UNCONSCIOUS BIAS AND THE LIMITS OF DIRECTOR INDEPENDENCE

*Antony Page**

Corporate directors make difficult decisions: How much should we pay our CEO? Should we permit a lawsuit against a fellow director? Should we sell the company? Directors are legally obligated to decide in good faith based on the business merits of the issue rather than extraneous considerations and influences. Naturally, some directors may have preferences, or even biases: Our CEO, my colleague and friend, deserves a lot; The company should not sue my fellow board member; We should not sell, because after all, I would like to remain a board member. But the courts presume that independent directors either do not have these preferences or can make decisions without being affected by them. Similarly, independent directors acting in good faith are likely to believe that they are either unbiased or have overcome their biases. Based on a synthesis of more than two decades of social psychology research, this article argues that frequently the courts' presumption and the directors' belief will be wrong. First, directors are likely to have preferences, even though they sometimes will not be consciously aware of them. Second, regardless of directors' good faith, unconscious and, to a significant extent, uncontrollable cognitive processes will prevent the directors' decisions from being unaffected by their preferences. Given this serious flaw in the conception of independent directors' decision-making ability, the Article briefly evaluates several legal and procedural solutions, including heightened judicial scrutiny, expanded roles for other decision makers, and changed decision-making processes.

* Associate Professor and John S. Grimes Fellow, Indiana University School of Law–Indianapolis. J.D., Stanford Law School; M.B.A., Simon Fraser University; B.Comm., McGill University. I would like to thank Professors Amitai Aviram, Larry Ribstein, Joan Heminway, Cynthia Williams, and participants at the Midwestern Law & Economics Association 2005 conference, American Psychology Law Society 2006 conference, and colloquia at University of Illinois, Indiana University, and Stetson University. In addition, Court Farrell, Elizabeth Ellis, and Rachel Rinehart provided diligent research assistance. I would also like to thank Christopher Anderson, Amberlee Cook, Gerald Meyer, Alicia Weis, and Neil Manzullo of the *University of Illinois Law Review*.

TABLE OF CONTENTS

I. INTRODUCTION

In the wake of the high profile corporate collapses and scandals of 2001 and 2002, regulators focused on corporate governance and independent directors in particular.[1] In general, companies were required or encouraged to increase the percentage of independent directors on their board and increase the use of independent directors on board committees.[2] For example, the two largest U.S. stock exchanges, the New York

1. *See* Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1535–40 (2007).

2. *See infra* Part II.

Stock Exchange and NASDAQ, introduced rules requiring that a majority of a company's board of directors be "independent."[3] In addition, the exchanges required that three key committees—audit, nominations, and compensation committees—be comprised entirely of independent directors.[4]

Congress, the SEC, and the stock exchanges, however, paid much less attention to the definition of independence or how to determine whether a director was, in fact, independent. Generally, directors are independent if neither they nor their close family members are employees of the company or have a material financial relationship with the company (other than compensation from their board service).[5] In essence, directors are Darwinian *homo economicus*, biased only by significant financial incentives to themselves and their families.

This model is flawed, as directors may in some circumstances be systematically biased for many other reasons besides family and finance. It will come as no surprise that people are also biased by group loyalties, friendship, and nonpecuniary self-interest. These other potential sources of bias are either ignored or minimized. For example, the Delaware Supreme Court concluded that "most" friendships were not of a sufficiently "bias-producing nature" to negate a director's independence.[6] If the courts recognize these biases, they typically assume that a director's good faith efforts or competing interests, such as a director's reputational interest, will prevent biased decision making.[7] Indeed, such biases might matter little if directors, acting in good faith, could identify and control them.

Frequently, however, the director can neither identify nor control biases. People appear to suffer from a subset of "bounded rationality," sometimes termed "bounded ethicality"—an inability to perceive our

3. *See* NYSE, Inc., Listed Company Manual § 303A.01–.02 (2004), *available at* http://www.nyse.com/Frameset.html?nyseref=htttp://www.nyse.com/regulation/nyse/118250812422.htm&displyPage=/lcm/lcm_section.html [hereinafter NYSE Listed Company Manual] (defining "independent director" for purposes of listing on the NYSE); NASDAQ, Inc., Manual: Marketplace Rules § 4200(a)(15) (2008), *available at* http://wallstreet.cch.com/NASDAQTools/Bookmark.asp?id=nasdaq-rule_4300&manual=/nasdaq/main/nasdaq-equityrules/ [hereinafter NASDAQ Manual] (defining "independent director" for NASDAQ listing purposes). The American Law Institute has likewise endorsed the majority independent director standard. AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 3A.01 (1994) ("The board of every large publicly held corporation . . . should have a majority of directors who are free of any significant relationship . . . with the corporation's senior executives . . . .").

4. *See* NYSE Listed Company Manual, *supra* note 3, § 303A.04–.07; NASDAQ Manual, *supra* note 3, § 4350(c)(3)(A)–(B), (c)(4)(A), (d)(2). The NASDAQ also permits a company to select director nominees and approve CEO compensation by a majority vote of independent directors. *Id.*

5. *See infra* Parts II.A & II.B.

6. Beam *ex rel*. Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1050 (Del. 2004).

7. *See infra* notes 56–60 and accompanying text.

own ethical limitations.[8] Recent psychological research demonstrates that people are often both unaware of their biases and, more importantly, how their biases affect their decision making.[9] What we decide can depend greatly on what we want to decide, but an "illusion of objectivity" prevents us from seeing the impact of our motivations.[10] Ex ante we think we *can* decide ethically, and ex post we think we *have* decided ethically. What information we look for, how we evaluate what we find, and how we remember it are all affected by our initial cognitions and motivations.[11]

After analyzing this research and its implications for the decision making of independent directors, this Article briefly evaluates potential responses. First, judges could impose a more robust definition of independence, as demonstrated by a Delaware trial court, or scrutinize decisions more closely in conflict of interest situations. Second, a different decision maker (such as an independent specialist or even the shareholders themselves) could be used in those situations—notably executive compensation, derivative litigation, and takeovers—where conflicts of interest between directors and shareholders are most likely. Third, different decision-making strategies could be used to reduce, if not entirely eliminate, the impact of unconscious bias.[12]

The Article proceeds as follows. Part II provides a brief overview of the current approach for determining a director's independence. Part III examines why directors might be biased. It presents the uncontroversial evidence that people will be biased in favor of themselves, their friends, and their groups. These biases have often been referred to, and recognized by the courts as, "structural bias."[13] This Part goes beyond conventional wisdom, however, with reference to a host of cognitive psychological studies that demonstrate that sometimes these biases can be unconscious. People may *unknowingly* favor themselves, their friends and their groups. Part IV shows how these biases can result in biased decision making, without the awareness or intent of the decision maker. Unfortunately, even well-intentioned, principled directors acting in good faith may not necessarily be capable of reaching an unbiased decision. Unconscious processes can so affect the decision maker that they have a "bias blind spot."[14] Part V highlights possible responses.

8. Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, *in* CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 74, 74–75 (Don A. Moore et al. eds, 2005) [hereinafter CONFLICTS OF INTEREST].

9. *See infra* Parts IV.B–D.

10. *See infra* notes 276–88 and accompanying text.

11. *See infra* Part IV.C.

12. The use of particular decision-making and deliberation strategies as a means to better fulfill a board's duty of loyalty will be explored in a subsequent article, *Process Matters: Directors, Decision-Making, and the Duty of Loyalty*.

13. *See infra* notes 55–61 and accompanying text.

14. Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 369 (2002).

II. WHO IS AN INDEPENDENT DIRECTOR?

Publicly traded companies in the United States must comply with three main sources of rules defining independent director status: stock exchange listing requirements,[15] federal requirements such as the Sarbanes-Oxley Act,[16] and state corporate laws of which Delaware's are by far the most important.[17] Many companies also maintain their own internal standards that define who will be considered an independent director.[18]

An independent director is usually defined in the negative. Although the specifics differ, an independent director is typically one who: (a) is not an executive of the company, (b) does not directly or indirectly conduct material business with the company or have a material financial interest different from shareholders, and (c) does not have close family members who fall within the first two categories. Directors are thus viewed as *homo economicus* (biased by financial incentives) combined with a form of Darwinism (biased in favor of close family).

A. Stock Exchanges and Federal Law

The New York Stock Exchange listing requirements explicitly identify five relationships that prevent a finding of independence. A director is not independent if she (or a member of her immediate family) either currently or in the preceding three years (a) is an employee, (b) has received $120,000 or more from the company in a twelve-month period, (c) is associated with the company's internal or external auditor, (d) is an executive officer of another company that had officers of the first company on its compensation committee, or (e) is an executive officer of a company that has had transactions exceeding $1 million or 2 percent of its gross revenue with the director's company.[19] In addition, the board must "affirmatively determine" and publicly disclose whether a director has any "material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company)."[20]

The NASDAQ's approach is very similar. The NASDAQ rules list seven prohibited categories that are similar to the NYSE's categories, but with minor changes such as different dollar and percentage thresh-

15. *See, e.g.*, NYSE Listed Company Manual, *supra* note 3; NASDAQ Manual, *supra* note 3.

16. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in sections of 11, 15, 18, 28, and 29 U.S.C.).

17. *See, e.g.*, Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1749–50 (2006).

18. *See, e.g.*, The Dow Chemical Co., *Independent Director Standards*, http://www.dow.com/about/aboutdow/standards/index.htm (last visited Nov. 12, 2008).

19. NYSE Listed Company Manual, *supra* note 3, § 303.02(b)(i)–(iv), (b)(v).

20. *Id.* at § 303A.02(a).

olds.[21] The stock exchanges' focus is thus on business or commercial relationships and the potential resulting conflicts. The exchanges are far less concerned with social or structural concerns.

The Sarbanes-Oxley Act requires that all audit committee members be independent.[22] Independence requires that a director "not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee—(i) accept any consulting, advisory, or other compensatory fee from the issuer; or (ii) be an affiliated person of the issuer or any subsidiary thereof."[23] The Securities and Exchange Commission requires that a majority of the board of an investment company be independent, which is anyone who is not an "interested person."[24] An interested person includes the usual list of selected employees and affiliates, immediate family members, and those with material business or professional relationships.[25] Again, the focus is on business or commercial relationships.

Third parties have also attempted to define independence. The American Law Institute recommends a similar definition, but further includes a catchall that a director who "is subject to a controlling influence" by an interested director is not independent if "that controlling influence could reasonably be expected to affect the director's or officer's judgment . . . in a manner adverse to the corporation."[26] "Controlling influence" is undefined but does not include subtler influences. Institutional Shareholder Services, the self-styled world's leading provider of corporate governance services,[27] has a somewhat narrower definition of independence. Like the exchanges, the Sarbanes-Oxley Act, and the SEC, however, the definition focuses on business and family relationships.[28]

B. State Law: Delaware

Courts in Delaware, the preeminent U.S. jurisdiction for corporate law, apply a nuanced case-by-case approach to the question of director independence.[29] Under Delaware law, directors are presumed independ-

21. *See* NASDAQ Manual, *supra* note 3, § 4200(a).
22. *See* Sarbanes-Oxley Act of 2002 § 301, Pub. L. No. 107-204, 116 Stat. 745 (codified in sections of 11, 15, 18, 28, and 29 U.S.C.).
23. 15 U.S.C. § 78j-1(m)(3)(B) (2000 & Supp. V 2005).
24. *See* Role of Independent Directors of Investment Companies, Investment Company Act Release No. 33-7932, 17 C.F.R. §§ 239, 240, 270, 274 (2001).
25. *See* 15 U.S.C. § 80a-2(a)(19) (2000 & Supp. V 2005).
26. AM. LAW INST., *supra* note 3, § 1.23(a)(4).
27. RiskMetrics Group, ISS Governance Services, http://issproxy.com/issgovernance.html (last visited Nov. 12, 2008).
28. INST. S'HOLDER SERVS., ISS US CORPORATE GOVERNANCE POLICY 2007 UPDATES 5 (2006).
29. Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1049 (Del. 2004) ("Independence is a fact-specific determination made in the context of a particular case.").

ent and disinterested until shown otherwise.[30] The touchstone "[u]pon which a director's independence must be measured is whether the director's decision is based on the corporate merits of the subject before the board, rather than extraneous considerations or influences."[31] The key question is "[i]ndependent from whom and independent for what purpose?"[32]

Somewhat confusingly, the court divides the inquiry into two separate questions: first, "whether the director is disinterested in the underlying transaction"; and second, "even if disinterested, whether the director is otherwise independent."[33] Disinterest refers to financial benefits. A director is not disinterested if she will "receive a personal financial benefit from a transaction that is not equally shared by the stockholders."[34] She is also not disinterested where a decision of the board "will have a materially detrimental impact on a director, but not on the corporation and the stockholders."[35] This inquiry is normally fairly straightforward. It applies most obviously in situations where a director is on both sides of a transaction, such as when a director is attempting to do business with the company.[36]

The second, generally more debatable, question is whether the director is otherwise independent, which refers to a director's state of mind. To demonstrate that a director lacks the necessary independence,

30. *Id.*

31. *Id.* (quoting Aronson v. Lewis, 473 A.2d 805, 816 (Del. 1984)); Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993) (holding that the inquiry is "whether the board that would be addressing the demand can impartially consider its merits without being influenced by improper considerations"); *see* Brehm v. Eisner, 746 A.2d 244, 257 (Del. 2000) (stating that a director must not be "incapable, due to personal interest or domination and control, of objectively evaluating a demand" in order to be independent). Other states agree with this definition of independence. *See, e.g.*, Desaigoudar v. Meyercord, 108 Cal. App. 4th 173, 190 (2003) (holding that the court must determine whether a director is "in a position to base his decision on the merits of the issue rather than being governed by extraneous considerations or influences").

32. *Beam*, 845 A.2d at 1050; *see also* Orman v. Cullman, 794 A.2d 5, 22 (Del. Ch. 2002) (stating that an independent director may not "have a financial interest in the transaction or [be] dominated or controlled by a materially interested director"). Other jurisdictions follow similar approaches. *See, e.g.*, Park River Owners Corp. v. Bangser Klein Rocca & Blum, L.L.P., 703 N.Y.S.2d 465, 466 (2000) (defining a director's interest as "either self-interest in the transaction at issue or a loss of independence because a director with no direct interest in a transaction is controlled by a self-interested director"); MODEL BUS. CORP. ACT § 8.60 (2008) (stating that a director is not independent if "he or a related person is a party to the transaction or has a beneficial financial interest in or is so closely linked to the transaction and of such financial significance to the director or a related person that the interest would be reasonably expected to exert an influence on the director's judgment if he were called upon to vote on the transaction").

33. *Beam*, 845 A.2d at 1049; *see Aronson*, 473 A.2d at 812 (holding that to be disinterested, "[d]irectors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally").

34. *Rales*, 634 A.2d at 936 (citations omitted).

35. *Id.*

36. A management buyout is a common illustration of this type of conflict of interest. Management is trying to buy the company, and naturally would prefer a lower price. For an example of management overreaching, see Dennis Berman & Henny Sender, *Backstory of Kinder LBO Underscores Web of Ethical Issues Such Deals Face*, WALL ST. J, Sept. 29, 2006, at C1, C4.

a plaintiff must show that the "directors were dominated or otherwise controlled by an individual or entity interested in the transaction,"[37] or put differently, that a director is not so "'beholden' to an interested director . . . that his or her 'discretion would be sterilized.'"[38] The standard is based not on a "reasonable director," but rather on the "actual person."[39] And as the terms "dominated," "controlled," and "beholden" suggest, the standard is very difficult to meet.[40]

Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart provides a good illustration of the difficulty of showing that a director is not independent under Delaware law.[41] The plaintiff began a derivative action against Martha Stewart, alleging that she had breached her fiduciary duties in connection with an illegal sale of stock in an unrelated company.[42] In a derivative action the corporation must first be given the chance to control the lawsuit, in a process known as demand, because it is the company's cause of action. Demand, however, is excused as futile if a majority of the board is not independent and disinterested, and thus is unable to objectively consider it.[43]

The plaintiff argued that two directors were not independent because they had longstanding personal relationships with Stewart.[44] Furthermore, the plaintiff argued that none of the directors were disinterested, given that they might (a) face liability for inadequately monitoring Stewart's activities, and (b) lose the emoluments of board services if replaced by Stewart who had that power as the controlling shareholder.[45]

Although at the pre-answer stage of litigation all reasonable inferences must be drawn in plaintiff's favor, the court rejected these arguments. The court acknowledged that "[s]ome professional or personal friendships, which may border on or even exceed familial loyalty and closeness, may raise a reasonable doubt whether a director can appropriately consider demand. This is particularly true when the allegations raise serious questions of either civil or criminal liability of such a close friend."[46] The friendship, however, "must be of a bias-producing na-

37. Grobow v. Perot, 539 A.2d 180, 189 (Del. 1988).

38. *Beam*, 845 A.2d at 1050 (quoting *Rales*, 634 A.2d at 936).

39. McMullin v. Beran, 765 A.2d 910, 923 (Del. 2000).

40. Courts will sometimes shift away from a strictly subjective standard because they are unwilling to prevent "regular folk," for whom directors' fees would be material, from serving as independent directors. *See, e.g.*, *In re* Walt Disney Co. Derivative Litig., 731 A.2d 342, 360 (Del. Ch. 1998), *rev'd on other grounds*, 746 A.2d 244 (Del. 2000) (noting that "'regular folks' would face allegations of being dominated by other board members, merely because of the relatively substantial compensation provided by the board membership compared to their outside salaries"); *In re* InfoUSA S'holders Litig., 953 A.2d 963, 992 (Del. Ch. 2007) (same).

41. 845 A.2d 1040.

42. *Id.* at 1044.

43. For example, if a shareholder wants company A to sue company B, a director who serves on both companies would have an obvious conflict. More commonly, a derivative suit seeks to sue the company's board, which is clearly counter to the board's interest.

44. *Id.* at 1046.

45. *Id.*

46. *Id.* at 1050.

ture. . . . 'Not all friendships, or even most of them, rise to this level . . . .'"[47] Even though the trial court had found one of the relationships a "close call,"[48] the top court opined that "a much stronger relationship" between Stewart and the directors would be necessary for the plaintiff to prevail.[49]

The court also held that more than just a shareholder's control of a corporation was needed to create a reasonable doubt of independence.[50] Even though the directors were appointed by Stewart, and could be removed by her at any time, this did not mean that they were beholden to or dominated by her.[51]

Moreover, although *Beam* concerned presuit demand, the opinion reached out to discuss the special litigation committee (SLC) situation. In situations where demand would be futile, the board frequently can appoint an SLC composed of independent directors to determine whether to litigate, settle, or terminate the court action.[52] An important distinction is that whereas in the presuit demand context the plaintiff bears the burden of proof, in the SLC context the committee bears it.[53] In addition, the plaintiff is not entitled to discovery on the issue of director independence in presuit demand. The court pointedly refused, however, to decide whether there was any different substantive definition of independence at these two stages of litigation.[54]

To be fair, the court acknowledged that in some circumstances bias could result from friendship or power.[55] The court also understood that "a director cannot be expected to exercise his or her independent business judgment without being influenced by the . . . personal consequences resulting from the decision."[56] More generally, Delaware courts have occasionally acknowledged a "'structural bias' argument, which presupposes that the professional and social relationships that naturally

47. *Id.* (citing cases where the courts found friendship too weak to create bias). Other courts have expressly followed the *Beam* approach. *See, e.g.*, *In re* Sonus Networks, Inc., 499 F.3d 47, 68 (1st Cir. 2007) (stating that *Beam*'s friendship standard is "demanding"); Connolly v. Gasmire, 257 S.W.3d 831, 847 (Tex. App. 2008) (noting that "friendship must be accompanied by substantially more" to rebut a presumption of director independence for presuit demand purposes).

48. *Beam*, 845 A.2d at 1053–54.

49. *Id.* at 1052, 1054.

50. *Id.* at 1055.

51. *Id.* at 1056–57. In theory, plaintiff could prevail if the director's compensation were of "such subjective material importance that its threatened loss might create a reason to question whether the director is able to consider the corporate merits of the challenged transaction objectively." Telxon Corp. v. Meyerson, 802 A.2d 257, 264 (Del. 2002). *But cf. Beam*, 845 A.2d at 1050.

52. Committees are also used to negotiate and approve self-dealing transactions such as management buyouts.

53. The SLC must also demonstrate that it "acted in good faith" and "had reasonable bases for [its] recommendations." *In re* Oracle Corp. Derivative Litig., 824 A.2d 917, 928 (Del. Ch. 2003).

54. *Beam*, 845 A.2d at 1055.

55. *Id.* at 1052.

56. *Id.* at 1049 (quoting Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993)).

develop among members of a board impede independent decision making."[57]

The Delaware courts do not, however, allow plaintiffs to use structural bias as direct evidence of lack of independence or appear to acknowledge the magnitude of personal consequences.[58] In addition, directors' reputational interests will normally outweigh their professional and social relationships.[59] A plaintiff must, generally without discovery, produce specific evidence that the independent "director would be more willing to risk his or her reputation" than jeopardize his relationship with the other party.[60] Direct evidence of lack of independence is hard to come by, though many plaintiffs attempt to show that friendships among directors compromise their independence. The Delaware Supreme Court in *Aronson* recognized correctly that "[c]ritics will charge that we are ignoring the structural bias common to corporate boards throughout America, as well as the other unseen socialization processes cutting against independent discussion and decisionmaking in the boardroom."[61]

C. Definitional Problems

Lawmakers and perhaps investors view independent directors as a key part of the U.S. corporate governance system.[62] The Organization for Economic Cooperation and Development states the conventional view:

> Independent board members can contribute significantly to the decision making of the board. They can bring an objective view to the evaluation of the performance of the board and management. In addition, they can play an important role in areas where the interests of management, the company and its shareholders may diverge such as executive remuneration, succession planning, changes of

57. *Beam*, 845 A.2d at 1050–51; *see also* Aronson v. Lewis, 473 A.2d 805, 815 n.8 (Del. 1984); Guttman v. Huang, 823 A.2d 492, 500 (Del. Ch. 2003); *In re* Pure Res. Inc. S'holders Litig., 808 A.2d 421, 444 (Del. Ch. 2002). In *Zapata*, a decision regarding an SLC's power, the Supreme Court noted that "we must be mindful that directors are passing judgments on fellow directors . . . who . . . [sometimes] designated them to serve both as directors and committee members." Zapata Corp. v. Maldonado, 430 A.2d 779, 787 (Del. 1981). In *Unocal*, a takeover case, the court as justification for invoking intermediate level scrutiny observed that there was a risk that directors might act solely or primarily to keep themselves in office. Unocal Corp. v. Mesa Petroleum, 493 A.2d 946, 955 (Del. 1985).

58. *Beam*, 845 A.2d at 1051.

59. *Id.* at 1052.

60. *Id.* (stating that a plaintiff must show that "the non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director").

61. *Aronson*, 473 A.2d at 815 n.8. The Delaware Supreme Court continued to acknowledge its critics without taking action in *Beam*. *See Beam*, 845 A.2d at 1051.

62. *See, e.g.*, Charles M. Elson, *Enron and the Necessity of the Objective Proximate Monitor*, 89 CORNELL L. REV. 496, 498 (2004) (arguing that board independence is a "critical component of modern governance theory").

corporate control, take-over defences, large acquisitions and the audit function.[63]

The underlying notion is that independent directors are more likely to monitor management effectively because they have an objective view, no conflicts of interest, and as a result, unbiased judgment. In economic terms, they are thought to reduce the agency cost problem stemming from the separation of economic ownership and control found in most publicly traded companies.[64]

It is perhaps surprising then that researchers have not been able to identify a clear-cut relationship between corporate performance and the proportion of independent directors on the board,[65] or serving on audit, nominations, or compensation committees.[66] Enron, Worldcom, and many other prominent companies that collapsed had a majority of independent directors on the board.[67]

Commentators have noted that independent directors may lead to other problems. Limitations on independent directors' effectiveness include "constraints on time, information, and inclination."[68] Independent directors are likely to be less informed about the company and have less incentive to perform well than inside directors.[69] In addition, they may reduce board cohesiveness by failing to be perceived as team players,[70] or by reducing trust within the board.[71]

63. OECD PRINCIPLES OF CORPORATE GOVERNANCE 64–65 (2004).

64. *See generally* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 69–118 (1932).

65. There is an extensive, albeit largely inconclusive, literature addressing the relationship between corporate performance and independent directors. *See generally* Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231 (2002); Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921 (1999); Dan R. Dalton et al., *Meta-Analytic Reviews of Board Composition, Leadership Structure, and Financial Performance*, 19 STRATEGIC MGMT. J. 269 (1998); Gordon, *supra* note 1, at 1500–08 (2007); Laura Lin, *The Effectiveness of Outside Directors as a Corporate Governance Mechanism: Theories and Evidence*, 90 NW. U. L. REV. 898 (1996) (describing studies).

66. *See* April Klein, *Firm Performance and Board Committee Structure*, 41 J.L. & ECON. 275, 275 (1998).

67. *See, e.g.*, Elson, *supra* note 62, at 501 (observing that "most of [the Enron] directors would have been considered independent under then-existing Securities and Exchange Commission or New York Stock Exchange requirements"); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 26 (2002) (arguing that "board independence has done little to prevent past mismanagement and fraud").

68. Ribstein, *supra* note 67, at 26 (summarizing MYLES MACE, DIRECTORS: MYTH AND REALITY (1971)).

69. *See, e.g.*, Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1282 (1982); Stephen M. Bainbridge, *A Critique of the NYSE's Director Independence Listing Standards*, FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUD. 22–23 (2002), *available at* http://www.fed-soc.org/doclib/20070324_NYSEStandards.pdf.

70. *See, e.g.*, Fischel, *supra* note 69, at 1283; Roberta S. Karmel, *The Independent Corporate Board: A Means to What End?*, 52 GEO. WASH. L. REV. 534, 550–51 (1984); Julian Velasco, *Structural Bias and the Need for Substantive Review*, 82 WASH. U. L.Q. 821, 860 (2004).

71. *See, e.g.*, Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 812–13 (2001).

The above criticisms appear well founded, but it is also likely that the perceived benefit of independent directors—unbiased judgment—is only sometimes achievable. As discussed above, director independence continues to effectively mean financial independence for the director (and close family members) from the corporation. As Professor Brudney commented twenty-five years ago, "No definition of independence yet offered precludes an independent director from being a social friend of, or a member of the same clubs, associations, or charitable efforts as, the persons whose compensation or self-dealing transaction he is asked to assess."[72] The result is that a so-called independent director can pass judgment on their friends, on people who will determine whether they can stay a director or not, and on people who controlled past and will control future rewards. Given the definition of independent, what are some potential threats to an independent director's unbiased judgment?

III. BIASES AND MOTIVATIONS

Courts and academics have acknowledged that directors may be biased merely due to their role as members of a board of directors. Typically this has been referred to under the broad rubric of structural bias.[73] Only occasionally, however, has either group acknowledged the potential role of unconscious biases. The following three Sections explore how directors, "independent" or otherwise, may have personal interests, above and beyond their financial and family interests, that conflict with their professional obligation as directors. "As self-interested actors in a world of limited goods and opportunities, we are motivated to promote and justify resource distributions that favor us and those to whom we are linked by ties of kinship or group membership."[74]

The first two Sections summarize psychological research, primarily from the last twenty years, that demonstrates the possibility of far more pervasive and far deeper unconscious biases than has hitherto been recognized. Broadly speaking, these biases can be divided based on whether they result from self-interest (broadly understood) or simply

72. Victor Brudney, *The Independent Director—Heavenly City or Potemkin Village?*, 95 HARV. L. REV. 597, 613 (1982); *see also* Langevoort, *supra* note 71, at 801 (defining "an independent director [as] one who actually takes the monitoring task . . . seriously").

73. "Structural bias," defined as an "inherent prejudice against any derivative action resulting from the composition and character of the board of directors," appears to have first been used by Mark A. Underberg in Note, *The Business Judgment Rule in Derivative Suits Against Directors*, 65 CORNELL L. REV. 600, 601 n.14 (1980). Since then the term has been used for a "wide variety of factors . . . includ[ing] the CEO's and other corporate insiders' practical control over nominating new directors and removing incumbents; business relationships that may exist between outside directors and the corporation; the common cultural and professional background of many directors, and the frequent social ties among them . . . ." Kenneth B. Davis, Jr., *Structural Bias, Special Litigation Committees, and the Vagaries of Director Independence*, 90 IOWA L. REV. 1305, 1308 (2005) (citations omitted); *see also* Velasco, *supra* note 70, at 855 (describing three structural bias paradigms).

74. Kristina A. Diekmann et al., *Self-Interest and Fairness in Problems of Resource Allocation: Allocators Versus Recipients*, 72 J. PERSONALITY & SOC. PSYCHOL. 1061, 1061 (1997).

from membership within a group. The third Section then evaluates another set of motives that some have argued allow a director to overcome self-interested and ingroup biases, whether conscious or otherwise. Such motives include an individual's desire to be and appear competent and to have a good reputation.

A. Ingroup Bias

Ingroup bias is the general "tendency to evaluate one's own groups more positively in relation to other groups."[75] Positive evaluations may then result in preferential treatment.[76] The bias can include behaviors, attitudes, and cognition.[77] Favoring can take many forms, but may include rating ingroup contributions more highly, or assigning greater financial rewards. Though the notion of ingroup bias may be unsurprising when applied to groups based on race or ethnicity, nationality, religious belief, or even college alma mater, ingroup bias occurs even when the groups are categorized on a trivial or random basis, like a coin toss, sharing the same fingerprint type, birthday, or final digit of a social security number.[78] The bias is so fundamental that "a preference for one's ingroup may be as ordinary as a preference for one's own children."[79]

This basic idea, that people will favor their own group members, is relatively uncontroversial. The notion of recommending a fraternity brother for a job or a member of your church for law school admission is commonplace. This type of ingroup bias is conscious and explicit. Furthermore, on its face it would appear controllable—simply do not rec-

75. Michael Healy & Victoria Romero, *Ingroup Bias and Self-Esteem: A Meta-Analysis*, 4 PERSONALITY & SOC. PSYCHOL. REV. 157, 157 (2000). Ingroup bias is also referred to as intergroup bias. *See* Miles Hewstone et al., *Intergroup Bias*, 53 ANN. REV. PSYCHOL. 575, 576 (2002) ("Intergroup bias refers generally to the systematic tendency to evaluate one's own membership group (the ingroup) or its members more favorably than a nonmembership group (the out-group) or its members.").

76. *See, e.g.*, Diekmann et al., *supra* note 74, at 1071–72 (finding that participants judged unequal allocations that favored a member of their group to be "much fairer" than unequal allocations that favored a member of a different group).

77. Hewstone et al., *supra* note 75, at 576.

78. Henri Tajfel was the first to document what has become known as the minimal group paradigm. The original experiments are described in Henri Tajfel et al., *Social Categorization and Intergroup Behavior*, 1 EUR. J. SOC. PSYCHOL. 149, 172–77 (1971), and Michael Billig & Henri Tajfel, *Social Categorization and Similarity in Intergroup Behavior*, 3 EUR. J. SOC. PSYCHOL. 27, 37–48 (1973). *See also* Jerry M. Burger et al., *What a Coincidence! The Effects of Incidental Similarity on Compliance*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 35, 35 (2004) (finding that subjects were more likely to respond positively to a stranger's request if they shared even a superficial match, such as shared names, birthdays, or fingerprint types); John F. Finch & Robert B. Cialdini, *Another Indirect Tactic of (Self-) Image Management: Boosting*, 15 PERSONALITY & SOC. PSYCHOL. BULL. 222, 228–30 (1989) (finding that participants who were informed that they had the same birthday as Rasputin judged him more positively); Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. SOC. ISSUES 79, 83–86 (1969) (describing perceptual effects of grouping). Burger and colleagues argue that these incidental similarities "most likely result[] in . . . a fleeting sense of liking between the participant and the requester." Burger et al., *supra*, at 41.

79. Laurie A. Rudman, *Social Justice in Our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias*, 17 SOC. JUST. RES. 129, 139 (2004).

ommend the fraternity brother or church member.[80] It becomes much more complicated if the recommender believes the fraternity brother or church member is most qualified. More interesting, however, is how much ingroup bias is implicit.[81] There is now some evidence from brain scan studies that ingroup bias may result from different neural underpinnings.[82]

Automatic (e.g., implicit and unconscious) ingroup bias has now been demonstrated in nearly one hundred studies.[83] These studies have looked at groups not only based on obvious categories such as race and ethnicity,[84] gender,[85] age,[86] and sexual orientation,[87] but also completely arbitrary laboratory divisions.[88] Although gender, race, and age have been listed as "the big three" for grouping, "[f]eatures that signal a person's *social category membership* represent a fourth kind of 'most favored information' that has privileged access to the mind."[89] In some cases, ingroup bias appears only at the automatic level and not at a conscious level.[90]

80. This position is akin to Chief Justice Roberts's statement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2767 (2007) (plurality opinion).

81. For an example of implicit ingroup bias with real world consequences, see David M. Messick & Max H. Bazerman, *Ethical Leadership and the Psychology of Decision Making*, 37 SLOAN MGMT. REV. 9, 16 (1996) (arguing that ingroup bias is likely a common cause of discriminatory lending).

82. *See, e.g.*, Jason P. Mitchell et al., *Dissociable Medial Prefrontal Contributions to Judgments of Similar and Dissimilar Others*, 50 NEURON 655, 660 (2006).

83. Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004); *see also* Brian Mullen et al., *Ingroup Bias as a Function of Salience, Relevance, and Status: An Integration*, 22 EUR. J. SOC. PSYCHOL. 103, 117 (1992) (summarizing the research examining ingroup bias). Sometimes favoring members of one's own group takes the form of derogating the outgroup.

84. *See generally* John F. Dovidio et al., *Contemporary Racial Bias: When Good People Do Bad Things*, *in* THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL 141 (Arthur G. Miller ed., 2004) (describing unconscious racism and ingroup bias and summarizing previous research).

85. *See, e.g.*, Jennifer A Richeson & Nalini Ambady, *Who's in Charge? Effects of Situational Roles on Automatic Gender Bias*, 44 SEX ROLES 493 (2001).

86. *See, e.g.*, Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 800 (2001).

87. *See, e.g.*, Melanie C. Steffens, *Implicit and Explicit Attitudes Towards Lesbians and Gay Men*, 49 J. HOMOSEXUALITY 39, 39–40 (2005).

88. *See, e.g.*, Leslie Ashburn-Nardo et al., *Implicit Associations as the Seeds of Intergroup Bias: How Easily Do They Take Root?*, 81 J. PERSONALITY & SOC. PSYCHOL. 789, 790 (2001); David DeSteno et al., *Prejudice from Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 PSYCHOL. SCI. 319 (2004) (suggesting that some emotional states can lead to automatic bias toward outgroups); Charles W. Perdue et al., *Us and Them: Social Categorization and the Process of Intergroup Bias*, 59 J. PERSONALITY & SOC. PSYCHOL. 475, 475 (1990) (demonstrating that social categorization can occur unconsciously).

89. Daniel M. Wegner & John A. Bargh, *Control and Automaticity in Social Life*, *in* 1 HANDBOOK OF SOCIAL PSYCHOLOGY 446, 472 (Daniel T. Gilbert et al. eds., 4th ed. 1998) (emphasis in original).

90. Anthony G. Greenwald et al., *Implicit Partisanship: Taking Sides for No Reason*, 83 J. PERSONALITY & SOC. PSYCHOL. 367, 370, 377 (2002) (finding that participants who simply studied the names of four other people for less than a minute began to group the four names to themselves and to positive outcomes, without any conscious awareness that they were doing so); Rudman, *supra* note 79,

In general, the stronger the group ties or similarities, the stronger the bias,[91] but groups based on as little as pleasant social or professional contacts can also lead to biased decision making based on unconscious cognitive, affective, and motivational processes.[92] Repeated exposure to people "tends to enhance their subjective value," and therefore also increases the bias.[93] This can occur, even when people have no conscious awareness of exposure.[94] Members of high status or high power groups[95] generally have higher levels of automatic ingroup bias than members of groups with lower status or power, as do more loyal members.[96]

at 136 (reporting that "people preferred the dominant group to the extent that it was culturally favored, but only at the automatic level").

91. For a recent example, see Stefan Stürmer et al., *Empathy-Motivated Helping: The Moderating Role of Group Membership*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 943, 952 (2006), reporting that, in the minimal group paradigm, group members were more likely to help other ingroup members based on their perceived similarities. In general, it is likely that there is greater bias in collective-oriented societies than individualistic-oriented societies, like the United States. *See* Steven J. Heine & Darrin R. Lehman, *The Cultural Construction of Self-Enhancement: An Examination of Group-Serving Biases*, 72 J. PERSONALITY & SOC. PSYCHOL. 1268, 1274 (1997). Nearly all of the studies cited here were performed with U.S. participants. Therefore, cultural factors are unlikely to weaken the conclusions.

92. Paul Thagard, *The Moral Psychology of Conflicts of Interest: Insights from Affective Neuroscience*, 24 J. APPLIED PHIL. 367, 374–75 (2007).

93. Robyn M. Dawes, *Behavioral Decision Making and Judgment*, *in* 1 HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 89, at 497, 521; *see also* Eddie Harmon-Jones & John J.B. Allen, *The Role of Affect in the Mere Exposure Effect: Evidence from Psychophysiological and Individual Differences Approaches*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 889, 889 (2001) (finding physical evidence based on cheek muscle activity in favor of the exposure effect); Rudman, *supra* note 79, at 138 (stating that it has become an "axiom that proximity leads to attraction"); Robert B. Zajonc & Hazel Markus, *Affective and Cognitive Factors in Preferences*, 9 J. CONSUMER RES. 123, 125 (1982) (referring to the exposure effect as a "basic process in preference and attitude formation and change"); Robert B. Zajonc, *Attitudinal Effects of Mere Exposure*, 9 J. PERSONALITY & SOC. PSYCHOL., June 1968, at 1 (defining the exposure of the individual effect as "mere repeated exposure to a stimulus is a sufficient condition for the enhancement of his attitude toward it"). *See generally* Robert F. Bornstein, *Exposure and Affect: Overview and Meta-Analysis of Research, 1968–1987*, 106 PSYCHOL. BULL. 265 (1989) (analyzing 208 studies and finding strong support for the exposure effect, including for social stimuli).

94. *See* Robert F. Bornstein et al., *The Generalizability of Subliminal Mere Exposure Effects: Influence of Stimuli Perceived Without Awareness on Social Behavior*, 53 J. PERSONALITY & SOC. PSYCHOL. 1070, 1074, 1077 (1987) (finding that "subliminal exposure to the image of a person would increase positive affect toward that person" and concluding that subliminal effects likely have an impact in real life interpersonal situations); William Raft Kunst-Wilson & R.B. Zajonc, *Affective Discrimination of Stimuli that Cannot Be Recognized*, 207 SCI. 557, 557–58 (1980) (finding that people preferred polygons that experimenters had previously presented to them, even though they could not recognize them); Piotr Winkielman et al., *Subliminal Affective Priming Resists Attributional Interventions*, 11 COGNITION & EMOTION 433, 433 (1997) (finding reliable shifts in affect resulting from subliminal primes).

95. *See* Rudman, *supra* note 79, at 136 (noting that this bias applies to a host of different status variables, including one particularly relevant to a board of directors, socioeconomic status); Itesh Sachdev & Richard Y. Bourhis, *Power and Status Differential in Minority and Majority Group Relations*, 21 EUR. J. SOC. PSYCHOL. 1, 22 (1991); *see also* Marilynn B. Brewer & Rupert J. Brown, *Intergroup Relations*, *in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 89, at 554, 544–94 (reviewing studies); Diekmann et al., *supra* note 74, at 1073 (finding that advantaged recipients were more likely to rationalize benefits to members of their own group (and more likely to violate an equality norm) than less advantaged recipients with respect to members of the less advantaged recipients' group).

96. *See* Guido Hertel & Norbert L. Kerr, *Priming In-Group Favoritism: The Impact of Normative Scripts in the Minimal Group Paradigm*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 316, 321, 322 (2001)

The positive impact of ingroup membership can even result in the impossible situation where each individual ingroup member is judged superior to the ingroup average.[97] "Nominal and symbolic affiliation with a group is enough to lead people to strenuous advocacy on behalf of, and selective partisan perception with respect to, the group."[98]

Directors, even those defined as independent, are members of the board of directors and, so the theory goes, are likely to be biased in favor of other directors. More than twenty years ago, Cox and Munsinger noted in their seminal work, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*,[99] how ingroup bias in the context of a special litigation committee might lead to a decision to discontinue otherwise meritorious derivative litigation. They observed that the selection process for director nominees and the likely high value directors place on their membership on the board are factors tending to lead to stronger ingroup biases.[100] Director nominees will often be friends or have social connections with other board members, thereby exacerbating biases.[101] Even newly appointed members of a special litigation committee will meet and work with existing board members, possibly resulting in favoritism toward the preexisting directors.[102]

They also summarize the then-existing homogeneity of U.S. boards and explain how cultural and intellectual similarities intensify ingroup bias.[103] (In the early 1980s, 93 percent of directors were college-educated white males, who tended to be wealthy, Protestant, and Republican.)[104]

(finding that when experimenters primed loyalty there were greater amounts of ingroup favoritism, due to the "rather unconscious" application of social scripts).

97. *See* Yechiel Klar & Eilath E. Giladi, *No One in My Group Can Be Below the Group's Average: A Robust Positivity Bias in Favor of Anonymous Peers*, 73 J. PERSONALITY & SOC. PSYCHOL. 885, 885 (1997) (finding that subjects judged nearly all anonymous members of an ingroup as superior to the other ingroup members); Yechiel Klar et al., *Nonunique Invulnerability: Singular Versus Distributional Probabilities and Unrealistic Optimism in Comparative Risk Judgments*, 67 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 229, 229 (1996) (finding that peers were judged less likely to suffer future negative events than the average of the peer group); Yechiel Klar, *Way Beyond Compare: Nonselective Superiority and Inferiority Biases in Judging Randomly Assigned Group Members Relative to Their Peers*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 331, 331 (2002) (finding that members of a small peer group systematically judged randomly selected members of the group as superior to the group average and median on socially desirable traits such as intelligence and friendliness); *see also* Eilath E. Giladi & Yechiel Klar, *When Standards Are Wide of the Mark: Nonselective Superiority and Inferiority Biases in Comparative Judgments of Objects and Concepts*, 131 J. EXPERIMENTAL SOC. PSYCHOL. 538, 549–50 (2002) (finding that the foregoing superiority biases are likely cognitive and motivational in origin).

98. *See* Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189, 195 (2004) (citation omitted).

99. James D. Cox & Harry L. Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 LAW & CONTEMP. PROBS. 83, 88 (1985).

100. *Id.* at 98, 102.

101. *See* Langevoort, *supra* note 71, at 797 (noting that "[i]nvitations to the board are based heavily on matters like compatibility and 'fit'").

102. *See* Cox & Munsinger, *supra* note 99, at 103–04.

103. *Id.* at 105–08.

104. *Id.* at 106. This was an improvement from the early 1960s, when fully 56 percent of directors were graduates of a mere fifteen colleges. *Id.*

Today directors still tend to have relatively strong ties and similarities, as they tend to be fairly homogeneous.[105] More generally, groups that are essentially self-selecting will often have homogeneous attitudes, since people naturally tend to form relationships with those who are similar.[106] Overall, Cox and Munsinger conclude that "powerful psychological factors are at work within the boardroom, creating a cohesive, loyal, conforming ingroup that will support its members . . . under low and high levels of motivation and group values."[107]

B. Self-Interest

It is uncontroversial that people are self-interested. People will generally seek financial and social benefits for both themselves and close family members. This suggests that in the business context, directors are likely to prefer outcomes that serve their pecuniary and social needs. Definitions of independence recognize this notion, but carve out financial and social rewards of serving on a board.[108]

The courts have even recognized in one conflict of interest situation, the takeover bid, that directors may be biased by the desire to keep their jobs.[109] Courts have failed, however, to recognize this same bias when there is a controlling shareholder, who generally has unfettered discretion regarding who shall serve on the board of directors.

Serving on a board of directors provides rewards. Obviously there are financial rewards. Median annual compensation in 2006 for a director serving at the one hundred largest NYSE listed companies was

---

105. A recent survey found that 71 percent of the directorships at the top one hundred companies were held by white males. Minorities made up 15 percent of the directorships and women were 17 percent. *See* ALLIANCE FOR BOARD DIVERSITY, WOMEN AND MINORITIES ON FORTUNE 100 BOARDS 6 (2008), http://www.proutgroup.com/Resources/abdreportfinal2008.pdf. Another recent survey found similar results among the directors of the top two hundred companies. JULIE HAMBROCK DAUM ET AL., SPENCER STUART 2006 BOARD DIVERSITY REPORT (2006), http://www.spencerstuart.com/research/articles/955/. Diversity likely declines as one includes smaller companies. *See* Carol Hymowitz, *In the U.S., What Will It Take to Create Diverse Boardrooms?*, WALL ST. J., July 8, 2003, at B1 (reporting that minorities account for only 8.8 percent of directorships at the 1500 largest companies).

106. *See* David C. Matz & Wendy Wood, *Cognitive Dissonance in Group: The Consequences of Disagreement*, 88 J. PERSONALITY & SOC. PSYCHOL. 22, 35 (2005) ("[M]any aspects of group formation and interaction lead to attitudinal homogeneity among group members."); Richard L. Moreland, *The Formation of Small Groups*, *in* 8 GROUP PROCESSES: REVIEW OF PERSONALITY AND SOCIAL PSYCHOLOGY 80, 81–103 (Clyde Hendrick ed., 1987).

107. Cox & Munsinger, *supra* note 99, at 99; s*ee also* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 32 (2004) (arguing that a board's norms "tend to foster board cohesion"). Bebchuk and Fried quote a director who has served on several boards stating that "[i]t is hard to explain to a person who is not a director. It is in many ways a club." *Id.*

108. *See, e.g.*, *In re* Walt Disney Co. Derivative Litig., 731 A.2d 342, 356–60 (Del. Ch. 1998), *rev'd on other grounds*, 746 A.2d 244 (Del. 2000); NYSE Listed Company Manual, *supra* note 3, § 303A.02; NASDAQ Manual, *supra* note 3, § 4200(a)(15).

109. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (referring to the "omnipresent specter that a board may be acting primarily in its own interests" when it defends against a hostile takeover).

$174,000,[110] with those serving on committees earning somewhat more.[111] Board membership itself requires only a part-time commitment, and many directors serve on more than one board.[112] Notwithstanding the high compensation, the vast majority of directors tend to be high-income, high-net-worth individuals, so the actual marginal value of the extra income may not be as high. On the other hand, studies suggest that a reward's magnitude may not be as important as existence of the reward itself.[113]

Directors may also be rewarded by the company's CEO due to the CEO's control over the company's resources. These resources may be directed to the directors' company or the directors' favorite charity.[114] For example, donations to directors' preferred charitable organizations were noted as a factor that contributed to the failure of Enron's board.[115] CEOs or other senior executives may also reward directors through their professional and social contacts or influence.[116] Finally, a CEO can "use his or her bully pulpit to support higher director compensation."[117]

Social rewards, such as validation, may be even more important than the pecuniary impact of board directorship. Serving as a director may contribute to one's sense of self worth. The successful investor Warren Buffett reports "what many big shots love is what I call elephant bumping. I mean they like to go to the places where other elephants are, because it reaffirms the fact that when they look around the room and they see all these other elephants that they must be an elephant too, or why would they be there?"[118]

---

110. FREDERIC W. COOK & CO., INC., DIRECTOR COMPENSATION: NASDAQ 100 VS NYSE 100 (2005), http://www.fwcook.com/alert_letters/2005_directorscomp.pdf [hereinafter FREDERIC W. COOK]. In 2002, mean director compensation at the two hundred largest U.S. companies was $152,000, and $116,000 at the 1,000 largest companies. *See* BEBCHUK & FRIED, *supra* note 107, at 25. Compensation can easily exceed $400,000. *See, e.g.*, Occidental Petroleum Corp., Proxy Statement (Mar. 22, 2007), http://sec.edgar-online.com/2007/03/22/0000797468-07-000029/Section3.asp.

111. FREDERIC W. COOK, *supra* note 110, at 6 (reporting median annual compensation of NYSE 100 compensation committee members at $177,817, audit committee members at $180,651, compensation committee chairs at $190,135, and audit committee chairs at $191,432).

112. BEBCHUK & FRIED, *supra* note 107, at 17; *see* JAY W. LORSCH & ELIZABETH M. MACIVER, PAWNS OR POTENTATES: THE REALITY OF AMERICA'S CORPORATE BOARDS 24–25 (1989).

113. *See, e.g.*, John Bishop, *The Recognition and Reward of Employee Performance*, 5 J. LAB. ECON. S36, S51–52 (1997) (citing studies examining the effect of merit-based pay on employee productivity).

114. BEBCHUK & FRIED, *supra* note 107, at 27–28 (stating that "[i]t has been common practice for companies to make charitable contributions to nonprofit organizations that employ or are headed by a director"); *see also* Biondi v. Scrushy, 820 A.2d 1148, 1157 (Del. Ch. 2003) (noting that the company had been generous to a foundation that was important to the challenged independent director).

115. PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON GOVERNMENTAL AFFAIRS, THE ROLE OF THE BOARD OF DIRECTORS IN ENRON'S COLLAPSE, S. REP. NO. 107-70, at 55 (2002), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/enron/senpsi70802rpt.pdf [hereinafter ENRON REPORT].

116. BEBCHUK & FRIED, *supra* note 107, at 27–28.

117. Lucian A. Bebchuk & Jesse M. Fried, *Pay Without Performance: Overview of the Issues*, 30 J. CORP. L. 647, 656 (2005).

118. JOHN C. COFFEE ET AL., KNIGHTS, RAIDERS, AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER 14 (1988) (quoting Warren Buffett).

In addition to financial and social rewards, potential career rewards exist for directors who are also executives, such as developing skills and contacts.[119] Through board service, "executives gain broader insight into trends in finance, technology, marketing and other fields of interest to their firm."[120]

Given the financial rewards and "highly valued personal nonpecuniary rewards derived from the director's selection and service,"[121] a director can be expected to want to remain a director. Directors thus are likely biased in favor of decisions that allow them to continue as directors, including decisions in favor of those people who determine future board membership, such as a controlling shareholder or those directors serving on nomination committees.[122] Even when there is no threat to directors' continued board membership, social norms help ensure that they remember those that nominated them. "The norm of reciprocation—the rule that obliges us to repay others for what we have received from them—is one of the strongest and most pervasive social forces in all human cultures."[123] Directors' decision making may thus be biased merely from a sense of obligation based in gratitude.[124]

C. Self-Image and Social Perception

As many commentators have noted, directors are not solely motivated by a desire to enrich themselves or their families or enhance a group to which they belong. In addition to being self-interested, directors are motivated to maintain a desirable self-image and to be competent. There are many reasons to "do a good job," such as "a director's sense of honor; her feelings of responsibility; her sense of obligation to the firm and its shareholders; and, her desire to 'do the right thing.'"[125] Psychologists agree:

119. Directors report that they are persuaded to sit on boards more by these nonfinancial rewards than by the financial compensation. *See* Lynne L. Dallas, *Proposals for Reform of Corporate Boards of Directors: The Dual Board and Board Ombudsperson*, 54 WASH. & LEE L. REV. 91, 109 (1997).

120. Cox & Munsinger, *supra* note 99, at 95.

121. *Id.* at 107.

122. There is research demonstrating that even so-called independent nominating committees often end up nominating candidates who are suggested or preferred by the incumbent CEO. *See* Michael Dorf, *The Group Dynamics Theory of Executive Compensation*, 28 CARDOZO L. REV. 2025, 2033 (2007); James D. Westphal & Edward J. Zajac, *Who Shall Govern? CEO/Board Power, Demographic Similarity, and New Director Selection*, 40 ADMIN. SCI. Q. 60 (1995) (showing that CEOs generally control director selection).

123. Robert B. Cialdini & Noah J. Goldstein, *Social Influence: Compliance and Conformity*, 55 ANN. REV. PSYCHOL. 591, 599, 604 (2004) (noting that gifts are often reciprocated, even when they are unwanted by the participant).

124. BEBCHUK & FRIED, *supra* note 107, at 31 (citing Brian G. Main et al., *The CEO, the Board of Directors and Executive Compensation: Economic & Psychological Perspectives*, 4 INDUS. & CORP. CHANGE 293 (1995)) (arguing that directors may not bargain hard over compensation with a CEO who brought them onto the board).

125. Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1052 n.32 (Del. 2004) (quoting Lynn A. Stout, *On the Proper Motives of Corporate Directors (or, Why You Don't Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1, 8–9 (2003)); *see*

> [A]s social and socialized beings, we want to be perceived by our peers (and to perceive ourselves) as fair and even handed. Indeed, most of us want to see ourselves, and be seen by others, not only as fair but also as generous, or at least less self-serving than other actors would be in similar circumstances.[126]

Courts and academics have both dismissed, or at least minimized, the dangers of structural bias on these grounds. For example, the Delaware Supreme Court has noted in support of its position that an outside director often depends on maintaining a good reputation, and would therefore be unlikely to jeopardize that reputation with a biased decision based on social ties.[127] Accordingly, a plaintiff must show that "the non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director."[128] Fama and Jensen have similarly noted the importance of a director's reputation for future employment and thus as a mechanism to reduce biased decision making.[129]

In passing, in many if not most potential conflict of interest situations, it seems likely that the group or self-interested decision is not one that carries any reputational risk. Remember, "the relevant reputation for directors is the one among their peers, who face the same issues and are likely to be quite sympathetic."[130] Foreclosing a derivative suit or acquiescing in executive salary raises is unlikely to raise any eyebrows among top executives or other board members. Furthermore, a reputation for loyalty may in fact increase a director's desirability to CEOs or others involved in the selection of board members.[131]

---

also William T. Allen, *Independent Directors in MBO Transactions: Are They Fact or Fantasy?*, 45 BUS. LAW. 2055, 2061–63 (1990) (arguing that it is a sense of duty that creates effective independent directors).

126. Diekmann et al., *supra* note 74, at 1061; *see, e.g.*, Chugh et al., *supra* note 8, at 81–86 (pointing out that people want to see themselves as moral, competent, and deserving); Cialdini & Goldstein, *supra* note 123, at 604 ("Individuals are driven to be consistent not only with their trait self-attributions, but with their previous behaviors and commitments as well.").

127. *Beam*, 845 A.2d at 1052. For discussions of the role of reputation in shaping behavior, see Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1793–97 (2001); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1814–23 (2001); and Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1255–64 (1999).

128. *Beam*, 845 A.2d at 1043.

129. *See* Eugene F. Fama & Michael C. Jensen, *The Separation of Ownership and Control*, 26 J.L. & ECON. 301, 315 (1983) (arguing that an efficient labor market serves to control directors, as directors' reputations affect their chance for future board appointments); *see also* Michael P. Dooley & E. Norman Veasey, *The Role of the Board in Derivative Litigation: Delaware Law and Current ALI Proposals Compared*, 44 BUS. LAW. 503, 535 (1989) (dismissing the argument "that outside directors generally are more willing to risk reputation and future income than they are to risk the social embarrassment of calling a colleague to account"). *But see* Velasco, *supra* note 70, at 825 (arguing in favor of an intermediate standard of review for situations where the directors may have subtle conflicts of interest that are not powerful enough to warrant the entire fairness standard).

130. Velasco, *supra* note 70, at 859–60.

131. *See* Dorf, *supra* note 122, at 2032–33 ("Directors who wish to remain in office . . . need to please whoever determines the composition of the corporation's slate of nominees.").

Veasey relies not on reputation (and possible future remuneration) but rather on individual probity:

> Friendship, golf companionship, and social relationships are not factors that necessarily negate independence. . . . [T]here is nothing to suggest that, on an issue of questioning the loyalty of the CEO, the bridge partner of the CEO cannot act independently as a director. To make a blanket argument otherwise would create a dubious presumption that the director would sell his or her soul for friendship.[132]

To the contrary, the blanket argument otherwise is merely that even the most ethical director may make a decision influenced by friendship, without awareness or intention. Directors might not knowingly sell their soul, but that does not mean their souls are uncompromised. Our other motivations, in combination with cognitive effects, may result in us being unable to see the conflicts.[133] Perhaps the advantages of the current approach outweigh the disadvantages, but one need not impugn the integrity of directors to argue otherwise.

Reputation, personal conscience, and self-image arguments may well be persuasive, but the arguments apply only to influences of which the person is aware. One might stipulate that most directors are ethical (or will not sell their souls for friendship or pecuniary remuneration) and when charged with making a decision in an unbiased way, will attempt to do exactly that to the best of their abilities. If, however, bias can result not from corruption or intentional misfeasance, but rather from unintentional (and often unconscious) motivational and cognitive processes, unbiased decision making (short of recusal) may be beyond the best of their abilities.[134] Chugh and colleagues draw a distinction between visible conflicts of interest, which are clear and obvious yet thought to be overcome, and those that are invisible and thus unrecognized.[135] Structural bias and directors who are not dominated or controlled may involve both types. A few conflicts, such as material amounts of money unavailable to shareholders or close family relationships, are visible conflicts that the law recognizes as necessarily disqualifying the decision maker. Other conflicts are visible, like decisions regarding a lawsuit against a controlling

---

132. E. Norman Veasey, *The Defining Tension in Corporate Governance in America*, 52 BUS. LAW. 393, 405–06 (1997). Veasey goes on to state, however, that "directors must be aware of any appearance that they lack independence" and that "the better practice is that each director should be like Caesar's wife: above reproach." *Id.*; *see also* Dooley & Veasey, *supra* note 129, at 537 (arguing that asserting the "argument in favor of closer judicial review of board decisions on loyalty matters is to assert that independent directors are more likely to risk their reputations to excuse cheating than to excuse carelessness").

133. *See infra* Part IV.D.

134. *See generally* Moore & Lowenstein, *supra* note 98 (summarizing research); Jason Dana & George Lowenstein, *A Social Science Perspective on Gifts to Physicians from Industry*, 290 J. AM. MED. ASS'N 252 (2003).

135. Chugh et al., *supra* note 8, at 91.

shareholder, but seen as controllable. Still others, such as some motive-based conflicts, are visible to some but unrecognized by others.[136]

Several different prototypes for considering biased evidence processing also exist.[137] At one extreme is fraud—"intentional, conscious efforts to fabricate, conceal, or distort evidence."[138] In the middle is advocacy—"the selective use and emphasis of evidence to promote a hypothesis, without outright concealment or fabrication."[139] The arguments regarding reputation or good faith are addressed only to these two prototypes, primarily advocacy.

Contemporary psychologists, however, recognize unintentional bias as another prototype.[140] This prototype concerns bias that is involuntary, unconscious, and can occur even when the decision maker is seeking an accurate conclusion in addition to having a preferred conclusion.[141]

In the following Part, I argue that decision makers, regardless of their good intentions, are frequently *unable* to put aside their biases. The above biases and motivations are not necessarily, or in some cases even likely to be, secret. Most of us are aware that we are likely to be favorably disposed towards groups of which we are members, our friends, and anything that socially or financially benefits us. Certainly, we are aware that others have those biases.[142] We think, however, that we can compensate for those biases. Cognitive processes, many of which are unconscious, may prevent decision makers from even realizing that their biases are influencing their decisions.[143] Put differently, conscious and unconscious biases will affect decision making and sometimes be determinative. Thus, internal pressure to do the right thing or a desire to maintain a reputation for fair-mindedness in the community will not necessarily

136. *See* Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 575–76 (2007).

137. Robert J. MacCoun, *Biases in the Interpretation and Use of Research Results*, 49 ANN. REV. PSYCHOL. 259, 267–69 (1998).

138. *Id.* at 268.

139. *Id.*

140. *Id.* (describing both unintentional cognitive and motivational biases).

141. *Id.* at 269–73.

142. Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781, 784–88 (2004).

143. Cognitive processes "[refer] to all processes by which the sensory input is transformed, reduced, elaborated, stored, recovered, and used." ULRIC NEISSER, COGNITIVE PSYCHOLOGY 4 (1967). By contrast, an approach beginning with motivations: "Instead of asking how a man's actions and experiences result from what he saw, remembered, or believed, the dynamic psychologist asks how they follow from the subject's goals, needs, or instincts." *Id.* The modern consensus is that both cognition and motivation interact to result in biased decision making. *See* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 541 (2004) (reporting that "[t]he prevailing consensus is that motivations guide and interact with the cognitive system, influencing how people reason and perceive their environments"). For the purposes of this article we need not address precisely whether cognitive or motivational processes are at work. *See also* Susan T. Fiske, *Intent and Ordinary Bias: Unintended Thought and Social Motivation Create Casual Prejudice*, 17 SOC. JUST. RES. 117, 125 (2004) (suggesting that the distinction between motivation and cognition is absurd because our brains do not neatly distinguish these processes).

result in an unbiased decision. This failure stems not from a director's unwillingness to be neutral but from a lack of ability. In short, people are hardwired to enact their unconscious biases.[144]

Although people are aware of many biases, they will frequently not recognize situations involving potential bias and conflict of interest. Subtle conflicts of interest, like those involving directors' indirect personal and social benefits, "may not be obvious to the involved agents who interpret their situations differently from impartial observers."[145] By remaining oblivious to the potential conflict of interest, a decision maker can more easily reach a personally desirable conclusion.[146]

IV. UNCONSCIOUS PROCESSES

Based on the above described biases, directors, independent or otherwise, are reasonably likely to hold certain views toward questions posed to the board. For example, should we approve the CEO compensation package? (Yes, because he is like us, a member of my group, and thus he deserves it; and for directors who are also CEOs, yes, because it may favorably affect my own compensation.) Should we approve another firm's takeover bid of our company? (No, because we have managed the firm well and because I want to retain the benefits associated with board membership.) Should we allow a derivative suit to go forward? (No, because this involves a suit against a group of which I am a member; and if it also targets a controlling shareholder, no, because I do not want to lose the benefits of board membership.)[147] Should we approve this conflict of interest transaction between our company and another director? (Yes, this transaction is likely to be fair to the company,

144. Moore and Loewenstein argue that the brain actually processes motives in different ways. In particular, they argue that a person's ethical and professional responsibilities (such as a director's obligation to fairly assess the merits of a derivative suit against a controlling shareholder) are more likely to be processed consciously, whereas a person's self interest (such as a director's desire to stay on the board of directors) tends to be processed automatically. *See* Moore & Loewenstein, *supra* note 98, at 190. Because automatic processing occurs unconsciously, "its influence on judgment and decision making is difficult to eliminate or completely correct. The consequence of this differential processing is that self-interest often prevails, even when decision makers consciously attempt to comply with the ethical mandates of their profession." *Id.* at 190–91.

145. Thagard, *supra* note 92, at 369.

146. *See* David M. Bersoff, *Why Good People Sometimes Do Bad Things: Motivated Reasoning and Unethical Behavior*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 28, 38 (1999) (observing that "people commonly distort the moral implications of their desired behavioral response and end up acting contrary" to their motivations or morality, honesty, and personal integrity).

147. A director's attitude towards a derivative suit is also likely to be negative because directors fear personal liability and because they perceive few benefits to shareholders. *See* Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1748 (2004) (noting that "derivative suits are today regularly portrayed as nuisance suits whose 'principal beneficiaries . . . are attorneys'") (citations omitted).

because members of my group are like me, and thus likely to be fairer and more ethical than average.)[148]

Directors may, of course, be consciously aware of their biases. (For example, I do not believe that Martha would have misbehaved; thus, I do not think a suit against her should go forward.) We generally know that we like our friends, support members of our groups, and favor decisions that benefit us. Regardless of awareness, however, having a theory, initial predisposition, or preference will often unconsciously affect our decision-making processes.[149] The ideal is unbiased evidence processing: a director should make a decision based solely on the business merits and an unbiased evaluation of all reasonably available relevant information.[150] The problem is that decision makers often act like "intuitive lawyers" who desire "predetermined, particular conclusions" rather than "intuitive scientists" who desire "optimal, accurate conclusions."[151] The next Sections examine various psychological processes that allow people to confirm their initial theories and predispositions, and thus reach preferred decisions.

A. The Importance of the Starting Point

An independent director is faced with a decision in an area likely to raise group- or self-interest concerns. The director is not likely (and may be unable) to start from a completely blank slate.[152] He or she will likely have a starting point, probably reached very quickly.[153] "[T]he starting point of a decision process has a disproportionate effect on its out-

148. It is worth noting that the Enron board, when faced with the proposed transactions between Enron's CFO Andrew Fastow and Enron that ultimately led to Enron's implosion, knowingly suspended Enron's code of ethics as a necessary preliminary step before acceptance. *See* ENRON REPORT, *supra* note 115, at 24.

149. *See, e.g.*, Erica Dawson et al., *Motivated Reasoning and Performance on the Wason Selection Task*, 28 PERSONALITY SOC. PSYCHOL. BULL. 1379 (2002); Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568, 569–70 (1992); Timothy D. Wilson et al., *Mental Contamination and the Debiasing Problem*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 185, 186–87 (Thomas Gilovich et al. eds., 2002).

150. Of course, even scientists do not necessarily follow this approach. *See* MacCoun, *supra* note 137, at 263–64, 279–81 (examining bias or perceived bias of social scientists in selecting and interpreting research evidence).

151. Roy F. Baumeister & Leonard S. Newman, *Self-Regulation of Cognitive Inference and Decision Processes*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 3, 3 (1994); *see also* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 820 (2001) ("The reasoning process is more like a lawyer defending a client than a judge or scientist seeking truth.").

152. MICHAEL S. GAZZANIGA, THE ETHICAL BRAIN 161 (2005) ("Humans are belief-formation machines. We form beliefs fast and firmly, and then deepen them. . . . We become beholden to them and will adhere to them even in the face of information to the contrary.").

153. John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 AM. PSYCHOL. 462, 475 (1999) (noting that "our preferences and many other judgments may be made literally before we know it").

come."[154] For example, people may reach a different decision between two mutually exclusive alternatives depending on whether they are asked to choose or reject an alternative.[155] In one experiment, researchers instructed subjects to adjudicate a child custody case in which one parent must be granted sole custody.[156] Although awarding sole custody to one parent is functionally equivalent to denying sole custody to the other, whether subjects were asked to award or deny custody affected final decisions.[157]

If the director's starting point involves "initial judgments, choices, or beliefs," several lines of research show that the cognition is more likely to be confirmed.[158] Surprisingly, "[s]imply entertaining a belief elevates the perceived informativeness of evidence that may confirm that belief."[159] Psychologist Daniel Gilbert has developed an explanation.[160] He argues that social and cognitive psychology suggest that human belief procedures do not follow the expected stages of, first, understanding a proposition and, then, deciding whether to accept or reject it.[161]

Instead, when we first understand a proposition we accept it as true, and then only later, if we judge it to be false, do we "unaccept" it.[162] Either procedure would reach the same result if we had unlimited cognitive resources. But because our cognitive resources are bounded, and because the second stage requires greater effort (unaccepting a proposition is difficult), the systems result in different end states. Supporting this view, when people's cognitive resources are stretched they are more likely to believe that false propositions are true, but not that true propo-

154. Samuel D. Bond et al., *Information Distortion in the Evaluation of a Single Option*, 102 ORG. BEHAV. & HUM. DECISION PROCESSES 240, 240 (2007) (testing "the idea that individuals, having not yet committed to a particular course of action, bias their interpretation of new information to support an initial disposition").

155. Eldar B. Shafir, *Choosing Versus Rejecting: Why Some Options Are Both Better and Worse than Others*, 21 MEMORY & COGNITION 546, 548–50 (1993); *see also* Amos Tversky & Itamar Gati, *Studies of Similarity*, *in* COGNITION AND CATEGORIZATION 79, 83 (Eleonor Rosch & Barbara B. Lloyd eds., 1978) (finding that subjects would conclude that East and West Germany were more or less different than Nepal and Sri Lanka depending on whether they were asked which countries were more similar or which countries were more different).

156. Shafir, *supra* note 155, at 549.

157. *Id.* at 553–54. Shafir concluded that "[w]hether we end up choosing or rejecting often seems an accident of fate." *Id.* at 554.

158. Tobias Greitemeyer & Stefan Schulz-Hardt, *Preference-Consistent Evaluation of Information in the Hidden Profile Paradigm: Beyond Group-Level Explanations for the Dominance of Shared Information in Group Decisions*, 84 J. PERSONALITY & SOC. PSYCHOL. 322, 323 (2003) ("[S]everal lines of research show that people are somehow reluctant to revise initial judgments, choices or beliefs.").

159. William B. Swann, Jr. & Toni Giuliano, *Confirmatory Search Strategies in Social Interaction: How, When, Why, and with What Consequences*, 5 J. SOC. & CLINICAL PSYCHOL. 511, 522 (1987).

160. *See* Daniel T. Gilbert, *How Mental Systems Believe*, 46 AM. PSYCHOL. 107, 107 (1991).

161. *Id.* at 107 (describing understanding followed by acceptance or rejection as Cartesian).

162. *Id.* at 107–08 (describing understanding and acceptance as simultaneous, possibly to be followed by "unaccepting," as Spinozan). Or as William James described Spinoza's view, "All propositions . . . are believed through the very fact of being conceived." *Id.* at 108 (quoting WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 136 (1890)).

sitions are false.[163] If Gilbert is correct that people's brains follow the second procedure rather than the first, then a confirmatory search, as described below, is reasonable because such searches often prove more informative than other types of searches.[164]

As the above suggests, a director is unlikely to be aware of the impact of the starting place, because much of the impact will occur as unconscious information processing.[165] In addition, this effect is likely to be even stronger if the starting place is linked to the director's motivation.[166] The next Sections examine how this unconscious information processing occurs and can bias the decision. In short, the unconscious affects both the information search and the evaluation of what is found.[167]

B. Motivated Reasoning

Francis Bacon observed that "[t]he human understanding resembles not a dry light, but admits a tincture of the will and passions, which generate their own system accordingly, for man always believes more readily that which he prefers."[168] Contemporary psychologists have reached the same conclusion as Bacon.[169] The notion has even become widespread in

163. Daniel T. Gilbert et al., *Unbelieving the Unbelievable: Some Problems in the Rejection of False Information*, 59 J. PERSONALITY & SOC. PSYCHOL. 601, 603 (1990).

164. Gilbert, *supra* note 160, at 115.

165. Tom Pyszczynski & Jeff Greenberg, *Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model*, *in* 20 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 297, 305 (Leonard Berkowitz ed., 1987) (observing that "[a] great deal of information processing occurs at a level beneath conscious awareness").

166. *Id.* at 330 ("A self-serving bias is likely to intrude on the selection of hypotheses for testing, the generation of inference rules, the search for attribution-relevant information, the evaluation of the information that one accesses, and the amount of confirmatory and disconfirmatory evidence that is required before an inference is made.").

167. Although to the author's knowledge no one has yet explained how the unconscious might affect independent directors' decision making, the means by which this might happen has been looked at in other contexts. For example, Judge Posner reached a similar conclusion regarding the impact of judicial biases:

> I doubt that any of the justices has so debased a conception of the judicial office as to try deliberately to swing the election to his preferred Presidential candidate. But the undeniable interest that a judge, especially a Justice of the U.S. Supreme Court, has in who his colleagues and successors will be is likely to have alerted the Justices to features of *Bush v. Gore* that might otherwise have eluded them. The conservative Justices may have been more sensitive to arguments based on Article II and the equal protection clause than they otherwise would have been, and the liberal Justices more sensitive to the weaknesses of those arguments than they otherwise would have been.

RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 180 (2001). Jerome Frank, a leading legal realist who served on the United States Court of Appeals for the Second Circuit, also suggested the impact of unconscious bias, observing that "[f]acts . . . are what the judge thinks they are," and not necessarily objective reality. JEROME FRANK, LAW AND THE MODERN MIND xviii (1930).

168. FRANCIS BACON, NOVUM ORGANUM 26 (Joseph Devey ed., P.F. Collier & Sons 1902) (1620), *available at* http://oll.libertyfund.org/title/1432 (emphasis added).

169. *See, e.g.*, Tanya L. Chartrand & John A. Bargh, *Automatic Activation of Impression Formation and Memorization Goals: Nonconscious Goal Priming Reproduces Effects of Explicit Task Instructions*, 71 J. PERSONALITY & SOC. PSYCHOL. 464, 464 (1996) (stating that it is today uncontroversial to say that a person's "[i]ntentions and goals affect not only what one considers important enough

popular culture. Witness the linguists' "word of the year" for 2005: "truthiness," defined as "the quality of stating concepts one wishes or believes to be true, rather than the facts."[170] Psychologists have referred to this process as motivated reasoning, where motivation refers to any "wish, desire or preference that concerns the outcome of a given reasoning task . . . ."[171] Numerous studies illustrate the phenomenon.[172] For example, one early experiment demonstrated how subjects, informed that they were either a better or worse performer than average, were able to easily, and self-servingly, explain their better or worse performance.[173] Likewise, studies of doctors, accountants, auditors, and lawyers demonstrate such motivated reasoning.[174]

---

to pay attention to, but also how one uses, interprets, and subsequently remembers that information"); David Dunning et al., *What the Commentators Motivated Us to Think About*, 10 PSYCHOL. INQUIRY 79, 79 (1999) (concluding that "[t]he debate over whether motivation influences judgment has been settled"); Arie W. Kruglanski, *Motivated Social Cognition: Principles of the Interface*, *in* SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES 493, 493 (E. Tory Higgins & Arie W. Kruglanski eds., 1996); Thagard, *supra* note 92, at 376 (noting that there is "abundant psychological evidence" of the impact motivation on people's beliefs).

170. *Linguists Vote 'Truthiness' the Word of the Year*, WASH. POST, Jan. 7, 2006, at E18. (Truthiness is also included in the Oxford English Dictionary.)

171. Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480 (1990). It is possible that a decision maker's motivation may be to make an accurate choice. There is evidence that decision makers motivated to be accurate (and with no reason to prefer one alternative to another) process information more carefully and follow more complex cognitive strategies. *Id.* at 482. In some circumstances, however, the goal to be accurate may in fact increase bias. *Id.* For example, accuracy-motivated subjects were more likely to weight irrelevant information to moderate a prediction than those who were not motivated. *See* Philip E. Tetlock & Richard Boettger, *Accountability: A Social Magnifier of the Dilution Effect*, 57 J. PERSONALITY & SOC. PSYCHOL. 388, 397 (1989); *see also* Arie W. Kruglanski, *Motivation and Social Cognition: Enemies or a Love Story?*, 1 INT. J. PSYCHOL. & PSYCHOL. THERAPY 33, 41 (2001) (defining a goal as "[a] desirable state of affairs attainable through one's actions").

172. An example is the classic study in which Dartmouth and Princeton fans watched a football game between the two schools, and were asked to report any infractions and rate their seriousness. The two fan groups, according to the study's authors, were so biased that they appeared to see vastly different games. David M. Messick & Keith Sentiss, *Fairness, Preferences and Fairness Biases*, *in* EQUITY THEORY: PSYCHOLOGICAL AND SOCIOLOGICAL PERSPECTIVES 61, 83 (David M. Messick & Karen S. Cook eds., 1993) (citing A.H. Hastorf & H. Cantrill, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 130 (1954)).

173. Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOCIAL PSYCHOL. 880, 884 (1975); *see also* Lee Ross et al., *Social Explanation and Social Expectation: The Effects of Real and Hypothetical Explanations upon Subjective Likelihood*, 35 J. PERSONALITY & SOC. PSYCHOL. 817, 826 (1977). For more recent experiments, see, e.g., Lisa Sinclair & Ziva Kunda, *Motivated Stereotyping of Women: She's Fine if She Praised Me but Incompetent if She Criticized Me*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1329, 1340 (2000) (finding that students who received lower grades from female professors were more likely to use negative stereotypes about female professors); Lisa Sinclair & Ziva Kunda, *Reactions to a Black Professional: Motivated Inhibition and Activation of Conflicting Stereotypes*, 77 J. PERSONALITY & SOC. PSYCHOL. 885, 902 (1999) (finding that people praised by an African-American were less likely to use negative African-American stereotypes).

174. *See* Samuel Issacharoff, *Legal Responses to Conflicts of Interest*, *in* CONFLICTS OF INTEREST, *supra* note 8, at 189, 190 (lawyers recommending that clients initiate lawsuits); Jerome P. Kassirer, *Physicians' Financial Ties with the Pharmaceutical Industry: A Critical Element of a Formidable Marketing Network*, *in* CONFLICTS OF INTEREST, *supra* note 8, at 133, 138–39 (doctors prescribing drugs manufactured by companies that have provided incentives to them); Mark W. Nelson, *A Review of Experimental and Archival Conflicts-of-Interest Research in Auditing*, *in* CONFLICTS OF INTEREST, *su-*

As one might expect, to be effective—in other words, to genuinely believe what one desires to be true or to genuinely believe that one's decision is untainted by extraneous motivations—motivated reasoning must be largely immune to conscious examination. Accordingly, decision makers acting in good faith will attempt to be rational and reach a persuasive conclusion.[175] They will not, however, realize that their attempt to be rational may be biased by their goal.[176]

Psychologists have argued that a person's goals may alter perceptions, attitudes, and attributions.[177] Motivation may also "affect reasoning through reliance on a biased set of cognitive processes: strategies for accessing, constructing, and evaluating beliefs."[178] Furthermore, the decision maker does not even have to be conscious of the goal, or have consciously selected it.[179] Put somewhat differently, "conscious choice is not necessary for goal activation and operation."[180]

How then does motivated reasoning occur? Gilovich suggests that decision makers in fact ask a different question depending on how eager they are to reach a particular conclusion. "For desired conclusions . . . it is as if we ask ourselves '*Can* I believe this?,' but for unpalatable conclusions we ask, '*Must* I believe this?'"[181] The legal analog would be that for desired conclusions one asks, "*Could* a reasonable person believe it?" whereas for undesirable conclusions one asks, "*Would* all reasonable people believe it?" The burden of persuasion is much lower for the first question.

Of course, people sometimes reach undesirable conclusions. People are motivated not only toward their desired conclusion, but also to be

pra note 8, at 41, 50–51 (describing factors that compromise the objectivity of accounting firms); Don A. Moore et al., *Auditor Independence, Conflict of Interest, and the Unconscious Intrusion of Bias* 6 (Harvard Bus. Sch., Working Paper No. 03-116, 2003) (describing auditors' bias in favor of their clients). Self-interested decision making is not limited to the professions. Academics who have studies accepted attribute their success to the quality of the article, whereas those who have studies rejected attribute the result to factors such as an unlucky choice of reviewers. Mary Glenn Wiley et al., *Why a Rejection? Causal Attribution of a Career Achievement Event*, SOC. PSYCHOL. Q. 214, 217–19 (1979).

175. Kunda, *supra* note 171, at 482–83 (1990) (proposing "that people motivated to arrive at a particular conclusion attempt to be rational and to construct a justification of their desired conclusion that would persuade a dispassionate observer").

176. *Id.* at 483 (arguing that "people do not realize that the [reasoning] process is biased by their goals").

177. *Id.* at 493.

178. *Id.* at 480.

179. Chartrand & Bargh, *supra* note 169, at 469–73 (demonstrating that goals could be activated and affect memories without the conscious awareness of participants); *see also* John A. Bargh et al., *The Automated Will: Nonconscious Activation and Pursuit of Behavioral Goals*, 81 J. PERSONALITY & SOC. PSYCHOL. 1014, 1024 (2001) (showing that people can have behavioral goals without conscious awareness of them, and that these nonconscious goals then operate and affect behavior in a similar way to consciously chosen goals); Bargh & Chartrand, *supra* note 153, at 462–64 (reviewing studies showing the automatic activation of goals); James S. Uleman, *When Do Unconscious Goals Cloud Our Minds?*, *in* 9 ADVANCES IN SOCIAL COGNITION 165, 165–66 (Robert S. Wyer ed., 1996).

180. Chartrand & Bargh, *supra* note 169, at 465.

181. THOMAS GILOVICH, HOW WE KNOW WHAT ISN'T SO 84 (1991).

both rational and perceived as rational.[182] Thus, motivation can affect or influence our judgments but cannot completely control them.[183] In short, enough evidence to support the desired conclusion must exist, but "the process of justification construction can itself be biased by our goals."[184] If a derivative suit accuses the CEO of criminal behavior and the evidence is overwhelming, directors allow the suit to go forward, or, when faced with a tremendous takeover premium, target boards accept the offer. Motivated reasoning will assist directors in reaching a preferred result only in those gray areas where reasonable minds might differ.

C. Predecisional Information Processing

"The human understanding, when any proposition has been once laid down . . . forces everything else to add fresh support and confirmation; and although most cogent and abundant instances may exist to the contrary, yet either does not observe or despises them . . . rather than sacrifice the authority of its first conclusions."[185]

As Bacon hypothesized, numerous studies have shown that people will frequently either neglect or reject disconfirming information. This process, termed confirmation bias, creates a tendency for people to search for and interpret new information as supportive of current beliefs and to fail to search for, ignore, discredit, or underweight unsupportive information.[186] Although some people are corrupt and do this consciously, many people will do this in good faith. In other words, they are unaware of the self-interested bias by which they process information.

Overall, this distortion of information has been demonstrated on more than just the usual collection of college students. Russo and colleagues tested professionals, including auditors, and found they also biased their information processing.[187] Schulz-Hardt and colleagues looked at executives of both financial and industrial companies and found confirmation bias equal to that of college students regarding financial in-

182. *See supra* Part III.C.

183. ZIVA KUNDA, SOCIAL COGNITION 224 (1999) (noting that "despite our best efforts to be objective and rational, motivation may nevertheless color our judgment"); Thagard, *supra* note 92, at 376 ("There is abundant psychological evidence that people's beliefs are determined in part by their motivations as well as by the available evidence.").

184. KUNDA, *supra* note 183, at 224.

185. BACON, *supra* note 168, at 23.

186. *See generally* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998). It has also been referred to as the "positive test strategy." *See* Joshua Klayman & Young-Won Ha, *Confirmation, Disconfirmation, and Information in Hypothesis Testing*, 94 PSYCHOL. REV. 211, 213 (1987). For an extensive bibliography of scholarly articles addressing the confirmation bias, see Confirmation Bias/Confirmatory Bias, http://confirmation-bias.behaviouralfinance.net/ (last visited Nov. 13, 2008).

187. J. Edward Russo et al., *Predecisional Distortion of Information by Auditors and Salespersons*, 46 MGMT. SCI. 13, 13 (2000); *see also* Stefan Schulz-Hardt et al., *Biased Information Search in Group Decision Making*, 78 J. PERSONALITY & SOC. PSYCHOL. 655, 659–60 (2000) (finding biased information processing in groups of midlevel managers).

vestments.[188] A correlation between investment professionals' evaluations of the desirability and likelihood of economic outcomes has also been found.[189] Desirable outcomes were seen as more likely to occur than undesirable outcomes.[190]

Based on an extensive review of the predecision processing literature, Brownstein identified the following preconditions under conflict theory for biased predecision processing: "When decision makers are in danger of experiencing negative consequences due to risks associated with two or more alternatives (i.e., are in conflict), have no hope of finding a better solution, and cannot delay or defer the decision, they can be expected to conduct selective information searches or report spreading evaluations of the alternatives."[191] These preconditions are frequently the case for directors' decisions in subtle conflict of interest situations.

If biased information processing exists, it likely "increases as the importance of the task increases," "[w]hen [decision makers] expect to choose one of the alternatives," and "when the alternatives involve more negative consequences."[192] Decisions of the board of directors tend to involve each of these factors. Brownstein also states "that biased processing increases as the difficulty of the decision increases."[193] Again, difficult decisions are likely to be the norm for these decisions,[194] or rather it is difficult decisions where we should be most concerned about unconscious biases.

Research suggests that group processes, such as a board's deliberation, can in fact increase biased predecision processing over that of individuals.[195] Groups, just like individuals, prefer supporting to conflicting

188. Ditto & Lopez, *supra* note 149, at 570 ("An eclectic body of theory and research, therefore, supports the conclusion that information consistent with a preferred judgment conclusion is less likely to initiate intensive cognitive analysis than is information inconsistent with that conclusion.").

189. *See* Robert A. Olsen, *Desirability Bias Among Professional Investment Managers: Some Evidence from Experts*, 10 J. BEHAV. DECISION MAKING 65, 70–71 (1997); *see also* Brent L. Cohen & Thomas S. Wallsten, *The Effect of Constant Outcome Value on Judgments and Decision Making Given Linguistic Probabilities*, 5 J. BEHAV. DECISION MAKING 53, 53–55 (1992) (finding that people overestimated the likelihood of positive outcomes).

190. *See* Olsen, *supra* note 189, at 66.

191. Aaron L. Brownstein, *Biased Predecision Processing*, 129 PSYCHOL. BULL. 545, 548, 559 (2003) (reviewing seven major theories and forty years of empirical studies on biased predecision processing, and concluding that many studies have "found biased processing before . . . committing [a] consequential decision").

192. *Id.* at 561.

193. *Id*. Granted, there are some mechanisms at work that may reduce biased processing, such as when a decision will have to be justified to others.

194. Cox & Munsinger, *supra* note 99, at 88 (referring to the decision whether to continue a derivative suit as a "multifaceted, inherently complex choice").

195. Schulz-Hardt et al., *supra* note 187, at 666; *see also* Brownstein, *supra* note 191, at 561 ("[W]hen decision making occurs in a group setting, group members are more likely to selectively search for information favorable to a preliminary favorite than individuals making private decisions."). Whether groups are more or less biased than the people composing the groups, depends on the nature and strength of the bias, the decision process, and the distribution of individual preferences in the group. Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687, 693 (1996) (concluding that there is no simple answer to the question whether groups are more biased than individuals).

information, and the effect increases the more the group prefers the supported alternative.[196] Groups may be more or less biased than the people composing the groups, depending on the nature and strength of the bias, the decision process, and the distribution of individual preferences in the group.[197]

The following Subsections first review evidence of biased information searches, in the sense that a decision maker will selectively search or selectively retrieve information, and then evidence of selective interpretation and evaluation. Finally, this Article examines how information is remembered.

1. Selective Search and Exposure

People approach an information task differently depending on their initial theory or belief.[198] Generally a decision maker will attempt to evaluate an uncertain proposition, such as "this derivative suit against my colleagues is without merit," by constructing a case to support the proposition rather than by attempting to discredit it. People tend to actively seek evidence confirming their theory or supporting their attitudes or expectations.[199] This confirmation bias has been demonstrated in numerous areas.[200] It may even have contributed to both space shuttle disasters.[201] The bias can arise even when researchers offer subjects rewards

---

196. Schulz-Hardt et al., *supra* note 187, at 666.

197. *Id.*

198. Part III has described why it is likely that independent directors will have theories or beliefs biased in favor of the group or themselves.

199. Dieter Frey et al., *Information Seeking Among Individuals and Groups and Possible Consequences for Decision Making in Business and Politics*, *in* 2 UNDERSTANDING GROUP BEHAVIOR: SMALL GROUP PROCESSES AND INTERPERSONAL RELATIONS 211, 212–20 (Erich H. Witte & James H. Davis eds., 1996) (reviewing studies in both individual and group contexts); Eva Jonas et al., *Confirmation Bias in Sequential Information Search After Preliminary Decisions: An Expansion of Dissonance Theoretical Research on Selective Exposure to Information*, 80 J. PERSONALITY & SOC. PSYCHOL. 557, 557 (2001) ("When people seek new information, these information search processes are often biased in favor of the information seeker's previously held beliefs, expectations or desired conclusions."); Kunda, *supra* note 171, at 494 ("[P]eople are biased toward seeking instances that are consistent with a hypothesis that they are testing rather than instances that are inconsistent with it."); *see also* Sharon R. Lundgren & Radmila Prislin, *Motivated Cognitive Processing and Attitude Change*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 715, 722–23 (1998) (attitudes); Robin L. Pinkley et al., *"Fixed Pie" a la Mode: Information Availability, Information Processing, and the Negotiation of Suboptimal Agreements*, 62 ORG. BEHAV. & HUM. DECISION PROCESSES 101, 105–06 (1995) (negotiations).

200. *See, e.g.*, Arthur S. Elstein & Georges Bordage, *Psychology of Clinical Reasoning*, *in* HEALTH PSYCHOLOGY—A HANDBOOK 333, 352–58 (George C. Stone et al. eds., 1979) (medicine); Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JURY DECISION MAKING 192, 192–96 (Reid Hastie ed., 1993) (law); Ryan D. Tweney, *A Framework for the Cognitive Psychology of Science*, *in* PSYCHOLOGY OF SCIENCE: CONTRIBUTING TO METASCIENCE 342, 346–49 (Barry Gholson et al. eds., 1989) (science); *see also* Michael J. Mahoney, *Publication Prejudices: An Experimental Study of Confirmatory Bias in the Peer Review System*, 1 COGNITIVE THERAPY & RES. 161, 162 (1977) ("[T]he most costly expression of [confirmatory bias] may be among scientists themselves.").

201. *See* David E. Sanger, *Report on Loss of Shuttle Focuses on NASA Blunders and Issues Somber Warning*, N.Y. TIMES, Aug. 27, 2003, at A1.

for (and are thus assumed to have a motivation in favor of) accuracy.[202] The bias may well be strongest in those instances where the decision maker is self-interested.[203] As a result, "[t]hese biased information search processes lead to the maintenance of the information seeker's position, even if this position is not justified on the basis of all available information."[204]

Professor Wason performed one of the first studies demonstrating selective search in 1960.[205] Researchers presented subjects with a series of numbers that conformed to a mathematical rule (e.g., 2, 4, 6).[206] The subjects' task was to determine the rule, which they did by generating their own series of three numbers. Although the underlying rule was simply that the numbers ascended, typically subjects generated more complex rules, such as the numbers increased by two.[207] Subjects tended to test only series of numbers consistent with their initial hypothesis (e.g., 6, 8, 10) rather than inconsistent (e.g., 6, 10, 12).[208]

In another experiment, participants asked whether practicing before playing tennis was related to winning concentrated on the times where this occurred, whereas those participants asked to determine whether practicing was related to losing focused on losing situations.[209] Another example involved experimenters asking subjects to determine whether someone was extroverted or introverted. Subjects were much more likely to ask questions that would confirm the presence of introversion if answered affirmatively.[210] Sometimes participants asked questions with

202. George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 159 (1993) (finding that people exhibited self-serving biases even when paid to make accurate judgments).

203. Pyszczynski & Greenberg, *supra* note 165, at 319 (observing that "selective exposure to information consistent with a self-serving conclusion is one important means through which individuals maintain an illusion of objectivity concerning their attributions"). Several theories have been developed to explain this phenomenon. *See, e.g.*, Shelly Chaiken et al., *Heuristic and Systematic Information Processing Within and Beyond the Persuasion Context*, *in* UNINTENDED THOUGHT 212 (James S. Uleman & John A. Bargh eds., 1989) (multiple motive heuristic systematic model); ARIE KRUGLANSKI, LAY EPISTEMICS AND HUMAN KNOWLEDGE (Elliot Aronson ed., 1989) (lay epistemics); Kunda, *supra* note 171 (motivated cognition).

204. Eva Jonas et al., *supra* note 199, at 557; *see also* Ziva Kunda et al., *Directional Questions Direct Self-Conceptions*, 29 J. EXPERIMENTAL SOC. PSYCHOL. 63, 63 (1993) (finding that subjects reached hypothesis-consistent conclusions based on a selective search for information).

205. Peter C. Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, 12 Q.J. EXPERIMENTAL PSYCHOL. 129, 130 (1960) [hereinafter Wason, *Failure*]; *see also* Peter C. Wason, *Reasoning*, *in* NEW HORIZONS IN PSYCHOLOGY 135, 139–42 (Brian M. Foss ed., 1966) (conducting research demonstrating that subjects disproportionately seek evidence that confirms their hypotheses).

206. Wason, *Failure*, *supra* note 205, at 131–33.

207. *Id.*

208. *Id.*

209. *See* Jennifer Crocker, *Biased Questions in Judgment of Covariation Studies*, 8 PERSONALITY & SOC. PSYCHOL. BULL. 214, 217–18 (1982).

210. *See* Mark Snyder & William B. Swann, *Hypothesis-Testing Processes in Social Interaction*, 36 J. PERSONALITY & SOC. PSYCHOL. 1202, 1205 (1978) ("[I]ndividuals will systematically formulate confirmatory strategies for testing hypotheses about other people."); *see also* Richard B. Skov & Steven J. Sherman, *Information-Gathering Processes: Diagnosticity, Hypothesis-Confirmatory Strategies, and Perceived Hypothesis Confirmation*, 22 J. EXPERIMENTAL SOC. PSYCHOL. 93, 94 (1986).

such low diagnostic value that almost anyone, extrovert or introvert, would respond in the affirmative, but these answers were also used to confirm the presence of the introversion.[211]

Not only may the search for evidence be biased, but the length of the search may be affected. Typically, decision makers seek more information if the earlier information disconfirms the favored hypothesis, whereas if earlier information confirms the hypothesis, the search may be brought to an end.[212]

How might this play out in the context of directors' decisions? Quite simply, if directors already have a theory (e.g., "I do not think the suit should go forward"), or even more strongly if they have a preference (e.g., "I do not want the suit to proceed"), directors may seek out information that is likely to confirm the theory or preference. For example, in the derivative suit context, this might mean looking for information about the high costs of pursuing a suit, such as distracted management or reduced employee morale, rather than the benefits, such as deterrence of potential future wrongdoing. It may also mean that the information search is continued until confirming information is found.

2. *Evaluation and Interpretation*

"It is the peculiar and perpetual error of the human understanding to be more moved and excited by affirmatives than negatives."[213]

After obtaining information, even if the search were performed objectively, how then might a director process the information? Not only might directors be more moved, persuaded, and excited by the confirming information, they may also evaluate and interpret confirming and disconfirming information in different ways.[214] Completely unbiased

211. *See* Skov & Sherman, *supra* note 210, at 96 (noting how the framing of a question about loud parties made all respondents seem introverted).

212. GILOVICH, *supra* note 181, at 56 (noting that "[e]very experimental psychologist I know is much more likely to run an additional experiment if the results of an initial study refute a favored hypothesis than if the results support it"); Baumeister & Newman, *supra* note 151, at 4–5; Ditto & Lopez, *supra* note 149, at 570 (using the phrase "asymmetrical quantity of processing"); Peter H. Ditto et al., *Motivated Sensitivity to Preference-Inconsistent Information*, 75 J. PERSONALITY & SOC. PSYCHOL. 53, 54 (1998) ("Information inconsistent with a preferred judgment . . . is more likely to initiate effortful cognitive analysis.").

213. BACON, *supra* note 168, Aphorism 46.

214. *See generally* GAZZANIGA, *supra* note 152, at 122 ("We are a self-concerned interpreter of all incoming information."). An illustration of this self-concerned interpretation is the stereotype threat studies in which Asian women who were reminded that they were Asian before a math test performed better than Asian women who were given the same math test without being reminded of anything, and both groups did better than Asian women reminded that they were women before the math test. *See* Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 83 (1999); Margaret Shih et al., *Stereotype Performance Boosts: The Impact of Self-Relevance and the Manner of Stereotype Activation*, 83 J. PERSONALITY & SOC. PSYCHOL. 638, 638 (2002).

evaluation is unlikely.[215] Researchers have demonstrated the biased evaluation and interpretation of data in favor of the decision maker's existing preferences in numerous contexts.[216]

Balcetis and Dunning provide a recent, simple illustration of the point.[217] In their studies, researchers showed participants a figure that could be seen as either the letter B or the number 13, and participants generally reported that the figure they saw was the figure that rewarded them. The researchers concluded that "participants' desires, hopes, fears, or wishful thinking led them to perceive a representation of the visual environment they desired."[218] Of particular interest, however, was that this bias appeared preconsciously; participants were generally unaware of the alternative interpretation of the figure. Balcetis and Dunning found that "wishful thinking constrains perceptual processes preconsciously, *before* the products of those processes become available to conscious awareness."[219] In other words, participants' self-serving motives influenced their data interpretation without any conscious awareness.

Changes in preference or evaluations that occur after a decision—cognitive dissonance—has long been known as a psychological process.[220] "Dissonance research revealed that not only could people be manipulated into telling lies, insulting other people, and eating grasshoppers, but that they would subsequently change their attitudes to believe the lie that they told, to derogate the victim of their insult, and to develop a liking for the taste of grasshoppers."[221] Thus, a director who votes against continuing a shareholder derivative suit might discount evidence of the CEO's wrongdoing after the vote, or as argued by Bebchuk and Fried, a director who is also a highly compensated executive is "likely to have

215. *See* GAZZANIGA, *supra* note 152, at 137 (observing that "we don't just neutrally add up incoming information").

216. Greitemeyer & Schulz-Hardt, *supra* note 158, at 324 (citing numerous studies); *see also* GAZZANIGA, *supra* note 152, at 135 ("Our brain is adapted for extreme efficiency; for that reason it distorts incoming information to fit in with our current beliefs about the world."); David Dunning et al., *Ambiguity and Self-Evaluation: The Role of Idiosyncratic Trait Definitions in Self-Serving Assessments of Ability*, 57 J. PERSONALITY & SOC. PSYCHOL. 1082, 1089 (1989) (providing evidence of how ambiguous criteria are interpreted in a self-serving manner).

217. *See* Emily Balcetis & David Dunning, *See What You Want to See: Motivational Influences on Visual Perception*, 91 J. PERSONALITY & SOC. PSYCHOL. 612, 615–16 (2006).

218. Balcetis & Dunning, *supra* note 217, at 621.

219. *Id.* at 621 (emphasis added).

220. LEON FESTINGER, CONFLICT, DECISION, AND DISSONANCE 153–58 (1964); *see also* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957). Cognitive dissonance does not, of course, explain initial decision making because of its ex post etiology. For a review of psychological theories of cognitive consistency, see Dan Simon & Keith J. Holyoak, *Structural Dynamics of Cognition: From Consistency Theories to Constraint Satisfaction*, 6 PERSONALITY & SOC. PSYCHOL. REV. 283, 283–86 (2002); Wendy Wood, *Attitude Change: Persuasion and Social Influence*, 51 ANN. REV. PSYCHOL. 539 (2000).

221. Simon & Holyoak, *supra* note 220, at 283 (citations omitted).

formed a belief that such [compensation] arrangements are desirable and serve shareholders."[222]

More recently, however, studies have shown that these changes in preferences or evaluations (or as a psychologist might put it, "the mental representation of the decision environment") can occur *before* the decision has been made.[223] If changes do occur before the decision, then the changes are *playing a causal role* in the resulting decision rather than merely a psychological role afterwards. This process "in which the evidence influences the conclusions and, at the same time, the emerging conclusion affects the evaluation of the evidence" has been termed bidirectional.[224] (By contrast, the normal unidirectional model of decision making involves a process where an objective evaluation of the evidence leads to the conclusion.)[225] For example, a director who thinks it unlikely that the CEO committed any wrongdoing might reweigh or reevaluate information to be consistent with her intuition. Naturally this makes it more likely that the final decision will be that there was no wrongdoing, and thus no lawsuit should proceed. Of course, the decision maker is unaware of these changes, in fact, *must* be unaware of these changes, in order for them to work. This distortion of information has been referred to as a subset of biased predecisional processing: predecisional distortion of information.[226] It is a way of converting ambiguous, often complex information into coherent support for a particular decision.

a. Quantity and Quality of Evidence

The threshold regarding how persuasive evidence must be for accepting or rejecting a hypothesis may differ, depending on whether the hypothesis is desirable or undesirable.[227] Generally, a decision maker will require less, and less useful, information to accept a desirable hy-

222. BEBCHUK & FRIED, *supra* note 107, at 33.

223. *See, e.g.*, Brownstein, *supra* note 191, at 566 (concluding that research demonstrates that biased information processing can occur both before the decision maker commits to a decision or even reaches an internal decision); Keith J. Holyoak & Dan Simon, *Bidirectional Reasoning in Decision Making by Constraint Satisfaction*, 128 J. EXPERIMENTAL PSYCHOL. 3, 4 (1999) ("[T]he pressure to achieve coherence guides the decision-making process itself, rather than simply providing post hoc rationalizations.").

224. Dan Simon et al., *The Redux of Cognitive Consistency Theories: Evidence Judgments by Constraint Satisfaction*, 86 J. PERSONALITY & SOC. PSYCHOL. 814, 814 (2004); *see also* Nickerson, *supra* note 186, at 196 ("Observation and prediction were linked in a circle of mutual confirmation rather than being independent of each other as we would expect according to the conventional idea of an experimental test." (quoting HARRY COLLINS & TREVOR PINCH, THE GOLEM: WHAT EVERYONE SHOULD KNOW ABOUT SCIENCE 45 (1993))).

225. *See* Nickerson, *supra* note 186, at 186; Simon et al., *supra* note 224, at 816.

226. *See* Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 J. EXPERIMENTAL PSYCHOL.: APPLIED 91, 91 (2001); Simon et al., *supra* note 224, at 832.

227. *See* Pyszczynski & Greenberg, *supra* note 165, at 313 (arguing that people will have asymmetrical evidentiary requirements because "people are generally better able to make use of information" that supports the hypothesis); Yaacov Trope & Akiva Liberman, *Social Hypothesis Testing: Cognitive and Motivational Mechanisms*, *in* SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES, *supra* note 169, at 239, 262.

pothesis than to reject it.[228] In other words, the necessary quantity and quality of evidence may be different. This asymmetrical evidentiary requirement may result in biased decision making, in that a desired hypothesis is more likely to be confirmed.[229] For the decision maker, the pleasant feelings generated by accepting a desired hypothesis would help reduce the costs of an incorrect acceptance; likewise, unpleasant feelings created by rejecting a desired hypothesis would increase those costs.[230] It is also worth noting that people may apply different evidentiary thresholds because of varying cognitive processes[231] resulting from prior beliefs and expectancies (rather than due to motivational forces).[232]

The criteria used for decision making may also vary in a self-serving manner.[233] Affected parties will often have self-serving views regarding fair outcomes of disputes.[234]

b. Constructive Information Processing/Inconsistent Weighing

Decision makers will often judge information that supports their hypothesis as more important, valid, and accurate than information counter to their hypothesis.[235] Participants who were motivated to reach a *particular conclusion* likewise weighted supporting information more heavily.[236] Interestingly, participants supported preferred alternatives

228. *See* Pyszczynski & Greenberg, *supra* note 165, at 313.

229. Asymmetrical evidentiary requirements are not per se evidence of bias. As Trope and Liberman note, because there may be different costs associated with accepting or rejecting a desired hypothesis, "symmetry is not the hallmark of objectivity." Trope & Liberman, *supra* note 227, at 264.

230. *Id*.

231. *See supra* notes 159–64 and accompanying text.

232. *See, e.g.*, Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2098 (1979). *See generally* RICHARD E. NISBETT & LEE D. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980).

233. Messick & Sentiss, *supra* note 172, at 70–72 (finding that participants will often apply either equity (rewards allocated in accordance with efforts or performance) or equality (rewards allocated equally) in self-serving ways).

234. Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1341–42 (1995) (finding that in a simulation people's assigned roles affected their view of the fairness of a settlement and their prediction of the magnitude of a judicial award); Kimberly A. Wade-Benzoni et al., *Egocentric Interpretations of Fairness in Asymmetric, Environmental Social Dilemmas: Explaining Harvesting Behavior and the Role of Communication*, 67 ORG. BEHAV. & HUM. DECISION PROCESSES 111, 114 (1996) (finding self-serving biases among participants contributing to overfishing).

235. Ditto & Lopez, *supra* note 149, at 569; Greitemeyer & Schulz-Hardt, *supra* note 158, at 336 (finding "strong and stable biases in favor of the initially preferred alternative"); Russo et al., *supra* note 187, at 13; J. Edward Russo et al., *Predecisional Distortion of Product Information*, 35 J. MARKETING RES. 438, 439 (1998); J. Edward Russo et al., *The Distortion of Information During Decisions*, 66 ORG. BEHAV. & HUM. DECISION PROCESSES 102, 107 (1996).

236. Lindsley G. Boiney et al., *Instrumental Bias in Motivated Reasoning: More When More Is Needed*, 72 ORG. BEHAV. & HUM. DECISION PROCESSES 1, 12–14 (1997); Diekmann et al., *supra* note 74, at 1071–72 (finding that participants weighted criteria differently so as to justify unequal allocations); Messick & Sentiss, *supra* note 172, at 76–79 (observing that participants tend to believe inputs that they provide are more important than others' inputs); *see also* Ziva Kunda, *Motivated Inference: Self-Serving Generation of Causal Theories*, 53 J. PERSONALITY & SOC. PSYCHOL. 636, 640 (1987) (finding that subjects generated self-serving attributions regarding causes of divorce); Leigh Thomp-

more when additional support was necessary for the alternative to be chosen.[237]

Selective weighting occurs even if there is no clear motivation to reach a particular conclusion, perhaps simply because of the motivation to reach *a* conclusion. For example, Holyoak and Simon found that the weight given to legal arguments during the decision-making process increased in the direction that supported the verdict eventually reached.[238] Subjects reported high confidence levels in their verdicts, even though the sample cases were both ambiguous and complex.[239] Furthermore, they found it hard to remember their predecision assessments.[240] As another example, a decision maker will generally give more weight to the input of advisors who most support the decision maker's views.[241] Simon and his colleagues concluded that the "reconstruction of preferences seems to be the natural outcome of the very process of decision making."[242] People do not appear likely to remember or be aware of their reconstruction of preferences.[243]

Irrelevant information or unjustifiable factors may also be used to support a preferred alternative.[244] Various studies have shown that a choice between two alternatives is affected when a third choice, clearly

son & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 ORG. BEHAV. & HUM. DECISION PROCESSES 176, 178–79 (1992).

237. Boiney et al., *supra* note 236, at 12.

238. Dan Simon et al., *The Emergence of Coherence over the Course of Decision Making*, 27 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 1250, 1250 (2001) (finding "that the decision-making process was accompanied by a systematic change in the evaluation of the inferences towards a pattern of coherence with the emerging decision"); *see also* Carlson & Russo, *supra* note 226, at 91–92 (finding distortion of evidence); Lorraine Hope et al., *Understanding Pretrial Publicity: Predecisional Distortion of Evidence by Mock Jurors*, 10 J. EXPERIMENTAL PSYCHOL.: APPLIED 111, 113 (2004) (finding that following exposure to a biased newspaper account of a murder, subjects evaluated the evidence in the trial that was consistent with the pretrial publicity as more persuasive). In a subsequent study Simon and his colleagues found that the legal decision makers' views on the evidence and arguments become consistent with the emerging verdict just from merely thinking about the case, without requiring any overt commitment to the verdict. Simon et al., *supra*, at 1257–58. In these studies, if as seems likely the participants did not have particular motivations to reach one verdict or the other, it indicates the importance of cognitive biases, or alternatively the importance of a coherence motivation. *See also* Dan Simon et al., *Construction of Preferences by Constraint Satisfaction*, 15 PSYCHOL. SCI. 331, 335 (2004) [hereinafter Simon, *Construction*] (finding that as subjects "processed the decision task, their preferences for the attributes of the alternative that was ultimately chosen increased, while their preferences for the attributes of the to-be-rejected choice decreased").

239. Holyoak & Simon, *supra* note 223, at 21–23.

240. *Id.* at 23.

241. Nigel Harvey et al., *Using Advice and Assessing Its Quality*, 81 ORG. BEHAV. & HUM. DECISION PROCESSES 252, 253 (2000).

242. *See* Simon, *Construction*, *supra* note 238, at 335.

243. Holyoak & Simon, *supra* note 223, at 23 (finding "an apparent tendency to believe that whatever one now believes, one has always (to some degree) believed").

244. *See, e.g.*, Christopher K. Hsee, *Elastic Justification: How Tempting but Task-Irrelevant Factors Influence Decisions*, 62 ORG. BEHAV. & HUM. DECISION PROCESSES 330 (1995); Christopher K. Hsee, *Elastic Justification: How Unjustifiable Factors Influence Judgments*, 66 ORG. BEHAV. & HUM. DECISION PROCESSES 122 (1996).

inferior to one of the alternatives, is also presented.[245] The presence of the third alternative gives decision makers an additional reason to choose the alternative to which the third alternative is clearly inferior. The study also showed that people might engage in more biased processing when their desired alternative is less justifiable.[246] Strong evidence in favor of a particular conclusion may also affect the evaluation of the strength of logically unrelated evidence.[247] A recent study even demonstrated that people would distort information in order to support an *inferior* choice.[248]

Finally, numerous studies show that a decision maker, forced to decide between two or more alternatives, will often process the information in a biased way. Decision makers will "spread" their evaluations of alternatives so there is greater differentiation between them.[249] As when an irrelevant factor is used to justify a decision, the decision maker can feel more confident about the quality of the decision.

c. Resistance to Disconfirming Information

Assuming that a decision maker finds information that is inconsistent with his or her preferred conclusion or belief, the information is more likely to be intensively scrutinized and criticized than consistent information.[250] This is part of the "well-documented resistance of opinions against disconfirming evidence."[251]

For example, in a now classic study, experimenters presented subjects with two studies on the deterrent effect of capital punishment.[252] The two studies reached opposite results, using either intra- or inter-state comparisons to support the conclusions.[253] Participants attacked the methodology (i.e., sample size, sample selection, absence of controls) of whichever study failed to support their previous beliefs on capital pun-

245. Itamar Simonson, *Choice Based on Reasons: The Case of Attraction and Compromise Effects*, 16 J. CONSUMER RES. 158, 160–61 (1989).

246. *Id*. at 161.

247. *See* Simon, *Construction*, *supra* note 238, at 335 ("[O]ne piece of strong evidence . . . triggers changes in the evaluation of unrelated attributes . . . .").

248. J. Edward Russo et al., *Choosing an Inferior Alternative*, 17 PSYCHOL. SCI. 899, 899 (2006).

249. Perhaps the simplest explanation of this is Mill's "choice certainty" theory. He argued that because people want to make the best decision, they try to maximize their certainty that they are making the right decision. A wider spread in evaluations helps reassure people that they are making the correct choice. Judson Mills, *Interest in Supporting and Discrepant Information*, *in* THEORIES OF COGNITIVE CONSISTENCY: A SOURCE BOOK 771, 775–76 (Robert P. Abelson et al. eds., 1968).

250. Ditto & Lopez, *supra* note 149, at 581–82; Kari Edwards & Edward E. Smith, *A Disconfirmation Bias in the Evaluation of Arguments*, 71 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1996); Geoffrey D. Munro & Peter H. Ditto, *Biased Assimilation, Attitude Polarization, and Affect in Reaction to Stereotype-Relevant Scientific Information*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 636, 636 (1997); *see also* Jonathan J. Koehler, *The Influence of Prior Beliefs on Scientific Judgments of Evidence Quality*, 56 ORG. BEHAV. & HUM. DECISION PROCESSES 28 (1993).

251. Greitemeyer & Schulz-Hardt, *supra* note 158, at 324.

252. *See* Lord et al., *supra* note 232, at 2100.

253. *Id.*

ishment, but found the supporting study to be sound.[254] The contradictory evidence actually resulted in people being more confident about their initial views.[255] In short, the experimenters found that participants were more critical of scientific research that they would prefer not to believe.[256]

In a more recent illustration, subjects were given a fictional medical test for a "dangerous" enzyme deficiency.[257] Some subjects were told a test strip of paper would turn green if they had the deficiency, while others were told that it would turn green if they did not have the deficiency.[258] Those who tested positive for the deficiency scrutinized the test much more closely, waited longer for the results (here, whether a strip of paper would turn green), and were much more likely to perform multiple tests than those who tested negative.[259] While this response may not be unreasonable, the subjects who tested positive also rated the disease as much more common and much less serious than those who tested negative.[260]

A team of researchers found a neural basis for such differential scrutiny.[261] The study showed that those who strongly supported either 2004 presidential candidate were highly critical of the inconsistent statements the other candidate made, and forgiving of the inconsistent statements their preferred candidate made.[262] These conclusions are consistent with the other research cited here. The study also showed, however, that the parts of the brain normally engaged during reasoning had no increase in activity, whereas those parts linked to emotion and conflict resolution were active.[263] In addition, the brains of people rejecting unwanted information were active in areas associated with rewards and re-

254. *Id.* at 2101–03.

255. *Id.* at 2104.

256. *Id.* at 2106–07. Similar results were found in Tom Pyszczynski et al., *Maintaining Consistency Between Self-Serving Beliefs and Available Data: A Bias in Information Evaluation*, 11 PERSONALITY & SOC. PSYCHOL. BULL. 179, 184–85 (1985). Interestingly, in a subsequent study, when experimenters affirmed subjects' self-worth before they evaluated evidence on capital punishment that was contrary to their beliefs, the subjects were more persuaded by that contrary evidence. *See* Geoffrey L. Cohen et al., *When Beliefs Yield to Evidence: Reducing Biased Evaluations by Affirming the Self*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1151, 1161 (2000). The study suggests that people are motivated to maintain their self-image. *Id.*

257. Ditto & Lopez, *supra* note 149, at 574–76 (experiment two).

258. *Id.*

259. *Id.* at 576.

260. *Id.* at 575–76.

261. *See* Drew Westen et al., *Neural Bases of Motivated Reasoning: An fMRI Study of Emotional Constraints on Partisan Political Judgment in the 2004 U.S. Presidential Election*, 18 J. COGNITIVE NEUROSCIENCE 1947, 1955 (2006) (demonstrating through functional magnetic resonance imaging that the confirmation bias can occur at an unconscious level and is affected by emotions). Because this study was performed only on men, it may not be generalizable to women. *Id.* at 1956. Given, however, that 83 percent of directors are male, it can still shed some light in the corporate context. *See supra* note 105 and accompanying text.

262. Westen et al., *supra* note 261, at 1947–49, 1955.

263. *Id*. at 1955.

lief.[264] The lead researcher concluded, "Essentially, it appears as if partisans twirl the cognitive kaleidoscope until they get the conclusions they want, and then they get massively reinforced for it, with the elimination of negative emotional states and activation of positive ones."[265]

3. Memory

That memory is flawed is no surprise, certainly to anyone over the age of thirty.[266] "The human brain is built in a way that ensures our past memories are faulty."[267] Bartlett noted more than a century ago that memory is "not an exact event burned into the brain with exquisite accuracy," but rather "a social or cultural phenomenon."[268] That memory may involve construction or reconstruction is also likely no surprise.[269] "[I]t is also necessary to *remember* that events happened in the desired manner. And if it is necessary to rearrange one's memories or to tamper with written records, then it is necessary to *forget* that one has done so."[270]

That memory can be flawed in a systematic way, however, is more interesting. Memory, it turns out, can be affected by bias. Researchers have produced three types of data that suggest that motivation biases memory recall. The first type involves participants' spontaneous recall of varying memories and beliefs depending on their motivational goal.[271] For example, participants in simulated contracts negotiations were significantly better at remembering facts supporting their assigned position than facts supporting the other side's position.[272] The second type involves participants responding more quickly when the accessed memories and beliefs supported the desired goal.[273] Finally, participants used different statistical heuristics depending on the desired goal.[274] In general, people are more likely to remember information that supports their views than information that does not.[275]

264. *Id.* at 1956.

265. *See* MSNBC.com, *Political Bias Affects Brain Activity, Study Finds*, http://www.msnbc.msn.com/id/11009379/ (last visited Sept. 30, 2008) (quoting Drew Westen).

266. GAZZANIGA, *supra* note 152, at 127 (finding half of subjects were "substantially wrong in their memory reports" of the 1986 Challenger crash) (citation omitted).

267. *Id.* at 122.

268. *Id.* at 121 (noting that this view has much support).

269. *See id*. at 120 ("[Remembering is] an imaginative reconstruction, or construction, built out of the relation of our attitude towards a whole active mass of past experience." (quoting SIR FREDERIC C. BARTLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY 213 (1932))).

270. Chugh et al., *supra* note 8, at 80 (quoting GEORGE ORWELL, 1984 215 (Harcourt 1949)).

271. *See* Kunda, *supra* note 171, at 493–94 (listing examples of subjects' self-reported behaviors and memories that supported subjects' desired self-concepts, attitudes, or beliefs) (citations omitted).

272. Thompson & Loewenstein, *supra* note 236, at 176.

273. *Id.* (citations omitted).

274. *Id.*

275. *See, e.g.*, Jonathan Baron, *Myside Bias in Thinking About Abortion*, 7 THINKING & REASONING 221, 221 (1995) (reporting that people remember evidence that supports their views more readily than evidence that does not); Kunda, *supra* note 171 (reviewing studies). For a more recent

If a director is motivated in favor of a fellow director or herself, she appears more likely to remember supportive information. If she remembers supportive information, she is more likely to substantiate and rely on that information.

D. Illusion of Objectivity

Even though directors' biases can affect decision making at an unconscious level, it does not follow that there is necessarily a problem. If, for example, directors, acting in good faith, were aware of their biases, they could recuse themselves. Alternatively, if they could control or compensate for their biases, then we could be confident that decisions were made on the business merits rather than other factors.[276]

From a psychological perspective, neither alternative appears likely. Ex ante we generally believe that we can be objective. Ex post we typically believe that we have been objective. Abundant evidence exists, however, to show that we are often wrong. People frequently lack self-knowledge:

> Decision makers . . . have no way of knowing whether their decisions emanate from the biases they have acquired from personal interests instead of from good reasoning . . . . People are incapable of knowing whether they are acting appropriately or out of a conflict of interest. Hence morally objectionable factors such as personal relationships can intrude into official decisions without much possibility of detection.[277]

We tend to think that our decisions are unbiased and our beliefs justified.[278] The U.S. President captured this idea nicely when he said, "I know what I believe and I believe what I believe is right."[279] Pyszczynski

---

study, see Michael J. Marks & R. Chris Fraley, *Confirmation Bias and the Sexual Double Standard*, 54 SEX ROLES 19, 19 (2006), which found that people were more likely to remember information supporting their views of male and female sexuality than information that did not support their views. *See also* Holyoak & Simon, *supra* note 223, at 4 (showing that consistently increasing "shifts in beliefs and attitudes trigger correlated shifts in memory"). *But see* Alice H. Eagly et al., *The Impact of Attitudes on Memory: An Affair to Remember*, 125 PSYCHOL. BULL. 64, 66 (1999) (finding evidence that subjects were just as likely to remember information inconsistent with their personal beliefs as consistent information); Allyson L. Holbrook et al., *Attitude Importance and the Accumulation of Attitude-Relevant Knowledge in Memory*, 88 J. PERSONALITY & SOC. PSYCHOL. 749, 766 (2005) (same).

276. Veronika Denes-Raj & Seymour Epstein, *Conflict Between Intuitive and Rational Processing: When People Behave Against Their Better Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 819, 819 (1994) (arguing that "humans can respond rationally (in the sense of engaging their deliberative, rational system in an objective, unbiased manner) only to the degree to which they are aware of and can therefore compensate for their experientially influenced thoughts and response tendencies").

277. Thagard, *supra* note 92, at 373–74.

278. Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 545 (2004) (referring to the "robust body of literature demonstrating that people have a general tendency to perceive objectivity in their reasoning processes").

279. *See Washington Week with Gwen Ifill* (PBS television broadcast July 27, 2001), *transcript available at* http://www.pbs.org/weta/washingtonweek/transcripts/transcript010727.html (quoting George W. Bush). The aphorism commonly attributed to Mark Twain is equally applicable: "It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so."

and Greenberg referred to this as an "illusion of objectivity."[280] As they put it, "[I]n order to best meet one's needs, people seek to maintain an illusion of objectivity concerning the manner in which their beliefs and inferences are formed."[281]

There are several reasons for this "bias blind spot"[282] or "illusion of objectivity."[283] First, we have a self-enhancement bias: we are generally motivated to view ourselves in a positive light.[284] If we are competent and moral, then we think we should be able to make unbiased decisions.[285] We also tend to think that we are better than others at making such decisions. Second, we think we see the world as it actually is, and those who do not see it the way we do are biased.[286] Third, we believe that we have access to our own decision-making processes, so we know what caused us to reach a particular decision.[287] Each of these reasons may involve some level of self-deception.[288] Finally, some evidence exists that people cannot control their biases, even when they are aware of them.[289]

1. Competence

"And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?"[290]

As the biblical quote suggests, we are often good at perceiving the faults of others, and not as good at perceiving our own.[291] It is often easy

BrainyQuote, *Mark Twain Quotes*, http://www.brainyquote.com/quotes/authors/m/mark_twain.html (last visited Nov. 13, 2008).

280. Pyszczynski & Greenberg, *supra* note 165, at 302 (arguing that when motives influence judgment "they do so in ways that enable one to maintain an *illusion of objectivity* concerning the manner in which these inferences were derived. To maintain such an illusion, the perceiver must control the information that he or she brings to bear on the inference in question.").

281. *Id.* at 317.

282. *See* Pronin et al., *supra* note 14, at 369–70.

283. Pyszczynski & Greenberg, *supra* note 165, at 302.

284. Joachim Krueger & Richard A. Mueller, *Unskilled, Unaware, or Both? The Better-than-Average Heuristic and Statistical Regression Predict Errors in Estimates of Own Performance*, 82 J. PERSONALITY & SOC. PSYCHOL. 180, 186–87 (2002) (finding that self-enhancement bias can benefit the perceiver more often than not); Kerr et al., *supra* note 195, at 687 (noting that people show consistent biases in judgment, stemming in part from self-enhancing motives).

285. Chugh et al., *supra* note 8, at 84 ("In a conflict of interest, competence is often viewed as sufficient for avoiding suboptimal decision-making.").

286. *Id.* at 81.

287. *Id.* at 87–90 (discussing invisible conflicts of interest).

288. *See* Anne E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 225 (2004) ("[Self deception] is common, normal, and accepted as constant and pervasive in individuals' lives. We are creative narrators of stories that tend to allow us to do what we want and that justify what we have done. We believe our stories and thus believe that we are objective about ourselves."); Thagard, *supra* note 92, at 375 ("The reason that people frequently succumb to self-deception is that belief acceptance is determined not just by coherence with other beliefs including the relevant evidence, but also by emotional attachments to personal goals such as maintaining self esteem.").

289. *See infra* Part IV.D.4.

290. Pronin et al., *supra* note 142, at 781 (quoting *Matthew* 7:3 (King James)).

to see how others may be biased,[292] especially after one is informed of cognitive and perceptual biases.[293] (Imagine a lawsuit against you: would you want the plaintiff's friend or someone who receives money from the plaintiff deciding whether the case should proceed?)[294] It is much harder to recognize one's own biases.[295]

The simple fact is "most of us believe that we are capable and impartial decision-makers."[296] In numerous areas of human endeavor more people claim to be above average than is statistically possible, or otherwise overestimate their own abilities.[297] Claims of ethicality (either of not being affected by one's own interests, or being able to make a decision on the merits regardless of them) are no different.[298] Not only are we ca-

291. Pronin et al., *supra* note 142, at 785–88 (reviewing extensive evidence of people's views of others as more likely to be biased than themselves).

292. *See, e.g.*, Diekmann, *supra* note 74, at 1073 (finding that participants believed that other participants would show greater ingroup bias than they would); Joachim I. Krueger, *Enhancement Bias in Descriptions of Self and Others*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 505, 513–15 (1998); Dale T. Miller & Rebecca K. Ratner, *The Disparity Between the Actual and Assumed Power of Self-Interest*, 74 J. PERSONALITY & SOC. PSYCHOL. 53, 60 (1998) (finding that subjects both deny the impact of self-interest on their own decision making and overestimate the impact of self-interest on others).

293. *See* Linda Babcock et al., *supra* note 234, at 1337 (finding that even when informed of cognitive and perceptual biases, most people believe that others have such biases but that they do not); James Friedrich, *On Seeing Oneself as Less Self-Serving than Others: The Ultimate Self-Serving Bias?*, 23 TEACHING OF PSYCHOL. 107, 108–09 (1996) (finding that subjects believe themselves less susceptible to bias than others, even after learning of the better-than-average bias); Pronin et al., *supra* note 14, at 369 (finding that subjects overwhelmingly believed that they were much less likely to have cognitive and motivational biases than the average person, even after researchers described the bias whereby people see themselves as better than average).

294. Fortunately, it appears as though the special litigation context is "the 'only instance in American Jurisprudence where a defendant can free itself from a suit by merely appointing a committee to review the allegations of the complaint.'" Einhorn v. Culea, 612 N.W.2d 78, 91 (Wis. 2000) (quoting Lewis v. Fuqua, 502 A.2d 962, 967 (Del. Ch. 1985)).

295. Trope & Liberman, *supra* note 227, at 264 ("It is difficult to tell whether people—including ourselves—are objective.").

296. *See* Bond et al., *supra* note 154, at 240; *see also* Chugh et al., *supra* note 8, at 84 (noting that "individuals who are paid to make sound decisions are unlikely to doubt their own competence in doing so").

297. *See* Justin Kruger, *Lake Wobegon Be Gone! The "Below-Average Effect" and the Egocentric Nature of Comparative Ability Judgments*, 77 J. PERSONALITY & SOC. PSYCHOL. 221, 221 (1999) (concluding that "most of us appear to believe that we are more athletic, intelligent, organized, ethical, logical, interesting, fair-minded, and healthy—not to mention more attractive—than the average person"); Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCHOL. 1121, 1121 (1999) (reporting on many studies showing that people overestimate their abilities); *see also* Nicholas Epley & David Dunning, *Feeling "Holier than Thou": Are Self-Serving Assessments Produced by Errors in Self- or Social Prediction?*, 79 J. PERSONALITY & SOC. PSYCHOL. 861, 861 (2000) (more virtuous); Michael McCall & Katherine Nattrass, *Carding for the Purchase of Alcohol: I'm Tougher than the Other Clerks Are!*, 31 J. APPLIED SOC. PSYCHOL. 2184, 2184 (2001) (more principled); Don A. Moore et al., *Positive Illusions and Forecasting Errors in Mutual Fund Investment Decisions*, 79 ORG. BEHAV. & HUM. DECISION PROCESSES 95, 110–12 (1999) (investing); Janet Polivy & C. Peter Herman, *If at First You Don't Succeed: False Hopes of Self Change*, 57 AM. PSYCHOLOGIST 677, 677 (2002) (overestimates of one's own performance).

298. *See* W.B.G. Liebrand et al., *Why We Are Fairer than Others: A Cross-Cultural Replication and Extension*, 22 J. EXPERIMENTAL SOC. PSYCHOL. 590, 591 (1986); David M. Messick et al., *Why We Are Fairer than Others*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 480, 481 (1985).

pable and impartial, we are more capable and impartial than others.[299] Similarly, we also believe ourselves to be less biased by irrelevant or inappropriate information than our peers.[300]

Dolly Chugh and colleagues develop this idea:

> Ethical decisions are biased by a stubborn view of oneself as moral, competent, and deserving, and thus, not susceptible to conflicts of interest. To the self, a view of morality ensures that the decision maker resists temptations for unfair gain [and] a view of competence ensures that the decision maker qualifies for the role at hand . . . .[301]

2. *Naïve Realism*

Reasonable people accept that their decisions are suspect if they were based on biased information searches or biased evaluation of the evidence. Typically, however, people are confident in their own decisions.[302] People are "naïve realists" who tend not to "fully appreciate the subjective status of their own construals."[303] The naïve realism illusion results from "the individual's conviction that he or she perceives reality objectively and that reality will be similarly perceived by those who share that objectivity."[304] We are the objective reasonable person, "privy to an invariant, knowable, objective reality," and others would see this too, if only they were not self-interested or otherwise biased.[305] When others have a different point of view, such as whether a derivative suit should go

299. Moore & Loewenstein, *supra* note 98, at 195–96 (explaining that people like to believe not only that they are better than they actually are but also better than others); Pronin & Kugler, *supra* note 136, at 576 (showing that participants were "overly prone to deny their own bias").

300. Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 125 (1994).

301. Chugh et al., *supra* note 8, at 84.

302. *See, e.g.*, Holyoak & Simon, *supra* note 223, at 21 (reporting that participants showed a great deal of confidence in their verdict for a simulated case despite the ambiguity of the case); Russo et al., *supra* note 248, at 903 (finding that decision makers were equally confident in their choices regardless of whether they chose the inferior or superior option).

303. Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: "Naïve Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 404 (1995) (finding that both pro-choice and pro-life subjects believed that the other side's beliefs and assumptions were shaped more by political ideology and less by objective or rational concerns than their own views and assumptions). Naïve realism also implies that people fail to allow for the subjective construal of others when judging a person's behavior as well. *Id.* (referring to the "blindness to intersubjective differences in construal").

304. *Id.* at 413.

305. *Id.* at 405; *see also* Justin Kruger & Thomas Gilovich, "*Naive Cynicism" in Everyday Theories of Responsibility Assessment: On Biased Assumptions of Bias*, 76 J. PERSONALITY & SOC. PSYCHOL. 743, 743–44 (1999). We also think we have better interpersonal knowledge about others than they have about us. *See* Emily Pronin et al., *You Don't Know Me, but I Know You: The Illusion of Asymmetric Insight*, 81 J. PERSONALITY & SOC. PSYCHOL. 639, 650–52 (2001). We may even think that we not only know ourselves better than others do, but better than our peers know themselves. *Id.* at 645.

forward, it is those others who are not only mistaken, but often biased as well.[306]

3. Introspection

Not surprisingly, people generally believe that their decisions result from conscious thought, or alternatively, that simply thinking about why one made a decision will uncover the reasons.[307] After all, we have extensive, privileged access to our own conscious thoughts, emotions, and motives. We also tend to weigh our own introspective evaluations more highly in evaluating bias than the introspections of others.[308] Researchers, however, have demonstrated this privileged access can lead our judgments astray in many situations,[309] including whether our judgments were biased.[310]

In fact, people do not necessarily know why they have reached a particular decision.[311] As described above, decisions can result from unconscious mental processes. Not only are people unaware of these processes, but our conscious access to them is very limited.[312] The mind can be thought of as a wizard, producing appearances that do not necessarily reflect underlying reality.[313] "[Though the mind] leads us to think that it

---

306. *See, e.g.*, Geoffrey L. Cohen, *Party over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCHOL. 808 (2003); Cynthia M. Frantz, *I Am Being Fair: The Bias Blind Spot as a Stumbling Block to Seeing Both Sides*, 28 BASIC & APPLIED SOC. PSYCHOL. 157 (2006); Pronin et al., *supra* note 305, at 640 (arguing that we perceive bias in others partly because of naïve realism); Glenn D. Reeder et al., *On Attributing Negative Motives to Others Who Disagree with Our Opinions*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1498 (2005).

307. For a general discussion of this point, see Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 229–35 (2005).

308. Pronin & Kugler, *supra* note 136, at 575–76.

309. Daniel T. Gilbert et al., *The Peculiar Longevity of Things Not So Bad*, 15 PSYCHOL. SCI. 14, 16–18 (2004) (emotions); Justin Kruger & Thomas Gilovich, *Actions, Intentions, and Self Assessment: The Road to Self-Enhancement Is Paved with Good Intentions*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 328, 334 (2004) (future behavior); Emily Pronin et al., *Everyday Magical Powers: The Role of Apparent Causation in the Overestimation of Personal Influence*, 91 J. PERSONALITY & SOC. PSYCHOL. 218, 220 (2006) (causation); Daniel M. Wegner et al., *Vicarious Agency: Experiencing Control over the Movements of Others*, 86 J. PERSONALITY & SOC. PSYCHOL. 838, 839–40 (2004) (causation); Timothy D. Wilson & Elizabeth W. Dunn, *Self-Knowledge: Its Limits, Value and Potential for Improvement*, 55 ANN. REV. PSYCHOL. 493, 502–03 (2004) (attitudes); Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 345, 347–49 (2003) (emotions).

310. *See* Joyce Ehrlinger et al., *Peering into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 680, 681, 683, 689–90 (2005); Kruger & Dunning, *supra* note 297, at 1121 (arguing that subjects overestimated their performance relative to others because they lacked insight into their weaknesses); Pronin et al., *supra* note 142, at 794; Pronin & Kugler, *supra* note 136, at 572–73.

311. *See, e.g.*, GAZZANIGA, *supra* note 152, at 161 ("We quickly lose insight into [our beliefs'] origins or their frequent strangeness and hold them to be meaningful, guiding presences in our lives.").

312. *See* Balcetis & Dunning, *supra* note 217, at 623 (finding that people fail to recognize certain self-serving biases because they take place outside conscious awareness).

313. *See* DANIEL M. WEGNER, THE ILLUSION OF CONSCIOUS WILL 28 (2002).

causes its own actions . . . it really doesn't *know* what causes its own actions."[314]

Frequently (and inevitably), we are ignorant of the mental processes that led to a particular result.[315] There is, however, ample evidence that factors we either cannot or will not recognize affect the decisions we reach.[316] Decision making in conflict of interest situations may result not from conscious reasoning but instead as a post hoc rationalization.[317] More than thirty years ago, Paul Slovic and colleagues demonstrated in an experimental setting that stockbrokers frequently failed to understand how they reached their investment decisions.[318]

A more prosaic example dates back more than seventy years. Researchers hung two ropes from a ceiling at greater than arms-width.[319] The problem was to attach the two ropes together. Most participants did not think of swinging a rope as a way to bring them close enough together until a researcher "accidentally" brushed against one of the ropes thereby setting it in motion.[320] Subjects, however, failed to recognize what had cued them towards that solution. Rather, they invented other explanations.[321]

Part of the difficulty is termed "source confusion": "the inability to recognize the exact contribution of all of the influences on one's judgments."[322] People make decisions based on numerous sources of information but have difficulty determining what information led to their

314. *Id.*; *see also* BENEDICTUS DE SPINOZA, ETHICS 144 (G.H.R. Parkinson ed. & trans., 2000) (1677) (claiming that "opinion . . . consists simply in the fact that they are conscious of their actions and ignorant of the causes by which those actions are determined"). Spinoza's observation is reflected in everyday notions of folk psychology. Thagard, *supra* note 92, at 379 (observing that "[f]olk psychology [assumes] that people's actions derive from their conscious beliefs and actions"). Folk psychology is defined as the "common-sense conceptual framework that we, as human beings, employ to understand, predict, and explain the behavior of other humans and higher animals." Dictionary of Philosophy of Mind, http://philosophy.uwaterloo.ca/MindDict/folkpsychology.html (last visited Nov. 14, 2008).

315. Tenbrunsel & Messick, *supra* note 288, at 225 (arguing that self-deception, "defined as being unaware of the processes that lead us to form our opinions and judgments," results in unethical decision making).

316. *See* Bond et al., *supra* note 154, at 240 ("[A]n abundant body of research has shown that our decisions are affected by a variety of factors that we are unable or unwilling to recognize."); Thagard, *supra* note 92, at 374 ("People naturally have personal goals that may conflict with their professional responsibilities, but lack a mental mechanism to detect such divergences . . . . Hence people usually remain unaware that they are acting immorally as the result of a conflict of interest.").

317. Haidt, *supra* note 151, at 814 (suggesting that "moral reasoning does not cause moral judgment; rather, moral reasoning is usually a post-hoc construction, generated after a judgment has been reached").

318. Paul D. Slovic et al., *Analyzing the Use of Information in Investment Decision Making: A Methodological Proposal*, 45 J. BUS. 283, 300 (1972).

319. Norman R.F. Maier, *Reasoning in Humans: II. The Solution of a Problem and Its Appearance in Consciousness*, 12 J. COMP. PSYCHOL. 181, 182 (1931).

320. *Id.* at 183.

321. *Id.* at 186.

322. Wilson & Brekke, *supra* note 300, at 129.

overall judgment.[323] One example of this is the halo effect, whereby a decision maker's judgment of a person's performance is affected by his liking of the person.[324] Another example, recognized by the courts, involves police lineups.[325] Eye-witnesses must not be shown photographs of suspects before a lineup in case they confuse seeing the photograph with seeing the perpetrator.[326]

In short, directors acting in good faith will know that they intended to be unbiased and did not feel any influences of bias; therefore, they conclude there was no bias. Even though we think we are processing information objectively, frequently we are just unaware of how our information processing actually is biased.[327]

4. Weak Control

Biases and biased information processing would matter much less if, as people tend to think, we could control our biases. There is evidence, however, that we cannot control them. People not only "underestimate their own susceptibility to bias" but also "overestimate the extent to which they can control their judgments."[328]

Wilson and Brekke refer to a judgment where the decision maker is influenced in an undesired way "because of mental processing that is unconscious or uncontrollable" as "mental contamination."[329] For example, researchers have shown that information affects people's judgment, even when they know the information should not be used or is inaccurate.[330]

---

323. Richard E. Nisbett & Timothy D. Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 233 (1977); *see also* Timothy D. Wilson et al., *Introspection, Attitude Change, and Attitude-Behavior Consistency: The Disruptive Effects of Explaining Why We Feel the Way We Do*, *in* 19 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 123 (Leonard Berkowitz ed., 1986).

324. Richard E. Nisbett & Timothy DeCamp Wilson, *The Halo Effect: Evidence for Unconscious Alteration of Judgments*, 35 J. PERSONALITY & SOC. PSYCHOL. 250, 250 (1977).

325. *See, e.g.*, Simmons v. United States, 390 U.S. 377, 382–83 (1968).

326. *See* Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 610, 612 (1998).

327. Ap Dijksterhuis & Loran F. Nordgren, *A Theory of Unconscious Thought*, 1 PERSP. ON PSYCHOL. SCI. 95, 98 (2006) ("It may feel as if one is processing information with the goal of making a decision when what one really—unknowingly—is doing is processing information with the goal of confirming an expectancy.").

328. Wilson & Brekke, *supra* note 300, at 126.

329. *Id.* at 119.

330. Colin Camerer et al., *The Curse of Knowledge in Economic Settings: An Experimental Analysis*, 97 J. POL. ECON. 1232, 1232 (1989); Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880, 880, 891 (1975) (finding that subjects continued to use information even when told expressly that the information was inaccurate); Daniel M. Wegner et al., *The Transparency of Denial: Briefing in the Debriefing Paradigm*, 49 J. PERSONALITY & SOC. PSYCHOL. 338, 344 (1985) (same); Robert S. Wyer, Jr. & Thomas Lee Budesheim, *Person Memory and Judgments: The Impact of Information that One Is Told to Disregard*, 53 J. PERSONALITY & SOC. PSYCHOL. 14, 14, 28 (1987) (same); Robert S. Wyer, Jr. & William H. Unverzagt, *Effects of Instructions to Disregard Information on Its Subsequent Recall and Use in Making Judgments*, 48 J. PERSONALITY & SOC. PSYCHOL. 533, 533 (1985) (same). *See generally* Wilson & Brekke, *supra* note 300.

"Anchoring" is a well known illustration of this predecision bias. People will often "make estimates by starting from an initial value that is adjusted to yield the final answer."[331] We are drawn toward numbers previously listed, even when we consciously know these numbers are irrelevant or absurd, and then our adjustments are frequently inadequate. For example, students provided higher estimates of textbook prices if they were first asked whether the average textbook price exceeded $7,128.53,[332] and participants estimated a higher average annual temperature in San Francisco if they were first asked whether the temperature exceeded 558 degrees.[333]

In another study, although subjects reported they would not want gender to influence their hiring decision, they also overwhelmingly indicated that they would want to know the gender of an applicant.[334] Notwithstanding subjects' intentions, knowing the gender of the applicant then biased the decision making.[335]

Another experiment showed that subjects asked to choose information categorized as either uncertain, true, or false, deliberately chose information from each category, presumably acting under the assumption that they would be able to keep the different types of information clear in their minds.[336] People, however, could not always retain these clear distinctions.[337] Overall, Wilson and Brekke are "rather pessimistic" that mental contamination can be avoided or corrected.[338]

E. Limitations

Notwithstanding the vast body of research on unconscious processes, only some of which is analyzed above, it is worth re-emphasizing a limitation. Most importantly, we do not have the unfettered ability to arrive at our desired conclusions. People are not "at liberty to conclude

331. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128 (1974).

332. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 788–89 (2001) (citing an unpublished study described in SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 146 (1993)).

333. *Id.*

334. Wilson & Brekke, *supra* note 300, at 125–26.

335. *Id.* In the judicial context, the rules of evidence provide that juries may not hear certain kinds of information in part so that they will not be prejudiced unfairly.

336. *Id.* at 128 (citing Daniel M. Wegner et al., *From Here to Uncertainty: Selective Exposure to Misleading Information*, Paper Presented at the 100th Annual Convention of the American Psychological Association (Aug. 1992)).

337. *See* Norbert Schwarz et al., *Metacognitive Experiences and the Intricacies of Setting People Straight: Implications for Debiasing and Public Information Campaigns*, 39 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 127, 147–52 (2007) (describing studies showing that familiar statements are more likely to be believed, even when the familiar statements are incorrect).

338. Wilson & Brekke, *supra* note 300, at 120. Wilson & Brekke list a series of steps that must occur in order to correct an unwanted bias. The decision maker must be aware of the unwanted mental processing and able to adjust the response. *Id.* at 119. "People are unaware of many of their cognitive processes, mental contamination often has no observable 'symptoms,' and people have limited control over their cognitive processes." *Id.* at 122.

whatever they want to conclude merely because they want to."[339] Rather, our decisions must be supportable at some level.[340] If no reasonable person could reach our desired conclusion, it is much less likely that we will be able to reach it. We can, in fact, only be "unreasonable within reason."[341]

Thus, if a decision is truly clear-cut, a board appears likely to do the right thing, regardless of preferences otherwise. Most decisions, however, especially those that are more complex, will be more ambiguous.[342] Directors with a preferred conclusion, whether or not they are consciously aware of it, are likely to be able to find at least some support for their conclusion.

V. POSSIBLE SOLUTIONS

If it is true that "parties with an interest in viewing data in a certain light are not *capable* of independent and objective judgment,"[343] the question remains, how should this be solved? One might argue that an involved collegial board is better than the alternatives and thus nothing should be done.[344] Or similarly, that the American model of corporate governance has yielded unprecedented prosperity and thus should not be changed.[345] After all, it is only in a relatively few areas that significant director shareholder conflicts of interest are likely. But just because something is good does not mean that it cannot be made better. It does, however, suggest that caution is appropriate.

If a problem is a lack of conscious awareness, as examples including doctors, lawyers, investment bankers, and accounting firms suggest,[346] the

339. Kunda, *supra* note 171, at 482–83.

340. *Id.* at 483 ("The biasing role of goals is thus constrained by one's ability to construct a justification for the desired conclusion: People will come to believe what they want to believe only to the extent that reason permits. Often they will be forced to acknowledge and accept undesirable conclusions, as they appear to when confronted with strong arguments for undesired or counterattitudinal positions.") (citation omitted).

341. Ronald Chen & Jan Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1203 (2004).

342. *See, e.g.*, Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1022 (Del. Ch. 2004) ("[T]he most interesting corporate law cases involve the color gray, with contending parties dueling over close questions of law, in circumstances when it is possible for each of the contestants to claim she was acting in good faith.").

343. Max H. Bazerman & Deepak Malhotra, *Economics Wins, Psychology Loses, and Society Pays*, *in* SOCIAL PSYCHOLOGY AND ECONOMICS 263, 267 (David De Cremer et al. eds., 2006) (emphasis added) (citing to Moore et al., *supra* note 174).

344. *See supra* notes 65–70 and accompanying text.

345. *See, e.g.*, Martin Lipton & Paul K. Rowe, *The Inconvenient Truth About Corporate Governance: Some Thoughts on Vice-Chancellor Strine's Essay*, 33 J. CORP. L. 63, 63 (2007) (arguing that the "director-centric governance system has created the most successful economy the world has ever seen").

346. *See* sources cited *supra* note 174; *see also* MAX H. BAZERMAN & MICHAEL D. WATKINS, PREDICTABLE SURPRISES: THE DISASTERS YOU SHOULD HAVE SEEN COMING AND HOW TO PREVENT THEM (2004) (arguing that recent financial scandals were caused in significant part by auditors' lack of independence).

solution cannot be based on conscious cost-benefit analysis. Thus, the problem, contrary to the view of the Delaware courts,[347] cannot be solved based on the reputation impact, the threat of civil or criminal prosecution, or any other measure intended to alter the decision maker's perceived cost-benefit function. Quite simply, "[p]enalties for unethical behavior are not enough if people do not know they are acting unethically."[348] Rather, if bias affects a decision, even when it is not desired by the decision maker, solutions must address "the psychological aspects of the conflict."[349]

Broadly speaking, there are several different approaches. In the next Sections, the Article briefly highlights potential solutions[350] that could be implemented based on changes in the law, changes in the decision maker, or more modestly, changes in decision-making procedures.[351]

A. Increased Judicial Scrutiny

There are several potential legal responses to the problem of the nonindependent director. Perhaps the most obvious of these is a more searching scrutiny of independence.

A well-respected judge, Vice Chancellor Leo Strine of the Delaware Chancery Court, addressed the independence of the two directors serving on an SLC for Oracle Corporation.[352] *In re Oracle* involved derivative suits alleging insider trading by several of Oracle's executives and a breach of the remaining directors' duty of care.[353]

The board chose for the SLC two recently recruited directors, professors at Stanford University, who had not been members of the board during the period at issue.[354] Neither professor had been specially compensated by Oracle, nor did either professor, in their personal view or the view of the board, possess any "material ties" with Oracle or any of the defendants.[355] The two professors hired independent advisors, con-

347. *See supra* note 57.

348. Bazerman & Malhotra, *supra* note 343, at 268 (arguing that an auditor can be truly independent only if he has no motivation at all to please the client).

349. *Id.*; *see also* Tenbrunsel & Messick, *supra* note 288, at 223 (arguing that the most promising explanation of and remedy for questionable corporate practices are "the psychological processes behind unethical decision making").

350. A subsequent article will explore in-depth how boards of directors in some situations could and should alter their decision-making and deliberation processes to better ensure unbiased decisions and to more clearly satisfy the duty of loyalty.

351. There are numerous proposals for corporate governance reform. *See generally* Ira M. Millstein & Paul W. MacAvoy, *Proposals for Reform of Corporate Governance*, *in* THE RECURRENT CRISIS IN CORPORATE GOVERNANCE 95, 119 (2003). The following merely addresses those most relevant to the problem of unconscious bias discussed here.

352. *In re* Oracle Corp. Derivative Litig., 824 A.2d 917, 920 (Del. Ch. 2003).

353. *Id.* at 922–23.

354. *Id.* at 923–24.

355. *Id.* at 929.

ducted an extensive investigation, produced a 1,110-page report, and concluded there had been no wrongdoing.[356]

Plaintiffs challenged the SLC's independence on the grounds that several of the defendants had ties to Stanford University.[357] Notwithstanding these ties, the court acknowledged that neither professor was financially compromised or was at risk of any job action.[358] Further, the court accepted that there was nothing in the record to suggest that either SLC member "acted out of any *conscious desire* . . . to do anything other than discharge their duties with fidelity" or was "dominated and controlled by any of the [other defendants], by Oracle, or even by Stanford."[359]

Nonetheless, Vice Chancellor Strine found that the SLC directors were not independent, due to "what academics might call the 'thickness' of the social and institutional connections among" the SLC members and the other parties.[360] The judge believed that "an emphasis on 'domination and control' would . . . denud[e] the independence inquiry of its intellectual integrity."[361] Instead, the judge chose to apply his own standard: "'At bottom, the question of independence turns on whether a director is, *for any substantial reason*, incapable of making a decision with only the best interests of the corporation in mind.'"[362] Even though the SLC members were neither dominated nor controlled, there was "too much vivid Stanford Cardinal red," or potential collegiality and loyalty, creating too great a risk of bias.[363]

In re Oracle broke new ground, in that previously any director with the sorts of ties that the Oracle SLC members had would have been found independent. Professional affiliations and (extremely) indirect financial ties had never before been sufficient to find a director not independent.[364] Specifically, Strine went beyond the traditional standard that director independence equals financial disinterest, and instead put some teeth into the touchstone phrase "extraneous considerations or influences."[365] Put somewhat differently, Strine recognized that people may be improperly moved by more than just money and close family ties and may be unable to control or counteract those influences.[366]

356. *Id.* at 926–27.

357. One or more of the defendants had made donations to Stanford, held Stanford degrees, or was a professor at Stanford. In addition, two directors and one of the SLC directors were involved with the Stanford Institute for Economic Policy Research. *Id.* at 930–36.

358. *Id.* at 930.

359. *Id.* at 937, 947 (emphasis added).

360. *Id.* at 936.

361. *Id.* at 937.

362. *Id.* at 938 (quoting Parfi Holding AB v. Mirror Image Internet, 794 A.2d 1211, 1232 (Del. Ch. 2001)).

363. *Id.* at 947.

364. Strine conceded that the result was "in tension with the specific outcomes of certain other decisions." *Id.* at 939 n.55.

365. *See supra* notes 37–51 and accompanying text.

366. *Oracle*, 824 A.2d at 939 n.55.

This more stringent approach to independence had been foreshadowed by a report on Enron prepared by a United States Senate subcommittee.[367] This report had concluded that a lack of board independence was in fact one of the causes of the Enron bankruptcy, even though Enron had a majority of "independent" directors based on the traditional definition.[368] The report noted in detail the indirect financial ties between Enron and a majority of the outside directors, which included similar ties to those listed in *In re Oracle*.[369] The report noted that "a number of corporate governance experts . . . identified these [and other] financial ties as contributing to the Enron board's lack of independence and reluctance to challenge Enron management."[370]

An alternative legal approach to a more stringent definition of an independent director would be to impose a more searching standard of review in those situations that are most vulnerable to conflicts of interest.[371] *Unocal* is just such an intermediate standard applied to a board's defensive measures to reduce the likelihood of a takeover.[372] The court reasoned that in the takeover context there was "the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders," justifying a higher standard.[373] *Unocal*'s effectiveness is questionable, however, judging from the Delaware Supreme Court's decisions. To date, in more than twenty years, only one case, *Omnicare, Inc. v. NCS Healthcare, Inc.*,[374] found a

367. *See* ENRON REPORT, *supra* note 115, at 54; *see also* Rachel A. Fink, *Social Ties in the Boardroom: Changing the Definition of Director Independence to Eliminate "Rubber-Stamping" Boards*, 79 S. CAL. L. REV. 455, 491–94 (2006) (proposing firms be required to hire board-rating agencies to evaluate the social ties among directors and that those whose ties are too strong should be ineligible to serve as independent directors).

368. *See* ENRON REPORT, *supra* note 115, at 54.

369. Ties between Enron and its independent directors included generous donations to the Anderson Cancer Center, for which two board members had served as president; to George Mason University, the employer of another board member; and to the American Council for Capital Formation, a nonprofit corporation chaired by a fourth director. *See id.* at 55–56.

370. *Id.* at 56.

371. *See* James D. Cox, *Searching for the Corporation's Voice in Derivative Suit Litigation: A Critique of Zapata and the ALI Project*, 1982 DUKE L.J. 959, 1008 (arguing in favor of more active judicial review); Claire A. Hill & Brett H. McDonnell, *Disney, Good Faith, and Structural Bias*, 32 J. CORP. L. 833, 834 (2007) (proposing an extension of the doctrine of good faith when the challenged decision occurred "within an environment of structural bias"); Velasco, *supra* note 70, at 860–65 (arguing in favor of an intermediate standard of review between the deferential business judgment rule and the entire fairness standard for director decisions in areas where structural bias is most likely to have an impact).

372. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954–55 (Del. 1985) (holding that to sustain anti-takeover measures, "directors must show that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed" and that the measures adopted were "reasonable in relation to the threat posed"). *Blasius* applies an even higher standard analogous to strict scrutiny in situations where the directors have acted with the primary motive of interfering with the shareholder franchise—a situation likely to pose a conflict of interest. *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 661 (Del. Ch. 1988).

373. *Unocal*, 493 A.2d at 954.

374. 818 A.2d 914 (Del. 2003).

violation of *Unocal*, and that case involved very unusual facts.[375] In addition, *Omnicare* has faced unusually harsh criticism.[376]

Increasing judicial scrutiny, however, is not necessarily a panacea.[377] It has costs. First, "it is easier to accuse someone of bias then [sic] to actually establish that a judgment is in fact biased."[378] In addition, "it is always possible that the bias lies in the accuser rather than (or in addition to) the accused."[379] Judge Posner observed that judicial review of corporate decisions "makes directors overcautious, makes people reluctant to serve as directors, drives up directors' fees and officers' and directors' liability insurance rates, and leads boards of directors to adopt ponderous, court-like procedures."[380]

B. Different Decision Makers

If serving on a board inherently creates the risk of a biased decision maker, then changing the decision maker remains a possible solution. The corporation's shareholders are an obvious candidate. Currently, shareholders have the right to vote on matters like the election of directors and the appointment of auditors, but have little real power.[381] Bebchuk and Fried argue in favor of allowing more shareholder participation in the election of directors and in executive compensation.[382] For example, the "say-on-pay" initiative, if enacted, would allow shareholders a mandatory, albeit nonbinding, vote on executive compensation.[383] Thompson and Thomas suggest a variation on this alternative with their proposal that 1 percent or greater shareholders should be permitted to bring derivative litigation without first making demand on the board.[384]

375. *Id.* at 946 (Veasey, C.J., dissenting) (describing the case as "sui generis" and the facts as "unique").

376. *See, e.g.*, *In re* Toys "R" Us, Inc., 877 A.2d 975, 1016 n.68 (Del. Ch. 2005) (referring to *Omnicare* as "aberrational"); David Marcus, *Man of Steele*, D&O ADVISOR, Sept. 2004, at 16, 16 (quoting Delaware Supreme Court Chief Justice Steele suggesting that *Omnicare* might have the "life expectancy of a fruit fly").

377. *See, e.g.*, Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 107–09, 117–24 (2004) (describing problems with judicial review of directors' decisions).

378. MacCoun, *supra* note 137, at 263.

379. *Id.* Naïve realism, for example, discussed *supra* in Part IV.D.2, may "lead people to treat the viewpoints held and expressed by those who disagree with them about important . . . issues as evidence of subjective bias on the part of those opponents, bias not only in proceeding from evidence to conclusions but also in construing the evidence itself." Robinson, *supra* note 303, at 415.

380. Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 256 (7th Cir. 1986).

381. *See generally* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 732 (2007) (arguing that "[t]he shareholder franchise is largely a myth"). Target shareholders also have the right to vote on mergers, but only after the board has endorsed the transaction. *See, e.g.*, MODEL BUS. CORP. ACT § 11.04(6) (2008); DEL. CODE ANN. tit. 8, § 251(c) (2001).

382. *See* BEBCHUK & FRIED, *supra* note 107, at 210.

383. *See* Shareholder Vote on Executive Compensation Act, H.R. 1257, 110th Cong. (2007).

384. Thompson & Thomas, *supra* note 147, at 1790.

Another potential solution would be to appoint an independent specialist or specialists to make decisions in specified areas.[385] An obvious issue is that the specialist will not have the same level of company-specific information and expertise as the company's board, thus this solution appears inappropriate in contexts such as mergers and acquisitions.[386] It may, however, be possible to reduce this concern by ensuring that the specialist has independent sources of information.[387] The risk that an independent expert might be co-opted also exists. Arguably compensation consultants are an example of experts who have been co-opted, given that they invariably recommend substantial pay packages and provide cover for a board to approve them.[388]

Some academics have supported this notion of an independent specialist for derivative suit litigation. An expert may well be capable of judging the costs and benefits of the litigation. Seligman persuasively argues that a "disinterested person" should evaluate whether a lawsuit should proceed.[389] The advantages of this procedure may include "reduction of litigation costs, increased procedural fairness, and greater protection of shareholders."[390]

C. Different Processes

Even absent a change in laws or decision makers, boards could still improve their decision-making processes.[391] Such changes would have the added effect of improving the likelihood of a board's decision surviv-

385. Lynne Dallas has suggested creating a second board composed solely of independent directors that would perform conflicts monitoring. *See* Lynne L. Dallas, *Proposals for Reform of Corporate Boards of Directors: The Dual Board and Board Ombudsperson*, 54 WASH. & LEE L. REV. 91, 114 (2007); *see also* Millstein & MacAvoy, *supra* note 351, at 118 (arguing that an independent director rather than the company's CEO should serve as chair of the board in order to develop independent board leadership).

386. On the other hand, in some situations, an independent specialist might work well. For example, in an internal investigation typically a board uses in-house counsel or hires an outside law firm. As long as the company is not a client of the law firm that it hires, the risk of bias is reduced. There is, of course, a high risk of a biased investigation if the company is a significant client. *See, e.g.*, *In re* Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 668 n.103 (S.D. Tex. 2002). This approach is also reflected in the requirement that SLCs should hire their own legal and financial experts rather than use the company's.

387. *See* Dallas, *supra* note 119, at 130–37 (proposing the establishment of an ombudsperson as a source of information for independent decision makers); *see also* James D. Cox, *Managing and Monitoring Conflicts of Interest: Empowering the Outside Directors with Independent Counsel*, 48 VILL. L. REV. 1077, 1082 (2003).

388. *See* Lucian Arye Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 789–91 (2002) ("[M]anagers use compensation consultants primarily to justify executive pay, rather than to optimize it.").

389. See Joel Seligman, *The Disinterested Person: An Alternative Approach to Shareholder Derivative Litigation*, 55 LAW & CONTEMP. PROBS. 357, 362–65 (1992).

390. *Id.* at 358.

391. *See* MacCoun, *supra* note 137, at 275 (listing several debiasing techniques but noting "that none of these techniques provides 'silver bullet' solutions"); Thagard, *supra* note 92, at 378 (claiming that in situations where conflicts of interest are unavoidable, several strategies "may combine to reduce the prevalence of immoral decisions deriving from conflicts of interest").

ing attack under the business judgment rule or *Unocal*, because both depend in part on the reasonableness of the investigation.[392] Improvements in process would also increase the perceived fairness of the results.[393]

First, boards and courts should recognize the potential impact and presence of bias on the decision-making process.[394] If people were aware of decision-making research they might be less confident in their decisions and might generate questions that could lead to better decisions.[395] Admittedly, this approach in laboratory studies has had only limited success,[396] but it also has not been harmful.

Second, there are several decision-making strategies that may reduce the impact of unconscious bias. These approaches include dividing the task into first an information search and then a decision section;[397] requiring decision makers to justify their information choices;[398] appointing a director as "devil's advocate," thereby ensuring opposing arguments are given at least somewhat more consideration;[399] and deliber-

392. *See, e.g.*, Unocal v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (requiring that directors show "reasonable investigation"); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (requiring that directors inform themselves "of all material information reasonably available to them").

393. *See* Kees van den Bos et al., *When Do We Need Procedural Fairness? The Role of Trust in Authority*, 75 J. PERSONALITY & SOC. PSYCHOL. 1449, 1449 (1998) (noting that "perceived procedural fairness positively affects how people react to the outcomes they receive from authorities" and is "one of the most frequently replicated findings" in social psychology).

394. *See* Tenbrunsel & Messick, *supra* note 288, at 226 (noting that "we need to acknowledge the pervasiveness of self-deception and its role in unethical decision making"). Jerome Frank captured this notion for judicial bias: "The conscientious judge will, as far as possible, make himself aware of his biases . . . and, by that very self-knowledge, nullify their effect. . . . [T]he sunlight of awareness has an antiseptic effect on prejudices." Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 1331, 1369 (2003) (quoting *In re* J.P. Linahan, Inc., 138 F.2d 650, 652–53 (2d Cir. 1943) (Frank, J.)). Frank was also aware of the risks: "[O]ne of the subtlest tendencies which a conscientious judge must learn to overcome is that of 'leaning over backwards' in favor of persons against whom his prejudices incline him. . . . [S]ome men . . . have been unjust in their efforts to exclude bias . . . ." *Id.*

395. *See* Pronin & Kugler, *supra* note 136, at 576 (demonstrating that explaining the shortcomings of introspection reduced participants' confidence in their objectivity); Thagard, *supra* note 92, at 367–79. One problem is that the kind of process evidence presented here is not the best kind to persuade decision makers to change. *See* Bazerman & Malhotra, *supra* note 343, at 274–76. Frequently decision makers have the view that "credible empirical evidence consists of outcome data, not of mechanism data." *Id.* at 274.

396. *See, e.g.*, Pronin et al., *supra* note 14, at 378 (reporting studies that suggest "that knowledge of particular biases in human judgment and inference, and the ability to recognize the impact of those biases on others, neither prevents one from succumbing nor makes one aware of having done so"); Wilson & Brekke, *supra* note 300, at 130–33 (reporting that studies involving forewarning decision makers of potential biases have yielded mixed results).

397. Norbert L. Kerr & R. Scott Tindale, *Group Performance and Decision Making*, 55 ANN. REV. PSYCHOL. 623, 638 (2004).

398. Jonas et al., *supra* note 199, at 569 (claiming that a decision maker's focus will have been shifted at least somewhat from the decision to the information search).

399. Janis recommended the devil's advocate approach in his influential book. IRVING K. JANIS, GROUPTHINK 267–68 (1982). It has also been recommended by several scholars in the corporate context. *See, e.g.*, COLIN B. CARTER & JAY W. LORSCH, BACK TO THE DRAWING BOARD: DESIGNING CORPORATE BOARDS FOR A COMPLEX WORLD 175 (2004); Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1304–06 (2003); *cf.* James A. Fanto, *Whistleblowing and the Public Director: Countering Corporate Inner Circles*, 83 OR. L. REV. 435, 443 (2004) (proposing directors with an "oppositional" attitude).

ately framing a decision problem in multiple ways.[400] People are less likely to simply conduct confirmatory searches for information when they are led to consider the contrary proposition before the search.[401] This positive effect occurs even when the decision makers' mindset has been affected without their conscious awareness.[402]

Third, a commonly suggested approach to conflicts of interest is disclosure.[403] The Sarbanes-Oxley Act, Congress's response to Enron and other corporate scandals, includes sections requiring enhanced disclosure.[404] Other countries have also adopted this response.[405] The theory maintains that if directors disclosed their potential conflicts (notably here a candid discussion of the nature and strength of the ties that a director has with others), investors could evaluate a company's corporate governance and make decisions accordingly.[406] If their investments later prove unprofitable because of the conflicts, at least investors cannot claim that they were not warned.[407]

---

400. Daniel Kahneman & Amos Tversky, *Choices, Values and Frames*, 39 AM. PSYCHOLOGIST 341, 343 (1984).

401. Adam D. Galinsky & Gordon B. Moskowitz, *Counterfactuals as Behavioral Primes: Priming the Simulation Heuristic and Consideration of Alternatives*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 384, 384 (2000); Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1234 (1984). The same appears to be true for groups. Researchers found that subjects exposed as a group to counterfactual thoughts were more likely to seek out disconfirming information. *See* Laura J. Kray & Adam D. Galinsky, *The Debiasing Effect of Counterfactual Mind-Sets: Increasing the Search for Disconfirmatory Information in Group Decisions*, 91 ORG. BEHAV. & HUM. DECISION PROCESSES 69, 70 (2003). Follow-up research found that the positive effect of a counterfactual mindset on group decision making did not occur when only individual members of the group had the counterfactual mind set; the mind set had to be at the individual level. *See* Katie A. Liljenquist et al., *Exploring the Rabbit Hole of Possibilities by Myself or with My Group: The Benefits and Liabilities of Activating Counterfactual Mind-Sets for Information Sharing and Group Coordination*, 17 J. BEHAV. DECISION MAKING 263, 263 (2004).

402. *See* Galinsky & Moskowitz, *supra* note 401, at 384.

403. *See generally* CONFLICT OF INTEREST IN THE PROFESSIONS (Michael Davis & Andrew Stark eds., 2001). Interestingly, the SEC in 1978 proposed that proxy statements should specify whether outside directors were "independent" or "affiliated." *See* Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, Exchange Act Release No. 34-14,970, 15 SEC Docket 291 (July 18, 1978).

404. Sarbanes-Oxley Act of 2002, §§ 406(a), 407(a), 15 U.S.C. §§ 7264(a), 7265(a) (Supp. V 2005) (requiring a company to disclose whether it has a code of ethics and a financial expert on its audit committee rather than requiring these actions).

405. For example, in the United Kingdom, the Combined Code on Corporate Governance provides that boards should comply with guidelines requiring that directors are "independent in character and judgement" or explain why they do not comply. The board must also disclose whether the director had any "relationships . . . which are likely to affect, or could appear to affect, the director's judgement." COMBINED CODE ON CORPORATE GOVERNANCE § A.3.1 (2008) (U.K.), *available at* http://www.frc.irg.uk/corporate/combinedcode.cfm.

406. *See generally In re* Lear Corp. S'holder Litig., 926 A.2d 94, 98 (Del. Ch. 2007) (holding that "stockholders are entitled to know that the CEO harbored material economic motivations that differed from their own"); Paul M. Healey & Krishna G. Palepu, *Information Asymmetry, Corporate Disclosure, and the Capital Market: A Review of the Empirical Disclosure Literature*, 31 J. ACCT. & ECON. 405, 407–10 (2001).

407. *See* Daylian M. Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1, 2–4 (2005) (discussing the perceived advantages of disclosure for resolving conflict of interest problems).

Research, however, shows at least three difficulties with this approach. The first problem is that investors do not necessarily know what to do with the information.[408] Second, there is a concern about directors' responses to disclosure of their potential conflicts, referred to as "moral licensing."[409] Disclosure might reduce feelings of guilt about decision making in one's own or a friend's interest, thereby ultimately making such a decision more likely. Third, disclosure ultimately has no impact on the underlying problem of business decisions made on grounds other than the underlying merits. "[T]here is no reason to believe that the act of disclosing such interests would influence the unconscious processes of decision making that allow personal biases to distort reasoning away from professional responsibilities."[410]

Overall, given the different circumstances in which unconscious biases are likely to operate, the optimal approach is likely a modest blend of the above decision-making responses. Even though these biases are likely to be pervasive, overall the U.S. system of corporate governance has worked fairly well. In addition, all of the possible solutions evaluated here impose both costs and benefits, and ex ante it is impossible to know which would predominate. The advantage of the listed procedural changes is that their costs would be relatively low and their benefits in improved decision making could occasionally be very high.

VI. CONCLUSION

Corporate governance over the last thirty years has increasingly relied on the independent director.[411] More than twenty-five years ago the Delaware Supreme Court raised "the . . . question . . . whether inquiry as to independence, good faith and reasonable investigation is sufficient safeguard against abuse, perhaps subconscious abuse."[412] Now, hundreds of psychological studies later, the answer is clear: at least with respect to subconscious abuse, the inquiry is inadequate. Ideally, truly independent directors would always make decisions based solely on the corporate merits, without concern for their self-interests or emotional attachments. In situations involving conflicts of interest, however, psychological re-

408. *See* Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. REV. 789, 817–18 (2007) (discussing investors' difficulties with companies' disclosures).

409. Cain et al., *supra* note 407, at 7 (moral-licensing). Monin and Miller have used a similar term, "self-licensing," to describe the phenomenon that people are more likely to express possibly prejudicial attitudes if they have previously established their credentials as nonprejudiced. *See* Benoît Monin & Dale T. Miller, *Moral Credentials and the Expression of Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 33, 41–42 (2001); *see also* Joseph Nocera, *Disclosure Won't Tame C.E.O. Pay*, N.Y. TIMES, Jan. 14, 2006, at B1 (arguing that disclosure may in fact increase executive compensation).

410. Thagard, *supra* note 92, at 374.

411. *See* Jonathan H. Gabriel, *Misdirected? Potential Issues with Reliance on Independent Directors for Prevention of Corporate Fraud*, 38 SUFFOLK U. L. REV. 641, 646–47 (2005); Gordon, *supra* note 1, at 1471 (reporting that the "fraction of independent directors for large public firms has shifted from approximately 20% in the 1950s to approximately 75% by the mid-2000s").

412. Zapata Corp. v. Maldonado, 430 A.2d 779, 787 (Del. 1981).

search demonstrates that this ideal is near impossible to achieve, even when the decision maker is acting in good faith.

Whether or not we are aware of them, biases, in favor of oneself, one's friends, and one's status, pervade many aspects of the decision-making process. The impact on our decision making is virtually uncontrollable because it occurs outside of our conscious awareness. If the goal is to make business decisions based solely on the merits and not on extraneous considerations, we will frequently fall short. Fortunately, most of a director's decisions do not involve conflicts between director and shareholder interests. For the remainder—decisions involving compensation, derivative suits, presuit demand, takeover offers, and internal investigations—the issue is whether feasible responses might have greater costs than benefits. The modest responses advocated here, in particular with respect to improving decision-making processes, will likely meet this standard.