IN SEARCH OF AN ANTI-ELEPHANT: CONFRONTING THE HUMAN INABILITY TO FORGET INADMISSIBLE EVIDENCE

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INTRODUCTION

The Federal Rules of Evidence and their state counterparts represent the legal community's collective opinion regarding the information upon which jury verdicts should be based. The rules declare that evidence is inadmissible if it is deemed by the judiciary to be irrelevant, unduly prejudicial, confusing, or misleading.[1] Primary responsibility for ensuring that information presented in court does not run contrary to the rules of evidence falls in the first instance on trial attorneys, who are expected to submit motions *in limine* regarding controversial evidence, refrain from asking objectionable questions or making improper statements during trials, and ensure that witnesses' testimony complies with the rules. But attorneys are unable to anticipate a variety of courtroom events, such as whether witnesses will offer testimony prohibited by the rules despite the attorneys' best efforts and whether charges will be dismissed after related evidence has been offered. Moreover, trial attorneys are advocates interested in obtaining verdicts favorable to their clients and, as such, may be inclined to intentionally elicit or interject objectionable information during a trial if they believe that doing so will weaken the opponent's case. The result of these inadvertent and intentional introductions of inadmissible evidence is that jurors are fre-

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[1] FED. R. EVID. 402-403; JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE T-31 to -33 (Joseph M. McLaughlin ed., 2d ed. 2007) (reporting that all states have adopted rules identical or similar to FED. R. EVID. 402 and 403). Evidence is also inadmissible if it results in "undue delay," a "waste of time," or the "needless presentation of cumulative evidence." FED. R. EVID. 403. These forms of inadmissible evidence are not addressed in this Article because they are unlikely to modify jurors' views of the case to any appreciable degree. This is not to say that they should be ignored entirely, for they could theoretically impact verdicts. For example, such evidence may distract jurors from more pertinent evidence in the case or cause them to place more weight on particular items of evidence. Nonetheless, the present Article focuses on information that is considered inherently influential and, thus, by its very nature may substantially alter jurors' verdicts.

quently exposed to information that, according to the Federal Rules of Evidence, they should not consider when arriving at a verdict in the case.[2]

Following jurors' exposure to inadmissible evidence, trial judges may declare a mistrial if they believe the situation is sufficiently damaging to warrant this measure.[3] Mistrials are granted sparingly, however, due to competing considerations such as judicial economy and loss or deterioration of evidence over time, as well as the realistic assumption that there rarely will be a perfectly orchestrated trial.[4] Rather, it is standard procedure for trial judges to instruct members of the jury to disregard evidence that they should not have seen or heard. Instructions to disregard are thus an integral part of the trial process, considered to be "one of the most important tools by which a court may remedy errors at trial" and without which "few trials would be successfully concluded."[5]

Given the judiciary's heavy reliance on instructions to disregard, one might expect them to be a celebrated remedial tool. To the contrary, however, a longstanding and lively debate continues regarding their effectiveness. Whereas some judges express a general confidence in the instructions,[6] others believe that they are a mere legal fiction, promoting expediency at the expense of justice to the parties against whom inadmissible evidence is introduced.[7] Judges in the latter category have invoked a variety of

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2 *See, e.g.*, Bruton v. United States, 391 U.S. 123, 135 (1968) ("[I]nstances occur in almost every trial where inadmissible evidence creeps in . . . ."); State v. Winter, 477 A.2d 323, 326 (N.J. 1984) ("The plain fact of the matter is that inadmissible evidence frequently, often unavoidably, comes to the attention of the jury . . . ."); State v. Harmon, 956 P.2d 262, 271-72 (Utah 1998) ("There is rarely a case in which a trial judge is not called upon to affirm an attorney's objection and instruct the jury to disregard an improper question or an improper answer a witness has given.").

3 The standard generally used in making these determinations is that "there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions . . . and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." Greer v. Miller, 483 U.S. 756, 766 n.8 (1987) (citations omitted). Although originally articulated in the criminal context, the standard has also been applied in civil litigation. *See, e.g.*, Ramirez v. Debs-Elias, 407 F.3d 444, 447-48 (1st Cir. 2005).

4 *See, e.g.*, United States v. Sepulveda, 15 F.3d 1161, 1184 (1st Cir. 1993) ("Declaring a mistrial is a last resort, only to be implemented if . . . the trial judge believes that the jury's exposure to the evidence is likely to prove beyond realistic hope of repair.").

5 *Harmon*, 956 P.2d at 271-72 (citation omitted).

6 *See, e.g.*, People v. Goldsberry, 509 P.2d 801, 803 (Colo. 1973) ("It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information." (quoting *Bruton*, 391 U.S. at 135 (1968))); State v. Nowakowski, 452 A.2d 938, 939 (Conn. 1982) ("[C]urative instructions often remedy the prejudicial impact of inadmissible evidence.").

7 *See, e.g.*, United States v. Semensohn, 421 F.2d 1206, 1208 (2d Cir. 1970) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." (alteration in original) (quoting Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring))); Campbell v. State, 116 S.E. 807, 809 (Ga. 1923) (Russell, C.J., specially concurring) ("I think that every experienced practitioner knows that a mere statement by a judge that certain testimony is withdrawn from the jury is but the application of a fictitious remedy, if the evidence previously admitted is of such a nature as to have been originally harmful and prejudi-

metaphors to express the basis of their skepticism, such as: "[I]f you throw a skunk into the jury box, you can't instruct the jury not to smell it";[8] "[O]ne 'cannot unring a bell'";[9] "[A]fter the thrust of the saber it is difficult to say forget the wound";[10] "A drop of ink cannot be removed from a glass of milk";[11] and "The virus thus implanted in the minds of the jury is not so easily extracted."[12] The common thread running through these disparate images is the idea that it is cognitively impossible to cure the harm inflicted by inadmissible evidence. The Supreme Court has adopted the more optimistic view, assuming that instructions to disregard are generally effective but that some exceptions exist:

> It is not unreasonable to conclude that . . . the jury can and will follow the trial judge's instructions to disregard . . . . Nevertheless . . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.[13]

The Court has never elaborated guidelines to assist trial courts in discerning contexts in which the risks of failing to disregard are unacceptable, no doubt from uncertainty of what the human limitations might be.

Despite this uncertainty regarding the effectiveness of instructions to disregard, when rendering opinions, courts hold steadfastly to the presumption that any prejudice resulting from jurors' exposure to inadmissible evidence is eradicated by these instructions.[14] Their reluctance to question this presumption—like the Supreme Court's reluctance to establish a general

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cial."); Georgeson v. Nielsen, 260 N.W. 461, 463 (Wis. 1935) ("The remark being made, or made and repeated, the intended effect is probably produced, and the court's mere formal sustaining of the objection to it and telling the jury to disregard what they have already regarded can avail little towards destroying the effect thus probably produced.").

8 Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

9 *Id.*

10 *Id.*

11 Virgin Islands v. Toto, 529 F.2d 278, 283 (3d Cir. 1976).

12 United States v. Antonelli Fireworks Co., 155 F.2d 631, 655 (2d Cir. 1946) (Frank, J., dissenting) (quoting People v. Levan, 64 N.E.2d 341, 346 (N.Y. 1945)).

13 Bruton v. United States, 391 U.S. 123, 135 (1968) (citation omitted).

14 *E.g.*, Throckmorton v. Holt, 180 U.S. 552, 567 (1901) ("The general rule is that if evidence which may have been taken in the course of a trial be withdrawn from the consideration of the jury by the direction of the presiding judge, that such direction cures any error which may have been committed by its introduction."); United States v. Charmley, 764 F.2d 675, 677 (9th Cir. 1985) ("[A] cautionary instruction is ordinarily sufficient to cure any alleged prejudice to the defendant."); State v. Bergland, 187 N.W.2d 622, 626 (Minn. 1971) ("As a general rule, any error which may occur by reason of the erroneous admission of evidence is cured when that evidence is stricken from the record and accompanied by a clear instruction to disregard so that the evidence is not put to use by the jury."); State v. Gregory, 247 S.E.2d 19, 22 (N.C. Ct. App. 1978) ("Where a trial court sustains a defendant's objection to the answer of a witness, strikes same, and instructs the jury not to consider it, the jury is presumed to have heeded the instruction and any prejudice is removed.").

rule on the issue—may result largely from a lack of coherent scientific findings to inform the topic and, equally important, from the absence of an apparent alternative to the courts' traditional approach to disregarding. Until recently, behavioral scientists had not investigated the ability of the human mind to avoid thoughts on demand.[15] They also had not studied means by which humans may effectively debias their judgments following exposure to objectionable information. These now mature lines of research simultaneously undercut the traditional judicial approach to disregarding inadmissible evidence (i.e., considering disregarding to be equivalent to forgetting) and provide a viable alternative approach to disregarding (i.e., neutralization). Consonant with the maxim *fictio cedit veritati; fictio juris non est ubi veritas*,[16] the present Article argues that the courts' traditional approach to disregarding should be replaced with the scientifically supported approach presented here.[17]

At stake is a litigant's constitutional right to a fair trial. As recognized by the Supreme Court in *Bruton v. United States*,[18] "[a]n important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence."[19] While *Bruton* was a criminal case, civil litigants are, of course, afforded a similar right.[20] Such guarantees underscore the importance of dispensing with the inaccurate and unnecessary legal fiction that jurors can forget inadmissible evidence and replacing it with a procedure substantiated by empirical evidence.

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15 Richard M. Wenzlaff & Daniel M. Wegner, *Thought Suppression*, 51 ANN. REV. PSYCHOL. 59, 83 (2000) ("Virtually nonexistent fewer than 15 years ago, the study of thought suppression has grown into a significant area of scientific inquiry . . . .").

16 The phrase translates as: "Fiction yields to truth; where the truth appears, there is no fiction of law." BLACK'S LAW DICTIONARY 1719 (8th ed. 2004).

17 It is, of course, possible that the courts will take a contrary and not uncommon position captured by the maxim *lex contra id quod praesumit probationem non recipit* ("The law accepts no proof against that which it presumes."). BLACK'S LAW DICTIONARY 1730 (8th ed. 2004). However, the Supreme Court has implied that the traditional conception of disregarding exists out of necessity, suggesting that an empirically supported and feasible alternative to the forget approach would be welcome. Richardson v. Marsh, 481 U.S. 200, 211 (1987) ("The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process."). Moreover, it is not unlikely that lower courts, which have greater experience with and understanding of the many problems raised by the traditional forget approach to disregarding, would be equally or more receptive to a different way of conceptualizing disregarding and instructing jurors accordingly.

18 391 U.S. 123 (1968).

19 *Id.* at 132 n.6.

20 *E.g.*, Bailey v. Sys. Innovation, Inc., 852 F.2d 93, 98 (3d Cir. 1988) ("[F]airness in a jury trial, whether criminal or civil in nature, is a vital constitutional right."); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975) (noting that the Fourteenth Amendment's Due Process Clause guarantees the right to a fair trial to all persons).

This Article thus articulates the many ways in which courts' traditional conception of disregarding as forgetting and their corresponding instructions to jurors to forget inadmissible evidence may detract from the administration of justice. It proposes that the courts adopt a novel approach to disregarding, termed "neutralization," and presents both established research and an original empirical investigation demonstrating how the neutralization approach to disregarding resolves the problems associated with the traditional approach. Beyond articulating the general superiority of the neutralization approach, the Article describes how this approach performs relative to the traditional approach under certain complicating yet common variations of inadmissible evidence and instructions to disregard. The Article closes with several final observations, including the implications of the neutralization approach for the right to a fair trial, a critique of previously proposed solutions to the inadmissible evidence dilemma, and the potential of the neutralization approach to address other evidentiary challenges faced by the courts.

I. THE ELEPHANT IN THE COURTROOM

The traditional conception of disregarding as forgetting is reflected in judges' direct references to jurors forgetting the inadmissible evidence.[21] It also manifests in judicial statements referring to erasing inadmissible evidence from jurors' minds,[22] wiping the evidence from their minds,[23] and putting the evidence out of their minds.[24] Given this view, it is unsurprising

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21 *E.g.*, United States v. Kallin, 50 F.3d 689, 694-95 (9th Cir. 1995) (stating that the question raised by inadmissible evidence is "whether the jury can possibly be expected to forget it in assessing the defendant's guilt" (quoting *Richardson*, 481 U.S. at 208)); Smith v. State, 194 So. 2d 310, 313 (Fla. Dist. Ct. App. 1966) ("The jurors could not be expected to forget and disregard this inadmissible evidence in making their decision . . . .").

22 *E.g.*, Vigil v. People, 731 P.2d 713, 719 (Colo. 1987) (Lohr, J., dissenting) ("It is expecting too much from jurors to require them to erase so much evidence from their minds, especially where that evidence was highly prejudicial in its content."); Edmisten v. People, 490 P.2d 58, 65 (Colo. 1971) ("It is well established that error in admitting evidence may be cured by instructing the jury to disregard it unless such evidence is so prejudicial that the jury will unlikely be able to erase it from their minds."); State v. Hunt, 215 S.E.2d 40, 49 (N.C. 1975) ("In some instances because of the serious character and gravity of the incompetent evidence and the obvious difficulty in erasing it from the mind, the court has held to the opinion that a subsequent withdrawal did not cure the error.").

23 *E.g.*, Johnson v. Elk Lake Sch. Dist., 283 F.3d 138, 148 (3d Cir. 2002) ("[J]ury instructions to disregard particular statements can sometimes be 'intrinsically ineffective' because the 'nonadmissible declaration cannot be wiped from the brains of the jurors.'" (quoting *Bruton*, 391 U.S. at 129)).

24 *E.g.*, State v. Tinsley, 429 A.2d 848, 850 (Conn. 1980) ("The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." (quoting Delli Paoli v. United States, 352 U.S. 232, 248 (1957) (Frankfurter, J., dissenting), *overruled by* Bruton v. United States, 391 U.S. 123 (1968))); State v. Samurine, 135 A.2d 574, 580 (N.J. Sup. Ct. App. Div. 1957) ("[D]espite the

that instructions to disregard regularly encourage jurors to attempt this feat. Federal and state trial judges explicitly instruct jurors to forget inadmissible evidence as a routine matter, using language such as the following:

> I am going to strike from the record the [instances of inadmissible evidence]. Disregard those. Put those out of your mind. It is just as if that was never said. Now, when I do strike evidence, it should be stricken from your minds completely. And it is just as if it never occurred. So, put that out of your minds now.[25]

The courts also frequently employ a more laconic command such as "disregard the witness's last answer."[26] Each of these traditional instructions to disregard orders jurors to forget the inadmissible evidence. The first, referred to here as the "Elaborate Forget" instruction, is slightly more explicit in that it orders the jurors to perform the specific psychological task of for-

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charge it was impossible for the jurors to subtract this testimony from the total of the evidence and discard it from their minds."), *rev'd on other grounds*, 142 A.2d 612 (N.J. 1958); Asbury v. Commonwealth, 175 S.E.2d 239, 241 (Va. 1970) ("[T]he admission of incompetent evidence is reversible error notwithstanding the fact that the trial court . . . instructed the jury to disregard it, if such illegal evidence was so impressive that it probably remained on the minds of the jury and influenced their verdict.").

25 Commonwealth v. Errington, 442 N.E.2d 1170, 1172-73 n.1 (Mass. App. Ct. 1982) (quoting the trial court transcript), *rev'd*, 460 N.E.2d 598 (Mass. 1984). *See also* Shanklin v. Norfolk S. Ry., 369 F.3d 978, 984 n.2 (6th Cir. 2004) ("And if you don't remember what it was, that's good because you don't have to forget it then." (quoting the district court transcript)); United States v. Gonzalez-Vazquez, 219 F.3d 37, 48 (1st Cir. 2000) ("I am ordering that testimony to be stricken from the record, and I am instructing you to erase it from your mind entirely . . . ." (quoting the trial court transcript)); Burnett v. Martin, 405 So. 2d 23, 24 (Ala. 1981) ("You must do everything you can to erase it from your minds; just forget about it and not consider it as though it had never been given to you in the case. It is not to be considered as evidence, and you are just not to base your decision on it." (quoting the trial court transcript)); King v. State, 847 S.W.2d 37, 40 (Ark. 1993) ("[Y]ou are instructed that I have sustained an objection to that response. It should be disregarded and not considered at all. Put it out of your minds completely as you listen to the evidence and eventually as you deliberate with respect to this case." (quoting the circuit court transcript)); People v. Hogan, 647 P.2d 93, 110 n.12 (Cal. 1982) ("The [inadmissible evidence] was stricken out because it must not be considered by you in any way in deciding this case . . . . [S]o put that out of your minds and treat it as though you had never heard it." (quoting the trial court transcript)); State v. McIntyre, 737 A.2d 392, 396 (Conn. 1999) ("[T]he testimony . . . is being stricken in its entirety. It never happened. You never heard it . . . . It exists no longer and, therefore, is not part of this trial . . . ." (quoting the trial court transcript)); Commonwealth v. Adamides, 639 N.E.2d 1092, 1094 n.3 (Mass. App. Ct. 1994) ("I'm ordering that testimony stricken. You may not even remember it . . . ." (quoting the trial court transcript)); State v. Locklear, No. COA05-1021, 2006 WL 2806455, at *2 (N.C. Ct. App. Oct. 3, 2006) ("[T]he last statement of this witness is to be disregarded by you. I don't know whether you heard it or not . . . but if you did hear it, just strike it from your mind. It's not to play any part in the determination of any fact in this matter." (quoting the trial court transcript)).

26 *E.g.*, United States v. Harris, 325 F.3d 865, 871 (7th Cir. 2003) (upholding the trial court's response to inadmissible testimony that took the form: "Sustained. And I'll instruct the jury to disregard that testimony"); United States v. Clarke, 343 F.2d 90, 91 (3d Cir. 1965) (reporting that the trial judge instructed the jury to "disregard anything they have just heard in the last minute"); Bacher v. State, 686 N.E.2d 791, 794 (Ind. 1997) (reporting that the trial judge admonished the jury to "disregard the last remarks that the witness made").

getting. The second, referred to here as the "Minimal Forget" instruction, merely commands jurors to disregard without further explication.[27] In both instances, the courts proceed as though the inadmissible evidence is as easily expunged from the jurors' minds as it is from the trial record.

One memorable metaphor expressing concern with the traditional approach to disregarding was offered by Judge Jerome Frank: "[T]he judge's cautionary instruction may do more harm than good: It may emphasize the jury's awareness of the censured remark—as in the story, by Mark Twain, of the boy told to stand in the corner and not think of a white elephant."[28] Here, Judge Frank demonstrates an awareness of one of the fundamental paradoxes of the instruction to disregard under the traditional approach to disregarding. On one hand, the trial judge must communicate to jurors the impropriety of considering the inadmissible evidence when rendering their verdict. On the other, drawing additional attention to the evidence makes it more salient and, thus, less forgettable. And the more the judge tries to persuade the jury of its inappropriateness, the harder it will be for jurors to forget the evidence. Courts' adoption of the Elaborate Forget and Minimal Forget instructions thus manifests an inherent tension between motivating jurors to disregard inadmissible evidence and impeding their ability to do

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[27] While it is not as readily apparent that the Minimal Forget instruction does, in fact, direct jurors to forget the inadmissible evidence, it is precisely the courts' conception of disregarding as forgetting that drives them to use the Minimal Forget instruction. This point is discussed in detail later in this Part. Moreover, courts' conception of disregarding as forgetting is communicated to jurors at various times throughout the trial, not merely in the instruction to disregard. This occurs in questions judges ask of jurors following the instruction to disregard. *See, e.g.*, Kilpatrick v. State, 199 So. 2d 682, 688 (Ala. Ct. App. 1967) ("If I tell you not to consider something, can you gentlemen erase it from your mind[s] and forget it?" (quoting the trial court transcript)); Roaderick v. State, 570 S.E.2d 382, 384 (Ga. Ct. App. 2002) ("[The trial court] asked the jurors if they could put the testimony out of their minds completely . . . ."); State v. Spaulding, 794 A.2d 800, 803 (N.H. 2002) ("Is anyone going to have a problem with striking that question and answer from their . . . mind[s] and not considering it at all during their deliberations . . . .[?]" (quoting the trial court transcript)). The forget approach also is communicated in preliminary and final jury instructions. *See, e.g.*, United States v. De Jesus Mateo, 373 F.3d 70, 73 (1st Cir. 2004) ("Evidence that I ordered to be stricken, you are to disregard and put out of your minds." (quoting the district court transcript)); State v. McIntyre, 737 A.2d 392, 396 (Conn. 1999) ("If some evidence was presented and stricken from the record . . . you must not consider it. You must dismiss it from your minds and draw no inference from [it]. These matters are to be treated as though you had never known of them." (first alteration in original) (quoting trial court transcript)); State v. Stallings, 731 N.E.2d 159, 175 (Ohio 2000) ("Statements and answers . . . which you were instructed to disregard must be treated as though you never heard them." (quoting the trial court transcript)); Judicial Council of Cal. Civil Jury Instructions, CACI No. 106 (2006 & Supp. 2008) ("An attorney may make a motion to strike testimony that you have heard. If I grant the motion, you must totally disregard that testimony. You must treat it as though it did not exist."); Comm. on Pattern Jury Instructions, Ass'n of Supreme Court Justices, New York Pattern Jury Instructions—Civil § 1:7 (2006) ("At times during the trial I may sustain objections to questions . . . . [W]here an answer has been made, I may instruct that it be stricken or removed from the record and that you disregard it and dismiss it from your minds.").

[28] United States v. Antonelli Fireworks Co., 155 F.2d 631, 656 (2d Cir. 1946) (Frank, J., dissenting) (footnote omitted).

so. Minimal Forget instructions reflect the idea that courts should not draw any more attention than is necessary to the inadmissible evidence within the instruction to disregard, because doing so decreases the likelihood that jurors will be able to forget it. Elaborate Forget instructions, in contrast, evidence a belief that trial judges must emphasize that the inadmissible evidence should have no bearing on jurors' judgments in order to motivate jurors to comply with instructions to disregard.[29] The study reported in Part III tests whether the Minimal Forget or the Elaborate Forget instruction more effectively counters the biasing effects of inadmissible evidence.

A second problem generated by the courts' traditional approach to disregarding is that judges often refrain from restating the inadmissible evidence in the instruction to disregard from fear that drawing additional attention to the evidence will render it less forgettable.[30] This practice may minimize attention to the evidence, but it also decreases the likelihood that jurors will understand precisely what evidence they are to disregard. Without this understanding, jurors are more likely to use the inadmissible evidence in arriving at a verdict in the case as though no instruction to disregard had been given, to mistakenly disregard properly admitted evidence, or both. The traditional conceptualization of disregarding thus creates an inevitable conflict between fostering jurors' ability to forget the inadmissible evidence and informing jurors just what evidence they are to disregard. The empirical study reported in Part III tests whether restating the inadmissible evidence in the instruction to disregard is detrimental to countering its effects.

A third problem with the traditional "forget" conception of disregarding is that it encourages judges to instruct jurors to do the impossible—the human mind simply is not hardwired to forget on command. A substantial body of psychological research on thought suppression may provide insights into the consequences of jurors engaging in a concentrated effort to avoid thoughts of inadmissible evidence. This research consistently finds that individuals have difficulty avoiding thoughts as instructed and that the

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[29] Varied authorities have acknowledged the dilemma, albeit without recognizing its role in the genesis of the two different types of traditional forget instructions. As one court recently noted, "it is in the very nature of such admonitions that the jury's attention is drawn to the very evidence it is being instructed to ignore." People v. Payne, No. C047707, 2006 WL 1493743, at *8 (Cal. Ct. App. May 31, 2006). *See also* ROBERT E. KEETON, TRIAL TACTICS AND METHODS 199 (2d ed. 1973) ("Whether you choose to [request an instruction to disregard] should depend upon your judgment as to whether that additional emphasis on the matter will probably cause more thought to be given to it by the jurors and more harm to be done to your case . . . .").

[30] *See, e.g.*, United States v. Kallin, 50 F.3d 689, 694 (9th Cir. 1995) (citing the trial judge's restatement of the inadmissible evidence within the instruction to disregard as evidence that the instruction was flawed); Commonwealth v. Adamides, 639 N.E.2d 1092, 1095 & n.4 (Mass. App. Ct. 1994) (viewing the fact that the trial judge had not repeated the inadmissible evidence as support for its conclusion that the curative instruction was "well tailored" to avoid prejudice to the defendant).

reasons for this difficulty are inherent in the task of suppression.[31] According to this line of research, in order for individuals to discern whether they have successfully suppressed information, they need to monitor for thoughts of the information.[32] Monitoring ensures that the information remains present at some level of consciousness and may render it more accessible than it would be had no attempt to forget it been made.[33] Also of concern is the fact that cognitive resources devoted to suppression may be diverted from processing other information.[34] In combination, these consequences of thought suppression may, in turn, cause information to exert a stronger influence on subsequent decisions than if there had been no attempt to suppress it.[35]

Crucial differences between the thought suppression experimental paradigm and the trial context, however, militate against presupposing that jurors will experience these consequences when given an instruction to forget inadmissible evidence. Notably, in the thought suppression studies, participants were instructed not to think of an item while in a relatively vacuous social environment.[36] A possible boundary condition of the thought suppression research may be the presence of an opportunity to focus one's attention on the information one is trying not to think about. When the social environment contains a rich array of ambient information—especially information relevant to an important decision such as a trial verdict—the

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31 *E.g.*, C. Neil Macrae et al., *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808, 815 (1994) ("[F]ormerly unwanted stereotypic thoughts were shown to return and impact on perceivers' treatment of a stereotyped target [as a] cost[] that . . . derive[s] from the act of suppression itself"); Wenzlaff & Wegner, *supra* note 15, at 60-64 (reviewing studies in which participants were instructed to avoid thoughts of particular items—such as a white bear—and finding that attempts to suppress thoughts of the items were unsuccessful and often counterproductive).

32 *E.g.*, Daniel M. Wegner, *When the Antidote Is the Poison: Ironic Mental Control Processes*, 8 PSYCHOL. SCI. 148, 148 (1997) (describing the thought suppression mental apparatus as comprised of two components, a conscious one that "search[es] for mental contents consistent with the intended state of mind" and an unconscious counterpart that "searches for mental contents signaling a failure to create the intended state of mind").

33 *E.g.*, Macrae et al., *supra* note 31, at 809.

34 *E.g.*, C. Neil Macrae et al., *On Resisting the Temptation for Simplification: Counterintentional Effects of Stereotype Suppression on Social Memory*, 14 SOC. COGNITION 1, 15 (1996) (finding that participants who attempted to suppress stereotypic information about a person while forming an impression of that person showed diminished memory for non-stereotypic information about the person and enhanced memory for the stereotypic information).

35 *E.g.*, John A. Bargh et al., *The Additive Nature of Chronic and Temporary Sources of Construct Accessibility*, 50 J. PERSONALITY & SOC. PSYCHOL. 869, 876-77 (1986) (finding that accessible traits exert greater influence on impression formation); Daniel M. Wegner & Ralph Erber, *The Hyperaccessibility of Suppressed Thoughts*, 63 J. PERSONALITY & SOC. PSYCHOL. 903, 908-09 (1992) (finding that suppression operates similarly to primes in the environment, rendering the thought that is to be avoided more accessible than it would be in the absence of an attempt to suppress it).

36 *E.g.*, Daniel M. Wegner et al., *Paradoxical Effects of Thought Suppression*, 53 J. PERSONALITY & SOC. PSYCHOL. 5, 6-7 (1987); Macrae et al., *supra* note 31, at 810-11.

prominence of the objectionable information fades. Consequently, it may be difficult to place jurors in the same type of thought suppression mode found in the basic thought suppression literature. Moreover, given widespread recognition that the human mind is incapable of forgetting information on demand, jurors may be unlikely to attempt to comply with the traditional instructions to disregard as written. Rather, they may attempt to comply with the spirit of the instructions by employing methods of disregarding other than forgetting. A third purpose of the study reported in Part III is to illuminate the thought processes invoked in jurors by the Minimal Forget and Elaborate Forget instructions.

The forget approach to disregarding also generates a set of problems that is less conducive to empirical study. Trial judges, perhaps sensing the futility of instructing jurors to do something that is not humanly possible, sometimes instruct jurors merely to refrain from discussing inadmissible evidence during deliberations.[37] Inadmissible evidence can exert a strong influence on jurors' perceptions of the case regardless of whether it is discussed during deliberations, however, rendering this type of instruction to disregard unduly circumscribed. Judges also conclude, at times, that giving jurors any instruction to disregard would be more damaging than remaining silent.[38] Their belief that instructions to disregard are worse than the ill they are supposed to cure results in the absence of any judicial attempt to counteract the biasing effect of the inadmissible evidence. Similarly, trial attorneys sometimes forego seeking an instruction to disregard for fear that this "remedy" would not be in their clients' best interests.[39] The traditional conception of disregarding thus places targets of inadmissible evidence in the

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37 *E.g.*, State v. Humphery, 978 P.2d 264, 274 (Kan. 1999) ("[T]he last question and answer was improper. I have sustained the objection and you are not to consider that in your deliberations." (quoting the trial court transcript)).

38 *E.g.*, United States v. Owens, 23 F. App'x 550, 552 (7th Cir. 2001) ("[T]he [trial] judge commented that 'a remedy is just to forget it in the sense that the more you talk about these things, the more they'll be impressed on the minds of the jury.'"); Sowell v. Walker, 755 A.2d 438, 448 (D.C. 2000) (upholding trial judge's decision not to give an instruction to disregard, reasoning that the judge "could reasonably have believed that an instruction to the jurors to disregard what they had just heard . . . would have been just about as effective as a directive *not* to think about a pink elephant").

39 *E.g.*, Bulkmatic Transp. Co. v. Taylor, 860 So. 2d 436, 441 (Fla. Dist. Ct. App. 2003) (describing counsel's refusal of an instruction to disregard because it "would reinforce what the jurors had already heard"); State v. Flowers, No. A05-213, 2006 WL 1228997, at *4 (Minn. Ct. App. May 9, 2006) ("Defense counsel did not object, but after the jury was excused, moved for a mistrial, stating that any corrective instruction would 'highlight' or 'underscore' the prejudicial nature of the testimony."), *rev'd*, 734 N.W.2d 239 (Minn. 2007); Buckley v. State, 46 S.W.3d 333, 336 (Tex. App. 2001) (reporting that when the trial judge asked the attorney if he desired that the judge provide an instruction to disregard, the attorney responded: "Well if you tell 'em to disregard it they're gonna hear even more of it, so, no."). This concern is raised in popular trial practice treatises. *E.g.*, THOMAS A. MAUET, TRIALS: STRATEGY, SKILLS, AND THE NEW POWERS OF PERSUASION 523 (2005) ("Certainly, when an objection to testimony is sustained and the jury is instructed to disregard it, the jurors can hardly 'unremember' what they just heard . . . .").

unenviable position of requesting what they believe to be an ineffective instruction or foregoing the instruction and suffering the risks of forfeiting the issue on appeal.[40] As common sense dictates and the Supreme Court has confirmed, "to perform its high function in the best way 'justice must satisfy the appearance of justice.'"[41] The traditional approach to disregarding and its ensuing jury instructions do little to further the perception that the American legal system is dispensing justice.[42] They are, in fact, the subject of public ridicule, as illustrated (quite literally) in the popular media. A cartoon in *The New Yorker*, for example, depicts a court scene in which a witness looks self-satisfiedly at a deflated trial attorney while the trial judge impotently instructs the shocked jurors: "The jury will disregard the witness's last remarks."[43] Judges and attorneys likewise mock the traditional approach to disregarding. A *Judicature* cartoon, for example, portrays an attorney holding a microphone by his side and bowing before applauding jurors, while the trial judge admonishes the jurors to "completely disregard counselor's last number."[44]

The traditional conception of disregarding and its corresponding instructions to disregard are thus compromised by fundamental flaws inherent in equating disregarding with forgetting. Of course, articulating this situation takes one only so far toward improving it. The other essential component, a superior alternative to the traditional approach to disregarding, is therefore explored in the following Part.

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40 *See, e.g.*, Cambridge v. Duckworth, 859 F.2d 526, 533 n.4 (7th Cir. 1988) (stating that trial counsel's decision not to object to references to the client's previous guilty plea in the case "because he did not want to attract undue attention to the withdrawn plea" was reasonable but did not give the defendant grounds to "complain about the trial court's handling of the trial where the trial court was certain to grant any such motion to strike").

41 *In re* Murchison, 349 U.S. 133, 136 (1955) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)). *See also* Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 379-84 (2006) (discussing research on the importance of authorities' and institutions' legitimacy to their ability to carry out their functions).

42 As stated in the context of limited use instructions but equally applicable to inadmissible evidence, courts' traditional approach to disregarding "is a kind of 'judicial lie'" that "undermines a moral relationship between the courts, the jurors, and the public; like any other judicial deception, it damages the decent judicial administration of justice." United States v. Grunewald, 233 F.2d 556, 574 (2d Cir. 1956) (Frank, J., dissenting), *rev'd on other grounds*, 353 U.S. 391 (1957).

43 Lee Lorenz, *"The Jury Will Disregard the Witness's Last Remarks"*, THE NEW YORKER, Oct. 3, 1977, at 41.

44 Louthan, Cartoon, 74 JUDICATURE 56 (1990).

II. A POTENTIAL ANTI-ELEPHANT

Some courts have expressed great pessimism as to whether any resolution of the inadmissible evidence dilemma is possible.[45] Indeed, as previously mentioned, one preferred explanation for courts' longstanding adherence to the legal fiction that jurors can forget inadmissible evidence on demand is that no viable alternative exists.[46] During the past decade, however, psychologists have explored corrective mechanisms of human judgment and decisionmaking that may offer a means for overcoming the problems associated with the traditional approach to disregarding. In non-courtroom contexts, they have discovered that biasing information can be countered—or, as referred to here, "neutralized"—without asking participants to perform the cognitively impossible task of forgetting. Rather, they have succeeded by instructing participants to adjust their perceptions to account for the fact that they have been exposed to biasing information.[47]

Two separate areas of psychological research—one on correcting for bias and the other on discounting—provide the potential avenues through which inadmissible evidence may be neutralized. Empirical studies on correcting for bias may apply to inadmissible evidence that is true, reliable, and relevant to the verdict. According to this research, in order to arrive at unbiased judgments following exposure to biasing information, three main prerequisites must be satisfied. First, individuals must be aware of the in-

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[45] *See, e.g.*, State v. Kellington, 381 P.2d 215, 216 (Ariz. 1963).

> Had counsel for defendant made an objection in the presence of the jury, and had the trial judge admonished the jury to strike such testimony from their minds, it would have served no real purpose. The damage had been done, for the effect of such testimony, having no relation to the crime charged, was to create in the minds of the jury an impression that the defendant's character was bad, and no admonition by the court could expunge this prejudicial attribute.

Id. People v. Gregory, 177 N.E.2d 120, 123 (Ill. 1961) ("Once a jury is permitted to hear evidence strongly calculated to impress the minds of the jurors and create prejudice against an accused, the damage is done.").

[46] *See supra* note 17 (quoting Richardson v. Marsh, 481 U.S. 200, 211 (1987)); *supra* note 15 and accompanying text.

[47] Some cases refer to removing from jurors' minds the prejudicial effects of the inadmissible evidence as opposed to the inadmissible evidence itself. *See, e.g.*, People v. Laursen, 71 Cal. Rptr. 71, 74-75 (Cal. Ct. App. 1968) ("A number of noted jurists have commented upon the futility of admonishing a jury of laymen to erase from their minds the effect of persuasive but inadmissible evidence of guilt."); People v. Goldsberry, 509 P.2d 801, 803 (Colo. 1973) ("Even though the trial judge in this case made an effort to erase the effect of this inadmissible evidence from the minds of the jury by his cautionary instruction to disregard it, it is our view that a mistrial was, nevertheless, required . . . ."); People v. Garreau, 189 N.E.2d 287, 289 (Ill. 1963) ("[T]he prejudicial effect of an improper argument cannot always be erased from the minds of the jurors by an admonishment from the court."). It is unclear whether these statements reflect a longstanding rejection of the traditional conception of disregarding as forgetting in favor of a neutralization conception of disregarding by a minority of courts or merely an alternative way of expressing the traditional conception of disregarding as forgetting, but the statements are nonetheless more appropriately phrased than those presented *supra* in notes 21-24.

fluence the biasing information has on their decisions, including its direction and its magnitude.[48] Given that humans tend to lack direct access to their higher-order cognitive processes,[49] they often discern the influence exerted by biasing information through learning of the bias from a credible external source and then applying their intuitive theories to the situation.[50] Extrapolating this research *ex hypothesi* to a courtroom situation, trial judges may be able to instill in jurors, through the instruction to disregard, an awareness of the bias exerted by the inadmissible evidence on their views of the case, following which the jurors will decide how to respond given their intuitive theories.[51]

The second prerequisite to correction for bias is a motivation, or willingness, to correct.[52] This element is complicated in the trial context by the fact that the legal system imposes on jurors two primary, and sometimes competing, responsibilities. Jurors are expected to render justice, yet they also have a duty to follow the law applicable to the case whether this law is congruent with, or contrary to, their personal notions of justice. Instructions to disregard create a conflict between these two duties when the inadmissi-

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48 *E.g.*, Duane T. Wegener et al., *The Metacognition of Bias Correction: Naive Theories of Bias and the Flexible Correction Model*, *in* METACOGNITION: COGNITIVE AND SOCIAL DIMENSIONS 202, 207-08 (Vincent Y. Yzerbyt et al. eds., 1998); Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 120 (1994).

49 Wilson & Brekke, *supra* note 48, at 121-22 ("One impediment to [detection of mental contamination] is people's limited access to their mental processes.").

50 Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 233 (1977) (discussing research suggesting that individuals employ theories of the degree to which a particular environmental stimulus caused a particular cognitive response and that these causal theories are most likely to be accurate when the environmental stimulus is salient and is a plausible cause of the cognitive response, and alternative plausible causes of the response are unlikely); *see also* Wegener et al., *supra* note 48, at 208 (reporting that persons employ naive theories of how environmental stimuli influence their judgments when correcting for bias).

51 *See* discussion *infra* Part III.C. Some courts have expressed concern that jurors may be unaware of the extent to which they have been influenced by inadmissible evidence. *E.g.*, Lockhart v. United States, 35 F.2d 905, 907 (9th Cir. 1929) ("[T]he testimony wrongly admitted was highly prejudicial in its nature, and its effect could not be entirely eradicated from the minds of the jury by a simple instruction to disregard it. It certainly cannot be said that such testimony would not unconsciously affect the verdict, however much the jury might be disposed to follow the instructions of the court."); Latham v. United States, 226 F. 420, 425 (5th Cir. 1915).

> It is unreasonable to believe the jury will utterly disregard [inappropriate statements]. They may struggle to disregard them. They may think they have done so, and still be led involuntarily to shape their verdict under their influence . . . . To an extent not definable, yet to a dangerous extent, [these remarks] unavoidably operate as evidence which must more or less influence the minds of the jury . . . .

Id. (quoting Tucker v. Henniker, 41 N.H. 317, 325 (1860)). While this is certainly a legitimate concern, as will be seen in Part III, a carefully crafted neutralization instruction can communicate to jurors the biasing influence of the inadmissible evidence.

52 *E.g.*, Wegener et al., *supra* note 48, at 207; Wilson & Brekke, *supra* note 48, at 119-20.

ble evidence is true, reliable, and relevant to the verdict. Under these conditions, jurors must choose between, on the one hand, contravening the instruction to disregard so as to make what they believe to be the decision warranted by the information presented at trial and, on the other, following the instruction to render a verdict they may perceive to be unjust. Courts generally presume that jurors reconcile these conflicting responsibilities in favor of following the law.[53] Realistically, however, some jurors may rank their duty to render a fair verdict higher than their duty to disregard inadmissible evidence. To be maximally effective, therefore, the instruction to disregard should cause jurors to view the influence exerted by the inadmissible evidence as illegitimate, so that they are motivated to correct for it regardless of the relative importance they attach to their responsibilities.

Finally, correction for bias requires the ability to correct.[54] Research reveals that individuals are naturally inclined to correct for perceived biases in their judgments,[55] which indicates that most jurors will have had a great deal of practice with correcting for bias in their everyday lives prior to the trial.

The correction for bias approach has proven successful at eliminating a variety of illegitimate effects on judgments outside of the courtroom. In one study, for example, people instructed not to let their opinions of a speaker influence their views of the issue the speaker discussed successfully corrected for their opinions of the speaker when judging the issue.[56] In other studies, people asked to form an impression of a person after being reminded that they had been primed to think about either negative or positive traits rendered judgments of the person uninfluenced by the primed traits.[57]

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53 *E.g.*, Weeks v. Angelone, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions." (citing Richardson v. Marsh, 481 U.S. 200, 211 (1987))); Elliott v. State, No. 13-05-00227-CR, 2006 Tex. App. LEXIS 6220, at *3 (Tex. App. July 20, 2006) ("[C]ourts employ a presumption that juries follow the law as instructed by the trial judge and consider only what the judge allows them to consider." (citing Thrift v. State, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005))).

54 *E.g.*, Wegener et al., *supra* note 48, at 207; Wilson & Brekke, *supra* note 48, at 119-20.

55 *E.g.*, Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 14 (1989) (finding that both high- and low-prejudice individuals generate stereotypes when forming impressions of other people, but that low-prejudice individuals correct for this bias when sufficient cognitive resources are available); Daniel T. Gilbert et al., *On Cognitive Busyness: When Person Perceivers Meet Persons Perceived*, 54 J. PERSONALITY & SOC. PSYCHOL. 733, 738-40 (1988) (finding that forming impressions of other people based on their behavior generally involves a corrective mechanism in which situational constraints on the behavior are considered).

56 Richard E. Petty et al., *Flexible Correction Processes in Social Judgment: Implications for Persuasion*, 16 SOC. COGNITION 93, 100-03 (1998).

57 Fritz Strack et al., *Awareness of the Influence as a Determinant of Assimilation Versus Contrast*, 23 EUR. J. SOC. PSYCHOL. 53, 59 (1993) ("If subjects were reminded of the priming event, no assimilation effect was obtained."). *See also* Wendy J. Lombardi et al., *The Role of Consciousness in Priming Effects on Categorization: Assimilation Versus Contrast as a Function of Awareness of the Priming Task*, 13 PERSONALITY & SOC. PSYCHOL. BULL. 411, 426-28 (1987); Leonard S. Newman &

Additional illustrations of the successful implementation of a correction for bias approach following an authority's request to a decisionmaker not to let specific information influence a judgment are abundant.[58]

The correction for bias studies reveal that individuals correct for the amount of bias they perceive to exist.[59] Applied to a trial setting, jurors may be predicted to vary their corrections for the bias introduced by inadmissible evidence to the same degree that the judge's instruction to disregard—and their own intuitive theories—indicate is necessary. These studies also find that blatant influences are more likely to be corrected for than subtle influences.[60] Influences exerted by inadmissible evidence on jurors' views of the case can become salient to jurors when the instruction to disregard focuses on the inadmissible evidence. This, in turn, should promote correction for the biasing effect of the inadmissible evidence.[61]

James S. Uleman, *Assimilation and Contrast Effects in Spontaneous Trait Inference*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 224, 236-38 (1990).

58 *E.g.*, Norbert Schwarz & Gerald L. Clore, *Mood, Misattribution, and Judgments of Well-Being: Informative and Directive Functions of Affective States*, 45 J. PERSONALITY & SOC. PSYCHOL. 513, 518 (1983) (finding that people reminded of the poor weather they were experiencing compensated for it when reporting their happiness and life satisfaction); Richard E. Petty & Duane T. Wegener, *Flexible Correction Process in Social Judgment: Correcting for Context-Induced Contrast*, 29 J. EXPERIMENTAL SOC. PSYCHOL. 137, 144-47 (1993) (finding that people exposed to five attractive vacation locations (e.g., the Bahamas) corrected for the impact of these locations on their subsequent judgments of more mundane locations (e.g., Kansas City) when asked not to let the attractive locations influence their impressions of the other locations); Duane T. Wegener & Richard E. Petty, *Flexible Correction Processes in Social Judgment: The Role of Naive Theories in Corrections for Perceived Bias*, 68 J. PERSONALITY & SOC. PSYCHOL. 36, 40-41 (1995) (finding that people thinking of models and attractive actresses (e.g., Kim Basinger) corrected for the impact of the models and actresses on their subsequent judgments of average-looking people (e.g., Hillary Clinton) when asked not to let the attractive people influence their impressions of the average-looking people). Unlike in the experimental studies, the courts will not know how jurors who were not exposed to the inadmissible evidence would have decided the case, as gaining this knowledge would entail redoing the trial with the inadmissible evidence excised in front of a different jury, the very situation the instruction to disregard is intended to avoid. However, the basic correction for bias literature and the study presented in Part III suggest that the neutralization instruction to disregard will cause at least some jurors to correct for the biasing influence of the inadmissible evidence.

59 *E.g.*, Petty & Wegener, *supra* note 58, at 147; Wegener & Petty, *supra* note 58, at 47-49.

60 *E.g.*, Yaacov Schul & Eugene Burnstein, *When Discounting Fails: Conditions Under Which Individuals Use Discredited Information in Making a Judgment*, 49 J. PERSONALITY & SOC. PSYCHOL. 894, 901-02 (1985) (finding that individuals are more likely to disregard information when rendering a judgment of a person when their attention is focused on the information that is to be disregarded rather than on the information that is to be used in making their judgments).

61 Some cases contain instructions directing jurors not to use the inadmissible evidence when arriving at a verdict. *E.g.*, Minett v. Hendricks, 135 F. App'x 547, 549 (3d Cir. 2005) ("No one expects you to erase it from your memory. But you must remember not to use the struck piece of evidence to decide the case in any way. Anything less would mean you would not be doing your job pursuant to your oath." (quoting the trial transcript)); State v. Dunbar, Nos. 02-10-1974, 02-10-1975, 02-07-1300, 2006 WL 1585801, at *3 (N.J. Super. Ct. App. Div. June 12, 2006) ("How do you disregard something you have already heard[?] It is pretty simple. You make like the evidence in the case is a column of

Biasing information that is untrue, unreliable, or irrelevant tends to be neutralized by a process other than correction for bias. In these circumstances, the biasing information may be discounted altogether (i.e., given no weight) because it lacks any probative value.[62] Although discounting and correcting for bias are distinct processes, it is helpful to consider how discounting would be expected to operate in a trial setting using the three general prerequisites identified in the correction for bias literature.[63] First, the trial judge would alert the jurors to the falsity, unreliability, or irrelevance of the inadmissible evidence in the instruction to disregard. Second, the jurors would be expected to be motivated to discount the evidence, because complying with the judge's instruction facilitates arriving at a verdict that accords with the valid information presented at trial. Third, given that discounting invalid information when making judgments is an essential component of everyday life, jurors also can be expected to have honed this skill.

With respect to both the correction for bias and the discounting avenues to neutralizing inadmissible evidence, it is important to distinguish between the actual validity of the evidence and its perceived validity. For example, polygraph results, coerced confessions, and eyewitness testimony may be objectively unreliable, yet jurors may perceive them as reliable. Similarly, the instruction to disregard may cause evidence that is objectively true to appear untrue to the jurors. Some researchers have focused on the actual validity of the inadmissible evidence, theorizing that when evidence is ruled inadmissible despite being true, reliable, and relevant, jurors

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figures and when you come to the statement that [the witness] made, step over that figure and go on to the rest of the column figures and adding [sic] up the proof." (first alteration in original) (quoting the trial court transcript)). These instructions adopt a more realistic conception of disregarding than the traditional forget approach but, according to the basic correction for bias literature, probably do little to help jurors successfully disregard inadmissible evidence. When jurors focus on the admissible evidence, without paying due attention to the inadmissible evidence, they are less likely to realize that the inadmissible evidence has influenced their judgments, a necessary prerequisite to correction for bias.

62 People do not always discount invalid information. *E.g*., Craig A. Anderson et al., *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037, 1045 (1980) ("[I]nitial beliefs may persevere in the face of a subsequent invalidation of the evidence on which they are based, even when this initial evidence is itself . . . weak and inconclusive . . . ."). However, the circumstances that foster a failure to discount generally are not present in the inadmissible evidence context. For example, jurors are forewarned that information presented during the trial may be invalid, whereas failures to discount tend to result from information that is initially presented as unquestionably valid. Moreover, jurors are likely to have minimal opportunity to elaborate on and integrate the inadmissible evidence into their stories of the case before the instruction to disregard is given, whereas failures to discount generally require internally constructed theories for why the information is valid that then overcome external evidence to the contrary. See *infra* note 96 for a description of the story model of juror decisionmaking. Part IV.B addresses the situation in which belief perseverance may be most expected—when the instruction to disregard is delayed—and suggests a means by which to overcome it.

63 *See* Wegener et al., *supra* note 48; Wilson & Brekke, *supra* note 48, at 119-20.

lack the requisite motivation to disregard it.[64] Contrary to this theory, however, are findings that mock jurors sometimes do disregard valid inadmissible evidence.[65] The most obvious explanation for these results is that jurors may at times be inclined to prioritize their competing responsibilities in favor of following a court's instruction to disregard, despite the fact that following the court's instruction entails disregarding information that would result in a more accurate decision. So interpreted, these studies provide preliminary empirical support for the correction for bias avenue to neutralizing inadmissible evidence. An alternative and complementary explanation derives from research finding that mock jurors instructed to disregard pro-conviction inadmissible evidence were less certain that the defendant had actually committed the crime than were mock jurors who did not receive the instruction to disregard.[66] This uncertainty suggests that the instruction to disregard decreased the degree to which participants perceived the inadmissible evidence to be valid. Consequently, the study constitutes tentative support for the theory that jurors neutralize inadmissible evidence by discounting it. Taken together, these studies present the possibility that an instruction to disregard may counter the impact of objectively valid inadmissible evidence, either by instilling in jurors the sense that the evidence is inappropriate despite being valid or by undercutting its perceived validity. The study reported in Part III is designed to investigate the degree to which the correction for bias effects found in previous studies apply in the inad-

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64 *E.g.*, Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046, 1047 (1997) ("Although past research has yielded mixed results and although the problem has been conceptualized in broad cognitive and motivational terms, we believe that the impact of an instruction to disregard depends more specifically on whether it calls on the jury to set aside probative information that would promote accurate decision making or whether the information is withdrawn because it lacks credibility."). In a subsequent article, following criticism that this position incorrectly omitted other motivations that drive jurors' verdicts after their exposure to valid inadmissible evidence, Kassin and Sommers softened their position. Samuel R. Sommers & Saul M. Kassin, *On the Many Impacts of Inadmissible Testimony: Selective Compliance, Need for Cognition, and the Overcorrection Bias*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 1368, 1374 (2001) (stating that "the motivation to reach a just verdict is a crucial factor in determining whether jurors comply with instructions to disregard" but acknowledging that their research does not "rule out the possibility that other such motivations exist").

65 *E.g.*, Jeffrey Kerwin & David R. Shaffer, *Mock Jurors Versus Mock Juries: The Role of Deliberations in Reactions to Inadmissible Testimony*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 153, 159-60 (1994) (finding significantly lower conviction rates when mock jurors were instructed to disregard valid inadmissible evidence than when mock jurors were instructed that the evidence was admissible); Kassin & Sommers, *supra* note 64, at 1049 (finding that mock jurors were substantially less likely to render a guilty verdict when pro-conviction evidence was ruled inadmissible on procedural grounds than when it was ruled admissible (55 percent vs. 79 percent)). Although Kassin and Sommers did not report the significance of the difference between these two conditions, whether statistically significant or not, the 24 percent drop in guilty verdicts from the admissible condition to the inadmissible-procedural condition is certainly notable.

66 Kerwin & Shaffer, *supra* note 65, at 157.

missible evidence realm. Additionally, the study will elucidate the role of discounting in jurors' responses to inadmissible evidence.

Before reviewing that study, it is important to note that a subset of the problems associated with the traditional forgetting approach is resolved merely by reconceptualizing the jurors' task as neutralizing the inadmissible evidence. The neutralization approach eliminates courts' predicament of wanting to motivate jurors to disregard with a relatively powerful instruction yet wanting to avoid drawing attention to the inadmissible evidence. Under the neutralization approach, attention paid to the inadmissible evidence in the instruction to disregard is beneficial, not detrimental, to disregarding, such that the motivation and ability of jurors to disregard the evidence no longer conflict.

The neutralization approach also eliminates concerns associated with restating the inadmissible evidence in the instruction to disregard. Paying this additional attention to the inadmissible evidence benefits, rather than undermines, unbiased decisionmaking under the neutralization approach. Consequently, courts may restate the evidence to ensure that jurors understand precisely what they are to disregard without concern that this restatement makes it less likely that jurors will be able to disregard.

By replacing the forget approach with the neutralization approach, courts also may sidestep any negative impression of the legal system engendered by instructing jurors to do the impossible. Whereas forgetting on demand is well known to be beyond the capabilities of the human mind, correction for bias and discounting are frequently engaged in and should be more intuitively appealing to jurors and the public at large.

The remaining problems associated with the traditional approach to disregarding can be resolved only with empirical evidence that a Neutralization instruction effectively counters the damage inflicted by the inadmissible evidence and performs equally well or better than the Minimal Forget and Elaborate Forget instructions. With this evidence, courts may have the confidence to replace the traditional forget instructions with a Neutralization instruction and thereby do away with both the incentive to instruct jurors merely to disregard the evidence during deliberations and the tendency for judges and counsel to forego an instruction to disregard altogether. Consequently, a final purpose of the study presented in Part III is to test the relative effectiveness of the Minimal Forget and Elaborate Forget instructions versus the Neutralization instruction in countering the damaging effects of inadmissible evidence.

III. FORGETTING VERSUS NEUTRALIZING: AN EMPIRICAL INVESTIGATION[67]

A. *The Trial*

In this experiment, mock jurors read the transcript of a criminal trial in which the defendant was accused of murdering his wife and a neighbor.[68] The transcript included the opening statements of the prosecution and defense, the testimony of various witnesses, the closing arguments of both attorneys, and a brief instruction on the law by the presiding judge. It was approximately thirteen pages in length.

The target evidence (i.e., the evidence that was ruled admissible or inadmissible, depending on the experimental condition) consisted of the testimony of a prosecution witness, a police officer, that he and a fellow officer had found what appeared to be the murder weapon during a search of the defendant's apartment:

> PROSECUTOR: Did you find anything during your search of the area?
>
> POLICE OFFICER: No. But later that night a fellow officer and I searched the defendant's apartment and found a hunting knife with some freshly dried blood on it. We took the knife to the station, and DNA tests showed that the blood was that of Mr. Maddox, the male victim . . . .[69]

This evidence was introduced at the beginning of the sixth page of the transcript in all conditions except the Control.

Counsel for the defense made the same objection to this testimony in each condition in which it was introduced: "Objection, your Honor!" In the Admissible condition, the judge ruled the testimony admissible: "This testimony regarding the knife is admissible, and the jury is free to consider it when rendering a verdict." In the inadmissible conditions, the judge ruled the evidence inadmissible with one of three instructions to disregard:

> *Minimal Forget*: "This testimony regarding the knife is inadmissible, and the jury is instructed to disregard it."

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[67] All materials used to conduct the empirical study described in this Part, as well as the data generated, are on file with the author.

[68] See Kassin & Sommers, *supra* note 64, for a description of the stimulus trial that was modified for this study.

[69] The trial had been calibrated during pre-testing to result in an approximately equal percentage of guilty and not guilty verdicts. Different pieces of target evidence also were pre-tested, and the testimony regarding the hunting knife was found to increase significantly the percentage of guilty verdicts rendered when it was ruled admissible.

> *Elaborate Forget*: "This testimony regarding the knife is inadmissible, and the jury is instructed to disregard it. [JUDGE TURNS TO FACE JURORS] You jurors must erase this evidence from your minds. Forget that you heard it. Put it out of your minds completely, and do not give it another thought. You must not even remember that it was presented."[70]

> *Neutralization*: "This testimony regarding the knife is inadmissible, and the jury is instructed to disregard it. [JUDGE TURNS TO FACE JURORS] Now, I want to be very clear about something. It is important that you be aware that information sometimes biases our judgments even though we believe we have disregarded it. There is thus a very real danger that [the officer's] testimony regarding the knife may lead you to the wrong verdict unless you account for its improper influence on your judgment of [the defendant] and adjust your verdict accordingly."

It would be highly unusual for a prosecutor to fail to mention such incriminating evidence during closing arguments when it was ruled admissible during the evidentiary portion of the trial. Consequently, to achieve verisimilitude in the Admissible condition while maintaining the integrity of the experimental design, the target evidence was subsequently mentioned in the prosecutor's closing argument in each condition in which it was originally introduced:

> The evidence against [the defendant] is overwhelming. He fits the physical profile of the murderer. The defendant's story has time gaps during which he cannot show where he was or what he was doing. His fingerprints were found on the bodies of both of the victims. He is the only person with a motive to kill these people. And most important of all, the murder weapon was found in his apartment . . . .

In the Admissible condition, the defense attorney objected to this subsequent mention of the target evidence, and the judge again ruled the evidence admissible:

> DEFENSE ATTORNEY: I again object to reference to the knife, your Honor.

> THE COURT: As I ruled earlier, this evidence is admissible, and the jury may consider it.

In the inadmissible conditions, the defense attorney made the same objection, and the judge ruled the evidence inadmissible with an instruction that paralleled the original instruction to disregard:

> *Minimal Forget*: "As I ruled earlier, this evidence is inadmissible, and the jury is instructed to disregard it."

> *Elaborate Forget*: "As I ruled earlier, this evidence is inadmissible, and the jury is instructed to disregard it. Put it out of your minds. Do not think about it."

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70 The Minimal Forget and Elaborate Forget instructions were crafted to be representative of the forms they take in court. *See supra* notes 25-26 and accompanying text.

Neutralization: "As I ruled earlier, this evidence is inadmissible, and the jury is instructed to disregard it. It is important that you not allow this evidence to bias your verdict."

To minimize suspicion about the purpose of the experiment in the conditions in which the target evidence was introduced, two additional objections were made in all conditions (including the basic trial) before the point at which the target evidence was presented. One objection was made by each side, and the evidence objected to was ruled admissible in both instances.

B. *Experimental Design and Procedure*

Two hundred and thirty (82 male, 148 female) undergraduate students at Arizona State University participated in the experiment. Participants were randomly assigned to one of five conditions, aligning with the different versions of the trial outlined in the previous subpart: (1) A *Control* condition, in which participants were presented with a murder trial (and the target evidence referred to below was not included); (2) An *Admissible* condition, in which very damaging evidence against the defendant (the "target evidence") was introduced during the trial and ruled admissible; (3) An *Inadmissible-Minimal Forget* condition, in which the target evidence was ruled inadmissible with a Minimal Forget instruction to disregard; (4) An *Inadmissible-Elaborate Forget* condition, in which the target evidence was ruled inadmissible with an Elaborate Forget instruction to disregard; and (5) An *Inadmissible-Neutralization* condition, in which the target evidence was ruled inadmissible with a Neutralization instruction based on correction for bias and discounting principles.

Upon arrival, participants were told that they would read an abridged transcript from a murder trial that had taken place the previous year at the Maricopa County Superior Court in downtown Phoenix and then render a verdict in the case and answer a set of questions about the trial. Participants were encouraged to put themselves in the roles of jurors and to weigh the evidence as they would if they were actually serving as jurors in the case. To encourage them to adopt a juror mindset, they were led to believe that they were participating in an official government study of how males and females of different ages arrive at verdicts when they serve as jurors. These participants supposedly were providing the data on young males and females, whereas jurors at the Superior Court would supply the data on middle-aged and elderly jurors.[71] After being given these preliminary instructions, participants read the trial transcripts individually, at their own pace.

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[71] Prior mock jury research has found that college students' and community members' verdict preferences were indistinguishable. *E.g.*, Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 J. PERSONALITY & SOC. PSYCHOL. 21, 26

Upon finishing the transcripts, participants rendered a verdict in the case (not guilty or guilty)[72] and answered a series of questions that measured the following constructs on seven-point Likert-type scales:

(1) Participants' certainty that the defendant committed the crime (0 = "not at all certain" to 6 = "extremely certain");

(2) The perceived relevance of the target evidence to the case (0 = "not at all relevant" to 6 = "extremely relevant");

(3) How difficult it was to disregard the inadmissible evidence (0 = "not at all difficult" to 6 = "extremely difficult");

(4) The perceived impact of the target evidence on participants' beliefs that the defendant was guilty (-3 = "moved me a lot toward believing him not guilty" to +3 = "moved me a lot toward believing him guilty");

(5) The extent to which participants felt obligated to disregard the inadmissible evidence (0 = "not at all obligated" to 6 = "extremely obligated");

(6) The extent to which participants felt that the instruction to disregard limited their freedom to render the verdict they considered most just (0 = "not at all" to 6 = "extremely");

(7) The impact of the target evidence on participants' perceptions of three other admissible pieces of evidence (for all three, the scale was as follows: -3 = "moved me a lot toward believing him not guilty" to +3 = "moved me a lot toward believing him guilty"); and

(8) Participants' perceptions of the prosecutor's and defense counsel's competency (0 = "not at all competent" to 6 = "extremely competent"), honesty (0 = "not at all honest" to 6 = "extremely honest"), and likability (0 = "liked him not at all" to 6 = "liked him very much").

Also measured were:

(9) Participants' memory for the trial judge's admissibility ruling (participants marked the target evidence as being ruled either admissible or inadmissible by the trial judge, and these responses were checked against their experimental conditions);

(1988). Thus, contrary to the cover story for the experiment, the responses of the study participants should reflect those of the broader community of individuals who would serve on actual juries.

[72] In their classic study of jury decisionmaking, Kalven and Zeisel concluded that the "deliberation process might well be likened to what the developer does for an exposed film: it brings out the picture, but the outcome is predetermined." HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 489 (1966). More recent research has refined this view, finding, for example, that jurors who favor acquittal in criminal trials may be more influential during the deliberation process, but it supports Kalven and Zeisel's general point. *See, e.g.*, Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 545-46 (1992) (finding that the average juror's predeliberation award strongly predicted the jury verdict). Thus, the mock jurors in the present experiment did not engage in deliberations and render jury verdicts, because their individual verdicts would be expected to be reflected in the jury verdicts.

(10) Whether participants attempted to disregard the target evidence when it was ruled inadmissible (participants marked whether or not they had attempted to disregard the evidence); and

(11) If participants attempted to disregard the target evidence, how they approached the task (open-ended question).

C. *Results*[73]

Following a significant chi-square test of verdict by condition, $\chi^2(4, N = 230) = 11.36$, $p = .023$, an a priori contrast revealed that participants in the Admissible condition were significantly more likely to find the defendant guilty than were participants in the Control condition, $t(225) = -2.50$, $p = .013$. Thus, as expected, the target evidence significantly increased the number of guilty verdicts rendered when the trial judge ruled it admissible. Participants in the Admissible condition were also significantly more likely to find the defendant guilty than were participants in the Elaborate Forget condition, $t(225) = 2.95$, $p = .003$, and the Neutralization condition, $t(225) = 2.73$, $p = .007$. In other words, both the Elaborate Forget instruction and the Neutralization instruction successfully negated the impact of the inadmissible evidence on participants' verdicts. In contrast, participants in the Minimal Forget condition rendered verdicts not significantly different from either participants in the Admissible condition, $t(225) = 1.59$, ns, or participants in the Elaborate Forget and Neutralization conditions combined, $t(225) = 1.44$, ns. These results are illustrated in Figure 1.

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[73] A suspicion check revealed that 15 of the 230 participants exhibited a suspicion level greater than 0 on a scale ranging from 0 to 6. Participants' level of suspicion was evenly distributed across the conditions, $\chi^2(16, N = 230) = 18.55$, ns, and no participants were highly suspicious (5 or 6). Therefore, no participants are excluded from any analysis.

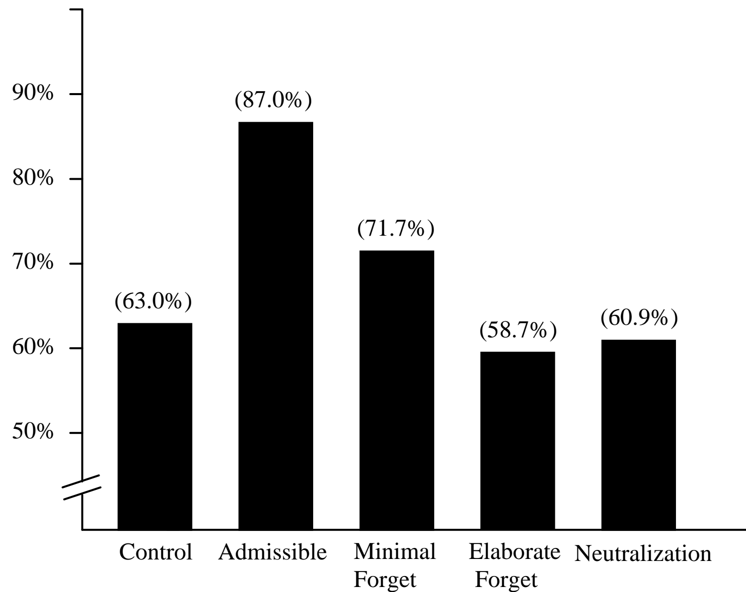

Figure 1. Percentage of Participants Who Rendered Guilty Verdict

Thus, the first major finding of the study is that the Minimal Forget instruction performed less effectively than both the Elaborate Forget and the Neutralization instructions. Mock jurors given the Minimal Forget instruction did not render verdicts comparable to those rendered by mock jurors who were not exposed to the inadmissible evidence.[74] The reasons for this inferior performance are discussed in detail below. The second major finding of the study is that, from a practical standpoint, both the Elaborate Forget and the Neutralization instructions appear to provide justice to litigants whose cases would otherwise be damaged by inadmissible evidence. In essence, these instructions returned the case to the state it was in before the inadmissible evidence was presented to the jurors. Why these two instructions perform comparably—including why the Elaborate Forget instruction was as effective at countering the damaging effects of the inadmissible evidence as the Neutralization instruction despite contrary findings in the basic psychological literature—also follows.

To begin with, participants in the Minimal Forget condition were significantly less likely than participants in the Elaborate Forget and Neutrali-

[74] Given the pattern of verdicts across conditions, it is likely that if the study had greater statistical power, the Minimal Forget condition would have been significantly different from the Admissible condition and significantly different from the Elaborate Forget and Neutralization conditions. That is, the Minimal Forget instruction appears to remove some of the prejudice associated with the inadmissible evidence but does not neutralize it.

zation conditions combined to recall that the target evidence had been ruled inadmissible, $t(135) = -2.70$, $p = .008$. Participants in the Elaborate Forget and Neutralization conditions did not differ in their memory for the admissibility ruling, $t(135) = .52$, ns.[75] Aside from certain subconscious influences that may be operating, memory for the inadmissibility ruling is a necessary precursor to the successful disregarding of inadmissible evidence; jurors who do not recall having been instructed to disregard inadmissible evidence cannot be expected to hold views of the case uninfluenced by the inadmissible evidence. Thus, these data suggest that the Minimal Forget instruction is comparatively ineffective, in part because fewer jurors thoroughly process it compared to the Elaborate Forget and Neutralization instructions. The Elaborate Forget and Neutralization instructions, on the contrary, are memorable, which facilitates jurors' compliance with them.

Relatedly, participants in the Minimal Forget condition were significantly less likely to attempt to disregard the inadmissible evidence than participants in the Elaborate Forget and Neutralization conditions combined, $t(135) = -2.02$, $p = .045$.[76] This difference may be attributable in large part, if not entirely, to the Minimal Forget instruction being less memorable than the Elaborate Forget and Neutralization instructions, given that there were no significant differences among the inadmissible conditions in how obligated the participants felt they were to disregard the testimony concerning the hunting knife, $F(2, 135) = 1.67$, ns. The study thus suggests that courts' concern that the Minimal Forget instruction may lack the forcefulness needed to motivate jurors to disregard is unfounded. However, the forgettable nature of the instruction may undermine its effectiveness and argue against its use in the courts.

The reported method by which participants in the inadmissible conditions attempted to disregard the target evidence—forget or neutralize—did not differ by condition, $\chi^2(2, N = 91) = 2.51$, ns. In other words, whether participants were given the Minimal Forget, the Elaborate Forget, or the Neutralization instruction, they reported taking similar approaches to disregarding.[77] This finding is integral to understanding why participants in the

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[75] These contrasts were conducted following a significant chi-square test of memory for the admissibility ruling in the three inadmissible conditions, $\chi^2(2, N = 138) = 7.32$, $p = .026$. The percentages of participants in the inadmissible conditions who correctly responded that the testimony concerning the hunting knife was ruled inadmissible were: Minimal Forget = 89.1%, Elaborate Forget = 100%, and Neutralization = 97.8%.

[76] The chi-square test of whether participants attempted to disregard the testimony concerning the target evidence in the inadmissible conditions revealed a marginally significant difference among conditions, $\chi^2(2, N = 138) = 5.36$, $p = .069$. The percentages of participants in the inadmissible conditions who reported attempting to disregard the hunting knife were: Minimal Forget = 60.9%, Elaborate Forget = 82.6%, and Neutralization = 71.7%.

[77] The distribution by conditions is as follows: Minimal Forget (57.1% neutralized, 32.1% suppressed); Elaborate Forget (57.9% neutralized, 34.2% suppressed); and Neutralization (66.7% neutralized, 27.3% suppressed). Participants not accounted for by the percentages gave either an ambiguous

Elaborate Forget and Neutralization conditions performed similarly on the verdict measure. Regardless of whether they were instructed to forget or to neutralize the inadmissible evidence, participants tended to adopt the neutralization method of disregarding. Presented with a complex social context and called upon to make an important decision on a subset of the information presented, jurors would appear to be inclined to adopt the strategy they use in their daily lives to debias decisions, rather than the one that common sense and science deem impossible. Tellingly, although participants given the Minimal Forget instruction reported taking an approach to disregarding similar to that taken by participants in the Elaborate Forget and Neutralization conditions, they found the hunting knife significantly more difficult to disregard, $t(96) = 2.56$, $p = .012$.[78]

Further support for the fact that participants in all three inadmissible conditions adopted a neutralization approach to disregarding and an explanation for why participants in the Minimal Forget condition found it more difficult to disregard the hunting knife are found in the "certainty that the defendant committed the crime" and the "perceived relevance of the hunting knife to the case" measures. A one-way analysis of variance revealed that participants' certainty that the defendant committed the crime varied significantly by condition, $F(4, 225) = 3.84$, $p = .005$, with participants in the Admissible condition significantly more certain that the defendant committed the murders than participants in the four other conditions combined, $t(225) = 3.45$, $p = .001$. There were no significant differences across the inadmissible conditions, $F(2, 135) = .51$, ns, although the results followed the same pattern found for the verdict (i.e., participants in the Minimal Forget condition were more certain that the defendant committed the crime than were participants in the Elaborate Forget and Neutralization conditions).[79]

The extent to which participants viewed the testimony concerning the hunting knife as relevant to the case also varied significantly by condition,

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answer (i.e., an answer that could be interpreted as either thought suppression or neutralization) or a nonresponsive answer (i.e., an answer that did not state how they attempted to disregard the inadmissible evidence). These percentages represent rough estimates of the method of disregarding employed, given that people have trouble reporting with precision their higher order mental processes, but it is telling that even the majority of participants who were given the Elaborate Forget instruction, a powerful suppression instruction, reported taking a neutralization approach to disregarding the inadmissible evidence.

[78] A chi-square test of the difficulty participants experienced when trying to disregard the hunting knife in the inadmissible conditions revealed significant differences among the conditions: $F(2, 96) = 3.33$, $p = .040$. The relevant cell means were: Minimal Forget = 4.93, Elaborate Forget = 3.95, and Neutralization = 3.93.

[79] The certainty means are: Control = 3.11, Admissible = 4.43, Minimal Forget = 3.72, Elaborate Forget = 3.61, and Neutralization = 3.35.

F(3, 180) = 3.05, *p* = .030.[80] Participants in the Elaborate Forget and Neutralization conditions combined viewed the target evidence as significantly less relevant than did participants in the Admissible condition, *t*(180) = 2.56, *p* = .011. In contrast, participants in the Minimal Forget condition did not differ from participants in the Admissible condition, *t*(180) = .24, ns, and viewed the target evidence to be significantly more relevant to the case than did participants in the Elaborate Forget and Neutralization conditions combined, *t*(180) = 2.29, *p* = .023.

A more precise view of the respective roles played by participants' certainty that the defendant committed the crime and the degree to which they perceived the target evidence as relevant to the case is presented in Figure 2.

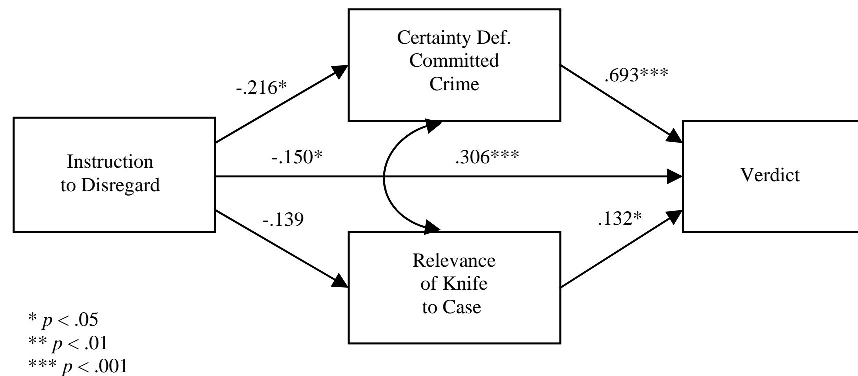

Figure 2. Path Model of Influence of Instruction to Disregard on Verdict (reported coefficients are standardized)

In this model, the Admissible condition is compared to the three inadmissible conditions. The significant negative relationship between instruction to disregard and certainty that the defendant committed the crime, in conjunction with the significant positive relationship between certainty that the defendant committed the crime and verdict rendered, suggests that the instructions to disregard lowered the number of guilty verdicts by decreasing some participants' certainty that the defendant committed the crime (i.e., by undermining the perceived validity of the inadmissible evidence so that participants discounted it when arriving at a verdict).

The nonsignificant path between instruction to disregard and perceived relevance of the hunting knife to the case suggests that the instructions did not directly influence the perceived relevance of the knife. Rather, the significant correlation between participants' certainty that the defendant com-

80 The relevance means are: Admissible = 5.46, Minimal Forget = 5.37, Elaborate Forget = 4.74, and Neutralization = 4.54.

mitted the crime and the perceived relevance of the hunting knife, in conjunction with the significant positive relationship between the perceived relevance of the knife and the verdict, suggests that some participants considered the inadmissible evidence less relevant to the case following the instructions to disregard because they believed the inadmissible evidence lacked validity.

Finally, the significant negative relationship between instruction to disregard and verdict illustrates that the instructions to disregard also influenced participants' verdicts directly. Thus, some participants judged the defendant to be not guilty following an instruction to disregard regardless of how certain they were that the defendant committed the crime and how relevant they believed the knife was to the case. These participants corrected for the biasing influence of the inadmissible evidence on their verdicts.

These data on the thought processes underlying participants' verdicts following the instructions to disregard provide strong support for the notion that each instruction to disregard instigated a neutralization approach to disregarding and also undermine any explanation based on participants' forgetting of the inadmissible evidence. Thus, this finding converges with participants' self-reports of their approach to disregarding.[81] Even when participants in the Elaborate Forget condition were adamantly instructed to forget the inadmissible evidence, they generally adopted a neutralization approach to disregarding. Not surprisingly, participants in the Minimal Forget condition, who were not explicitly told to forget the inadmissible evidence, also tended to adopt the neutralization approach. As discussed previously, however, participants in the Minimal Forget condition experienced greater difficulty with disregarding.[82] The Minimal Forget instruction to disregard did not undermine the validity of the inadmissible evidence, as did the Elaborate Forget and Neutralization instructions; participants in this condition therefore viewed the inadmissible evidence as more relevant to the case and, consequently, had at their disposal the correction for bias avenue of neutralization but not the discounting avenue.

Two additional measures are important to interpreting the aforementioned main findings of the study. It is noteworthy that participants' perceptions of the influence the hunting knife had on their belief that the defendant was guilty did not vary across the inadmissible conditions, $F(2, 135) = 1.21$, ns. Thus, whereas participants in the Elaborate Forget and Neutralization conditions accurately estimated the extent to which the inadmissible evidence moved them to believe that the defendant was guilty, participants in the Minimal Forget condition underestimated the effect of the inadmissible evidence on their judgments of guilt. In other words, yet another reason that the Minimal Forget instruction performed poorly was that it failed to

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81 *See supra* note 77 and accompanying text.

82 *See supra* note 78 and accompanying text.

convey to participants the large degree to which the inadmissible evidence altered their perceptions of the case.

It is also worth noting that the extent to which participants in the inadmissible conditions viewed the instructions to disregard the testimony concerning the hunting knife as limiting their freedom to render the verdicts they considered most just did not vary by condition, $F(2, 133) = .57$, ns. While rarely a concern of the courts, given that they presume jurors will follow instructions regardless of their characteristics, some legal commentators have expressed concern that forceful jury instructions may unintentionally motivate jurors to do the opposite of the instruction by generating psychological reactance.[83] That was not the case for either the Elaborate Forget or the Neutralization instruction, however, even though both contained strong admonitions to disregard. The fact that these instructions tended to undercut the validity of the inadmissible evidence or otherwise cause it to appear faulty may explain why participants exhibited no signs of reactance. Participants did not view the instruction to disregard as an attempt to curtail their freedom to render the verdict they considered most just, because not taking into account the apparently faulty evidence increased the likelihood of arriving at a just verdict. The trial judge was viewed as merely communicating to the jurors his knowledge about the flawed nature of the inadmissible evidence, thereby aiding them in their effort to render a just verdict.

D. *Discussion*

In this study, the Elaborate Forget instruction and the Neutralization instruction eliminated the influence of the inadmissible evidence on participants' verdicts, whereas the Minimal Forget instruction failed to do so. These results suggest that instructions to disregard even highly incriminating inadmissible evidence can be effective, as long as they are well formulated.

When considering what elements make for a well-formulated instruction, it is helpful to review the dependent measures on which participants in the Elaborate Forget and Neutralization conditions performed differently from participants in the Minimal Forget condition because these measures clarify the cognitive processes involved in counteracting the effects of the inadmissible evidence. Participants in the Elaborate Forget and Neutraliza-

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[83] *E.g.*, Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589, 607 (1997) (opining that, as a result of reactance, "jurors may not only fail to ignore the evidence but instead focus additional attention on it"). Psychological reactance is generally conceived of as "a motivational state directed toward the reestablishment of the free behaviors which have been eliminated or threatened with elimination." JACK W. BREHM, A THEORY OF PSYCHOLOGICAL REACTANCE 9 (1966).

tion conditions were more likely to recall having been instructed to disregard the inadmissible evidence than were participants in the Minimal Forget condition. The study thus provides evidence that courts' failure to restate inadmissible evidence within the jury instruction impedes rather than promotes successful disregarding. Participants in the Minimal Forget condition also tended to view the inadmissible evidence as more valid and more relevant to the case than did participants in the Elaborate Forget and Neutralization conditions. As a result, they were less likely to be able to discount the evidence.

To aggravate the situation, whereas participants in the Elaborate Forget and Neutralization conditions accurately estimated the extent to which the inadmissible evidence moved them to believe that the defendant was guilty, participants in the Minimal Forget condition underestimated this effect. Participants in the Minimal Forget condition thus failed to realize the true degree to which the inadmissible evidence altered their perceptions of the case. Given the foregoing findings, it is unsurprising that participants in the Minimal Forget condition were significantly less likely to attempt to disregard the inadmissible evidence than were participants in the Elaborate Forget and Neutralization conditions. In addition, when they did attempt to disregard the evidence, they experienced greater difficulty than did participants in the Elaborate Forget and Neutralization conditions.

Ironically, participants in the Minimal Forget condition do not appear to have been less motivated to disregard the inadmissible evidence. On the contrary, the degree to which they felt obligated to disregard the inadmissible evidence was comparable to that demonstrated by participants in the Elaborate Forget and Neutralization conditions. However, participants who received the Minimal Forget instruction exhibited lower awareness of the influence exerted by the inadmissible evidence and an impaired ability to disregard. These findings simultaneously alleviate the main concern with the Minimal Forget instruction—that it does not sufficiently motivate jurors to disregard—and point out other disadvantages of relying on this instruction. The Minimal Forget instruction, one of the two instructions courts regularly provide to jurors under the traditional approach to disregarding, proved generally ineffective at eliminating the prejudicial effects of the inadmissible evidence on participants' verdicts.

The Elaborate Forget and Neutralization instructions performed uniformly well on all of the dimensions studied. The basic psychological research on discounting and correction for bias accurately foretold the success of the Neutralization instruction. On the contrary, the basic psychological research on thought suppression failed to predict the Elaborate Forget instruction's successful performance. The dependent measures mediating type of instruction and verdict explain this finding. Participants in the Elaborate Forget condition did not report attempting to suppress the inadmissible evidence to any greater extent than did participants in the other inadmissible conditions. Moreover, the minority of participants in each of the inadmissi-

ble conditions who reported using a thought suppression approach to disregarding rendered verdicts not different from participants who reported using a neutralization approach to disregarding. These findings indicate that warnings against the possible dangers of giving a thought suppression instruction in the courtroom[84] may be unfounded from a purely cognitive perspective. However, they also make clear that the Elaborate Forget and Neutralization instructions generate the same mental response—a neutralization approach to disregarding—bringing into question any benefits to the courts of issuing an Elaborate Forget instruction when the more realistic and equally effective Neutralization instruction exists. The Elaborate Forget instruction encourages jurors to do the impossible (i.e., to erase information from their minds), whereas the Neutralization instruction acknowledges the boundaries of human cognition and works within them.

As a scientifically supported and intuitively appealing method of responding to the prejudicial effects of inadmissible evidence, the neutralization approach should remove the incentive for judges to either forego giving jurors an instruction to disregard or to unnecessarily limit the instruction's scope by telling jurors merely not to consider the inadmissible evidence during deliberations. Moreover, the Neutralization instruction avoids placing trial counsel in the difficult position of believing they might inflict further damage to their case by drawing additional attention to inadmissible evidence in a requested instruction to disregard yet being hesitant to proceed without such an instruction. Rather, the Neutralization instruction removes the conflict between the choices, because drawing additional attention to the evidence in the form of the neutralizing instruction increases the likelihood that jurors will be uninfluenced by the evidence.

In summary, the empirical study provides the additional insights needed to assess whether the neutralization approach alleviates each of the remaining problems associated with the traditional forget approach to disregarding. While the Elaborate Forget instruction performed comparably to the Neutralization instruction in terms of effectiveness, the Minimal Forget instruction was consistently inferior. This suggests that the courts might do well to abandon the Minimal Forget instruction. In considering the relative merits of the Elaborate Forget and Neutralization instructions, the various other problems associated with the Elaborate Forget instruction and resolved by the Neutralization instruction suggest that the former is perhaps

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[84] *E.g.*, DANIEL M. WEGNER, WHITE BEARS AND OTHER UNWANTED THOUGHTS: SUPPRESSION, OBSESSION, AND THE PSYCHOLOGY OF MENTAL CONTROL 116 (1989).

> The instruction cannot produce an erasure, a complete suppression. So, what is left is a remarkably volatile mental state. The jurors have the information, and the degree to which they use it or avoid it will be entirely dependent on how well they *remember to disbelieve*. If they are constantly on watch, and have enough additional facts to make sense of the case without the to-be-disregarded information, they may get by without ever using the forbidden ideas. If they just once forget to disbelieve, however . . . the forbidden ideas may very well surface and influence their judgments. If you were on trial would you want to trust their vigilance?

Id.

best considered a viable but inferior alternative to the neutralization approach.[85]

IV. FORGETTING, NEUTRALIZATION, AND THE COMPLEXITIES OF INADMISSIBLE EVIDENCE

Contemplation of a few additional aspects of inadmissible evidence and instructions to disregard is necessary to achieve a more complete understanding of the relative merits of the forget and neutralization approaches to disregarding. This Part first questions the "inherently prejudicial" concept used by the courts in relation to inadmissible evidence, thereby challenging a foundational assumption in this context. It then identifies and discusses common, yet intriguing, characteristics of inadmissible evidence and instructions to disregard.

A. *What is "Prejudicial"?*

When appellate courts have attempted to assess the extent to which a litigant was prejudiced by inadmissible evidence, they have assumed that the more "inherently prejudicial" the evidence, the more damage it inflicts on a litigant's case.[86] Research suggests, however, that "inherently prejudicial" may not be a meaningful concept. Rather, jurors' judgments may ultimately be less influenced by what is commonly perceived to be inherently prejudicial inadmissible evidence than by inadmissible evidence that is apparently less prejudicial. One study found, for example, that mock jurors

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[85] Two final, closely related, observations regarding the instructions tested in the study are warranted. First, participants' responses to the instructions underscore that seemingly slight changes in the wording of an instruction to disregard can substantially impact the instruction's effectiveness, such that great care should be taken when deciding on what language to use. Second, the effectiveness of instructions to disregard rests, in large part, on their clarity. *See, e.g.*, Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 172-73 (1982) ("The administration of justice will be improved to the extent that recurring difficulties in understanding instructions can be identified and eliminated."). Adopting an instruction to disregard such as the neutralizing instruction proposed here, which may be uniformly presented to jurors in lieu of attempting to craft instructions tailored to any given piece of inadmissible evidence or merely presenting the Minimal Forget instruction, should enhance this clarity.

[86] *See, e.g.*, United States v. Benz, 740 F.2d 903, 916 (11th Cir. 1984) ("[I]f the trial judge strikes erroneously admitted evidence from the record with an instruction that the jury disregard it, the error is cured unless the evidence is so highly prejudicial as to render the error incurable." (citation omitted)); State v. Bergland, 187 N.W.2d 622, 626 (Minn. 1971) ("If, however, evidence is of such . . . exceptionally prejudicial character that its withdrawal from the jury cannot remove the harmful effects caused by its admission, a new trial should be granted."); State v. Gregory, 247 S.E.2d 19, 22 (N.C. Ct. App. 1978) ("We think that the testimony complained of here was not so inherently prejudicial that the curative instruction was insufficient to remove any prejudice . . . .").

who were instructed to disregard powerful inadmissible evidence tended to overcompensate for the impact of the evidence and render verdicts in the opposite direction of the evidence, whereas mock jurors instructed to disregard weak inadmissible evidence tended to undercompensate for the evidence and render verdicts consistent with it.[87] Whether because jurors are more likely to be aware that the highly prejudicial inadmissible evidence may have influenced their perceptions of the case,[88] or because they are more motivated and able to correct for such blatant influence, "inherently prejudicial" inadmissible evidence may ultimately have a smaller effect on the verdict than inadmissible evidence that is deemed not to fall in this category. Consequently, any attempt to determine whether inadmissible evidence is unduly prejudicial should take into account not only the inherent prejudicial nature of the evidence, but also the possible differential neutralizing effects of the instruction to disregard.

The research noted above and the empirical investigation reported in Part III illustrate a benefit of a Neutralization instruction to disregard, which is that it appears well-suited to counteract the prejudicial effects of very powerful inadmissible evidence.[89] These studies also underscore the importance of making clear to jurors in the instruction to disregard the potential for overlooking subtle biasing influences exerted by seemingly less prejudicial inadmissible evidence, as jurors' intuitive theories likely will suggest that little or no neutralizing of this evidence is necessary.

The appropriateness of trial and appellate judges declaring certain inadmissible evidence "inherently prejudicial" is also called into question by one research team's attempt to quantify the damaging effects of particular inadmissible evidence within the trial context.[90] In this investigation, participants were asked to place themselves in the position of a juror at the trial of a car-pedestrian accident case and to rate forty pieces of inadmissible evidence according to how damaging the evidence was to the defendant's case.[91] This evidence represented most of the common forms of inadmissible evidence, such as other crimes allegedly committed by the defendant and the wealth of the defendant. The results revealed substantial variation in participants' assessments of prejudice concerning almost every form of

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87 Yaacov Schul & Harel Goren, *When Strong Evidence Has Less Impact Than Weak Evidence: Bias, Adjustment, and Instructions to Ignore*, 15 SOC. COGNITION 133, 149 (1997).

88 When a biasing influence is subtle, as opposed to blatant, jurors are less likely to be aware that it has altered their views of the case. *See, e.g.*, Lombardi et al., *supra* note 57; Newman & Uleman, *supra* note 57; Strack et al., *supra* note 57.

89 The Elaborate Forget instruction performed similarly, not because the mock jurors forgot the evidence but because they neutralized its effects on their judgments. The Minimal Forget instruction failed to counteract the prejudicial effects.

90 Lee E. Teitelbaum et al., *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147.

91 *Id.* at 1154-57.

inadmissible evidence evaluated.[92] The lack of agreement regarding the damaging nature of the evidence suggests that jurors do not share a common perception of the prejudice associated with inadmissible evidence. Consequently, it may be unhelpful to classify any given piece of inadmissible evidence as inherently high or low in prejudice for the additional reason that jurors are likely to be differentially influenced by it.[93] The neutralization approach naturally accommodates this differential impact. Although all jurors receive the same instruction to disregard, they individually apply their intuitive theories to the situation in order to approximate the degree of prejudice exerted by the inadmissible evidence and thereby determine the appropriate level of correction or discounting. In other words, once the instruction to disregard alerts jurors that the evidence is inadmissible and that it has the potential to prejudice their verdicts, jurors individually assess the degree to which it has tainted their perceptions of the case and adjust their verdicts accordingly.

B. *Timing of Instruction to Disregard*

Courts place great weight on the timing of the instruction to disregard. That an instruction is given immediately following jurors' exposure to inadmissible evidence is considered a factor predictive of its effectiveness.[94]

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92 For example, participants' responses to thirty-six of the forty pieces of inadmissible evidence spanned nine or all ten points of the scale, and the standard deviation for the large majority of the evidence was between 2.01 and 3.00. *Id.* at 1160-61.

93 This point is also demonstrated by an empirical investigation of the extent to which the prejudicial effects of inadmissible evidence introduced against a defendant vary as a function of the defendant's race. James D. Johnson et al., *Justice Is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 893, 894-96 (1995). The results showed that the African-American defendant was rated significantly more guilty than the Caucasian defendant following an instruction to disregard illegally obtained evidence of an incriminating phone call made by the defendant. *Id.* at 896. This differential usage of the inadmissible evidence against the African-American and Caucasian defendants appears to stem from the fact that participants in the Caucasian-defendant condition believed that the target evidence had a significantly greater effect on their judgments than did participants in the African-American defendant condition. *Id.* at 896-97. The authors discuss these results in terms of persons' tendencies to adjust their judgments to compensate for the amount of bias they perceive to exist and suggest that participants' tendencies to underestimate the effect that the inadmissible evidence had on their judgments when the defendant was African-American may have been due to previously held theories regarding African-American males. *Id.* at 897. Importantly, the instruction to disregard was fairly minimal: "You are to disregard all mention of this conversation. It is your legal duty to ignore testimony ruled inadmissible when you are making your final judgments of this case." *Id.* at 895. Participants' estimates of the degree to which they were influenced by the inadmissible evidence likely would have been more accurate if the instruction to disregard had more clearly alerted them to the possibility of bias.

94 *See, e.g.*, United States v. Berry, 627 F.2d 193, 198 (9th Cir. 1980) ("A timely instruction from the judge usually cures the prejudicial impact of evidence . . . ."); State v. Agundis, 903 P.2d 752, 762 (Idaho Ct. App. 1995) ("Where improper testimony arises and the trial court promptly instructs the jury

On the contrary, a delay in providing an instruction is thought to imply that the instruction failed to cure the prejudicial effects of the inadmissible evidence.[95] Judicial logic under the traditional approach to disregarding is that jurors will experience greater difficulty forgetting inadmissible evidence the longer it remains in their minds. Under the neutralization approach to disregarding, it remains ideal for the instruction to disregard to be given immediately following jurors' exposure to inadmissible evidence, albeit for different reasons. Once jurors have incorporated the evidence into their "stories of the case," it may be more difficult for them to discern the extent to which the inadmissible evidence has influenced their judgments.[96] In addition, after jurors have integrated the inadmissible evidence into their stories of the case, it may be more difficult for an instruction to disregard to undermine its validity. Once a belief is formed, subsequently encountered

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to disregard the evidence, it must be presumed that the jury followed the trial court's direction entirely."); Profit Recovery Group, USA, Inc. v. Comm'r, Dep't of Admin. & Fin. Servs., 871 A.2d 1237, 1243 (Me. 2005) ("Because the court . . . acted promptly in telling the jury to disregard the statement, its further action in denying the motion for mistrial was well within the bounds of its discretion.").

95 *See, e.g.*, United States v. Kallin, 50 F.3d 689, 694-95 (9th Cir. 1995) (finding an instruction to disregard to be ineffective when given a day after the jury's exposure to inadmissible evidence, "long after the impermissible inference was implanted in the minds of the jury"); Baldi v. Nimzak, 158 A.2d 915, 917 (D.C. 1960) ("[W]e do not think that instructions at the termination of all the evidence are sufficient to divest from the mind of the jury the weight and credibility it accorded the prejudicial evidence when introduced.").

96 The most compelling description of juror decisionmaking posits that jurors construct stories from a combination of the evidence presented at trial, their knowledge of situations similar to those discussed at trial, and their general understanding of human behavior. Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 192, 194 (Reid Hastie ed., 1993). It further posits that the content of a juror's final story determines what verdict is chosen by that juror. *Id.* at 193. Exposure to prejudicial inadmissible evidence can influence many aspects of story construction. The evidence adds an additional element to the story that becomes integrated with the story elements that are based on admissible evidence, jurors may draw inferences from the inadmissible evidence that ultimately become elements of the story, and story elements based on admissible evidence may be interpreted in light of the inadmissible evidence. *Cf.* Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories of Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979); Schul & Burnstein, *supra* note 60. In the study presented in Part III, where the instructions to disregard immediately followed participants' exposure to the inadmissible evidence, the hunting knife did not result in differential interpretation or weighting of any of the tested pieces of admissible evidence across conditions. Specifically, testimony that the defendant called an attorney before he called the police ($F(4, 224) = 1.40$, ns), that the defendant's fingerprints were on the victims' bodies ($F(4, 225) = 1.89$, ns), that the defendant had stopped using the services of a private investigator to surveil his wife before the killings took place ($F(4, 225) = 1.17$, ns), and that the defendant was in control of his emotions when he spoke with a friend at a bar on the night of the murders ($F(4, 225) = .22$, ns) was not differentially impactive across conditions. The absence of biased assimilation may help to explain why participants in the Elaborate Forget and Neutralization conditions were able to disregard the inadmissible evidence. Participants' task of disregarding may have been more challenging if they were faced with disregarding not only the inadmissible evidence itself, but also the impact of the inadmissible evidence on their perceptions of the admissible evidence.

information tends to be processed in a manner so as to be consistent with the belief (i.e., with greater attention and weight given to consistent evidence, neutral or slightly inconsistent evidence interpreted as consistent, and inconsistent evidence explained away or discounted).[97] This biased processing of subsequently encountered information sustains the belief when the evidence upon which it was originally based is challenged, because the belief has independent sources of support, any of which are sufficient to maintain it.[98]

While no empirical studies have investigated this issue, a Neutralization instruction probably need not immediately follow the inadmissible evidence to counter its prejudicial effects. When the instruction is delayed, it should make the jurors aware that the evidence may have biased their views of the case through these more subtle cognitive mechanisms that are not expected to operate when the instruction is provided immediately following their exposure to inadmissible evidence. If the jurors are willing to engage in this more challenging neutralization process,[99] the inadmissible evidence may be expected to exert little or no additional influence on their verdicts when the instruction to disregard is delayed. Future empirical investigation of this issue could explore methods for maximizing the effectiveness of delayed instructions.

C. *Repetition of Instruction to Disregard*

It is not uncommon for trial judges to repeat the instruction to disregard,[100] presumably in an effort to remind jurors that the evidence has been ruled inadmissible. This practice is considered counterproductive under the traditional forget approach to disregarding insofar as it once again draws jurors' attention to the very evidence they are to forget. The study presented in Part III, however, suggests that drawing attention to the inadmissible evidence is not problematic precisely because jurors do not forget the in-

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97 *See, e.g.*, Lord et al., *supra* note 96, at 2099 ("[T]here is considerable evidence that people tend to interpret subsequent evidence so as to maintain their initial beliefs.").

98 *E.g.*, Anderson et al., *supra* note 62, at 1045; Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880, 888-91 (1975).

99 With respect to all aspects of juror decisionmaking, including inadmissible evidence, it is important to keep in mind that the human motivation and ability to self-regulate high-level cognitive activity, including correcting for bias and discounting, is limited. Brandon J. Schmeichel & Roy F. Baumeister, *Self-Regulatory Strength*, *in* HANDBOOK OF SELF-REGULATION: RESEARCH, THEORY, AND APPLICATIONS 84, 86-87 (Roy F. Baumeister & Kathleen D. Vohs eds., 2004). When self-regulatory resources are depleted, automatic responses—in this context, jurors' natural reactions to the inadmissible evidence—tend to govern thought and behavior. *See id.* at 86.

100 *See, e.g.*, United States v. Cresta, 825 F.2d 538, 546, 549 (1st Cir. 1987); State v. Brush, 741 P.2d 1333, 1335 (Mont. 1987).

admissible evidence; rather, they neutralize it. Under the neutralization approach, where increasing the salience of the inadmissible evidence aids the disregarding process, judges may repeat the instruction to disregard without fear of aggravating the bias. Relatedly, the neutralization approach renders post-trial jury instructions more sensible, given that these instructions are no longer a reminder of the inadmissible evidence that jurors are to forget; rather, they reinforce the Neutralization instruction.[101]

D. *Subsequent Mention of Inadmissible Evidence*

Inadmissible evidence is sometimes explicitly repeated or alluded to after its initial introduction.[102] Under the traditional approach to disregarding, these subsequent mentions of the inadmissible evidence are cause for concern in that they once again direct jurors' attention to the evidence they are to forget. The neutralization approach, on the other hand, accommodates subsequent mentions of the inadmissible evidence. In the study reported in Part III, for example, the prosecution subsequently mentioned the inadmissible evidence, and the trial judge then issued an abridged version of the original instruction to disregard. This suggests that trial judges may be well-advised to provide a Neutralization instruction each time inadmissible evidence is directly or indirectly mentioned, to remind jurors that the evidence is inadmissible, and to counter biasing influences exerted by the reintroduction.

E. *Multiple Instances of Inadmissible Evidence*

Jurors are frequently exposed to multiple instances of inadmissible evidence during a trial. This situation magnifies the problems associated with the traditional forget approach to disregarding in that if jurors cannot erase one instance of evidence from their minds on demand, they obviously cannot be expected to erase more than one. Multiple instances of inadmissible evidence may also present a challenge for the proposed neutralization approach, if jurors find it more difficult to correct for the bias resulting from multiple instances of inadmissible evidence or to discount this evidence. More specifically, if the various instances of inadmissible evidence

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[101] The content of these instructions should, of course, be changed to align with the Neutralization instruction.

[102] Repetition by allusion is illustrated in *Greer v. Miller*, 483 U.S. 756 (1987). After the prosecution inappropriately mentioned the defendant's post-arrest silence, the trial court instructed the jurors to disregard it. The majority opinion states that the prosecutor did not mention this evidence again, but the dissent points out that the prosecutor stressed in his closing argument that the testimony of the defendant's accomplice was credible because he had not remained silent after arrest. *Id.* at 773 & n.3 (Brennan, J., dissenting).

do not all damage the case in the same direction (i.e., some target one party and others target another party), jurors must discern the overall impact of this evidence on their judgments and neutralize it. Although this challenge is not insubstantial, it may be readily surmountable. Clear Neutralization instructions following each introduction of inadmissible evidence, along with a brief reiteration of the various items of inadmissible evidence in the post-trial instructions to facilitate jurors' correction for bias and discounting, would appear to be the best method to minimize or eliminate the prejudicial effects exerted by the inadmissible evidence on jurors' judgments of the case. Further empirical investigation of the precise effects of multiple instances of inadmissible evidence on jurors' verdicts and the most effective means by which the Neutralization instruction may address them would be a worthwhile undertaking.

CONCLUSION

The courts have a longstanding tradition of instructing jurors to forget inadmissible evidence. Their initial adoption of this approach to disregarding and their reluctance to dispense with it despite the general knowledge that people are unable to forget information on demand suggest that the approach has served a necessary pragmatic function for the courts. Because jurors are regularly exposed to inadmissible evidence, and until now no realistic means by which to counter the prejudicial effects of inadmissible evidence on jurors' verdicts was known, courts have perforce adhered to the legal fiction that citizens somehow become willing and able to overcome their natural cognitive limitations upon entering the jury box.

This Article articulates the main problems associated with this legal fiction and identifies an alternative conception of disregarding—neutralization—to resolve them. Yet, a key question remains: Does the neutralization approach generate other problems or have potential weaknesses that should be taken into account when contemplating its adoption by the courts? Perhaps the most negative point that can be made about the neutralization approach is that it is difficult, if not impossible, to uncover the precise mechanisms involved in its employment. Jurors are expected to realize what their judgments of the case would have been if the inadmissible evidence had not been introduced and render verdicts consonant with this counterfactual vision. The precise psychology of how people accomplish this remains something of a mystery. Regardless, the empirical research on discounting and correction for bias identifies the general prerequisites of neutralization and demonstrates that individuals are capable of neutralizing the effects of contaminating information on their judgments. Indeed, an appealing feature of the neutralization approach is that correction for bias and discounting are an integral part of human impression formation and decisionmaking in everyday life. Thus, the approach asks jurors

to do nothing more than use their normal cognitive skills. And the empirical study reported here suggests that jurors can successfully perform this task.

Through reconceptualizing disregarding as neutralizing rather than forgetting, this Article offers courts the means by which to more effectively counter the prejudicial effects of inadmissible evidence on jurors' verdicts and thereby significantly facilitate courts' fulfillment of their constitutional obligation to afford criminal defendants and civil litigants their right to a fair trial. In the study reported here, the Minimal Forget instruction resulted in a percentage of verdicts not significantly different from the Admissible condition. This suggests that the Minimal Forget instruction commonly given by trial judges under the traditional approach to disregarding fails to return the case to its pre-inadmissible evidence state, thereby denying parties a fair trial in many cases. The study suggests that the Elaborate Forget instruction is not problematic in terms of its performance; participants in that condition rendered verdicts indistinguishable from participants in the Neutralization condition. This could be interpreted as meaning that the Elaborate Forget instruction undermines only the perception of justice, not the actual provision of justice. When one considers the other problems associated with the forget approach to disregarding, however, a different picture appears. For example, when attorneys opt not to request an instruction to disregard, and judges are deterred from giving one, on the grounds that jurors obviously cannot forget the inadmissible evidence as the Elaborate Forget instruction directs them to do, litigants' right to a fair trial may well be impeded. Likewise, when judges instruct jurors merely to avoid considering the inadmissible evidence during their deliberations, the right to a fair trial loses more of its meaning; the inadmissible evidence can exert a substantial influence on jurors' views of the case long before they set foot in the jury room. In addition to these substantive problems, the importance of public perception in maintaining the legitimacy of the jury system would appear to dictate dispensing with the unrealistic forget approach and adopting the more intuitively appealing and empirically validated neutralization approach in its place.

Legal commentators have proposed a few alternative solutions to the challenge posed by inadmissible evidence, but each suffers from deficiencies absent in the present proposal. By way of example, one proposal involves a radical restructuring of the jury system—providing jurors with videotaped, rather than live, trials—which makes it a relatively unattractive option and unlikely to gather support.[103] Others involve more minor altera-

[103] Saul M. Kassin & Christina A. Studebaker, *Instructions to Disregard and the Jury: Curative and Paradoxical Effects*, *in* INTENTIONAL FORGETTING: INTERDISCIPLINARY APPROACHES 413, 429 (Jonathan M. Golding & Colin M. MacLeod eds., 1998). Moreover, videotaped trials may have negative consequences such as omitting important information available to jurors in a live trial (e.g., the reactions of a party or witness to certain testimony) or decreasing the degree to which jurors take their role seri-

tions that are nonetheless unlikely to be palatable to members of the judiciary. One proposal, for example, suggests that trial judges explain to jurors the legal reasoning behind inadmissibility rulings.[104] Whereas this proposal likely provides a reasonable means of addressing objectively invalid inadmissible evidence, it fails to take into account the many instances in which evidence is ruled inadmissible despite being valid. A more prudent approach would provide the same type of instruction for all inadmissible rulings, as does the neutralization approach. This has the additional advantage of not requiring complicating variation in the instruction based on the rule of evidence invoked. Still another strike against this proposal is that trial courts generally attempt to prevent jurors from thinking about the bases of inadmissibility rulings.[105]

A third proposal suggests that trial judges should raise suspicion among jurors regarding the ulterior motives of the person who introduced the inadmissible evidence.[106] While instilling suspicion may eliminate the impact of the inadmissible evidence on jurors' verdicts, it has some fairly obvious drawbacks. It would be inappropriate when inadmissible evidence is introduced inadvertently. Moreover, if the suspicion instruction were used against defense counsel in a criminal trial, the defendant could reasonably argue that the court rendered the defendant's attorney ineffective as a result of his diminished credibility following the suspicion instruction.[107] Finally, if the goal of the courts is to return the case to the position it was in prior to the introduction of the inadmissible evidence, a remedy that directly addresses this evidence (as does the Neutralization instruction) is most appropriate, as it works through the same mechanism that altered the case, whereas the suspicion instruction alters the case once again.

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ously (i.e., the ceremonial nature of the trial may be undermined by the videotape's approximation to forms of entertainment such as movies and television programs).

104 *Id.* at 430.

105 Many states, for example, include a provision such as the following in their preliminary jury instructions: "If an exhibit is offered in evidence and an objection to it is sustained, you must not consider that exhibit as evidence. If testimony is ordered stricken from the record, you must not consider that testimony for any purpose. Do not concern yourselves with the reasons for my rulings on the admission of evidence." STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS (CIVIL) 6 (4th ed. 2005).

106 Steven Fein et al., *Can the Jury Disregard That Information? The Use of Suspicion to Reduce the Prejudicial Effects of Pretrial Publicity and Inadmissible Testimony*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1215, 1223-24 (1997).

107 In the study presented in Part III, participants' ratings of the prosecutor's honesty in the inadmissible conditions combined did not differ from the Control condition, $t(225) = -.54$, ns. Participants' ratings of the prosecutor's competency and likability did not differ by condition, $F(4, 225) = 1.42$, ns and $F(4, 224) = 1.47$, ns, respectively. Participants' ratings of the defense attorney's honesty, competency, and likability also did not vary by condition, $F(4, 225) = .26$, ns, $F(4, 225) = 1.17$, ns, and $F(4, 224) = 1.76$, ns, respectively. Thus, the instructions to disregard tested in the study left the participants' overall perceptions of the attorneys intact.

Beyond the inadmissible evidence context, the neutralization approach has the potential to address other evidentiary challenges faced by the courts. Under the limited use evidence doctrine, for example, trial judges direct jurors to forget evidence when making certain decisions yet to remember and use that same evidence when making other decisions.[108] Some members of the judiciary have viewed limited use evidence instructions with even greater skepticism than inadmissible evidence instructions under the traditional approach to disregarding. For example, writing for a four-person dissent, Justice Frankfurter opined: "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words . . . ."[109] A limited use Neutralization instruction, on the other hand, may be more effective. Jurors know that limited use evidence is true and reliable, because the courts otherwise would not instruct them to use it for any decisions. Consequently, the discounting component of the neutralization approach would not apply. At least some jurors, however, likely would be willing and able to correct for the biasing influence exerted by the limited use evidence on the decisions for which it should not be considered. This process would be akin to correcting for the bias associated with inadmissible evidence they perceive to be valid. Apart from limited use evidence, the neutralization approach also should be well-suited to countering the effects of extraneous information jurors obtain from the media or other sources outside of the trial context. Depending on whether the trial judge is able to undermine the perceived validity of the information, a Neutralization instruction may provoke jurors to discount the information or correct for its biasing influence. These hypotheses are ripe for empirical investigation.

If the right to a fair trial is to have meaning, sources of prejudicial error should be eliminated from trials when possible. To date, courts have lacked direction on which techniques can rectify the bias created by jurors' exposure to inadmissible evidence. The goal of this Article is to provide that guidance. The analytical framework and empirical studies discussed

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108 FED. R. EVID. 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."). For example, jurors are instructed not to take into account prior convictions in deciding whether a defendant acted in conformity with them but to consider the same evidence in assessing the defendant's credibility on the witness stand. FED. R. EVID. 404(b). Likewise, jurors are instructed not to consider evidence of a party's subsequent remedial measures in determining liability but to consider this same evidence for other purposes such as proving ownership or control of premises. FED. R. EVID. 407.

109 Delli Paoli v. United States, 352 U.S. 232, 247 (1957) (Frankfurter, J., dissenting), *overruled by* Bruton v. United States, 391 U.S. 123 (1968). Judge Learned Hand expressed a similar sentiment, referring to limited use instructions as a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

here suggest that with a neutralization technique, courts can safely draw the elephant out of the courtroom and free the minds of jurors to focus on the facts appropriate to a fair determination of guilt or innocence.