



Debiasing the Law

How understanding cognitive biases leads
to a more just legal system.

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THE O.J. SIMPSON TRIAL, HELD IN 1995, WAS ONE OF THE MOST

PUBLICIZED CRIMINAL TRIALS in American history. Simpson, a former professional football player and actor, was accused of the brutal murders of his ex-wife Nicole Brown Simpson and her friend Ronald Goldman. The case was filled with dramatic moments, but perhaps none more so than when Simpson tried on a pair of gloves allegedly used in the murders. The gloves appeared to be too small for Simpson's hands, leading to the now-infamous phrase by defense attorney Johnnie Cochran: "If it doesn't fit, you must acquit."

This statement is a classic example of the rhyme-as-reason effect. This cognitive bias suggests that if a statement or argument is presented in a way that is easy to process or understand, such as rhyming, it is more likely to be perceived as true. The defense team in the Simpson trial used this cognitive bias to its advantage, crafting a simple, memorable phrase that resonated with the jury. The phrase was catchy, easy to remember, and it simplified a complex legal argument into a straightforward, easily digestible concept. This ultimately contributed to Simpson's acquittal.

As legal professionals, it is crucial to understand the role of cognitive biases in the courtroom. These biases can subtly influence the decision-making process, swaying the opinions of jurors, judges, and even attorneys themselves. The rhyme-as-reason effect is just one of many cognitive biases that can impact legal proceedings.

ISBA RESOURCES >>

- Gino L. DiVito, *What I Learned From Teaching Trial Advocacy: Opening Statements and Storytelling*, 111 Ill. B.J. 28 (Oct. 2023), law.isba.org/3LPmiCe.
- Dr. Jacey Keeney & Margie Komes Putzler, *'That Case,'* The Catalyst (Feb. 2023), law.isba.org/3PQGZiH.
- ISBA Free On-Demand CLE, *In Your Favor! Understanding the Brain's Decision-Making Process So You Can Win More Cases* (recorded Oct. 8, 2021), law.isba.org/3t5fVV8.

Anchoring: the impact of first impressions

Another pervasive cognitive bias in legal settings is anchoring. Anchoring is a cognitive bias that refers to the human tendency to rely heavily on the first piece of information encountered (the “anchor”) when making decisions. Once an anchor is set, all subsequent judgments are made by adjusting away from that anchor. The power of the anchor often overshadows subsequent evidence, causing it to be assessed through the lens of the first piece of information.

Consider, for instance, a scenario where a juror learns about a defendant’s prior criminal record before hearing about the specific details of the current case. This initial piece of information serves as an anchor, setting a tone of criminality around the defendant. As a result, the juror may be more inclined to view the defendant as guilty, regardless of the evidence presented in the current case. This is the anchoring effect in action, and it can significantly influence the outcome of a case.

Recognizing the anchoring effect is crucial for legal professionals. Our understanding of this cognitive bias can help us strategize the presentation of evidence and arguments in a way that minimizes its impact. For instance, if you are aware that the prosecution is likely to introduce a defendant’s criminal history early in the trial, you might preemptively address this issue in your opening statement. By doing so, you can set a different anchor, one that contextualizes the defendant’s past and emphasizes the importance of judging the current case on its own merits.

Moreover, understanding the anchoring effect can also help you in your negotiations and plea bargaining. For example, the first offer made in a negotiation often serves as an anchor that influences subsequent discussions. If you are aware of this, you can use it to your advantage by making the first offer and setting an anchor that is favorable to your client.

However, merely recognizing the anchoring effect is not enough. We must also actively work to mitigate its impact. This could involve educating jurors about the existence of cognitive biases and how they can affect their decision-making process. It might also involve advocating for changes in legal procedures to minimize the potential for anchoring, such as presenting all evidence simultaneously rather than sequentially.

Furthermore, you must also be vigilant about your own susceptibility to the anchoring effect. Attorneys are not immune to cognitive biases. You must be mindful of the potential for anchoring in your own decision-making processes, whether it’s in evaluating a case, deciding on a negotiation strategy, or making judgments about a client’s credibility.

Debiasing techniques

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TAKEAWAYS >>

- Fortunately, the field of behavioral science has provided us with a wealth of research on debiasing techniques. These are critically important, peer-reviewed tools that can help us address biases in legal cases.

- Cognitive bias effects, such as anchoring and rhyme-as-reason, can be reversed or mitigated by such tactics as blind procedures, expert testimony, and deliberate decision-making.

- Debiasing techniques cannot eliminate biases entirely. Attorneys must remain vigilant about the potential for bias in every aspect of the legal process.

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address biases in legal cases.

One of these techniques is the implementation of blind procedures. Blind procedures, such as double-blind lineups or anonymized document reviews, can help reduce the influence of cognitive biases. In a double-blind lineup, for instance, neither the administrator nor the witness knows who the suspect is. This prevents the administrator from unconsciously influencing the witness's decision, and it prevents the witness from making assumptions based on the administrator's behavior. Similarly, anonymizing document reviews can help prevent biases based on the author's identity or other irrelevant factors. By removing identifying information or limiting the ability to draw comparisons, we can minimize the impact of biases on decision-making processes.

Another debiasing technique is the incorporation of expert testimony on cognitive biases. Expert testimony can help educate jurors and judges on the potential pitfalls of human reasoning. By making them aware of these biases, they are more likely to scrutinize their own thought processes and make more impartial judgments. For example, an expert might explain the concept of confirmation bias, where people tend to favor information that confirms their preexisting beliefs. Understanding this bias can help jurors and judges critically evaluate their own thought processes and ensure that they are

considering all evidence fairly.

A third debiasing technique is encouraging deliberative decision-making processes. Deliberative decision-making involves slow and careful consideration of evidence, which can help counteract the influence of cognitive biases. This may involve guiding jurors through a structured deliberation process or providing judges with checklists to ensure a thorough examination of the case. For instance, a checklist might remind a judge to consider alternative explanations for the evidence, to evaluate the credibility of each witness independently, or to avoid relying too heavily on first impressions. By encouraging a more thoughtful and systematic approach to decision-making, we can help reduce the influence of cognitive biases.

In addition to these techniques, several other strategies can be used to mitigate the impact of cognitive biases. For example, you can use pretrial research to identify potential biases among jurors and develop strategies to address them. You can also use jury instructions to remind jurors of the importance of impartiality and the potential influence of cognitive biases.

However, it's important to remember that debiasing techniques are not a panacea. While they can help reduce the influence of cognitive biases, they cannot eliminate them entirely. Attorneys must remain vigilant about the potential for bias in every aspect of the legal process, from their own decision-making to the judgments of jurors and judges. Lawyers also must continually educate themselves about the latest research on cognitive biases and debiasing techniques, and must be willing to adapt their practices as new information becomes available.

Bias in various legal contexts

The legal profession, in all its diverse fields, is a complex landscape where cognitive biases can subtly and significantly influence outcomes. Understanding and addressing these biases is not just a theoretical exercise, but a practical necessity that can affect

employment law, public procurement, criminal defense, business decisions, bankruptcy cases, police misconduct investigations, and many other areas.

In the realm of employment law, addressing biases is critical to ensuring fair hiring practices and preventing discrimination. For instance, anonymizing resumes during the recruitment process can help employers focus on candidates' skills and experience, rather than being influenced by gender, race, or age. This technique helps to mitigate the influence of implicit biases, which can unconsciously affect our judgments and decisions. By removing identifying information, we can create a more level playing field where candidates are evaluated based on their qualifications, not their personal characteristics.

During jury selection, the *voir dire* process provides an opportunity for attorneys to identify potential jurors with strong cognitive biases that may influence their decision-making. This is a critical step in ensuring a fair trial, as these biases can sway a juror's interpretation of the evidence and their final verdict. By asking carefully crafted questions, attorneys can gauge a potential juror's susceptibility to biases such as confirmation bias, where individuals favor information that confirms their preexisting beliefs, or anchoring bias, where the first piece of information encountered heavily influences subsequent judgments.

In public procurement, addressing biases helps ensure fair competition and transparent decision-making. By implementing blind evaluation processes, public officials can objectively assess bids without being influenced by factors such as the bidder's reputation or the anchoring effect. This helps to ensure that contracts are awarded based on merit, not bias, promoting fairness and integrity in public spending.

Criminal defense attorneys must be acutely aware of cognitive biases to effectively represent their clients. They can challenge the admissibility of prejudicial evidence that may trigger

anchoring or other biases, preventing the jury from forming an unfavorable view of the defendant based on irrelevant or misleading information. Additionally, they can educate jurors about cognitive biases through expert testimony, helping to create a more level playing field where the defendant is judged based on the evidence, not the sway of unconscious biases.

Cognitive biases can also impact business decisions, such as mergers, acquisitions, and contract negotiations. Lawyers can apply debiasing techniques to help clients make more informed decisions that are less influenced by cognitive biases. For example, they can encourage clients to consider a range of scenarios rather than anchoring on a single outcome; or, they can facilitate a devil's-advocate approach to challenge confirmation bias and promote more balanced decision-making. By doing so, they can help clients achieve better outcomes that are based on a thorough and objective assessment of the facts.

In bankruptcy cases, addressing cognitive biases is essential for fair asset distribution and accurate evaluation of debtor claims. By implementing blind

procedures and promoting deliberative decision-making, lawyers can help ensure that the bankruptcy process remains impartial and equitable. For instance, they can use anonymized document reviews to evaluate claims, preventing biases based on the debtor's identity or past behavior. They can also encourage trustees and judges to use checklists or structured decision-making processes to avoid being swayed by first impressions or irrelevant factors.

In cases of police misconduct, understanding and addressing cognitive biases is vital for evaluating the actions of law enforcement officers and holding them accountable. For instance, lawyers can scrutinize the reliability of eyewitness testimony, which is often influenced by cognitive biases such as the misinformation effect, where memory is distorted by misleading postevent information. By challenging the accuracy of such testimony and educating courts about the potential for bias, lawyers can help ensure that justice is served.

Conclusion: the path to a fairer legal system

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IN CASES OF POLICE MISCONDUCT, UNDERSTANDING AND ADDRESSING COGNITIVE BIASES IS VITAL FOR EVALUATING THE ACTIONS OF LAW ENFORCEMENT OFFICERS AND HOLDING THEM ACCOUNTABLE.

legal cases is an essential step toward a fairer and more just legal system. By understanding these biases and implementing debiasing techniques, lawyers can effectively navigate the complex landscape of human reasoning and ensure that justice is served. By doing so, they uphold the integrity of the legal profession and contribute to a society where fairness and justice prevail. **IBJ**

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