

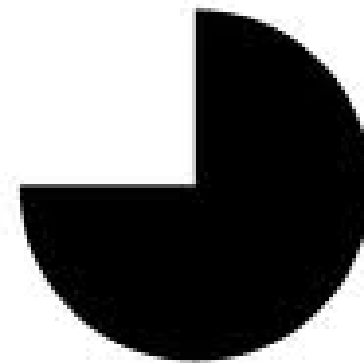
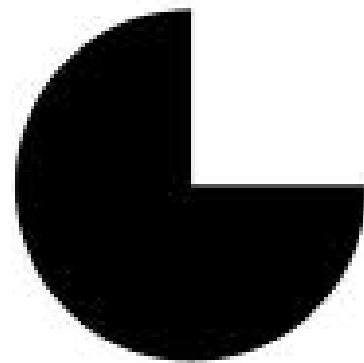
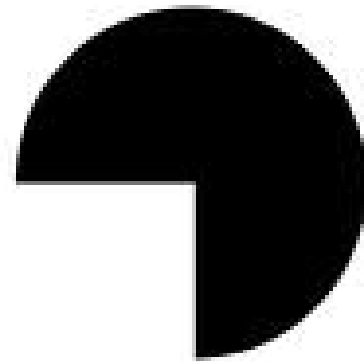
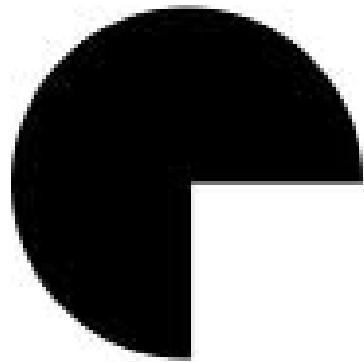
# Why Good Judges and Lawyers Make Bad Decisions

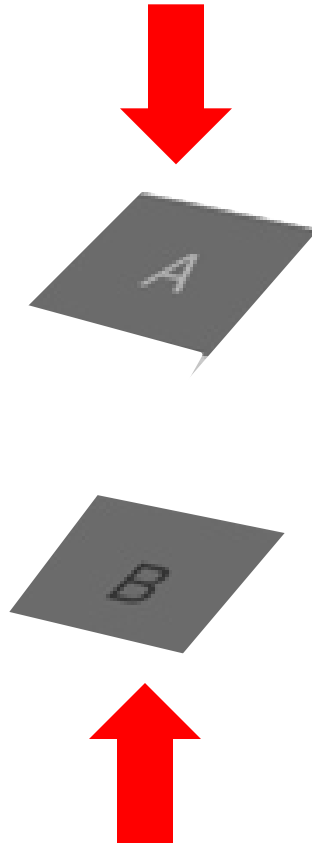


**Jeffrey J. Rachlinski**  
Professor of Law  
Cornell Law School



Dallas Bar Association; September 8, 2017





# My Thesis

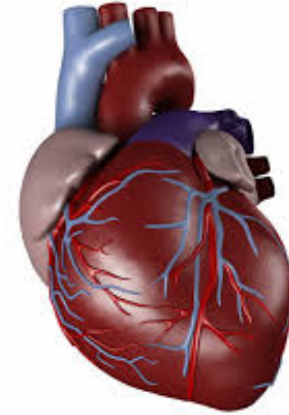
- Professional intuition is often accurate, but is a source of erroneous judgment
- Accuracy requires that engaging in a deliberative assessment

# Psychology of Judgment and Choice

- System 1 -- intuitive, associative, affective, rapid, confident judgment
- System 2 -- deliberative, rule-based, calculating, mathematical, deductive, slow, cautious judgment



I'm with stupid



# Judging: Generally and in the Courtroom

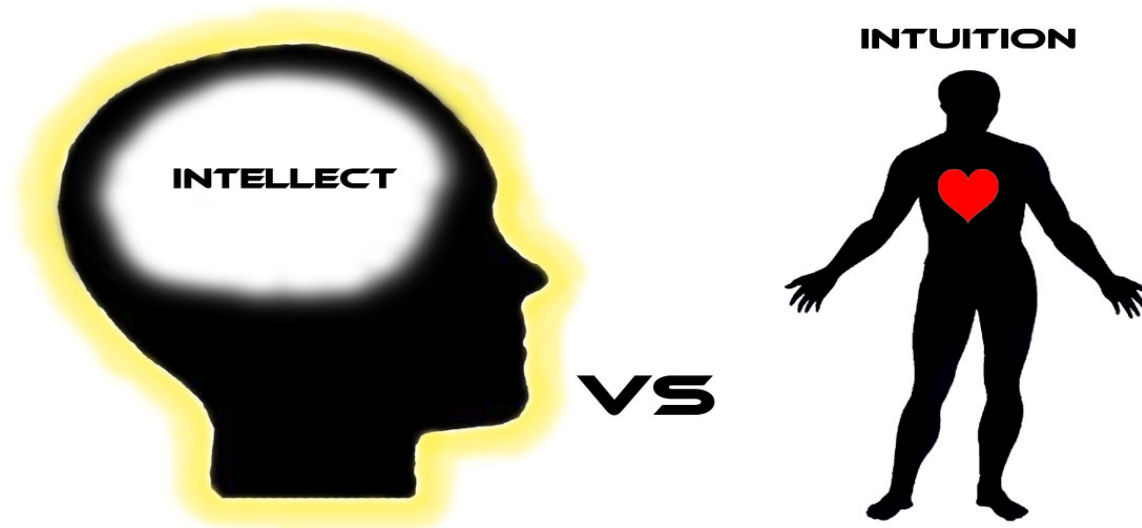
- In ordinary life, people must use both **System 1** and **System 2**
  - But **System 1** is faster, and a bit less conscious
  - Knowing when to suppress intuition is essential to sound judgment

# Our Research Program

- Over 5,000 trial judges & 400 lawyers
- Participating in judicial education conferences
- Hypothetical questions



# Cognitive Reflection Test



# Bat and Ball

A bat and a ball together cost \$1.10. The bat costs \$1.00 more than the ball. How much does the ball cost?

Intuition: 10 ¢

Answer: 5 ¢



- Answer: ball costs 0.10
  - “bat costs \$1.00 more than the ball” 1.10
  - “A bat and a ball together cost” 1.20
  
- Answer ball costs 0.05
  - “bat costs \$1.00 more than the ball” 1.05
  - “A bat and a ball together cost 1.10”

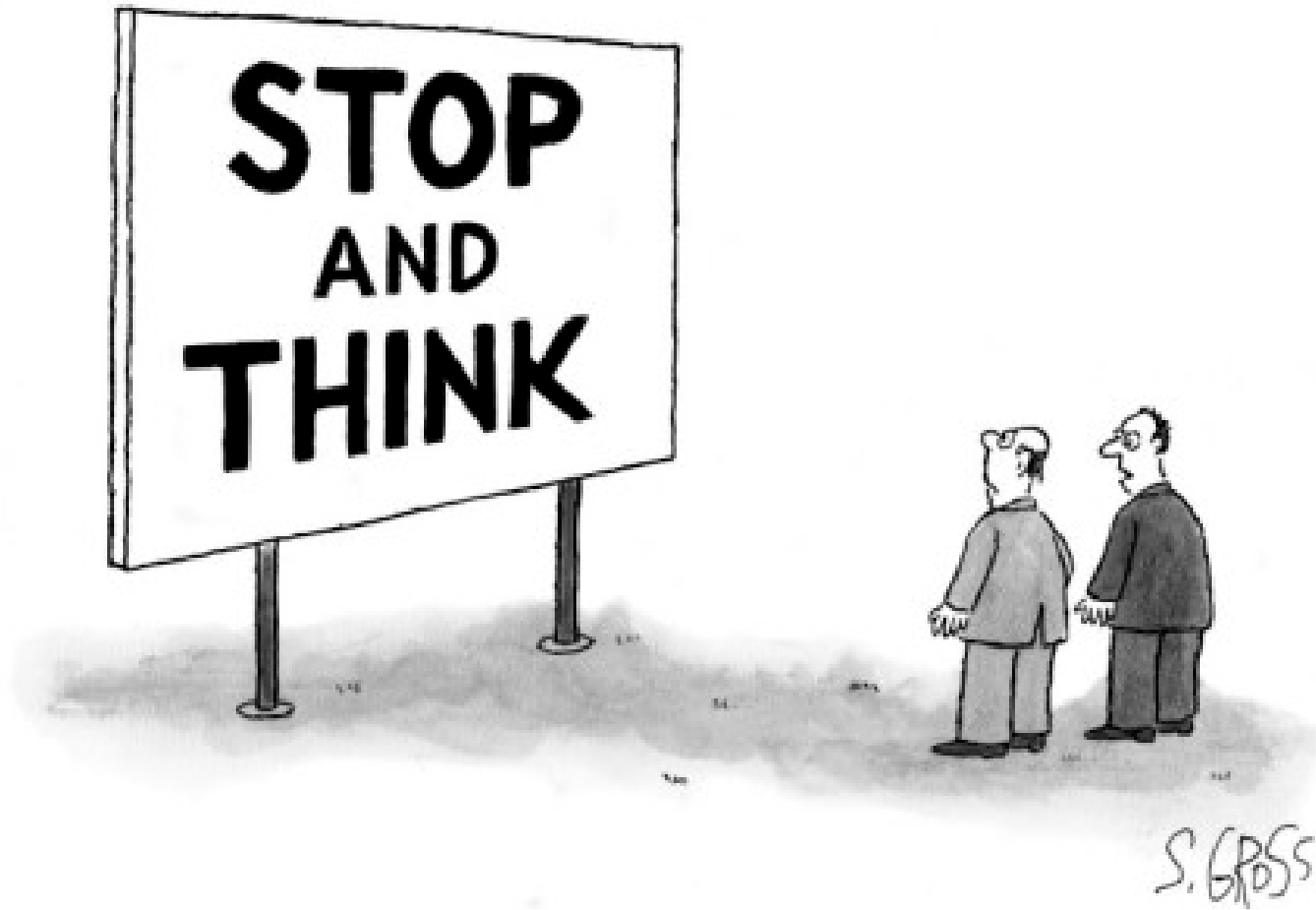
**HINT: The correct answer is 5 cents**

# CRT: Three Basic Findings

1. Even though the questions are not difficult, most people get most of them wrong.
2. The wrong answers most commonly chosen tends to be the intuitive ones
3. Those who get a problem wrong tend to think it an easier problem than those who get it right

# **CRT & Judges: Would they Perform Differently?**

- No: Most judges get most questions of this type wrong
- As do most lawyers



*It sort of makes you stop and think, doesn't it*

# 1. Anchoring





# Transparently Irrelevant Anchors Influence Judgment

- Write the last three digits of your phone #
- Add four hundred to the number
- Put the letters “A.D.” after the result
- Was Attila the Hun born before or after that year?



# Anchoring in Judges

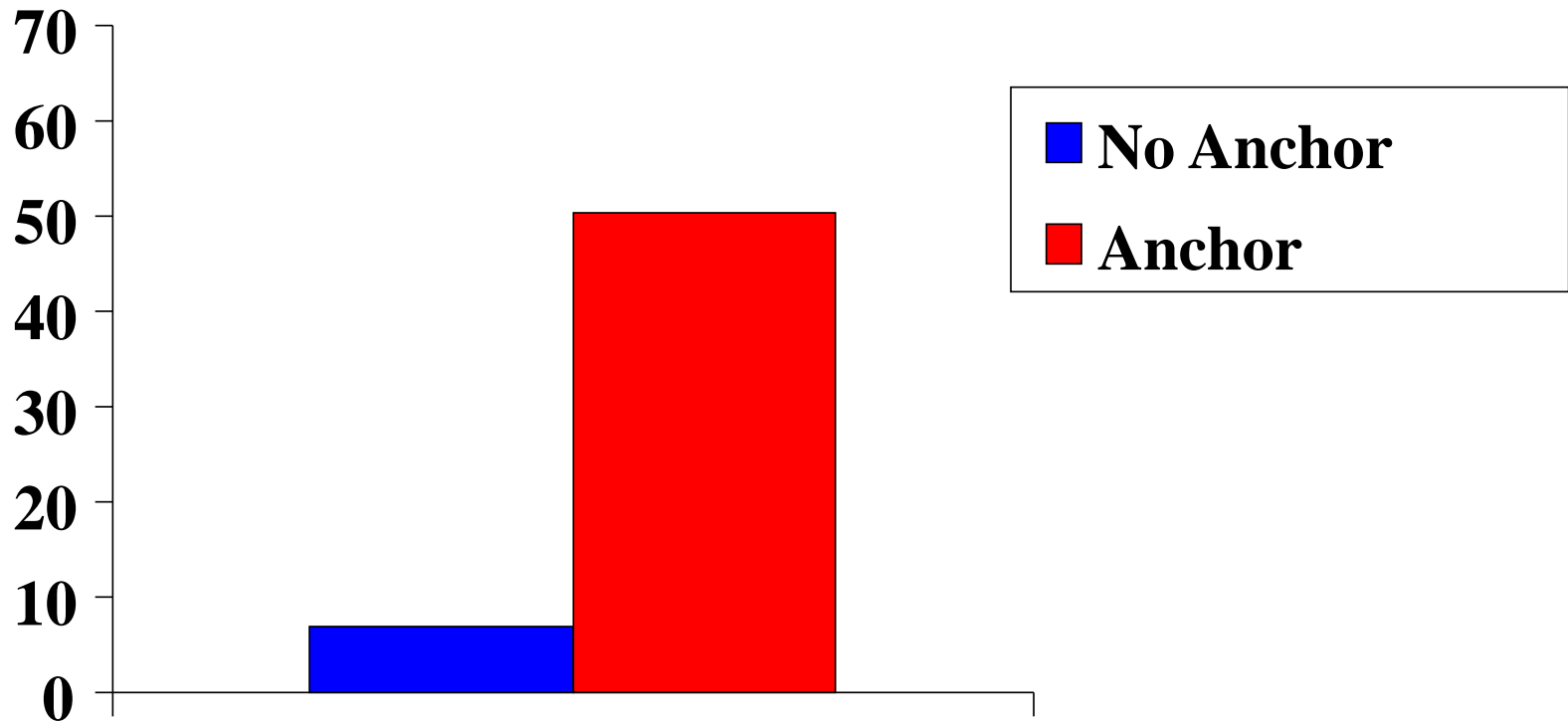
- Civil rights violation
- Defendant is a public-sector employer
- Plaintiff is a secretary
- Supervisor calls her racial epithets and ridicules her ancestry in front of co-workers and her daughter
- Plaintiff finds other position, but City human rights commission brings case on her behalf
- Only damages are for “mental anguish”

# The Anchor

- No Anchor—Plaintiff asserts that she recently saw a case similar to hers on a “court television show where the plaintiff received a compensatory damage award for mental anguish.”
- Anchor—Plaintiff asserts that she recently saw a case similar to hers on a “court television show where the plaintiff received a compensatory damage award of **\$415,300** for mental anguish.”

# Irrelevant Anchor: Results

(Median Award, in \$ thousand)



# Other Anchoring Effects in Judges

- Statutory limitations on jurisdiction
- Settlement offers
- Damage caps
- Order effects in sentencing

# Anchoring - Fine

- Violation of municipal ordinance by Roadhouse adjacent to residential neighborhood
- Numerous complaints of loud music on Roadhouse's outside deck
- What fine would you impose to reflect “degree of disruption” and “deter further offenses?”

# **Anchoring – Judges**

median fine

“Roadhouse 58” \$ 500

“Roadhouse 11,866” \$1,500

# FRAMING





# FRAMING

- Choices are evaluated in relation to a salient reference point, such as the status quo, not in the abstract
- People react differently to framed as “gains” than options framed as “losses”

# Framing Example

- Suppose you bet a friend \$50 that The Cleveland Cavaliers would win the NBA Championship (again) this past June. Golden State won and you have to pay out on your bet. How would you describe the outcome?
- I lost \$50

# Consequences of Framing

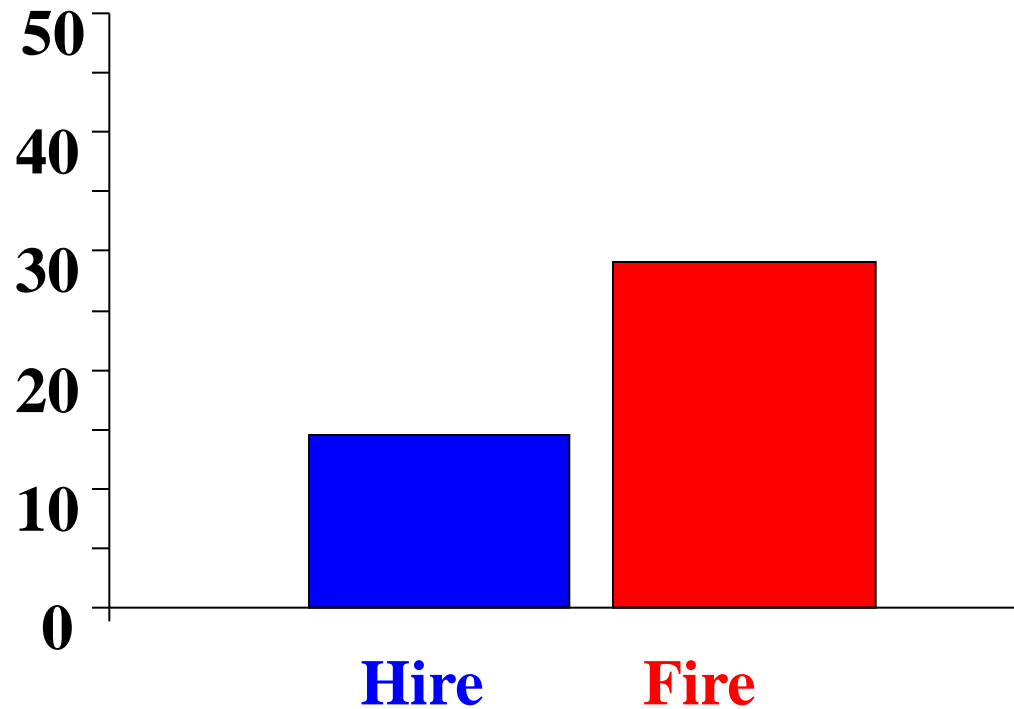
- People treat **losses** as more aversive than **foregone gains**
- People undertake more risk to avoid **losses** than to obtain **gains**

# Framing in judges: Employment Discrimination

- 61-year old plaintiff alleging age discrimination
- Age was “substantial motivating factor”
- Gatorville College, defendant chose 4 others for positions over him (all were under 30)
- “Energy” “Understanding of today’s college students”
- Variation
  - Hire: Gator college declined to hire him
  - Fire: Gator college fired him due to in staff cuts

# Framing & Discrimination

(% of judges agreeing age played “substantial factor”)



# Framing and Litigation

- Plaintiffs choose among “gains”
  - Settlement involves a certain recovery versus a gamble that further litigation might produce a larger recovery
- Defendants choose among “losses”
  - Settlement involves a certain payment versus a gamble that further litigation might produce a smaller payment

# Framing & Settlement: Scenario

- Copyright dispute between 2 publishing Companies
- Gains: Should Plaintiff accept \$60,000 settlement; lawsuit with a 50% chance of winning \$200,000 (\$50,000 attorney fees)?
- Losses: Should defendant pay \$140,000 settlement; lawsuit with a 50% chance of losing \$200,000 (\$50,000 attorney fees)?

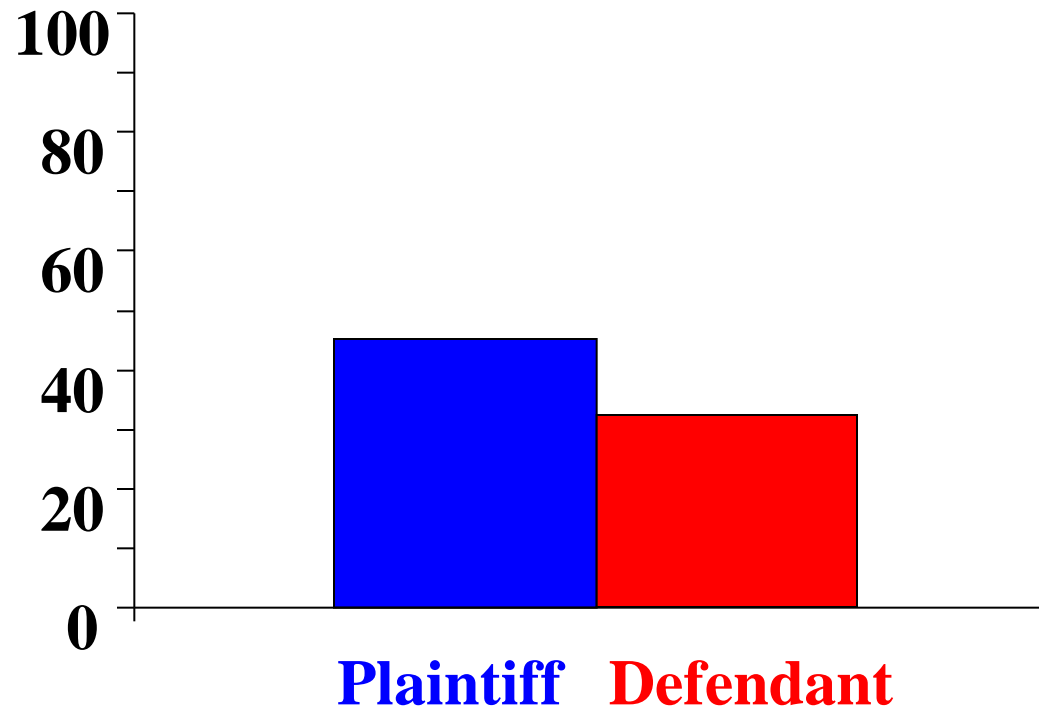
# Framing Explained

- The copyright dispute involves splitting a fixed pot of money
- For Plaintiff:
  - Settlement = \$60,000
  - Litigation =  $50\% \times (\$200k) - \$50k = \$50k$
- For Defendant:
  - Settlement = - \$140,000
  - Litigation =  $50\% \times (- \$200k) - \$50k = - \$150k$



# Framing Settlement: Results

(% of lawyers accepting settlement)



# Intuition in Lawyers: Sunk Costs



# Sunk Cost

“The sunk cost effect is ... a greater tendency to continue an endeavor once an investment in money, effort, or time has been made.”

- Arkes & Ayton (1999)

# Sunk Cost

“A prior investment should not influence one’s consideration of current options; only the incremental costs and benefits of the current options should influence one’s decisions.”

- Arkes & Ayton (1999)

# Sunk Cost in the NBA

- Top draft choices play more minutes and enjoy longer careers than low draft choices who outperform them.
  - Barry Staw & Ha Hoang (1995)
- Why not play your best players?



# Sunk Cost & Litigation: Lawyer's Problem

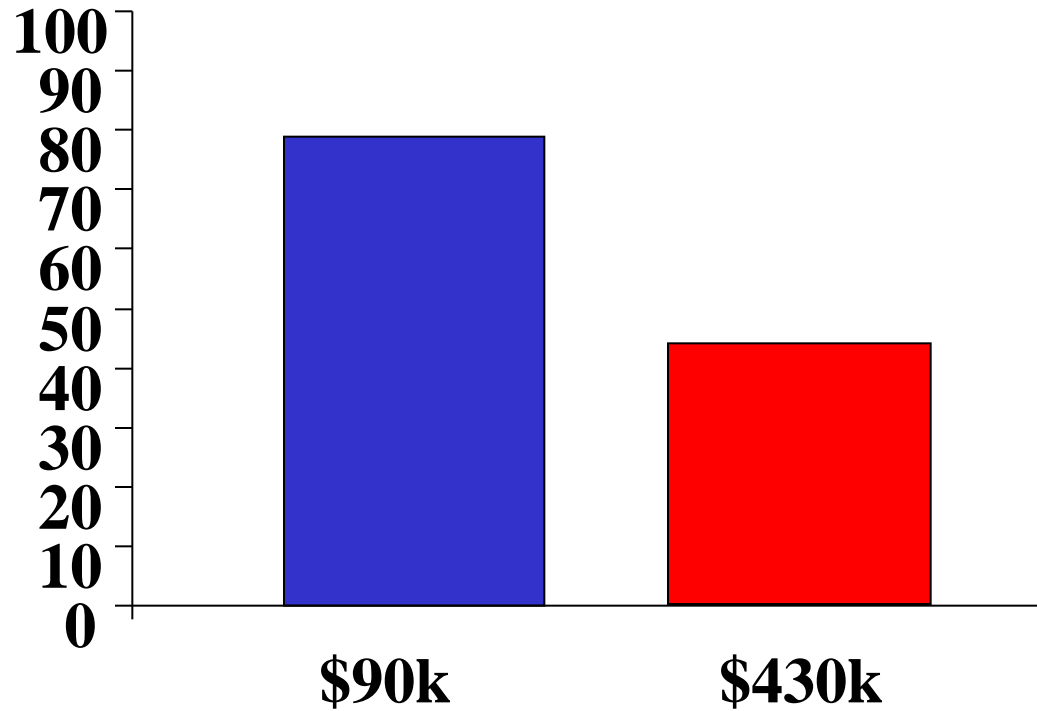
- Breach of contract case
- Plaintiff claims Defendant delivered defective machines
- Defendant denies claim
- Close case—50% chance Pl wins \$1m
- Defendant offers to settle for \$480k
  - \$70k attorney fees at trial
  - \$50k above expected value of trial

# The Sunk Cost

- 2 versions:
  - Already spent \$90,000
  - Already spent \$430,000
- As compared to \$480,000 settlement

# Sunk Cost: Results

(% Recommending Settlement)





# Conclusions

- Intuitive thinking can lead decision makers astray, even in legal contexts in which they are expert
- Mechanisms to engage the slower, deliberative system are essential to quality judicial decision making