



The Mediator's Mind: Insights from Psychology and Neuroscience

Professor Richard Birke
Willamette University College of Law

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11:30 am – 12:45 pm PACIFIC TIME

Note: The PowerPoint is currently available on the CADRE website:
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THE MEDIATOR'S MIND: INSIGHTS FROM PSYCHOLOGY AND NEUROSCIENCE

Professor Richard Birke
**Willamette University College of Law
& Center for Dispute Resolution**



Disclaimer

THE INNER GAME OF TENNIS

Revised Edition

W. TIMOTHY GALLWEY



THE TENNIS CLASSIC
—OVER 700,000 SOLD







ACTUALLY, THE PAIN
IS JUST NATURE'S
WAY OF KEEPING
YOU HUMBLE!



T32/166





An illustration on a green background. A dark blue rounded rectangle contains a light blue silhouette of a human head in profile, facing left. Inside the head, three black gears are visible. From the top of the head, a thick stream of multi-colored dots (red, yellow, green, blue, purple) flows upwards and to the right, resembling a waterfall of thoughts. In the dark blue background, there are several small, glowing circles in shades of blue, green, and yellow. The text "I can't stop bad thoughts" is written in a light blue, sans-serif font at the bottom left of the dark blue rectangle.

I can't stop bad thoughts



SCHOOL OF LAW







**ERRAND
BOY**





Heuristics and Biases

The Psychology
of Intuitive
Judgment

Edited by

Thomas Gilovich

Dale M. Griffin

Donald R. Kahneman

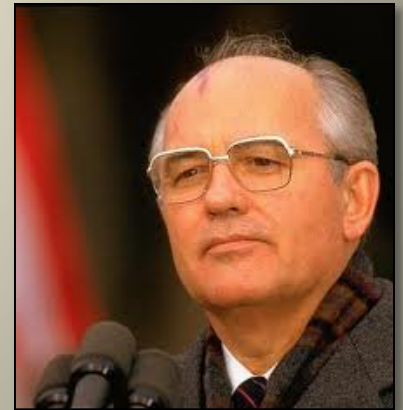
REACTIVE DEVALUATION



90%



80%



44%

REACTIVE DEVALUATION – part one

- **My negotiating opponent is my enemy**
- **If my opponent makes a proposal, it must be good for her**
- **What is good for her must be bad for me**
- **Therefore, I should reject my opponent's proposal**

Reactive to The Act of Offering



REACTIVE DEVALUATION – part two

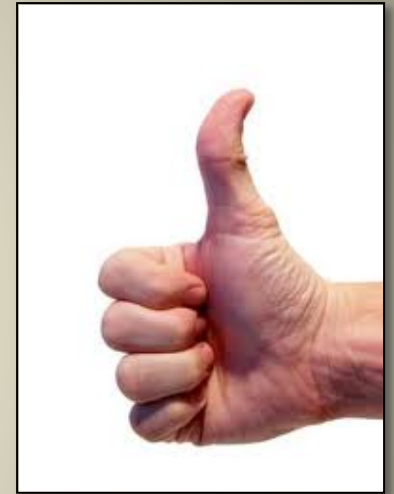
- Things offered are less valuable than things not offered

Cures?





McDonald's	
HAMBURGER	15¢
CHEESEBURGER	19¢
FRENCH FRIES	10¢
MILK	10¢
MILK SHAKE	20¢
Chocolate	
Strawberry	
Vanilla	
ROOT BEER	10¢
ORANGEADE	10¢
COCA COLA	10¢
COFFEE	10¢







Media Coverage



Biased toward Arabs

15% pro-Israel
60% anti-Israel



Biased toward Israelis

45% pro-Israel
28% anti-Israel

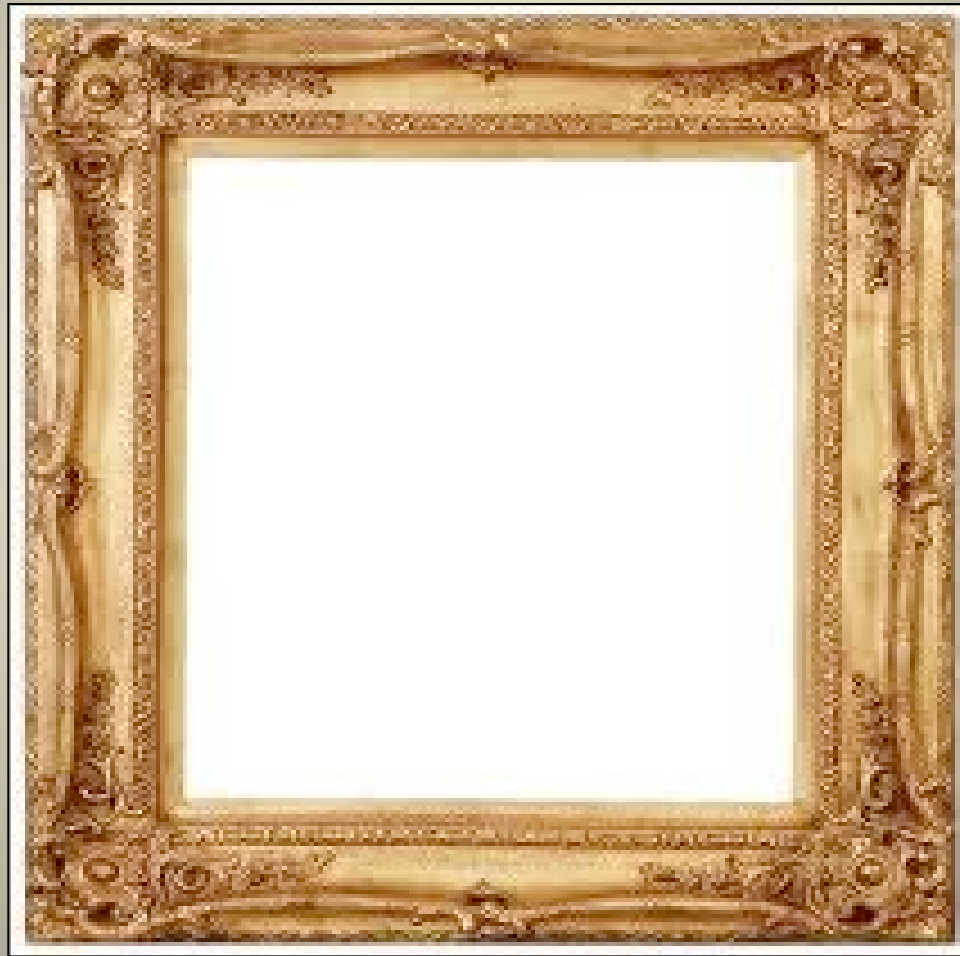
Exceptionalism

- You aren't like most...lawyers/Americans/what-have-you

IMPLICATIONS FOR NEGOTIATORS

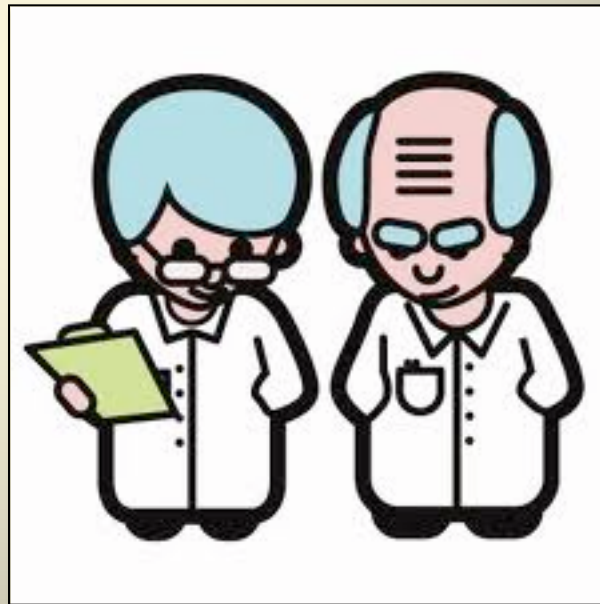
- We tend to *uncritically accept* evidence *supporting* our own positions
- We tend to *discount* equally probative evidence that *runs counter* to our positions

FRAMING



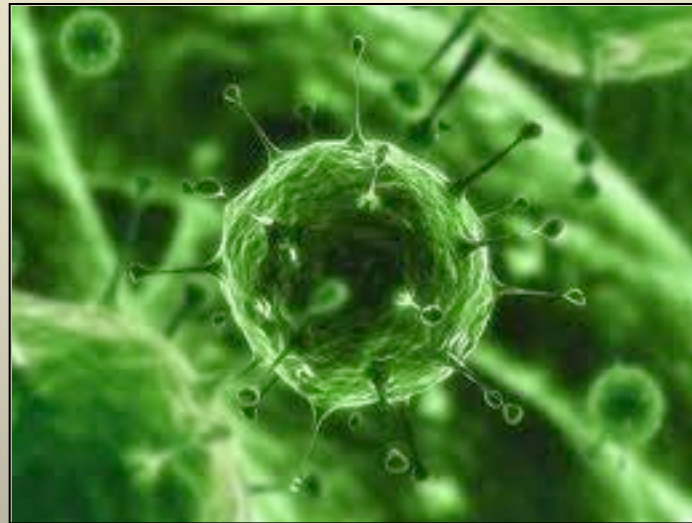
DOCTOR' S CHOSE

- Vaccine A – 200 doses, 200 lives saved
- Over vaccine B – 600 doses, 1/3 chance of saving a life



AND THEY CHOSE

- Vaccine D – 2/3 chance of a death
- Over Vaccine C – 400 certain deaths



BUT....

- Vaccine A is the same as C
- And B is D



Gains and Gambles

- People tend to be risk-averse in the face of gains
- That is, people don't like to gamble for “bigger gains”

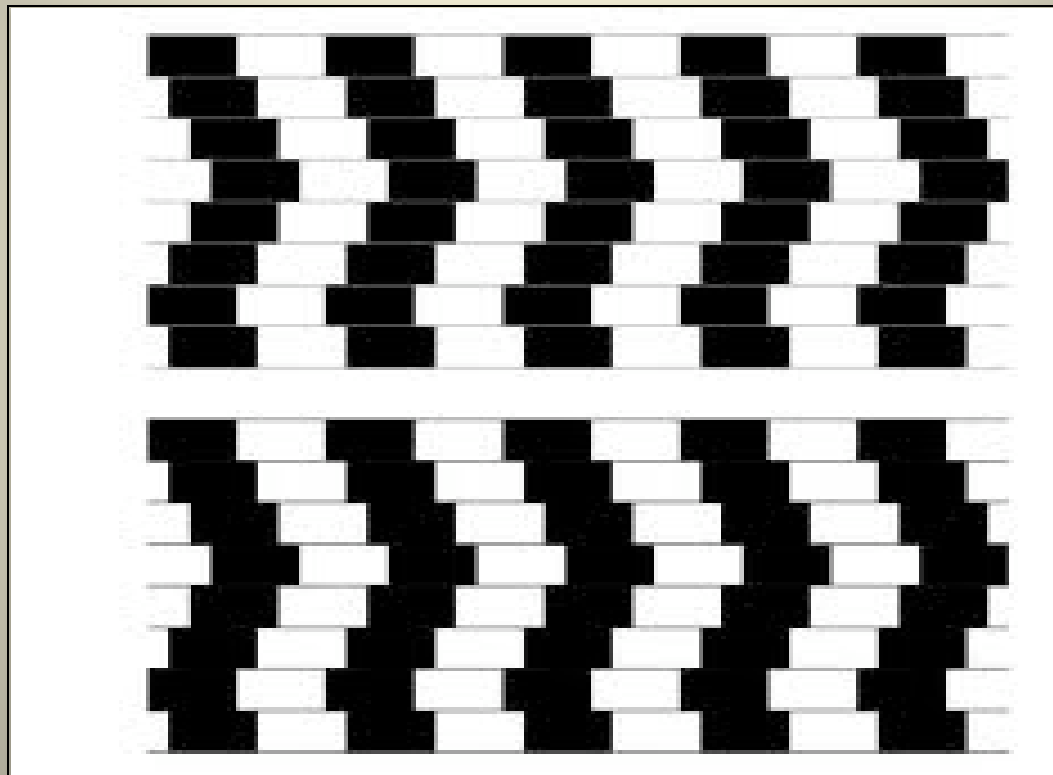


Losses and Gambles

- People tend to be risk-seeking when faced with the prospect of a certain loss
- That is, they'll take bad gambles if the alternative is to admit that they lost



WHETHER SOMETHING IS A GAIN OR A LOSS IS OFTEN AN ILLUSION!



LOSSES STING WORSE THAN GAINS FEEL GOOD



SO AGGREGATE LOSSES AND
SEGREGATE GAINS

Psychological principles associated with evaluation

- **Naive Realism and Biased Assimilation:** People believe that they “see the world as it is,” and this causes them to overweight information that confirms pre-existing hypotheses, and underweight disconfirming information.
- **Confirmation Bias:** People look for information that buttresses preexisting hypotheses in places likely to produce it.
- **Certainty and Possibility** (Psychophysics of Chance): Decision makers value the changes from impossibility to possibility, or from high likelihood to certainty, far more than equivalent changes in probability elsewhere on the certainty continuum.
- **False Uncertainty** (Psychophysics of Chance): People hesitate to make decisions when awaiting the outcome of a preliminary event, even where that preliminary event is irrelevant to the decision.
- **Focal Points:** People are drawn to insignificant deal points if those points can be made sufficiently salient or focal.
- **Availability:** People fail to differentiate adequately their case from notorious cases.
- **Anchoring:** People get stuck on salient, irrelevant numbers.
- **Base Rate Neglect:** People over-rely on misleading pieces of information that happen to be particularly salient, and they undervalue objective, collected data about similar cases.
- **Ellsberg's Paradox:** People prefer known risks to unknown risks, even when that preference yields worse results.
- **Temporal Nature of Preferences:** Future forecasts of preferences are poorly aligned with present desires.
- **Illusion of Control:** People believe that their contribution to an activity is valuable even when it is not.
- **Positive Illusions:** People believe that their contribution is more valuable than it actually is.
- **Optimistic Overconfidence:** People assess uncertainty levels optimistically.
- **False Consensus Bias** (Projection): People believe that others think the way they do or have values similar to their own.
- **The Endowment Effect:** A thing possessed becomes more valuable to the holder than to the market.
- **Fixed Pie Bias:** People tend to view situations as “zero-sum.”
- **Irrational Escalation:** Sunk costs compel continued funding of losing struggles.
- **Mental Accounting:** Arbitrary mental divisions of fungible assets into categories constrain the frontier of available utility.
- **Perspective Bias:** People evaluate information in accordance with partisan roles.
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Psychological principles associated with persuasion

- **Reactive Devaluation:** (a) Things that are offered are less valuable than things that are not offered; (b) Offers from an opponent are evaluated according to the status of the offeree relative to the offeror.
- **Fundamental Attribution Error:** We react to situations while others act in accordance with immutable character traits.
- **Reciprocation of Concessions:** People feel obliged to reciprocate for acts of goodwill, even if the act produces no value and was not requested or wanted.
- **Rejection of Offers and Later Cognitive Dissonance (Commitment Bias):** It is harder to say “yes” if you have already said “no.”
- **Authority:** Perceived authority causes changes in decision-making leading to compliance.
- **Scarcity or Deadlines:** Fleeting offers or disappearing commodities seem more valuable than if they were plentiful or available on request.
- **Fairness as a Decision-making Criterion:** People reject deals that leave them better off than no deal if they perceive that their norms of fairness are being violated in accepting the deal.
- **Construal Biases:** People think that others hold more extreme views than they do, and are unwilling to accept that others are generally moderates in a partisan situation.
- **Inertia of Preferences:** People will fail to take simple steps to further their interests if there is a preexisting decision methodology that offers a second best alternative.
- **Liking:** People really do say “yes” more to people they like.
- **Social Proof:** If everyone is doing it, it must be okay.
- **Risk Aversion:** People are risk avoiding in the face of gains.
- **Loss Aversion:** People are risk seeking in the face of losses.
- **Framing/Prospect Theory:** Many equivalent deals are accepted or rejected depending on the framing of the offer as opposed to the value of the offer.
- **Concession Aversion (status quo bias):** People do not value equal trades from a neutral perspective. They distort the value of the offer so as to overvalue the loss, making equal trades difficult to effectuate.
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PSYCHOLOGY FOR LAWYERS

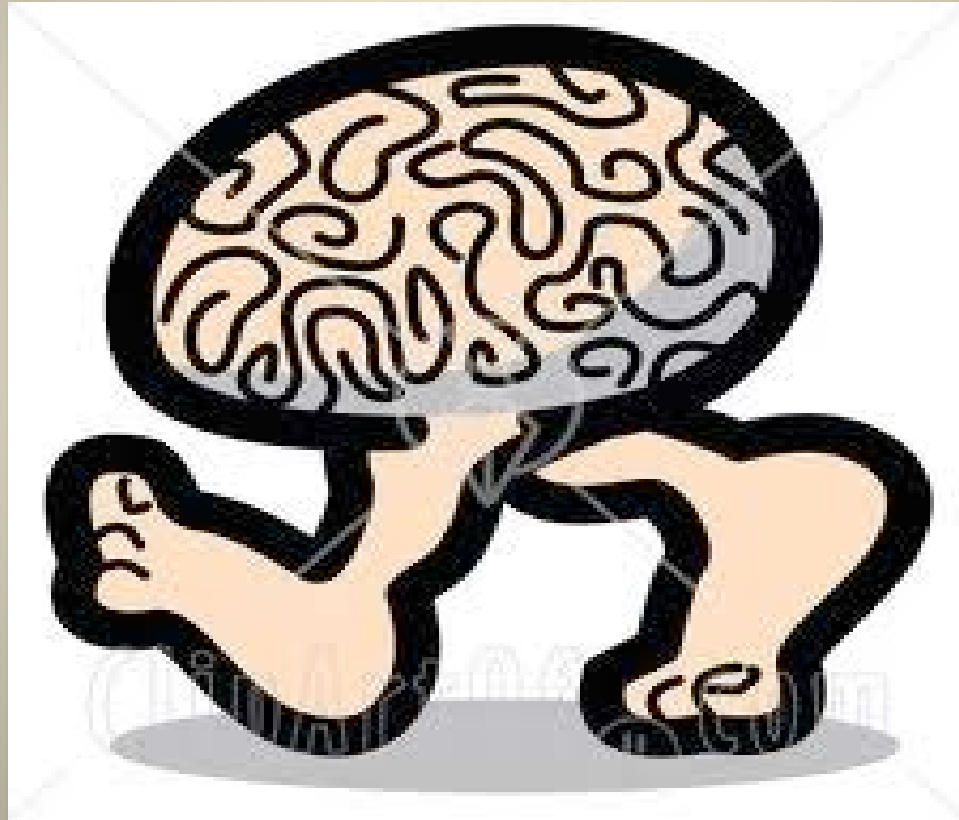


Understanding
the Human Factors
in Negotiation,
Litigation, and
Decision Making

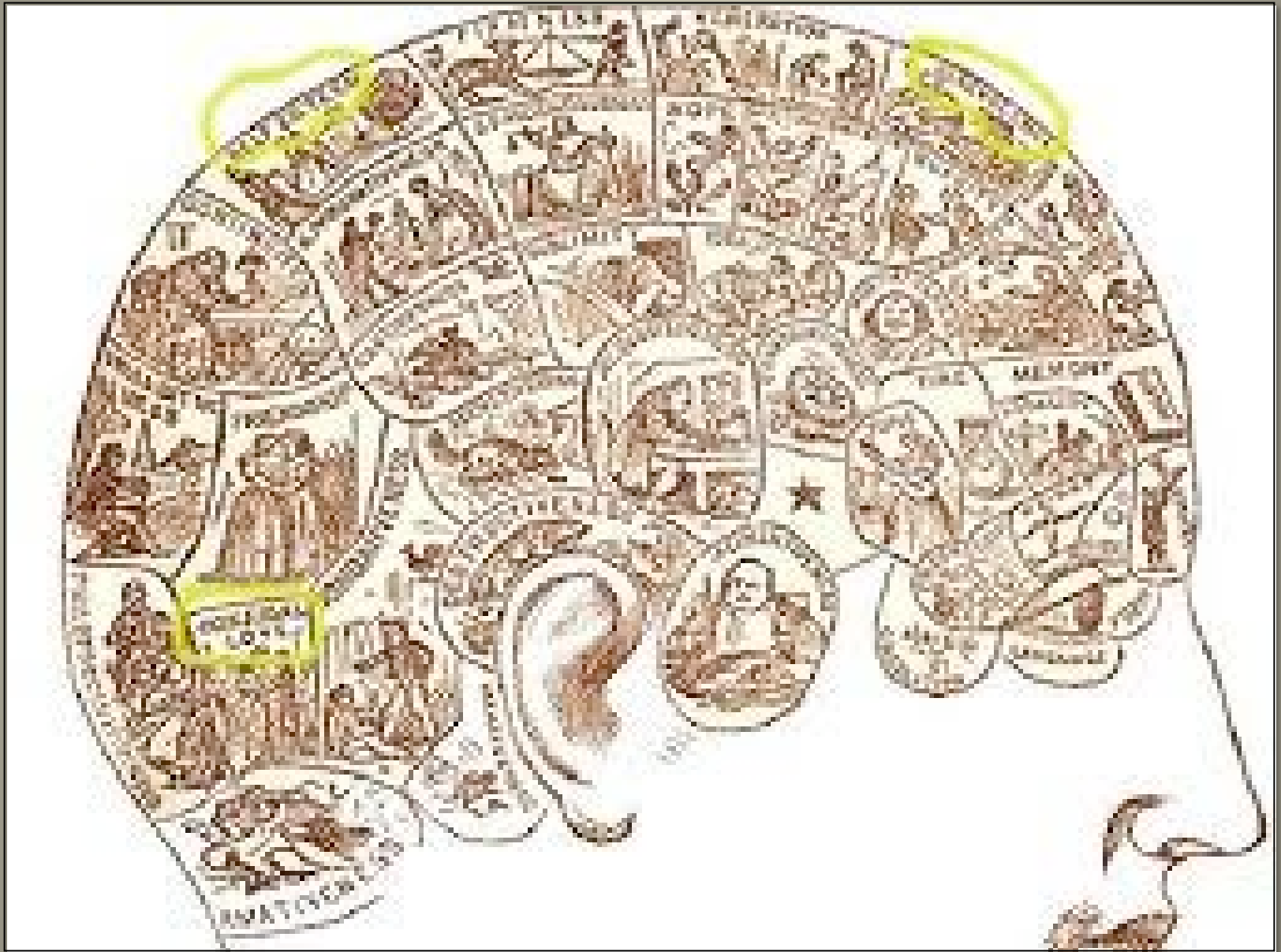
JENNIFER K. ROBBENOLT | JEAN R. STERNLIGHT

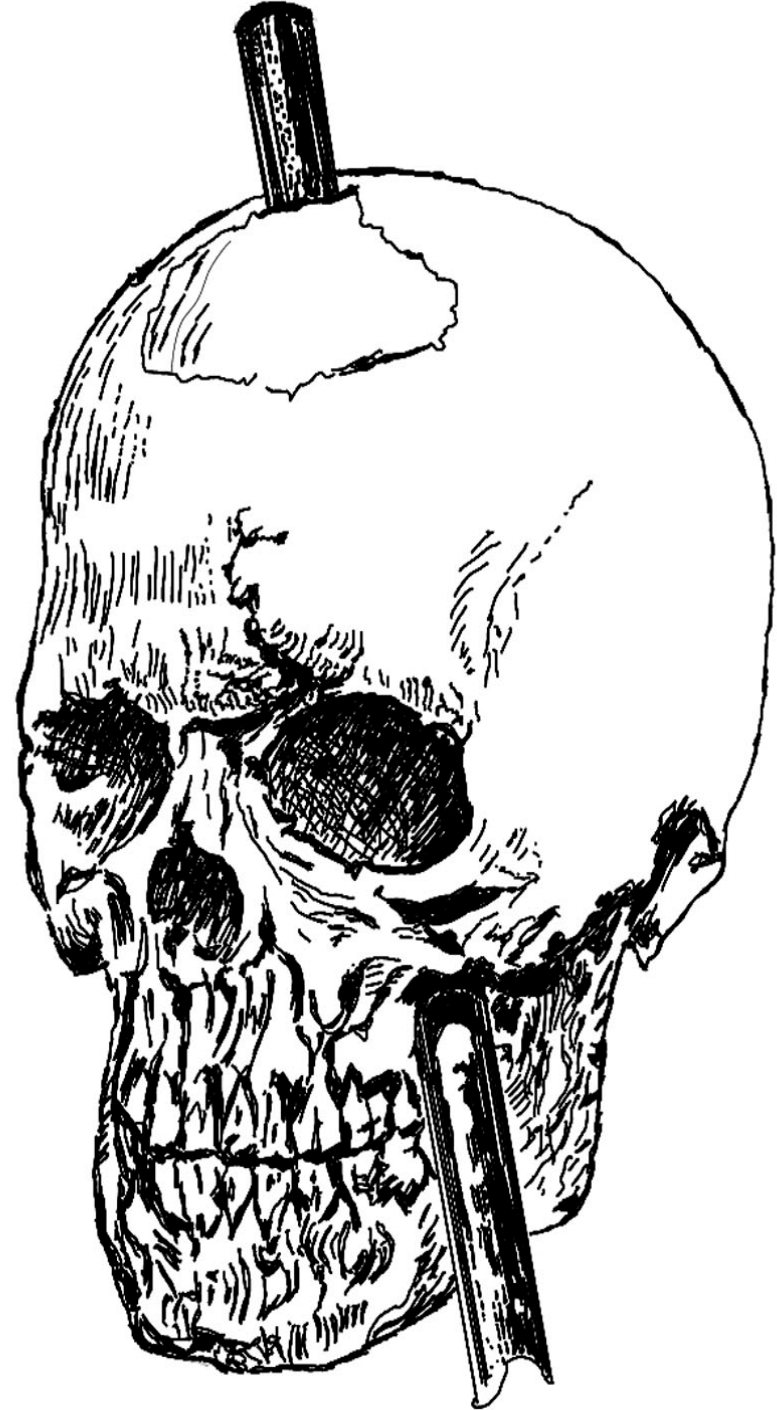


Along Comes Neuroscience

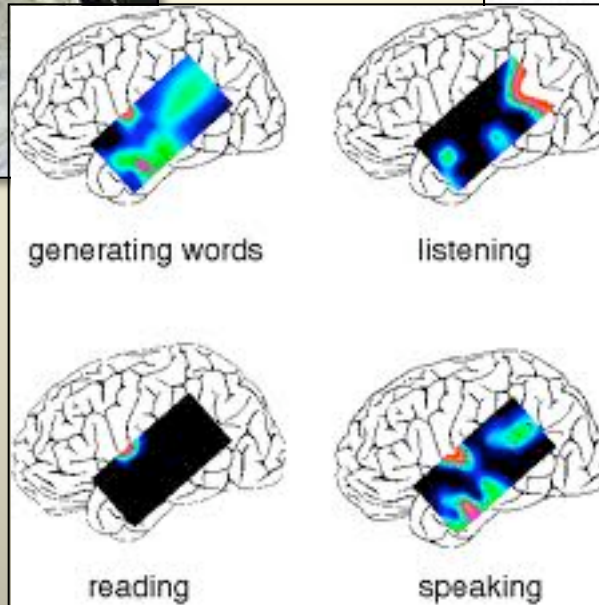
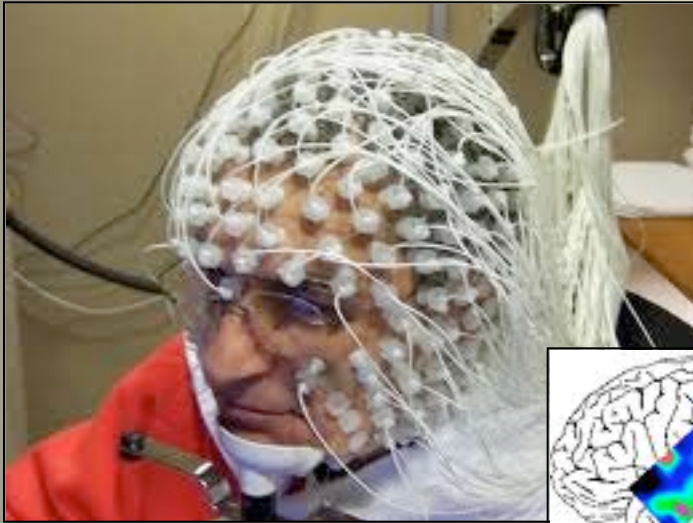




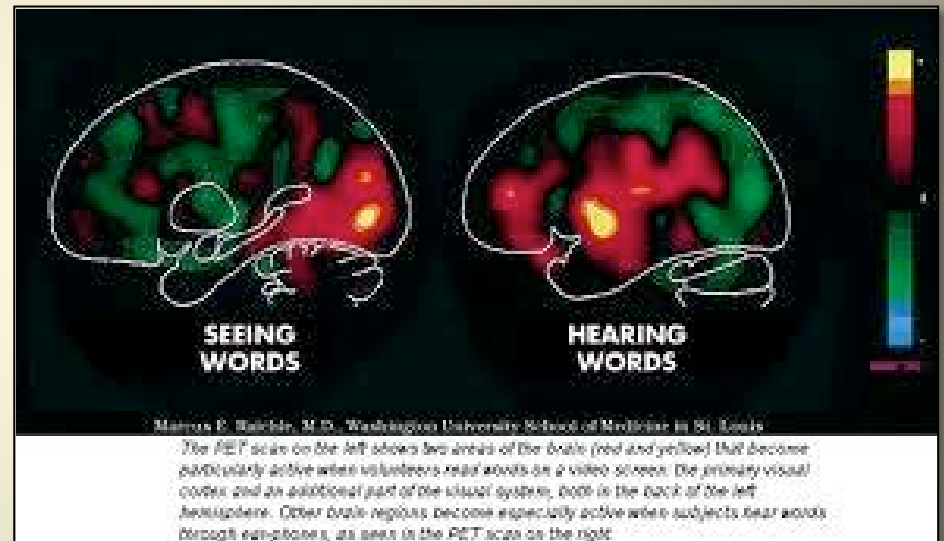
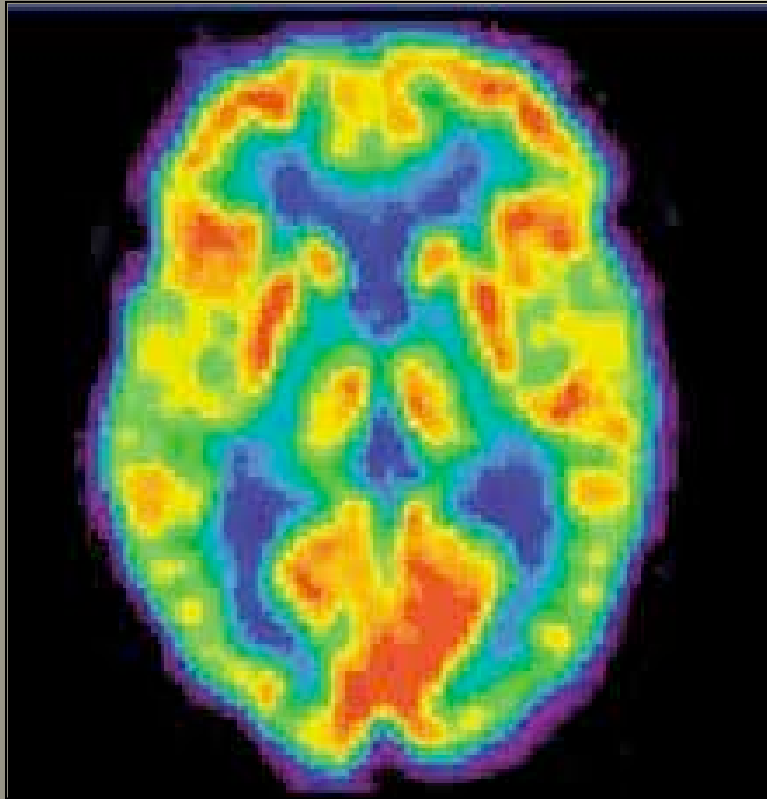




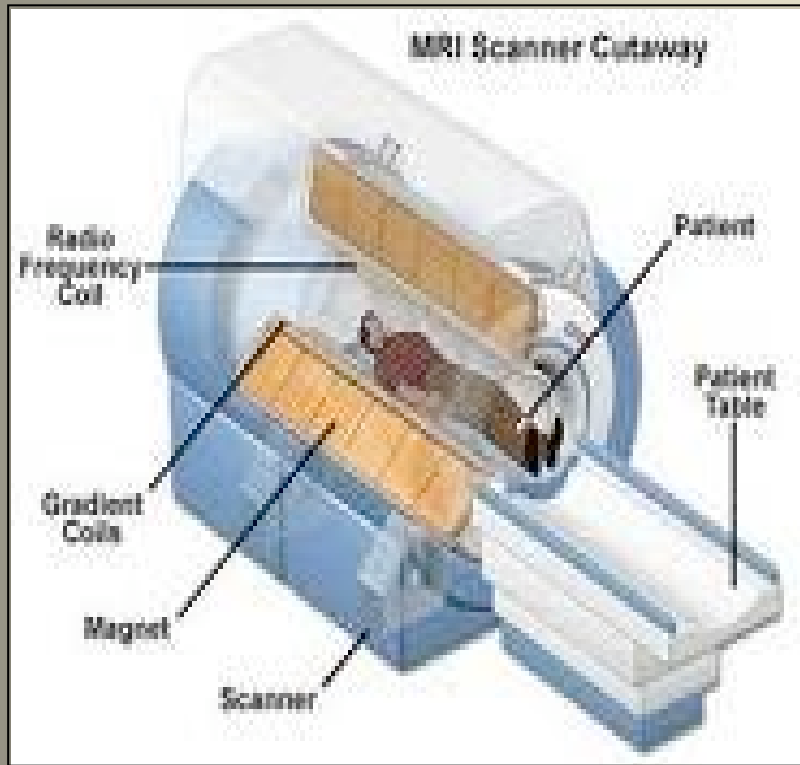
EEG



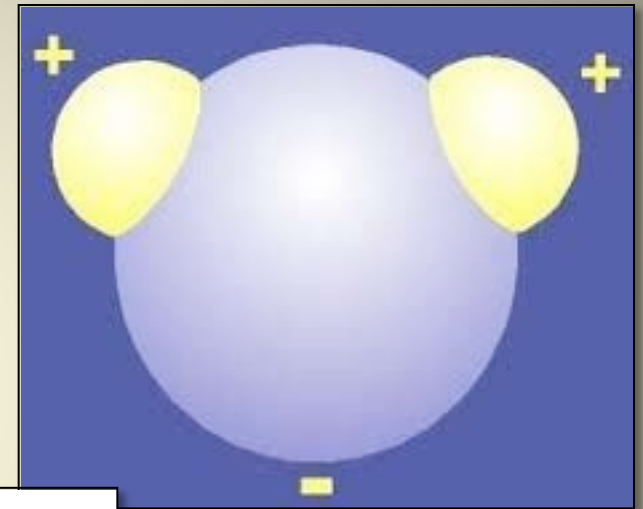
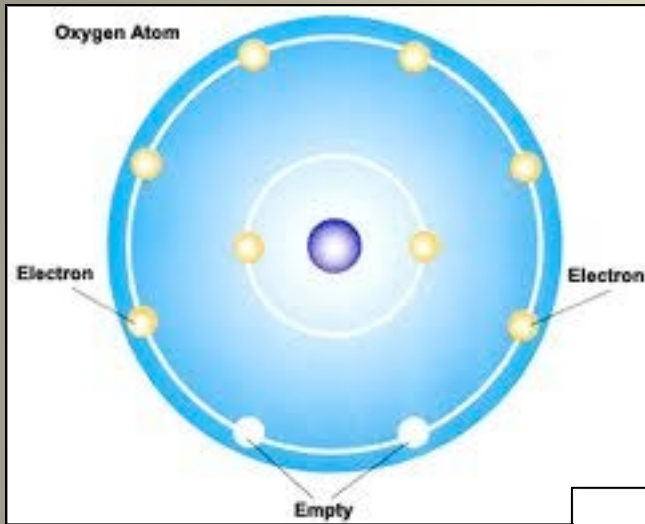
PET Scan



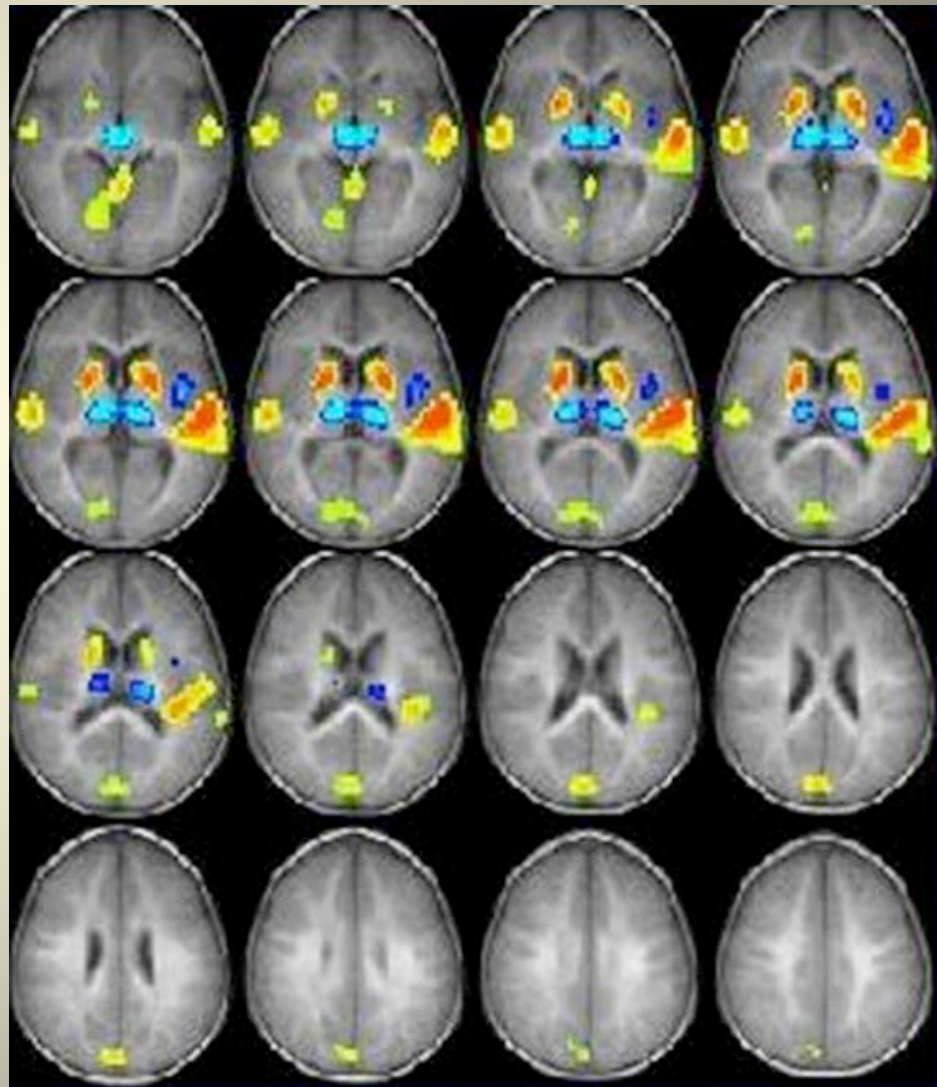
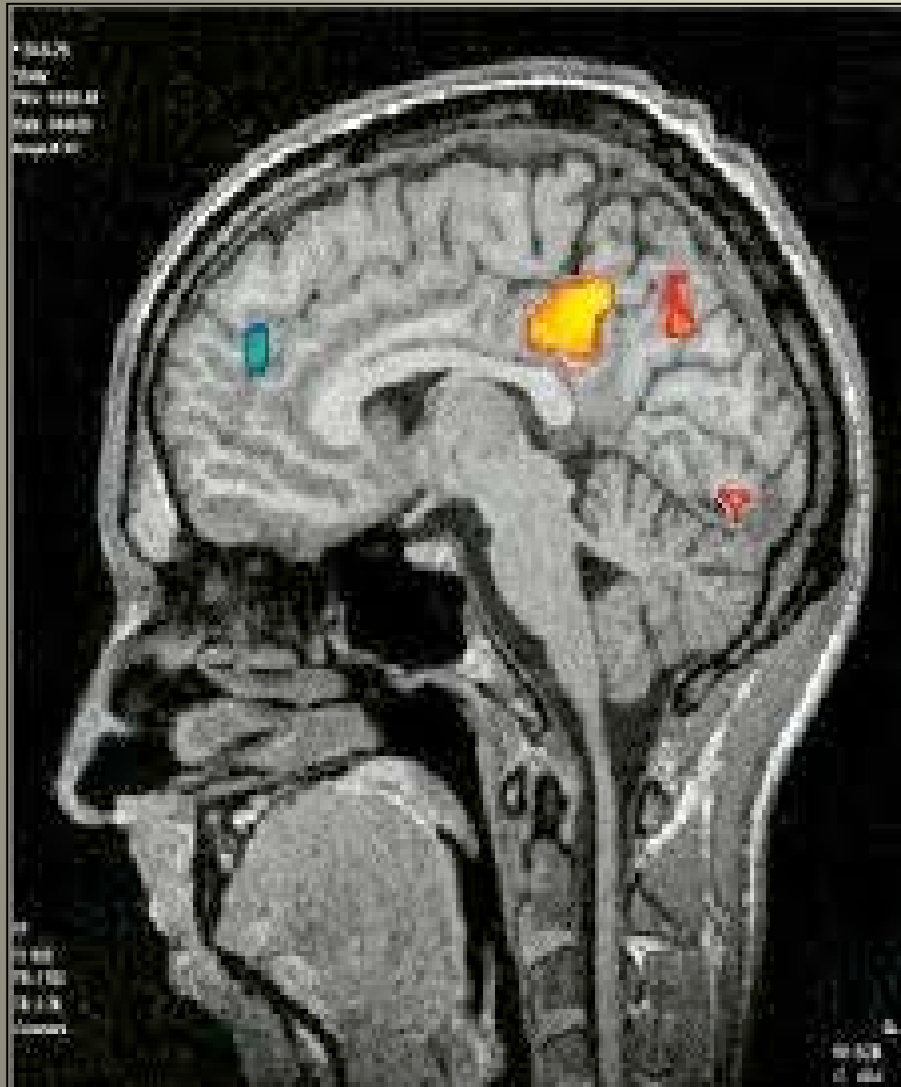
MRI



Oxygen and Magnets



fMRI



Location, Duration, Intensity

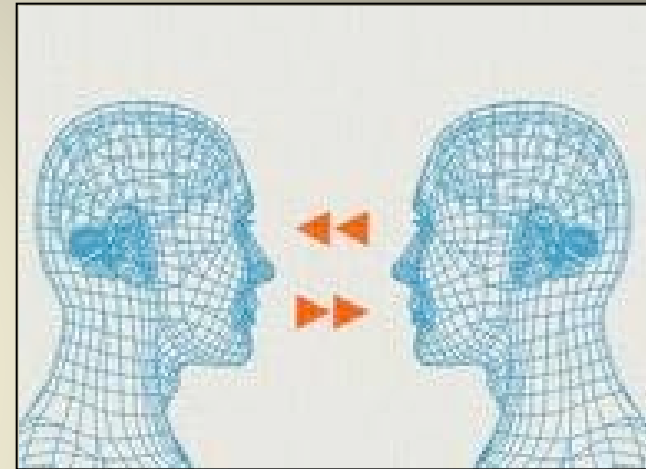
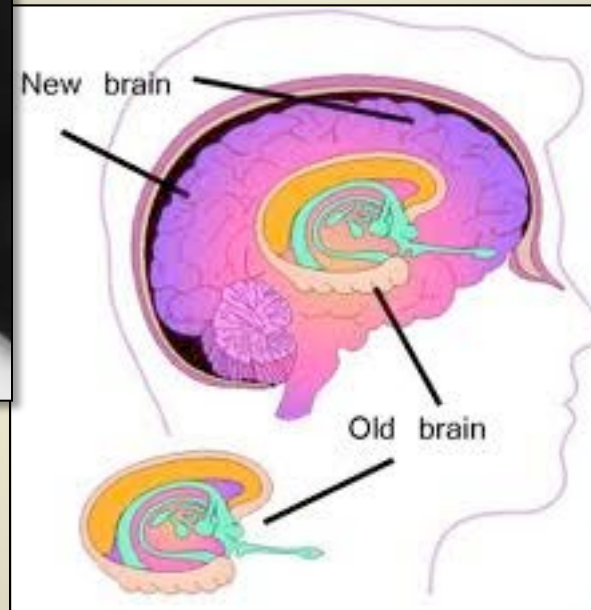


But Beware...

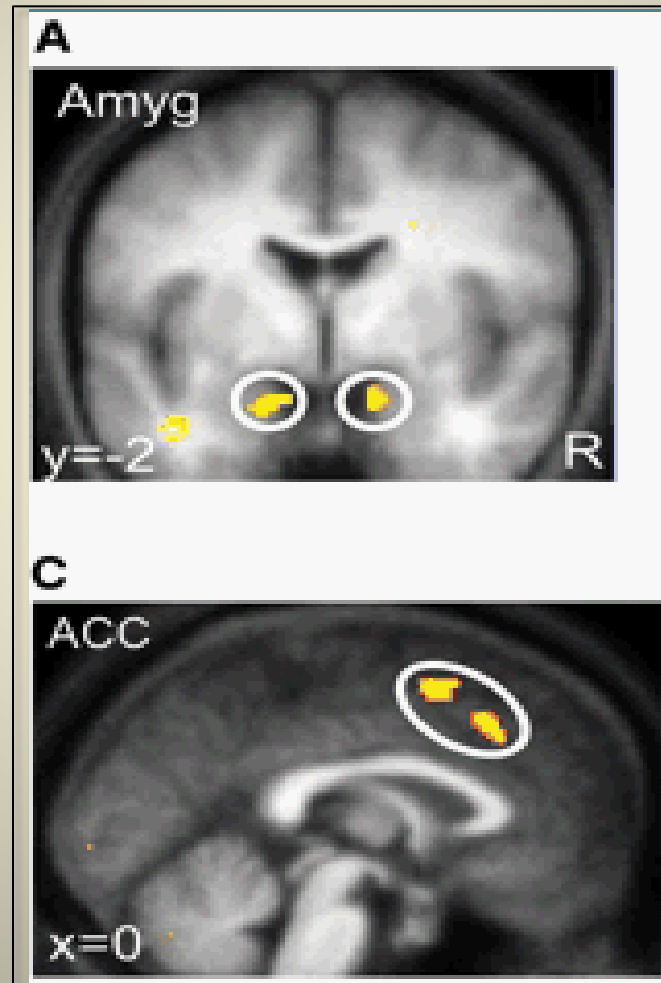
The part of the brain that shuts off critical analysis when it sees pretty pictures of the brain



The Relationship between Mediation and Neuroscience

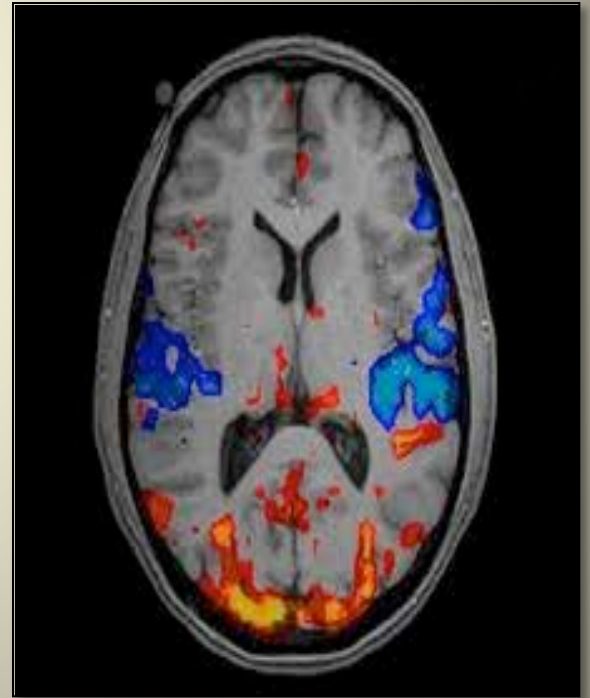


FRAMING OFFERS: LOSS AVERSION AND THE FMRI

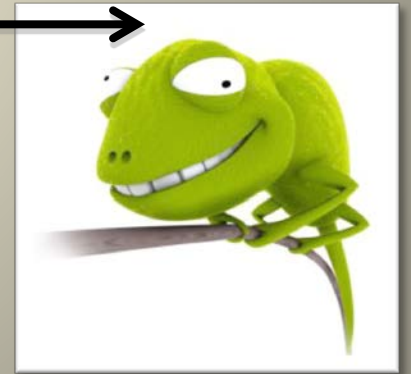
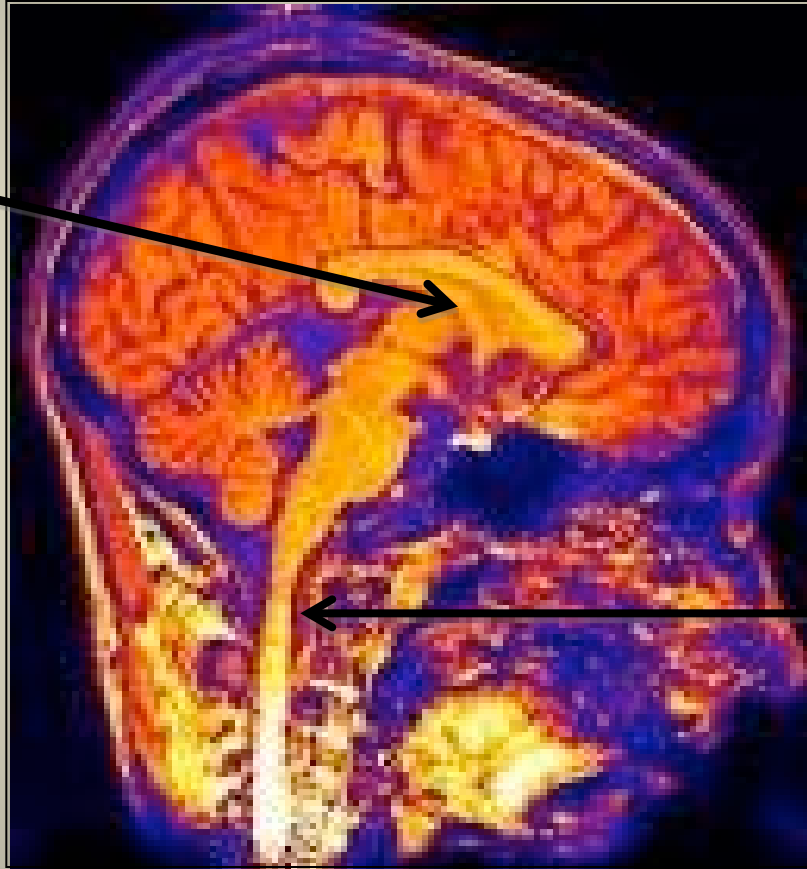


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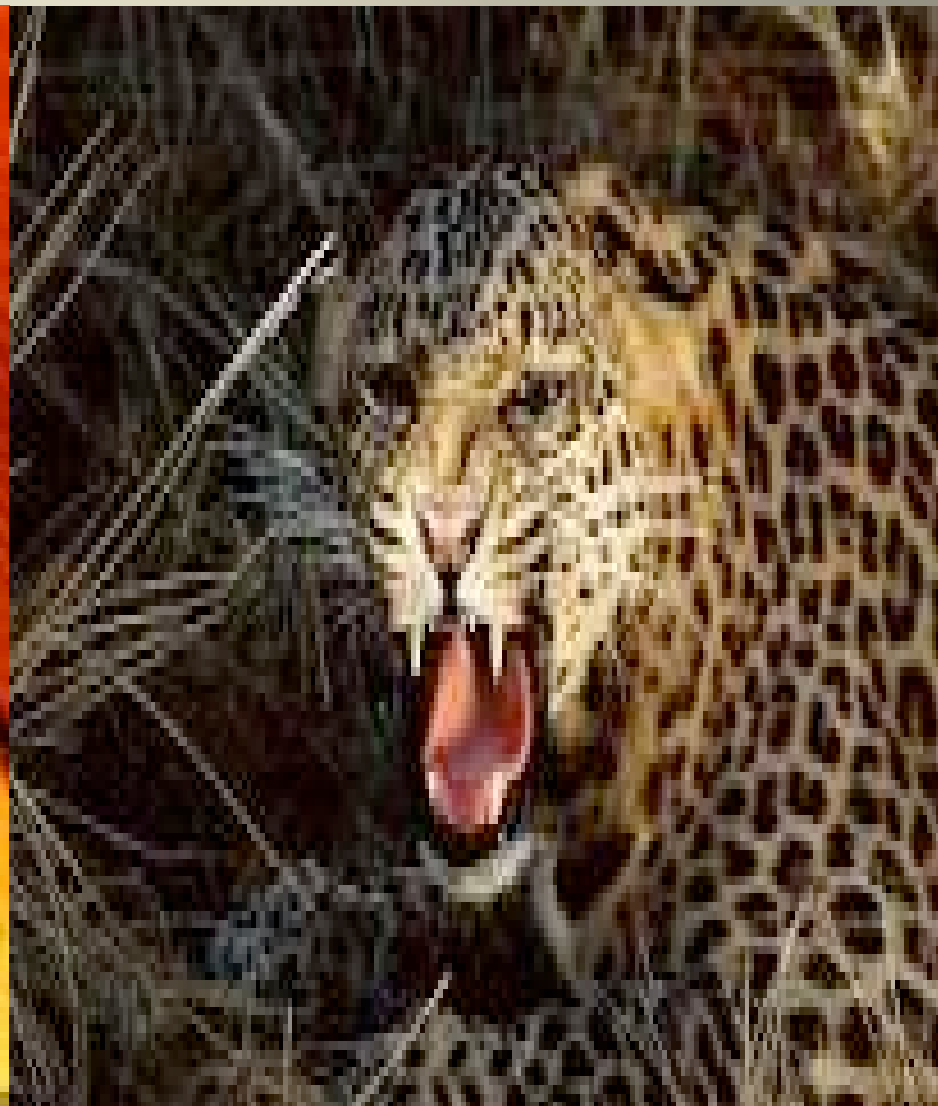
REACTIVE DEVAL & CONF BIAS IN THE fMRI

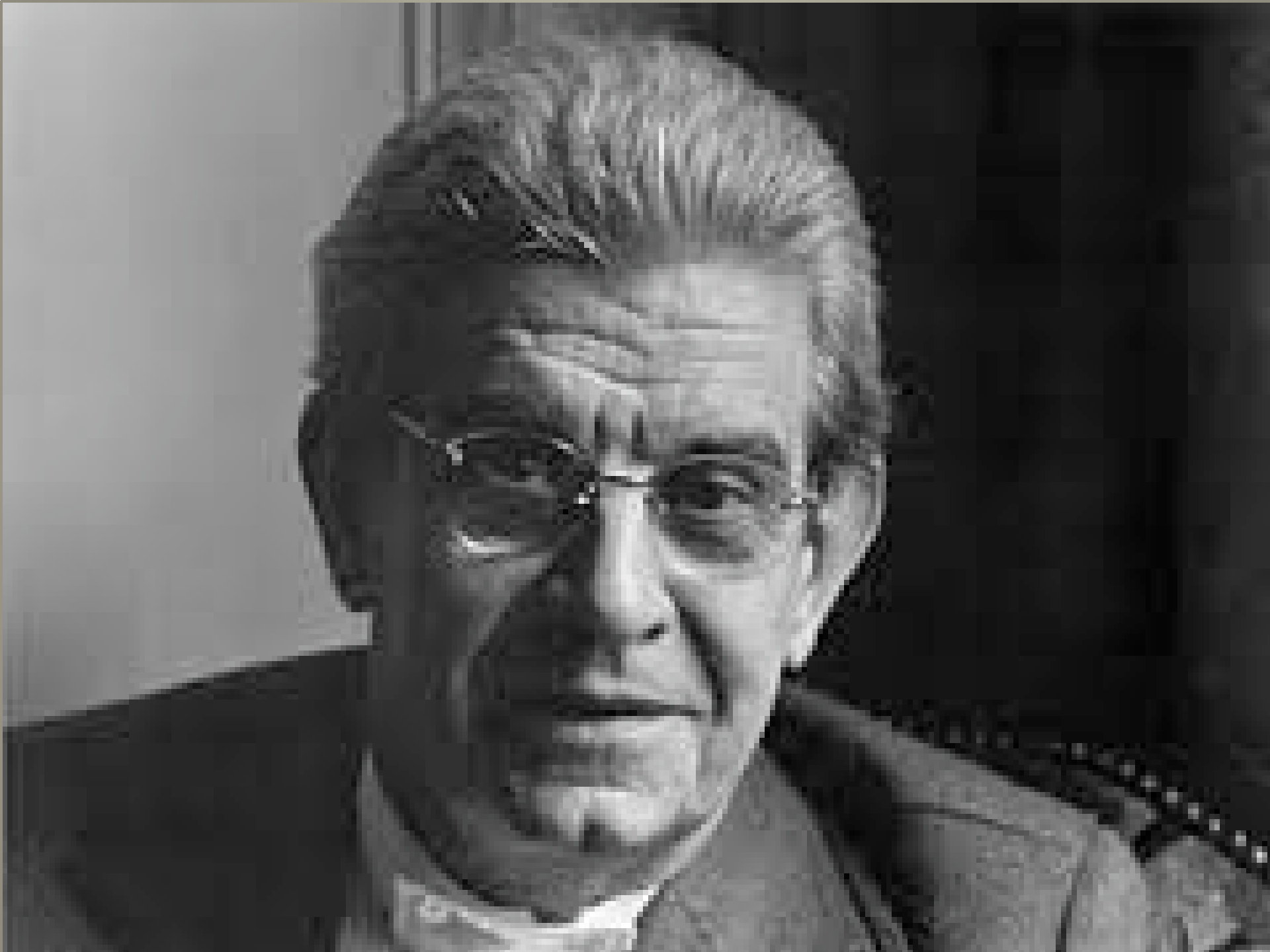


NEW AND OLD BRAINS



Disconfirmation





THE RETURN TO REACTIVE DEVAL & CONFIRMATION BIAS

- **Confirming** evidence or evidence from a trusted source leads to **rational** new brain executive thinking
- **Disconfirming** evidence or evidence from an opponent triggers **emotional** old brain instinctual and protective thinking



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THANKS!





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