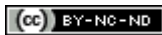


NOTES

ALL IS FAIR IF WE PRETEND IT IS: HOW THE COGNITIVE LIMITATIONS OF THE BRAIN UNDERMINE OUR JUDICIAL SYSTEM

Schuyler Leffler

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NOTES

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Schuyler Leffler*

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INTRODUCTION

When President Donald Trump left office in 2021, he took classified documents with him.¹ After officials were unable to convince Trump to return the documents, the FBI executed a search warrant resulting in the discovery that he possessed “thousands of documents, about 100 of which were marked as classified.”² Consequently, Trump was charged with thirty-seven felony counts of illegally retaining national defense information and concealing documents, which violates witness-tampering laws.³ The trial for the mishandling of these classified documents had been loosely scheduled to begin on May 20, 2024.⁴ This potential start date came after failed attempts by Trump’s legal team to delay the trial until after the 2024 election.⁵ Although the case against Trump was ultimately dismissed in November of 2024,⁶ the initial attempts to delay the trial are not unusual. As Peter Joy, an expert on criminal trials explains, “I have often observed that delaying a trial is a defense strategy, especially when the defense believes that the delay may weaken the prosecution’s case.”⁷ The prosecution’s case is in part weakened by stale memories resulting from temporal remoteness.⁸

In a similar vein, in the later months of 2023, there was a push by Republicans to initiate impeachment proceedings against then President Joe Biden.⁹ Despite the absence of evidence to launch such allegations, Republicans pushed forward in an

¹ Devan Cole, *Here’s What to Know About the Mar-a-Lago Documents Case*, CNN (Mar. 11, 2024, 4:08 PM), <https://www.cnn.com/2024/03/11/politics/mar-a-lago-documents-case-trump/index.html> [<https://perma.cc/3CW4-SF6A>].

² *Id.*

³ *Id.*

⁴ Peter A. Joy, *Trump May Try to Delay His First Federal Trial—It’s a Common Legal Strategy to Fend Off a Criminal Conviction*, CONVERSATION (Aug. 3, 2023, 8:23 AM), <https://theconversation.com/trump-may-try-to-delay-his-first-federal-trial-its-a-common-legal-strategy-to-fend-off-a-criminal-conviction-210363> [<https://perma.cc/DR53-TU3N>].

⁵ *Id.*

⁶ *US Court Dismisses Appeal in Trump Classified Documents Case*, REUTERS (Nov. 26, 2024, 4:23 PM), <https://www.reuters.com/world/us/us-court-dismisses-appeal-trump-classified-documents-case-2024-11-26/> [<https://perma.cc/GQZ6-7PV9>].

⁷ Joy, *supra* note 4.

⁸ *See id.*; *see also* William Glaberson, *Courts in Slow Motion, Aided by the Defense*, N.Y. TIMES (Apr. 14, 2013), <https://www.nytimes.com/2013/04/15/nyregion/justice-denied-courts-in-slow-motion-aided-by-defense.html> [<https://perma.cc/67YJ-9GK9>].

⁹ Paul Waldman, *The GOP Wants to Impeach Biden for ‘Corruption’? Don’t Make Me Laugh.*, WASH. POST: OPINION (Sept. 18, 2023), <https://www.washingtonpost.com/opinions/2023/09/18/biden-impeachment-republicans-corruption/> [<https://perma.cc/HKG2-H7KK>].

effort to normalize the concept of “the Constitution’s most extreme check on the presidency” in the minds of Americans.¹⁰ Repetition like this can not only normalize concepts and behavior, but can also increase the likelihood of acceptance because repeated information is thought to be more truthful.¹¹

Tactics like these—delay and repetition—are not unique to political endeavors. For example, delay in criminal trials is a well-known technique used to improve a defendant’s chance of acquittal.¹² The success of these types of tactics, and similar ones not mentioned, are rooted in understanding how the human brain does and does not work. Although the human brain can do quite a lot, there are still limits. Such limits take many forms, including working memory deficiencies, long-term memory retrieval issues, and mental capacity concerns, to name a few.¹³ These cognitive imperfections can be used offensively—as seen in these high-profile proceedings involving current and former presidents.¹⁴ Although it appears to be an attractive strategy, capitalizing on such cognitive limitations undermines the principles of justice that the United States’ judicial system seeks to uphold.

In Part I, this Note will first explain how the judicial system rests upon upholding fairness, particularly highlighting how interrelated the concept of justice is with impartiality. In Part II, this Note will provide a brief and general overview of how the brain works to provide the foundation for understanding select behaviors the human brain exhibits. This foundation will help demonstrate that these certain behaviors largely prevent us from being impartial decisionmakers. In particular, five cognitive phenomena—ranging from theories on biases to observed memory vulnerabilities—will be explored. In Part III, this Note will go on to explain how such phenomena contribute to our inability to be unbiased and argue that, therefore, these limitations undermine the justice promised to the American people. Further, in Part IV, this Note will identify that while some of these limitations can be managed and minimized, this ability exposes such cognitive limitations to offensive use, reinforcing the idea that they undermine the concept of fairness inherent to the

¹⁰ Jackie Calmes, Opinion, *Kevin McCarthy’s Impeachment Inquiry Proves There’s Only One Political Party of Revenge—the GOP*, L.A. TIMES (Sept. 21, 2023, 3:00 AM), <https://www.latimes.com/opinion/story/2023-09-21/impeachment-house-joe-biden-kevin-mccarthy> [<https://perma.cc/ZH2A-QGNN>].

¹¹ Aumyo Hassan & Sarah J. Barber, *The Effects of Repetition Frequency on the Illusory Truth Effect*, 6 COGNITIVE RSCH. 38, at 1 (2021), <https://cognitiveresearchjournal.springeropen.com/articles/10.1186/s41235-021-00301-5> [<https://perma.cc/P446-RELY>].

¹² Joy, *supra* note 4.

¹³ Chris William Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 STAN. L. REV. 291, 292–93 (2004).

¹⁴ See Cole, *supra* note 1; Joy, *supra* note 4.

delivery of true justice. Ultimately, the American judicial system is premised on an idea of justice made entirely unachievable by our very own minds.

I. INTRODUCTION TO THE JUDICIAL SYSTEM AND FAIRNESS

The Judicial Branch of the United States Government finds its authority in Article III of the Constitution.¹⁵ Article III vests the judicial power of the United States in the Supreme Court and any “inferior Courts as the Congress may from time to time ordain and establish.”¹⁶ Along with establishing the courts of the United States, Article III “guarantees that every person accused of wrongdoing has the right to a *fair* trial before a competent judge and a jury of one’s peers.”¹⁷ There are various legal guardrails in place secured by both the Constitution and supplementary rules like the Federal Rules of Evidence in the pursuit of Article III’s promise of fairness.¹⁸ The Constitution, for example, ensures that the accused has a right to call their own witnesses, confront those called against them, cannot be tried for the same crime twice, and cannot be forced to testify against themselves.¹⁹ Similarly, the Federal Rules of Evidence govern whether proposed evidence is relevant and admissible,²⁰ with a focus on ensuring that the legal proceedings remain just.²¹ Our judicial system therefore seems to be based on the idea that fairness is synonymous with justice, or rather, that in the absence of fairness, there is no justice. But what really is *fair*?

Black’s Law Dictionary defines *fairness* as either “the quality of treating people equally or in a reasonable way” and “the qualities of impartiality and honesty.”²² *Merriam-Webster’s Dictionary* similarly defines *fair* as that which is “marked by

¹⁵ U.S. CONST. art. III, § 1.

¹⁶ *Id.*

¹⁷ *The Judicial Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/> [<https://perma.cc/CX5N-TEQS>] (last visited Feb. 10, 2024) (emphasis added).

¹⁸ The purpose of the Federal Rules of Evidence is to “administer every proceeding *fairly*, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.” FED. R. EVID. 102 (emphasis added).

¹⁹ THE WHITE HOUSE, *supra* note 17.

²⁰ *See* FED. R. EVID. 401, 402.

²¹ FED. R. EVID. 102 (“These rules should be construed so as to administer every proceeding *fairly*, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”) (emphasis added).

²² *Fairness*, BLACK’S LAW DICTIONARY (12th ed. 2024).

impartiality and honesty.”²³ Although not done here, a review of all dictionaries would likely concretize the idea that fairness is inextricably linked with the concept of “impartiality.” It is, however, worthwhile to note that *Black’s Law Dictionary* defines “impartiality” as “the quality, state, or condition of being free from bias and of exercising judgment unswayed by personal interest; disinterestedness.”²⁴ Of particular importance to grasp from this definition is that in order to be impartial, one must be “free from bias.”²⁵

The Framers establishing our legal system likely did not have a robust understanding of how the human mind works.²⁶ Today, it is well-understood that being impartial is a difficult, if not altogether impossible, thing for humans to be.²⁷ So, it is curious that our system of justice, dependent on fairness (and therefore impartiality), is heavily reliant on an unachievable trait. Before articulating this conclusion, however, it is first important to understand how the brain works in order to fully appreciate the limitations that contribute to our inability to be impartial.

II. PSYCHOLOGY 101: AN EXTREMELY BRIEF OVERVIEW OF HOW THE BRAIN WORKS

Despite being only three pounds, the human brain is one of the most complex organs in the human body.²⁸ Part of the brain’s complexity is based on its architecture, like understanding how the many folds and valleys—known as gyri and sulci—maximize surface area and enhance neuronal connection.²⁹ But the brain is

²³ *Fair*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/fair> [<https://perma.cc/RH2E-UA9P>] (last visited Feb. 10, 2024).

²⁴ *Impartiality*, BLACK’S LAW DICTIONARY (12th ed. 2024).

²⁵ *Id.* (emphasis added).

²⁶ Although, this is unsurprising given that neuroscience as a field of study increased in popularity in the 1960s, many hundred years after the establishment of the United States Government. *Understanding the Brain: A Brief History*, THE UNIV. OF QUEENSLAND, <https://qbi.uq.edu.au/brain/intelligent-machines/understanding-brain-brief-history> [<https://perma.cc/7HVB-UUE2>] (last visited Feb. 10, 2024).

²⁷ Adam Alter, *The Persistent Illusion of Impartiality*, PSYCH. TODAY (June 2, 2010), <https://www.psychologytoday.com/us/blog/alternative-truths/201006/the-persistent-illusion-impartiality> [<https://perma.cc/Z284-AVPM>] (“The truth is that no human—Supreme Court justice or otherwise—is impartial.”).

²⁸ *Brain Basics: Know Your Brain*, NIH: NAT’L INST. OF NEUROLOGICAL DISORDERS AND STROKE, <https://www.ninds.nih.gov/health-information/public-education/brain-basics/brain-basics-know-your-brain> [<https://perma.cc/6AFE-8K6H>] (last visited Feb. 10, 2024).

²⁹ See Olivia Guy-Evans, *Gyri and Sulci of the Brain*, SIMPLY PSYCH. (Sept. 19, 2023), <https://www.simplypsychology.org/gyri-and-sulci-of-the-brain.html> [<https://perma.cc/3TXY-ZYK9>]; *Brain Gyrius*

also complex because of its executive functioning; it is “the seat of intelligence, interpreter of the senses, initiator of body movement, and controller of behavior.”³⁰ These functions are achieved by the sending, receiving, and interpreting of chemical and electrical signals.³¹ Some of these signals perform simple functions, such as signaling the feeling of hunger.³² Other signals initiate more complex behavior, like recoiling from a hot stove.³³ Even more complicated, however, are some innate psychological phenomena that influence the way people perceive external stimuli and, in turn, the way that they behave.³⁴

A critical component to note about the brain’s function is that many of these processes—signal sending to response behavior—happen seamlessly and without much conscious awareness³⁵—can you remember a time you actively had to think about pulling your hand away from a hot stove? The consequence of this automation is that the inherent psychological phenomena that this Note will explore are sites of automatic mechanistic mystery. Not only that, but these phenomena have substantial consequences in the judicial context, one which mandates precision—a process which arguably requires significant controlled thought and behavior. Consequently,

(Cerebral Cortex) and Sulcus (Neuroanatomy)|Important Features of the Central Nervous System, CLEVERLYSMART (Aug. 28, 2021), <https://www.cleverlysmart.com/brain-gyrus-cerebral-cortex-and-sulcus-neuroanatomy-important-features-of-the-central-nervous-system/> [<https://perma.cc/6YPH-ZZQG>] (“A larger surface area means that more neurons can be packed into the cortex so that it can process more information. Ultimately, cognitive functions will be better with gyri without having to increase the actual brain size, which would not fit into a skull.”).

³⁰ NIH: NAT’L INST. OF NEUROLOGICAL DISORDERS AND STROKE, *supra* note 28.

³¹ *Brain Anatomy and How the Brain Works*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/conditions-and-diseases/anatomy-of-the-brain> [<https://perma.cc/HCR8-WQYE>] (last visited Feb. 10, 2024).

³² A hormone known as ghrelin is responsible for indicating hunger, and when it travels to the brain, the hypothalamus interprets this signal and ultimately gets you to eat. Gary Starkman, *You’re Hungry—Says Who; Your Stomach or Your Brain?*, NY NEUROLOGY ASSOCS., <https://www.nyneurologists.com/blog/youre-hungry-says-who-your-stomach-or-your-brain> [<https://perma.cc/F7NN-YWZT>] (last visited Feb. 10, 2024).

³³ Sensory neurons in the hand initiate a “go” signal in the brain that then initiates the movement away from the stimulus. Eva Valenti, *Stanford Researchers Uncover the Neural Process Behind Reaction Time*, SCOPE (Aug. 12, 2011), <https://scopeblog.stanford.edu/2011/08/12/stanford-researchers-uncover-the-neural-process-behind-reaction-time/> [<https://perma.cc/Z9ZZ-SWW3>].

³⁴ See *infra* Part III.

³⁵ *Executive Function*, PSYCH. TODAY, <https://www.psychologytoday.com/us/basics/executive-function> [<https://perma.cc/UG8B-G84Q>] (last visited Feb. 14, 2024) (“Many behaviors in which humans engage, such as breathing or stepping out of the way of an oncoming car, occur without conscious thought.”).

this Note will argue that these psychological phenomena are ultimately cognitive limits that inhibit a truly fair judicial proceeding.

III. UNDERMINING JUSTICE: HOW THE BRAIN PREVENTS IMPARTIALITY

One of the many joys of brain science is learning about various theories of cognition. This includes the study of how the brain processes emotion, visual stimuli, and auditory information. Also a part of the cognitive science curriculum is learning about memory processing and various cognitive quirks. It is in these processes that the fairness of the judicial system is threatened, making the brain an unsuspecting villain to a system reliant on human interpretation. Although there are many cognitive processes that can be scrutinized under this lens, this Note will focus on several types of biases, the illusory truth effect, the continued influence effect, and the effect of delay on memory.

A. *Implicit Bias*

The concept of implicit bias has gained increased attention in legal education.³⁶ Implicit bias “describes a prejudice, stereotype, or presumption made about certain groups or populations pre-reflexively, or without conscious knowledge of that bias.”³⁷ The human brain, after all, is exceptional at recognizing patterns and drawing conclusions from its observations.³⁸ This automatic process, however, may “lead to overgeneralization and discrimination via ‘implicit bias’”³⁹ In other words, the generalizations made by the brain may subconsciously influence one’s understanding of groups of people, and further, may dictate behavior towards them.

Implicit bias operates in many settings, whether it be social situations or more formal settings like work or school.⁴⁰ A simple example of implicit bias at work relates to the heights of CEOs.⁴¹ Despite only 3.9% of adult men measuring at six feet two inches tall, “a random sampling of CEOs . . . found that nearly a third, or

³⁶ Shawn C. Marsh, *The Lens of Implicit Bias*, JUV. AND FAM. JUST. TODAY, Summer 2009, at 16, 18, https://www.ncjfcj.org/wp-content/uploads/2012/09/The-Lens-of-Implicit-Bias_0.pdf [<https://perma.cc/H3CL-WJSN>].

³⁷ Bernice B. Donald, Jeffrey Rachlinski & Andrew J. Wistrich, *Getting Explicit About Implicit Bias*, 104 JUDICATURE 75, 75 (2020–21) (footnote omitted).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *How to Identify and Overcome Your Implicit Bias*, MARYVILLE UNIV. (July 20, 2021), <https://online.maryville.edu/blog/addressing-implicit-bias/> [<https://perma.cc/9NCE-8A2V>].

⁴¹ *Id.*

roughly 33.3%” of CEOs were six feet two inches tall.⁴² Malcolm Gladwell, the author of *Blink: The Power of Thinking Without Thinking*—where he discusses this statistical finding—supposes that “this could be linked to an unconscious belief that height correlates with success.”⁴³ This unconscious belief is an implicit bias.⁴⁴ However, implicit bias is not confined to rather benign relationships such as height and success. Rather, it extends to settings where the consequences of implicit bias are much greater.⁴⁵ In the judicial context, implicit bias operates as a threat to fairness.

Implicit bias allows judicial actors to behave in accordance with conclusions drawn from perceived patterns, hindering true justice. One study found that “80 percent of white judges more strongly associated Black faces with negative words, and white faces with positive words.”⁴⁶ This type of implicit bias has the potential to govern behavior.⁴⁷ For example, in another study related to juvenile offenders, researchers found that “implicit biases correlated with judgments.”⁴⁸ Specifically, when it was “subtly suggested” that the defendant’s race was Black, harsher penalties were administered by “[j]udges who harbored a strong white-good/Black-bad association[.]”⁴⁹ Implicit bias, however, does not only affect the decisions made by judges. The phenomenon likely plays a role earlier in the judicial process as “[p]olice might be more inclined to arrest Black suspects and prosecutors might be more apt to pursue cases against Black defendants.”⁵⁰

Implicit bias also impacts jury decision making. Specifically, “research routinely finds that jurors view defendants who are more consistent (versus inconsistent) with stereotypical expectations as more likely to be guilty.”⁵¹ Even in a concerted effort to minimize the occurrence of a biased juror being picked through

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Donald et al., *supra* note 37.

⁴⁶ *Id.* at 76. The professors used the implicit association test (IAT) to lead to this finding.

⁴⁷ *Id.* (“[T]he judge’s implicit associations influenced their judgment.”).

⁴⁸ *Id.*

⁴⁹ *Id.* (“Judges who harbored a strong white-good/Black-bad association imposed harsher penalties on the defendant we had suggested was Black”).

⁵⁰ *Id.* at 77.

⁵¹ Johnathan P. Vallano, *Is Justice Blind if We Say It Is?*, 53 MONITOR ON PSYCH. 37 (2022) (citation omitted), <https://www.apa.org/monitor/2022/10/jurors-implicit-bias> [<https://perma.cc/34CF-F749>].

careful voir dire questioning, jurors may not know of their biases,⁵² and if they do, they may be unwilling to admit them.⁵³ Ultimately, “most of the researchers on jurors and implicit bias would agree that jurors are not immune from implicit bias and that these biases can lead to less-than-fair outcomes in the trial.”⁵⁴ In the judicial context, implicit bias exposes decisions at every stage of the process to be based on stereotypical patterns. Put more explicitly, judicial actors like police officers, attorneys, jurors, and judges may inadvertently rely on implicit bias to inform their behavior, thereby failing to act impartially. This failure makes justice inaccessible because justice’s requisite fairness cannot be achieved in the absence of impartiality. Implicit bias therefore is a cognitive limit that undermines justice.

B. Confirmation Bias

Like implicit bias, the effects of confirmation bias in judicial settings also lead to unjust results. Confirmation bias is a psychological process whereby the brain analyzes and considers new information in conformity with existing beliefs.⁵⁵ More precisely, new information that aligns with how one already views the world is likely to be given more credence than new information that challenges those pre-existing views.⁵⁶ Take astrological signs for a lighthearted example. For those that are well-versed in astrology and who “learn that a friend is a Libra, [they] may identify, automatically and effortlessly, parts of [their] friend’s personality that are said to be characteristic of Libras.”⁵⁷ Effectively, the astrologically-educated friend is understanding their friend’s behavior based on knowing how Libras *are*—that because their friend is a Libra, everything that coincides with stereotypical Libra

⁵² Hence why the phenomenon is called “implicit bias.”

⁵³ Vallano, *supra* note 51 (“And even if jurors are aware of their potential biases, there is no guarantee that they will inform the court of their bias. Many jurors want to promote the veneer of impartiality, the importance of which is repeatedly instructed. Therefore, jurors may be unwilling or unable to admit that their biases have seeped into their legal judgments.”).

⁵⁴ KATHERYN L. YETTER & BRIAN M. LEE, JUDGING THE BOOK BY MORE THAN ITS COVER: A SYMPOSIUM ON JURIES, IMPLICIT BIAS, AND THE JUSTICE SYSTEM’S RESPONSE 3 (2021), https://www.judges.org/wp-content/uploads/2021/04/NJC_WHITE-paper_web_singlepages-1.pdf [<https://perma.cc/H84P-UW8Q>].

⁵⁵ Dan Pilat & Sekoul Krastev, *Why Do We Favor Our Existing Beliefs?*, THE DECISION LAB, <https://thdecisionlab.com/biases/confirmation-bias> [<https://perma.cc/8VHN-XPY8>] (last visited Feb. 10, 2024).

⁵⁶ *Id.*

⁵⁷ Thomas Gilovich, *The Trap of Confirmation Bias*, N.Y. TIMES (Dec. 22, 2015, 3:21 AM), <https://www.nytimes.com/roomfordebate/2015/12/22/what-is-the-appeal-of-astrology/the-trap-of-confirmation-bias> [<https://perma.cc/5USS-7DLL>].

behavior must be *because* that friend is a Libra.⁵⁸ Confirmation bias, however, also has significant consequences in the context of judicial proceedings.

Confirmation bias can influence who gets picked during jury selection, how jurors interpret evidence, and even what information attorneys favor during trial.⁵⁹ Most threatening to the fair serving of justice is how confirmation bias affects jury decision making. This psychological shortcut “leads jurors to selectively focus on the evidence that supports their initial beliefs, disregard or explain away evidence that does not align with those beliefs, and distort evidence that is ambiguous.”⁶⁰ Implicit bias may exacerbate the effect of confirmation bias as well. Specifically, for a juror who holds an implicit bias regarding a particular group of people to which the defendant is a member of, “*all* evidence will be processed in a manner that bolsters their initial assumptions.”⁶¹ As an unintentional process, confirmation bias serves as a cognitive limit that prevents a fair trial. This is so because when a juror exclusively interprets evidence in conformity with preexisting opinions and viewpoints, they fail to be impartial. This failure undermines the very principle our judicial system is founded upon because without impartiality, there is no fairness, and therefore, no justice.

C. *Illusory Truth Effect*

The brain also faces a cognitive weakness in the context of judicial proceedings with the process of repetition. Although repetition has largely been viewed as a beneficial thing for things like remembering information,⁶² repetition also influences the brain’s perception of truth.⁶³ In short, “repeated information is often perceived as more truthful than new information.”⁶⁴ This concept is also referred to as the “illusory truth effect.”⁶⁵ The illusory truth effect describes the experience of coming

⁵⁸ *Id.*

⁵⁹ *Jury Bias: Uncovering its Influence on Trials*, JURY ANALYST (July 11, 2023), <https://juryanalyst.com/blog/confirmation-bias-influence-trials/> [<https://perma.cc/9S8X-KHEN>].

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Long-Term Memories a Matter of Order—Not Just Repetition*, N.Y.U. (Sept. 26, 2022), <https://www.nyu.edu/about/news-publications/news/2022/september/long-term-memories-a-matter-of-order-not-just-repetition.html> [<https://perma.cc/V7X4-TF7F>] (“The more times something is repeated, the better it is remembered . . .”).

⁶³ Hassan & Barber, *supra* note 11.

⁶⁴ *Id.*

⁶⁵ *Id.*

to believe false information as true if it is repeated to us again and again.⁶⁶ The current, widely supported theory for why this effect occurs is the “processing fluency account.”⁶⁷ This theory explains that “when information is repeated, it is processed more fluently and is consequently perceived to be more truthful.”⁶⁸ Like the brain recognizing patterns in developing implicit biases, the brain recognizes the pattern over time that “fluency . . . is predictive of truthfulness”⁶⁹

The strength of the illusory truth effect is surprising too. Studies have demonstrated that repetition of misinformation about observed events, fake news headlines, rumors, trivia statements, product claims, and opinion statements leads to increased believability and truth-value assignments.⁷⁰ Further, “the effect does not depend upon the source of the statements” and even persists “when participants are explicitly told that the source of the statements is unreliable”⁷¹ Even more, the illusory truth effect still “occurs when the repeated statements are highly implausible.”⁷² Finally, the illusory truth effect still persists even “when the repeated statements directly contradict participants’ prior knowledge.”⁷³

Beyond having profound effects on one’s perception of reality, studies have shown that people act on those misguided beliefs.⁷⁴ For example, at the beginning of the COVID-19 pandemic, a Belgian newspaper published an article linking 5G cellular service to the development of the virus.⁷⁵ Despite being scientifically unsupported, “belief in this conspiracy theory was also associated with reduced health-protective behaviors”⁷⁶ The illusory truth effect is therefore a cognitive

⁶⁶ *Why Do We Believe Misinformation More Easily When It’s Repeated Many Times?*, THE DECISION LAB, <https://thedecisionlab.com/biases/illusory-truth-effect> [<https://perma.cc/W2NQ-HV2V>] (last visited Feb. 10, 2024).

⁶⁷ Hassan & Barber, *supra* note 11 (citation omitted).

⁶⁸ *Id.* (citations omitted).

⁶⁹ *Id.* (citation omitted).

⁷⁰ *Id.* (citations omitted).

⁷¹ *Id.* (citations omitted).

⁷² *Id.* (citation omitted) (For example, the statement that “the earth is a perfect square”—something that seems undeniably implausible—was still found to succumb to the robustness of the illusory truth effect.).

⁷³ *Id.* (citations omitted).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* (citations omitted).

limit that can be taken advantage of and used to encourage jurors to be partial, undermining the serving of justice.

In a setting that requires fairness, the illusory truth effect can be capitalized on to tilt the scales one way over the other—something that obviously contradicts the idea of a just trial. The illusory truth effect has been demonstrated in simulated trial contexts.⁷⁷ For example, a study analyzing the significance of repeating important evidence found that repetition did indeed matter for jury decision-making.⁷⁸ Specifically, this study found that repetition of “certain types of details, like the unreliability of an accused and gravity of injuries inflicted on victims, matter in a potential juror’s decision-making process.”⁷⁹ The significance of which, for this Note’s argument, is that repetition can be used by judicial actors to negatively impact an accused’s ability to have the fact-finder consider evidence impartially. More precisely, the illusory truth effect jeopardizes the ability of a judge or jury to consider the evidence impartially because they may be inadvertently weighing certain evidence more heavily simply because it was repeated. This effect is also not exclusive to the prosecution’s offensive use. The defense may also repeat misleading or false claims that increase the likelihood of juror acceptance.⁸⁰ This may cause the fact finder to believe meritless claims over key evidence presented by the prosecution, similarly undermining a just trial. The illusory truth effect is therefore a powerful limit to cognition because repeated information can shape decisions even absent an impartial consideration of all evidence. Without impartial decision-making, justice is undermined.

D. Continued Influence Effect

Somewhat related to the illusory truth effect is the continued influence effect. The continued influence effect describes the phenomenon whereby “discredited and obsolete information continues to effect behavior and beliefs.”⁸¹ In other words, people will continue to rely on misinformation even after it has been retracted or

⁷⁷ Alexandra Johnston, Daniel Ambrosini & Bruno Losier, *The Impact of the Illusory Truth Effect and Location of Testimony in Juror Deliberations*, 4 INT’L J. RISK & RECOVERY 18, 18 (2021).

⁷⁸ *Id.* at 28.

⁷⁹ *Id.*

⁸⁰ Paul N. Luvera, *The Illusory Truth Effect*, PLAINTIFF TRIAL LAW. TIPS (Oct. 26, 2019), <https://plaintifftriallawyertips.com/the-illusory-truth-effect> [https://perma.cc/AV68-PX8Y].

⁸¹ Irene P. Kan, Kendra L. Pizzonia, Anna B. Drummey & Eli J.V. Mikkelsen, *Exploring Factors that Mitigate the Continued Influence of Misinformation*, SPRINGER OPEN (Nov. 27, 2021), <https://cognitiveresearchjournal.springeropen.com/articles/10.1186/s41235-021-00335-9> [https://perma.cc/KRA5-75PL].

corrected.⁸² It is thought that the continued influence effect occurs due to “selective retrieval of the misinformation . . . or from integration failure when processing the retraction.”⁸³ This phenomenon has been demonstrated with things like news, myths, and false allegations.⁸⁴ The continued influence effect is particularly important to examine in regards to judicial proceedings and justice due to the frequency of instances where information at trial is either withdrawn or required to be disregarded. More explicitly, the continued influence effect limits fairness in trials because the human brain is largely incapable of not relying on information, even after being told it is false or to disregard it.⁸⁵

In trial, objections may be made in regards to the admissibility of particular types of statements or evidence.⁸⁶ If the judge has determined that the relevant law precludes material to which counsel has objected, the judge will sustain the objection.⁸⁷ In the event that the judge decides that the jury should not have heard the objected-to material, he may instruct the jury to disregard the evidence and deliberate as though such testimony had never been uttered.⁸⁸ This instruction can be particularly difficult to act upon because of the continued influence effect.⁸⁹ Specifically, it has been demonstrated that “jurors are in fact unable to disregard inadmissible evidence even when they are instructed to do so and are willing to do

⁸² Ullrich K.H. Ecker & Luke M. Antonio, *Can You Believe It? An Investigation Into the Impact of Retraction Source Credibility on the Continued Influence Effect*, SPRINGER LINK (Jan. 15, 2021), <https://link.springer.com/article/10.3758/s13421-020-01129-y> [<https://perma.cc/5CA3-6JKC>].

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See generally Pamela N. Sandberg, Tess M. S. Neal & Karey L. O’Hara, *Can Jurors Disregard Inadmissible Evidence? Using the Multiphase Optimization Strategy to Test Interventions Derived from Cognitive and Social Psychological Theories*, 15 BEHAV. SCIS. 7 (2025).

⁸⁶ *Legal Information*, WOMENSLAW.ORG, <https://www.womenslaw.org/laws/preparing-court-yourself/hearing/objecting-evidence> [<https://perma.cc/29J9-5TB3>] (last visited Feb. 10, 2024).

⁸⁷ *Court Terminology*, SUMMERVILLE S.C., <https://www.summerville.sc.gov/249/Court-Terminology> [<https://perma.cc/P69N-XW2F>] (last visited Feb. 10, 2024).

⁸⁸ *The Answer Book for Jury Service*, VIRGINIA’S JUDICIAL SYSTEM, <https://www.vacourts.gov/courts/circuit/jury.pdf> [<https://perma.cc/UPY4-846Y>] (last visited Feb. 10, 2024); see also 241.2: *Juror Misconduct*, N.C. PROSECUTORS’ RES. ONLINE, <https://ncpro.sog.unc.edu/manual/241-2> (last visited Mar. 23, 2025).

⁸⁹ Stephanie C. Black, *The Continued Influence of Retracted Witness Testimony at Jury Trials*, 3 ICTP 94, 95 (2017) (“This continued influence effect is particularly salient for jury trials, for instance, when jurors fail to disregard withdrawn testimony . . . or fail to disregard withdrawn conclusions from refuted scientific studies[.]”) (citations omitted).

so.”⁹⁰ More unhelpful to retracting evidence from the minds of the jurors is the actual instruction to disregard the offending information. This is because the “judge’s order to disregard the evidence may actually . . . reforc[e] the evidence’s biasing effects.”⁹¹ When testimony or evidence has been determined to be inadmissible, it would be unfair for it to still be considered by jurors when returning a verdict. Unfortunately, the continued influence effect leads to such a result. The brain’s inability to cease relying on information that has been discredited or withdrawn is a cognitive limit that undermines justice as this inability means decision makers remain partial to forbidden evidence.

E. Delay

Finally, it is important to understand the effect that delay has on the brain, and ultimately, on a fair trial. Although delay is an external variable, its effect on memory makes it valuable to raise in the context of psychological characteristics that diminish a judicial proceeding’s ability to truly be just.

Generally, it is harder to remember things that happened a long time ago.⁹² There are many theories on why and how memories fade.⁹³ Although these theories are individually fascinating to read about, all acknowledge that memories become stale and unreliable.⁹⁴ Not even flashbulb memories—highly vivid memories that are formed after unexpected and emotional events—are resistant to forgetting.⁹⁵ Further, each time a memory is retrieved, it is reconstructed, increasing the chance of misremembering.⁹⁶ In the context of judicial proceedings, where much of the trial is reliant on witnesses’ memories, the risk of forgetting threatens the likelihood of a

⁹⁰ *Can Jurors Ignore Inadmissible Evidence?*, 24 TRIAL 80 (1988), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/can-jurors-ignore-inadmissible-evidence> [<https://perma.cc/858X-WDGX>].

⁹¹ *Id.*

⁹² Sam Wong & Catherine de Lange, *Memory Special: What Happens to Memories Over Time?*, NEW SCIENTIST (Oct. 24, 2018), <https://www.newscientist.com/article/mg24032011-200-memory-special-what-happens-to-memories-over-time/> [<https://perma.cc/WUD9-EUXK>].

⁹³ Kendra Cherry, *The Psychology of Forgetting and Why Memory Fails*, VERYWELL MIND (Feb. 27, 2023), <https://www.verywellmind.com/forgetting-about-psychology-2795034> [<https://perma.cc/WWM6-S9KM>]. Some examples include the interference theory, memory decay theory, and failure in retrieval theory, to name a few.

⁹⁴ *See generally id.*

⁹⁵ Jennifer M. Talarico & David C. Rubin, *Confidence, Not Consistency, Characterizes Flashbulb Memories*, 14 PSYCH. SCI. 455, 455 (2003). This study found that what differentiates flashbulb memories from regular ones is how confident people are in the accuracy of their memories—people report high levels of confidence even if the accuracy of the memory is low (i.e., forgetting has taken place).

⁹⁶ Ken Eisold, *Unreliable Memory*, PSYCH. TODAY (Mar. 12, 2012), <https://www.psychologytoday.com/us/blog/hidden-motives/201203/unreliable-memory> [<https://perma.cc/U3Q4-HHAD>].

truly fair trial. This threat is exacerbated when delay is used to purposefully increase the occurrence of forgetting.

Like how the illusory truth effect may be used proactively, delay may be used to inorganically increase the chances the jury may behave in a particular manner. And, just as it is unfair to use the illusory truth effect like this, it is unjust to use delay in such a way. Delay has been demonstrated to deleteriously impact the memory of witnesses.⁹⁷ For example, in a study where witnesses viewed a crime, reported on their observations initially and then again six months later, memory accuracy was significantly reduced.⁹⁸ Not only has delay been shown to impact witnesses' memories, but testimony or identification based on these inaccurate memories has led to wrongful convictions.⁹⁹ For example, as recorded by the Innocence Project, "mistaken identification by eyewitnesses played a role in 61% of . . . wrongful convictions" that were ultimately exonerated by DNA evidence since 1989.¹⁰⁰ This statistic makes the impact of weak memories particularly potent and emphasizes the unjust nature of taking steps to purposefully cause memories to deteriorate.

Memories are not infallible, and in the context of judicial proceedings, this characteristic is a cognitive limit. The fluidity of memory undermines the principles of justice because it can be taken advantage of—it can be used to unfairly limit the ability of a witness to recount their experience of the event at issue. This in turn prevents the fact finder from being able to have a fair accounting of an event, inauthentically shading the narrative presented to the decision-maker. The inauthenticity resulting from such a tactic creates imbalance between parties which prevents a truly fair trial, thereby undermining the justice ideal.

Natural cognitive processes are important factors to consider in evaluating the fairness of the judicial system. Despite the many guardrails in the judicial process meant to ensure fairness, organically occurring psychological processes undermine these safety features. Ultimately, these cognitive phenomena are incompatible with a justice system that mandates fairness as they each uniquely undermine the ability of judicial actors to remain impartial.

⁹⁷ Jacqueline M. Wheatcroft, Graham F. Wagstaff & Brian Manarin, *The Influence of Delay and Item Difficulty in Criminal Justice Systems on Eyewitness Confidence and Accuracy*, 1 INT'L J. HUMANS. & SOC. SCI. RSCH. 1 (2015).

⁹⁸ *Id.* at 6–7.

⁹⁹ Amy Morin, *Eyewitness Testimony: Reliability and Examples*, VERYWELL MIND (Dec. 18, 2023), <https://www.verywellmind.com/can-you-trust-eyewitness-testimony-4579757#toc=does-eyewitness-testimony-lead-to-wrongful-convictions> [<https://perma.cc/WPB3-CP9G>].

¹⁰⁰ *Id.*

IV. MANAGEMENT: HOW MANAGING THESE COGNITIVE LIMITATIONS MAY DO LITTLE TO ACHIEVE JUSTICE

There are steps judicial actors may take to minimize the effect of some of these cognitive limitations. However, just as it is possible to actively minimize the effect of these cognitive processes, it is also possible to enhance their effects, thereby re-emphasizing just how they can undermine the principles of justice.

A. *Implicit Bias*

To avoid the negative influence of implicit bias, the recommendation has been to become aware of the biases that one possesses and actively change one's behavior to override them.¹⁰¹ The American Bar Association (ABA) suggests that implicit biases may be “interrupted” by being aware, motivated, and trained, in addition to seeking diverse contacts, individuating, practicing perspective, and staying accountable.¹⁰² These strategies are widely echoed, including at institutions like Yale University and Georgetown University.¹⁰³ Studies on methods to reduce implicit bias specifically within jurors have also emphasized the need to draw attention to factors of a case that jurors may hold unconscious beliefs on, like race.¹⁰⁴ For example, “when race is made salient (e.g., via witness testimony) jurors are significantly less likely to find a Black defendant guilty than when race is not made salient.”¹⁰⁵ This finding left researchers to conclude that “racially charged cases or cases in which race is highlighted tend to mitigate potential juror biases.”¹⁰⁶

While there may be methods that judicial actors can use to attempt to minimize the effects of implicit bias in jury decision making, doing so assumes the actor is

¹⁰¹ *How to Confront Bias in the Criminal Justice System*, AM. BAR ASS'N (Dec. 2019), <https://www.americanbar.org/news/abanews/publications/youraba/2019/december-2019/how-to-confront-bias-in-the-criminal-justice-system/> [<https://perma.cc/X3M9-4SCH>].

¹⁰² *Id.*

¹⁰³ *Strategies to Reduce the Influence of Implicit Bias*, HORSLEY LAB, https://horsley.yale.edu/sites/default/files/files/IB_Strategies_033012.pdf [<https://perma.cc/54PV-BD27>] (last visited Feb. 10, 2024); *Six Interventions to Tackle Unconscious or Implicit Bias*, NAT'L CTR. FOR CULTURAL COMPETENCE AT GEO. UNIV., <https://nccc.georgetown.edu/bias/module-4/2.php> [<https://perma.cc/X3WB-59JF>] (last visited Feb. 10, 2024).

¹⁰⁴ Jacqueline M. Kirshenbaum & Monica K. Miller, *Judges' Experiences with Mitigating Jurors' Implicit Biases*, 28 PSYCHIATRY, PSYCH. & L. 683, 684 (2021).

¹⁰⁵ *Id.* (citation omitted)

¹⁰⁶ *Id.* (citation omitted). However, there were also findings that jurors who had particularly high racial IAT scores (the IAT, or “Implicit Association Test,” is the test used to identify individual biases one possesses) were more likely to render a guilty verdict for a Black defendant when race was made salient compared to when it was not. *Id.* at 685.

aware of this ability. Further, knowing about these methods may enable judicial actors to capitalize on inaction. For example, a prosecutor may choose not to highlight the race of the defendant, meaning jurors may not have been made aware of their potentially influential implicit biases. Making decisions influenced by invisible, already-held views entirely undermine the judicial ideal of fairness.

B. *Confirmation Bias*

Strategies for counteracting confirmation bias are much like the methods suggested for overcoming implicit biases. Making jurors cognizant of the potential impact of their biases may help to minimize the effect of confirmation bias.¹⁰⁷ Attorneys are encouraged to remind the jury that they must consider all evidence objectively, even if it contradicts already held beliefs.¹⁰⁸ Having similar approaches to reduce the effect of confirmation bias within judicial actors as those recommended for counteracting implicit bias, confirmation bias is exposed to the same vulnerabilities as implicit bias is. Specifically, just like for implicit bias, a judicial actor may choose not to draw attention to the fact that jurors may be analyzing evidence in line with their established beliefs. A failure to draw attention to this cognitive phenomenon may be used offensively if the judicial actor gets a sense that jurors may decide one way over another. So, inaction may be advantageous, but doing so undermines justice as evidence will not be considered objectively nor impartially.

C. *Illusory Truth Effect*

There are some suggested methods for combating the illusory truth effect, but it should be noted that “its negative effects can never be fully avoided[.]”¹⁰⁹ However, most applicable to a judicial proceeding for minimizing the illusory truth effect is encouraging critical thinking.¹¹⁰ In the absence of thinking critically about the information being processed “we make ourselves more susceptible to the illusory

¹⁰⁷ Steve Wood & Bill Kanasky, Jr., *Tips to Reduce Confirmation Bias in Jurors, Attorneys, and Clients—Part 2 of 2*, CSI, <https://www.courtroomsciences.com/blog/litigation-consulting-1/tips-to-reduce-confirmation-bias-in-jurors-attorneys-and-clients-part-2-of-2-659> [https://perma.cc/24GT-MUBF] (last visited Feb. 10, 2024).

¹⁰⁸ *Id.*

¹⁰⁹ Jonas De keersmaecker, Katharina Schmid, Nadia Brashier & Christian Unkelbach, *Four Ways to Deal with Misinformation in Decision-Making*, NAT’L ASS’N FOR PRESIDING JUDGES AND CT. EXEC. OFFICERS (Aug. 17, 2022), <https://napco4courtleaders.org/2022/09/four-ways-to-deal-with-misinformation-in-decision-making/> [https://perma.cc/ZFE4-QDEK].

¹¹⁰ See THE DECISION LAB, *supra* note 66.

truth effect.”¹¹¹ Without critically thinking, it is more likely that a falsehood goes undetected, and therefore the next time we hear that same falsehood, we are likely to accept it as true.¹¹²

In the context of a judicial proceeding, however, critical thinking is arguably difficult for jurors to do. This is in part difficult because jurors are not dealing with simple falsehoods (such as the false claim that 5G cellular service caused COVID-19 infections). They are instead tasked with disentangling strikingly different narratives between the prosecution and defense. Furthermore, jurors are unable to fact-check expert witness testimony. In many respects to judicial proceedings, critical thinking is largely limited—jurors are entirely reliant on the information presented at trial—making them perhaps more susceptible to the negative influence of the illusory truth effect. Consequently, judicial actors are arguably significantly advantaged by capitalizing on repetition because their audience is limited in countering the impact of the illusory truth effect. Accordingly, the counteracting mechanism for the illusory truth effect—critical thinking and fact checking—might be ineffective within the judicial context, allowing such a cognitive limit to persist as an underminer of justice.

D. *Continued Influence Effect*

The ability to mitigate the effects of the continued influence effect lie within the correction.¹¹³ A study found that if an alternative was provided at the time that misinformation was being corrected, the continued influence of that misinformation was reduced.¹¹⁴ However, a total elimination of the continued influence effect has not yet been demonstrated, likely because of how robust the phenomenon is.¹¹⁵ This study also found improvement with the continued influence effect when the correction was made alongside a repetition of the incorrect information.¹¹⁶

This mitigation strategy for the impact of the continued influence effect, however, might not be as applicable in the judicial context as one might hope.

¹¹¹ *Id.*

¹¹² *Id.* (“In short, fact-checking claims the first time you hear them is important to reduce the power of the illusory truth effect.”).

¹¹³ Kan et al., *supra* note 81.

¹¹⁴ *Id.* (This means, for example, that at the time of correcting wrong information, the correct information was provided.).

¹¹⁵ *Id.*

¹¹⁶ *Id.* (“Although, there is some evidence to support the idea that misinformation repetition may result in greater perceived truth . . .” making it not certain that repetition of the misinformation is a beneficial procedure to follow.).

Specifically, when material is struck from the record by a judge, the jury is not often provided an alternative. Accordingly, this mitigation technique is entirely ineffectual, leaving jurors still susceptible to the continued influence effect. Consequently, the continued influence effect remains a cognitive limit that undermines the principles of justice because its effects are hard to limit within the confines of judicial procedure.

E. Delay

Finally, the obvious mitigation technique to counteract memory deficits from delay is to not have delays. However, with delay being a popular technique to increase favorable outcomes for defendants, other methods to safeguard the memories of witnesses could be employed.¹¹⁷ Such methods may include taking depositions close to the time of the event in question to preserve the memories of the witnesses. However, processes like these can be expensive and therefore less utilized.¹¹⁸ Even further, arranging depositions takes time and may be performed after a significant time delay has already occurred. Consequently, delaying depositions may even be a favorable way to capitalize on the fragility of a witness's memory.

Memory is fallible and this characteristic is only exaggerated when techniques like delay are purposefully employed to further dilute a witness's memory. Preventing the effects on memory caused by delay can only be accomplished by avoiding delay which is entirely based on the ability of a judicial actor to act. As such, delay causes a cognitive limitation that undermines justice because it enables judicial actors to artificially change what evidence is capable of being presented and with what level of reliability.

CONCLUSION

The concept of justice, at least in the United States' legal system, is based on ensuring fairness.¹¹⁹ Fairness is intrinsically related to impartiality which is the "state . . . of being free from bias and of exercising judgment unswayed by personal

¹¹⁷ Joy, *supra* note 4.

¹¹⁸ Chris Finney, *If I Want My Lawyer to Depose Someone, Who Pays for the Deposition?*, FINNEY INJ. L., <https://finneyinjurylaw.com/video/if-i-want-my-lawyer-to-depose-someone-who-pays-for-the-deposition/> [<https://perma.cc/5KSY-CZYH>] (last visited Feb. 10, 2024) (The cost of a deposition "can range anywhere from \$170 to \$2,000 dollars. When you think about cases, those costs can add up in the \$20,000[-]\$30,000 dollar range, just for depositions alone.").

¹¹⁹ See, e.g., FED. R. EVID. 102.

interest”¹²⁰ In essence, legal decisions require that the decision-maker be able to consider evidence independent of personal biases and beliefs.

This requirement of impartiality, however, is arduous due to the way the brain naturally operates. The human brain identifies patterns to orient to its surroundings quickly and seamlessly.¹²¹ The human brain is also impressionable; repetition and delay have profound effects on belief and memory. Each characteristic can unfairly affect a judicial proceeding because they prevent impartiality from guiding decision making: implicit and confirmation biases urge conformity with preexisting, understood patterns and beliefs, and repetition (illusory truth effect) and delay artificially change and adjust the strength of beliefs. Further, if capitalized on, these innate cognitive characteristics and phenomena can be used offensively to purposefully disadvantage the opposing party.

In other settings, these cognitive characteristics may be beneficial, but in the context of a judicial proceeding, they operate as limits that undermine justice. So, we must confront the idea that we are simply pretending that our judicial system is just.

¹²⁰ *Impartiality*, BLACK’S LAW DICTIONARY (12th ed. 2024), available at Westlaw.

¹²¹ Donald et al., *supra* note 37.