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## The Emotional Juror.

### Cover Page Footnote

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# THE EMOTIONAL JUROR

Todd E. Pettys\*

[T]hings do not seem the same to those who are friendly and those who are hostile, nor . . . to the angry and the calm . . . .<sup>1</sup>

## INTRODUCTION

More than two thousand years ago, Aristotle observed that the most persuasive arguments are often those that appeal, at least in part, to the audience's emotions.<sup>2</sup> In the eyes of Aristotle, his teacher Plato, and countless numbers of their successors, however, emotions' persuasive power was hardly cause for celebration.<sup>3</sup> The Western philosophical tradition long insisted that emotions and reason were antithetical to one another: the more one could free oneself from emotional influences, the more rational one would be.<sup>4</sup> In other words, although an advocate might take advantage of other people's susceptibility to emotional appeals, those wishing to make the most reasonable decisions were strongly advised to try to push their emotions far to the side.

The belief that emotions undercut rational decision making is widely shared today,<sup>5</sup> particularly within the American legal community.<sup>6</sup> Rule

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1. Aristotle, *On Rhetoric: A Theory of Civic Discourse* 112 (George A. Kennedy trans., Oxford Univ. Press 2d ed. 2007).

2. See, e.g., *id.* at 113 ("The emotions . . . are those things through which, by undergoing change, people come to differ in their judgments . . ."); *id.* at 249 (advising speakers who wish to be persuasive to "lead the hearer into emotional reactions").

3. See Michael Frost, *Ethos, Pathos and Legal Audience*, 99 *Dick. L. Rev.* 85, 90 (1994) ("Aristotle and the other [Greek and Roman] rhetoricians decry the effect emotions may have on judges, but grudgingly concede that, since they often have a profound effect, advocates must exploit them whenever possible.").

4. See W. George Turski, *Toward a Rationality of Emotions: An Essay in the Philosophy of Mind* 2 (1994) (stating that, in Plato's view, "the emotions are what is bestial and animal-like in us, to be ruled and controlled by the rational soul"); R.T. Allen, *Passivity and the Rationality of Emotion*, 68 *Mod. Schoolman* 321, 321 (1991) (stating that European philosophers have persistently distinguished "between a lower and passive [and emotional] self which is *affected*, and a higher and active [and rational] self . . . which governs itself and the lower"); Dylan Evans, *The Search Hypothesis of Emotion*, 53 *Brit. J. Phil. Sci.* 497, 497 (2002) (stating that Plato believed that the more we could free ourselves from emotional influences, the more rational we would be); Nancy Sherman, *The Role of Emotions in Aristotelian Virtue*, in 9 *Proceedings of the Boston Area Colloquium in Ancient Philosophy* 1, 3 (John J. Cleary & William Wians eds., 1993) (stating that, in the eyes of Immanuel Kant and others, "emotions are viewed as the enemy of both reason and morality").

5. See Turski, *supra* note 4, at 2 ("The extent to which so many of us find this view natural and uncontroversial only confirms the power and longevity of the Platonic paradigm in our tradition."); Nico H. Frijda et al., *The Influence of Emotions on Beliefs*, in *Emotions*

403 of the Federal Rules of Evidence, for example, authorizes a trial court to exclude relevant evidence if its “probative value is substantially outweighed by the danger of unfair prejudice,”<sup>7</sup> and the rule’s advisory committee note explains that unfairly prejudicial evidence is evidence that has “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”<sup>8</sup> Two of the country’s leading evidence scholars advise their readers that “[i]ntuition and emotion in the trier of fact are matters to be controlled and minimized.”<sup>9</sup>

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and Beliefs: How Feelings Influence Thoughts 1, 2 (Nico H. Frijda et al. eds., 2000) (“The notion that emotions determine beliefs was a common assumption during much of human history, and probably still is. . . . In most discussions of the relations between emotion and cognition, the emphasis has been on the assumption that the former distorts the latter.”); Nancy Sherman, *Is the Ghost of Aristotle Haunting Freud’s House?*, in 16 Proceedings of the Boston Area Colloquium in Ancient Philosophy 63, 66 (John J. Cleary & Gary M. Gurtler eds., 2000) (“[Aristotle’s] explicit claim . . . is that we can change belief[s] by changing emotions. In so far as the rhetorician is in the business of influencing belief, this is important advice. Emotions and emotional mood affect judgment . . . .”); D. Don Welch, *Ruling with the Heart: Emotion-Based Public Policy*, 6 S. Cal. Interdisc. L.J. 55, 60 (1997) (“Affective argumentation may be effective, but for many commentators that is an unfortunate feature of our public discourse that should be resisted.”).

6. See, e.g., Peter B. Bayer, *Not Interaction but Melding—The “Russian Dressing” Theory of Emotions: An Explanation of the Phenomenology of Emotions and Rationality with Suggested Related Maxims for Judges and Other Legal Decision Makers*, 52 Mercer L. Rev. 1033, 1038 (2001) (“[W]hile not without the occasional notable exception, judicial opinions habitually profess a Platonic-Kantian credo that emotions have no legitimate place in legal decision making.”); Yoav Hammer, *Expressions Which Preclude Rational Processing: The Case for Regulating Non-informational Advertisements*, 27 Whittier L. Rev. 435, 459–60 (2005) (stating that advertisements can preclude rational processing when they “generate emotions”); Graham C. Lilly, *The Decline of the American Jury*, 72 U. Colo. L. Rev. 53, 57 (2001) (“Too often, to capture the jury’s emotion is to win the case.”); Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. Chi. L. Rev. 537, 593 (2005) (listing “react[ing] emotionally to the case” as one of the ways in which juries may go astray when awarding tort damages). Of course, the condemnation of emotions is not universal within the legal world. See, e.g., Peter W. Murphy, *“There’s No Business Like . . . ?”: Some Thoughts on Acting in the Courtroom*, 44 S. Tex. L. Rev. 111, 123 (2002) (arguing that appealing to jurors’ emotions “in some manner” is an ethically appropriate and practically required component of trial practice).

7. Fed. R. Evid. 403.

8. Fed. R. Evid. 403 advisory committee’s note; see also *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980) (explaining that evidence is “unfairly prejudicial if it appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case” (internal quotation marks omitted)); Paul C. Giannelli, *Understanding Evidence* 120 (2d ed. 2006) (“Rule 403 comes into play only if the evidence is prejudicial in the sense that the jury cannot rationally evaluate it.”); Paul R. Rice, *Best-Kept Secrets of Evidence Law: 101 Principles, Practices, and Pitfalls* 24 (2001) (“The only prejudice that will warrant the exclusion of probative evidence is prejudice that *unfairly biases the jury* against the opposing side, by appealing to their emotions rather than their minds . . . .”); Andrew E. Taslitz, *Abuse Excuses and the Logic and Politics of Expert Relevance*, 49 Hastings L.J. 1039, 1046 (1998) (stating that most discussions of rational uses of evidence “are either devoid of discussions of emotion, or emotion is viewed as something to fear, a source of juror ‘prejudice’”).

9. Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence Under the Rules: Text, Cases, and Problems* 61 (4th ed. 2000).

Some authors similarly insist that closing arguments aimed at stirring the jury's emotions are "out of bounds."<sup>10</sup> A leading specialist in criminal procedure argues that prosecutors should "forego not only appeals to prejudice, but any deliberate appeal to emotion,"<sup>11</sup> while the American Bar Association declares that "[t]he prosecutor should not use arguments calculated to inflame the passions . . . of the jury."<sup>12</sup> The premises underlying such pronouncements are articulated in a passage arguing for the exclusion of *all* emotional appeals in debates about public policy:

Appeals to emotion are fallacious because emotions are irrelevant as a basis for deciding an issue. While emotions have psychological relevance in that they have a persuasive impact on the human mind, they have no logical relevance because they are incapable of establishing the truth of conclusions. Proving truth requires the mustering of convincing evidence and not simply the exploitation of emotional sensitivities. Emotions may move us to act, but reason should control the course of that action.<sup>13</sup>

If emotional appeals are normatively problematic but nevertheless hold great persuasive potential, then trial attorneys face an ethical problem: when selecting the evidence and arguments that they will present to the jury in their effort to prevail on their clients' behalf, to what extent, if any, are they obliged to try to minimize the emotional impact? Of course, even if attorneys were determined to minimize the emotionalism of their presentations, they could not exclude emotions from the courtroom entirely. A trial for murder or rape, for example, will have unmistakable emotional dimensions no matter how coolheadedly analytical the attorneys try to be.<sup>14</sup> But if emotional impacts are regarded only as a necessary evil, do attorneys have a duty to try to minimize the intensity of those impacts and the frequency with which they occur?<sup>15</sup>

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10. Julian L. Bush, *Argument and Logic*, 67 Mo. L. Rev. 463, 470 (2002); accord Rosemary Nidiry, Note, *Restraining Adversarial Excess in Closing Argument*, 96 Colum. L. Rev. 1299, 1318 (1996) ("If the jury is supposed to decide solely on the evidence, a closing argument that appeals to other issues or emotions asks the jury to decide a case based on impermissible considerations.").

11. Albert L. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 636 (1972).

12. ABA Project on Standards for Crim. Justice, *Standards Relating to the Administration of Criminal Justice* 98 (1974).

13. Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 Am. U. L. Rev. 53, 66 (1992).

14. Cf. Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* 176 (3d ed. 2003) (stating that "no attempt is made to exclude . . . all evidence likely to evoke an emotional response"). For an interesting discussion of how attorneys might try to appeal to jurors' emotions in both rape and murder trials, see Joseph A. Colquitt, *Evidence and Ethics: Litigating in the Shadows of the Rules*, 76 Fordham L. Rev. 1641 (2007).

15. Even absent an ethical obligation, trial attorneys might find it tactically advisable to be sure that their emotional appeals are neither blatant nor disproportionate to the circumstances of the case at hand. See Raymond J. Brassard, *What Jurors Say About Lawyers*, 47 Boston B.J., Jan.–Feb. 2003, at 8, 9 ("Jurors resent appeals to emotion, passion or prejudice. Those appeals insult their intelligence and their ability to discharge their duty."); Valerie P. Hans & Krista Sweigart, *Jurors' Views of Civil Lawyers: Implications*

The problem is especially sharply felt by prosecutors, whose core objective “is not [to] win a case, but [to ensure] that justice shall be done.”<sup>16</sup> When, precisely, do emotional appeals threaten to yield irrational outcomes that would disserve the cause of justice? As Professor Welsh White observes, “Within the broad category of prosecutorial arguments that are potentially improper because of their tendency to inflame the jury or to appeal to its emotions, . . . specific guidelines for identifying improper arguments are usually as lacking at the penalty phase of capital cases as they are during ordinary criminal trials.”<sup>17</sup> Professor Fred Zacharias similarly notes that ethical guidelines give a prosecutor “remarkably little guidance” on the matter of “[h]ow emotional a summation [she may] make in her effort to sway the jury toward conviction.”<sup>18</sup> “For every commentator who concludes that prosecutors commit misconduct by appealing to emotion,” Zacharias writes, “another can be found who suggests that arousing jurors is the role of summation.”<sup>19</sup>

The long-standing dichotomy between emotions and rationality in the law, and the ethical quandaries that arise from it, stand in marked contrast to the growing conviction in other disciplines that emotions and rationality are inextricably—and usefully—linked.<sup>20</sup> Over the past quarter century,

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*for Courtroom Communication*, 68 Ind. L.J. 1297, 1318 (1993) (“[J]urors expressed ambivalence about emotionality in the arguments. They liked a small amount, but resented extreme appeals to their sympathy.”); Donald M. Peters, *Basics of Oral Argument*, 32 Ariz. Att’y, Nov. 1995, at 18, 29–30 (“[A]void heavy-handed appeals to passion or emotion [in bench trials]. . . . By all means, however, make *subtle* appeals to emotion. Judges are human.”).

16. *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”); Model Rules of Prof’l Conduct R. 3.8 cmt. 1 (2007) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); Model Code of Prof’l Responsibility EC 7-13 (1980) (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”).

17. Welsh White, *Curbing Prosecutorial Misconduct in Capital Cases: Imposing Prohibitions on Improper Penalty Trial Arguments*, 39 Am. Crim. L. Rev. 1147, 1152 (2002) (internal quotation marks omitted).

18. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand. L. Rev. 45, 46–47 (1991).

19. *Id.* at 97. One point on which probably all can agree, however, is that it is improper for an attorney to appeal to emotions that are unrelated to the evidence that the court deems admissible. *See, e.g.*, Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* 78 (1995) (arguing that jurors should disregard emotions that do not arise from the evidence presented by the parties); Zacharias, *supra* note 18, at 98 (arguing that prosecutors can appeal to jurors’ sympathies so long as those sympathies derive from the evidence admitted at trial); *cf.* Welch, *supra* note 5, at 78 (“Inappropriate uses of affective argumentation [in public-policy debates] would be those that are not related to judgments based on available evidence . . .”).

20. A handful of legal commentators have already noted the shift taking place in other disciplines. *See, e.g.*, Lynne N. Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574, 1575 (1987) (“The avoidance of emotion, affect, and experiential understanding reflects an impoverished view of reason and understanding—one that focuses on cognition in its most reductionist sense.”); Louis A. Jacobs, *Evidence Rule 403 After United States v. Old Chief*,

philosophers, psychologists, and neuroscientists have become increasingly convinced that there are ways in which emotions serve the cause of reason to such a significant extent that rational decision making often would be impossible without them. Philosopher Patricia Greenspan observes, for example, that modern philosophers are working to identify “an integral role” that emotions play when a person rationally chooses a course of conduct.<sup>21</sup> Philosopher Ronald de Sousa writes that “the calculi of reason . . . would be powerless in their own terms, except for the contribution of emotion.”<sup>22</sup> Philosopher R.T. Allen rejects the historic separation of a passive, emotional self from an active, rational self, and argues instead “that there is no mere passivity and no pure activity in human life, but that each necessarily involves the other.”<sup>23</sup> Philosopher and psychologist Yaniv Hanoch insists that “[i]ntellectual reasoning without emotions . . . seems to be next to impossible.”<sup>24</sup> Arguing that emotions play an essential role in the reasoning process, neuroscientist Antonio Damasio criticizes René Descartes and others for sharply separating “the most refined operations of the mind from the structure and operation of a biological organism.”<sup>25</sup>

In this essay, I rely upon these developments in other disciplines to lay the groundwork for a more finely tuned understanding of emotions’ place in the courtroom. The ethical uncertainties surrounding lawyers’ use of emotional appeals, and the increasing disparity between the ways in which the legal community and scholars in related disciplines talk about the role of emotions in rational decision making, are in large part the product of the legal community’s naïve and simplistic understanding of emotions themselves. In the evidentiary setting in particular, the legal community needs to move beyond the notion that all emotional influences automatically fall on the “unfair prejudice” side of the balance that Rule 403 prescribes for testing the relative weight of evidence’s probative value and potential for unfair prejudice.<sup>26</sup> Some emotional influences are indeed undesirable, but others are vitally important. Legal professionals need to understand the ways in which emotions aid rational decision making, while

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20 Am. J. Trial Advoc. 563, 581 (1997) (noting that some in the legal community have begun to reject “[a] facile dichotomy between cognitive and emotional qualities”); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 Cornell L. Rev. 655, 673 (1989) (“We need to discard the traditional opposition of Reason and Emotion and instead distinguish between emotions. In short, we need to distinguish those emotions which are morally appropriate from those which are not.”); Taslitz, *supra* note 8, at 1054 (“The emotionless person is an irrational person.”).

21. Patricia Greenspan, *Practical Reasoning and Emotion*, in *The Oxford Handbook of Rationality* 206, 206 (Alfred R. Mele & Piers Rawling eds., 2004).

22. Ronald de Sousa, *The Rationality of Emotion*, at xv (1987).

23. Allen, *supra* note 4, at 322.

24. Yaniv Hanoch, “Neither an Angel nor an Ant”: *Emotion as an Aid to Bounded Rationality*, 23 J. Econ. Psychol. 1, 18 (2002).

25. Antonio R. Damasio, *Descartes’ Error: Emotion, Reason, and the Human Brain* 250 (1994).

26. See *supra* note 7 and accompanying text (quoting the relevant portion of Rule 403).

also better understanding the ways in which emotions can undesirably skew jurors' judgments.<sup>27</sup> By coming to a clearer understanding of the roles that emotions play in jurors' decisions, we will be better able to debate the propriety of appeals to emotions in particular instances.

In Part I, I briefly define emotions, relying on several points of consensus that have emerged in recent years among scholars in philosophy, psychology, and neuroscience. In Part II, again relying on research in other disciplines, I identify a variety of roles that emotions play—sometimes for better, sometimes for worse—when people make decisions. In Part III, I apply these research findings to the courtroom setting, identifying ways in which emotions help jurors render accurate verdicts, as well as ways in which emotions can lead jurors astray.

### I. DEFINING EMOTIONS

When asserting that emotions undercut jurors' capacity to reach rational verdicts, courts and legal commentators generally have not attempted to say how, exactly, they define emotions. The legal community's use of the term, at least in the evidentiary context, appears simply to draw from the ordinary understanding of emotions as noncognitive, passively experienced mental states. One leading dictionary, for example, defines an emotion as "an affective state of consciousness in which joy, sorrow, fear, hate, or the like, is experienced, as distinguished from cognitive and volitional states of consciousness."<sup>28</sup>

As philosophers and others have worked to bridge the emotion-rationality divide, they have sought more nuanced distinctions in terminology. After all, if one believes that emotions play important roles in rational cognition, one cannot follow the dictionary's strategy of defining emotions by sharply distinguishing them from cognitive phenomena. Those scholars who are focusing on emotions today have not yet agreed upon precise definitions, but there does appear to be a consensus on three key points. Those points of consensus provide an understanding of emotions that is sufficient for our purposes here.

First, emotions are typically *evoked by* and *directed at* someone or something—as Patricia Greenspan puts it, emotions have "intentional objects."<sup>29</sup> Unlike moods such as cheerfulness and depression, which may

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27. Cf. D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 Wash. L. Rev. 289, 321 (1989) ("The mechanisms by which prejudicial evidence influences decision-making processes are only imperfectly understood . . .").

28. Webster's Encyclopedic Unabridged Dictionary of the English Language 637 (1996).

29. See Greenspan, *supra* note 21, at 207; accord C. Behan McCullagh, *The Rationality of Emotions and of Emotional Behaviour*, 68 Australasian J. Phil. 44, 46 (1990) ("Almost all philosophers have agreed that emotions have an object of some sort."); Sherman, *supra* note 4, at 10 ("[For Aristotle], emotions are *about* something that we represent in thought. Emotions are intentional states.")



bear no apparent relation to what is happening in one's environment and which often are not focused upon any particular person, thing, or condition,<sup>30</sup> emotions can almost always be traced to a particular stimulus. As Martha Nussbaum explains, "[E]motions contain within themselves a directedness toward an object . . . . My anger is not simply an impulse, a boiling of the blood: It is directed at someone, namely, a person who is seen as having wronged me."<sup>31</sup>

Second, an emotion is tightly bound up with the agent's evaluation of the person, thing, or condition that triggered the emotion.<sup>32</sup> Emotions reflect our appraisals of the stimuli to which we are responding.<sup>33</sup> R.T. Allen notes, for example, that to be afraid of something is "to evaluate the feared object as harmful to something which one values."<sup>34</sup> Nussbaum similarly writes,

[E]motions are so responsive to beliefs of certain sorts that they cannot come into being without them. . . . Being angry seems to require the belief that I, or something or someone important to me, have been wronged or harmed by another person's intentional action. If any significant aspect of that complex belief should cease to seem true to me—if I change my view about who has done the harm, or about whether it was intentional, or about whether what happened was in fact a harm, my anger can be expected to abate or to change its course accordingly.<sup>35</sup>

Third, an emotion is accompanied by physiological changes, such as an increased heartbeat, a jittery feeling in one's stomach, tightness in certain muscles, or changes in one's hormonal levels.<sup>36</sup> It is these physiological

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30. See Robert C. Roberts, *Emotions: An Essay in Aid of Moral Psychology* 112 (2003) ("A person can be depressed or melancholy, cheerful or elated, or fidgety or agitated without having any reasons for his state of mind, without being elated or depressed or agitated *about* anything . . . ."); Allen, *supra* note 4, at 324–25 (stating that, in contrast to emotions, moods such as happiness and depression do not have an "intentional structure"); McCullagh, *supra* note 29, at 46 ("Those [feelings] which appear to lack an object, such as general feelings of depression or cheerfulness, can be designated as 'moods.'").

31. Nussbaum, *supra* note 19, at 60.

32. See Patricia S. Greenspan, *Emotions and Reasons: An Inquiry into Emotional Justification* 4 (1988) (stating that one component of emotions consists of "evaluative propositions spelling out [the emotions'] intentional content"); Greenspan, *supra* note 21, at 207 ("The dominant approach in contemporary philosophy rests on assigning emotions an evaluative content.").

33. See Antonio Damasio, *Looking for Spinoza: Joy, Sorrow, and the Feeling Brain* 54 (2003) ("Emotions provide a natural means for the brain and mind to evaluate the environment within and around the organism, and respond accordingly and adaptively."); Keith Oatley, *Emotions: A Brief History* 3 (2004) ("[E]motions are most typically caused by evaluations—psychologists call them appraisals—of events in relation to what is important to us: our goals, our concerns, our aspirations."); Sherman, *supra* note 4, at 11 (tracing this view to Aristotle).

34. Allen, *supra* note 4, at 324.

35. Nussbaum, *supra* note 19, at 61; cf. Roberts, *supra* note 30, at 76–80 (arguing that emotions are "construals" relating to our "concerns").

36. See Damasio, *supra* note 33, at 28 (stating that emotions involve physical changes that are either visibly apparent or "'visible' with current scientific probes such as hormonal assays and electrophysiological wave patterns"); Oatley, *supra* note 33, at 3 ("Emotions may

changes that often alert us to an emotion's arrival, signaling that we have rapidly appraised something in our environment in a particular way. Antonio Damasio explains that we are equipped with the capacity for a core set of these physiological responses from the earliest years of our lives—these “primary emotions,” as he calls them, help us respond adaptively to our environment.<sup>37</sup> When we see a large animal, detect a snake's movement, hear a growling sound, or feel a sharp pain, for example, that perception “triggers the enactment of a body state characteristic of the emotion fear, and alters cognitive processing in a manner that fits the state of fear,” thus enabling us to behave in a manner appropriate to the situation.<sup>38</sup> As we grow older, we make an ever-increasing number of connections between stimuli and the physiological changes they induce, thereby giving rise to what Damasio calls “secondary emotions”—emotions that result from “systematic connections [we have formed] between categories of objects and situations, on the one hand, and primary emotions, on the other.”<sup>39</sup>

## II. THE INFLUENCE OF EMOTIONS IN DECISION MAKING

Although it has long been assumed that emotions influence our decisions, surprisingly little empirical research has been devoted to the issue until recently.<sup>40</sup> A moderate amount of research has been done on the influence of *moods* on cognitions—researchers have found, for example, that happy people can better recall happy aspects of a narrative, while sad people can better recall a narrative's sad aspects; that people can better retrieve memories when they return to the mood they were in when they stored the memories; and that happy people are more likely to forecast positive events,

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include bodily changes such as a glow and smile of happiness, the pounding heart of anxiety, the clenched fist of anger.”); Frijda et al., *supra* note 5, at 5 (stating that emotions involve “physiological changes”); Pillsbury, *supra* note 20, at 675 (stating that, under the prevailing view of emotions in the philosophical and psychological literature, an “emotion is a cognitive assessment of a person or situation, which assessment is associated with a physiological sensation”).

37. Damasio, *supra* note 25, at 131–34. Antonio Damasio argues that the primary emotions are “fear, anger, disgust, surprise, sadness, and happiness.” Damasio, *supra* note 33, at 44.

38. Damasio, *supra* note 25, at 131.

39. *Id.* at 134 (emphasis omitted); *see id.* at 134–39 (discussing secondary emotions); *cf.* Oatley, *supra* note 33, at 34 (“All humans start with much the same emotional repertoire, derived from genes. But effects of the genes are not fixed. They provide us with a start-up program that writes more of itself during interaction with the world.”). These secondary emotions include such emotions as “sympathy, embarrassment, shame, guilt, pride, jealousy, envy, gratitude, admiration, indignation, and contempt.” Damasio, *supra* note 33, at 45.

40. *See* Nico H. Frijda & Batja Mesquita, *Beliefs Through Emotions, in* Emotions and Beliefs: How Feelings Influence Thoughts, *supra* note 5, at 45, 46 (“Although an influence of emotions upon beliefs is widely accepted and ancient wisdom, there is little research proving this.”); *see also* Frijda et al., *supra* note 5, at 5 (“There is . . . hardly any empirical research on these issues. . . . [T]here is much discussion of the effects of cognitions upon emotions, but very little discussion of the effects of emotions upon cognitions. We know little about the scope of such effects . . .”).

while sad people are more likely to forecast unhappy events.<sup>41</sup> When we worry about how certain items of evidence might influence fact-finders in the courtroom, however, moods are not our central concern; we are not primarily worried, for example, that judges' and jurors' conclusions will be shaped by whether the judges and jurors come to the courthouse feeling cheerful or depressed.<sup>42</sup> Rather, our central concern focuses on the affective responses that particular items of evidence might evoke and on the ways in which those responses might influence the judges' and jurors' decisions.

Even though scholars' research in this area is still in its adolescence, we can already identify several ways in which emotions influence the decision-making process.

#### A. Information from Our Emotional Appraisals

Because our emotions are triggered by assessments of the stimuli in our environment,<sup>43</sup> they can serve as a powerful and immediately available source of information about the people, things, and conditions with which we come into contact. We can then use (or decline to use) this information when choosing among alternative courses of action. As philosopher Israel Scheffler observes, "[E]motions intimately mesh with all critical appraisals of the environment: the flow of feeling thus provides us with a continuous stream of cues significant for orientation to our changing contexts."<sup>44</sup> By making this ongoing flow of data available, emotions can alert us when something that we value is at stake. Nancy Sherman puts it well:

[E]motions can register the importance of certain concerns and objects in our lives. They can be powerful modes by which we record that something is valued or not, and worth keeping with or avoiding. They indicate this not from an impartial point of view, but from one's own corner of the world, from the point of view of what matters to me in living

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41. See Gordon H. Bower & Paul R. Cohen, *Emotional Influences in Memory and Thinking: Data and Theory*, in *Affect and Cognition: The Seventeenth Annual Carnegie Symposium on Cognition* 291, 292–304 (Margaret Sydnor Clark & Susan T. Fiske eds., 1982) (reviewing these findings); see also Frijda & Mesquita, *supra* note 40, at 46 (noting that some research has been done concerning moods' influence on beliefs).

42. Scholars have, however, done provocative research on such matters. See, e.g., Neal Feigenson & Jaihyun Park, *Emotions and Attributions of Legal Responsibility and Blame: A Research Review*, 30 *Law & Hum. Behav.* 143, 147 (2006) ("Many studies . . . have shown that people in moderately positive moods tend to think more creatively and to be better at drawing associations and at inductive reasoning than people in a neutral mood, whereas people in moderately negative moods tend to be better at analytic and deductive reasoning." (citations omitted)); *id.* at 148 ("People in positive moods tend to make more positive evaluations of ambiguous information; people in negative moods tend to interpret the same information more negatively." (citations omitted)).

43. See *supra* notes 32–35 and accompanying text (discussing emotions' evaluative dimension).

44. Israel Scheffler, *In Praise of the Cognitive Emotions and Other Essays in the Philosophy of Education* 7 (1991); see also *id.* at 6 ("Acquiring human significance through biographical linkage with critical features of the environment, our feelings come indeed to signify—to serve as available cues for interpreting the situation.").

well. Thus, it is because I care about certain features of self that threats against these give rise to anger . . . . In this way emotions can reflect in a concrete and immersed way some of the values that reflective inquiry mark [sic] more abstractly.<sup>45</sup>

If I feel anxious when thinking about someone traveling alone in a distant country, for example, it signals that I care about him or her. If I feel wary and uneasy when talking with someone I have just met, it indicates that there is something about the person that I am having difficulty trusting and that it might not serve my interests to believe what he or she is telling me.

By alerting us that something potentially significant is occurring, our emotions can spur us to focus our attention on the matter at issue, to make the necessary inquiries, and to respond in an appropriate way.<sup>46</sup> Don Welch gives an example:

[E]xperiencing a negative feeling immediately upon hearing a proposal is not an uncommon experience. Often the listener cannot articulate reasons to support that initial response at that time, but the negative feelings provoke a search for more facts or extended reflection on the issue as one seeks reasons for the response. The emotional reaction signals that something is wrong . . . .<sup>47</sup>

Of course, emotions are not flawless indicators of appropriate responses; intervening reflection and analysis may often be well-advised. After feeling misgivings when hearing the policy proposal in Welch's example, further reflection might lead me to realize that my misgivings are the product of insecurities or biases that should be ignored or eliminated, rather than be served by my conduct. After initially feeling uneasy when meeting a person for the first time and suspecting that the person is untrustworthy, I might learn with experience that the person is loyal and reliable, and that my initial emotional response was evoked by behaviors or traits having nothing to do with the person's trustworthiness. The fact that emotions can sometimes misdirect us, however, hardly negates the fact that they often serve us well by focusing our attention appropriately when circumstances affect people and things that we value. Indeed, it presumably is because emotions often serve us well that the evolutionary process of natural selection has permitted them to survive in the first place.<sup>48</sup>

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45. Sherman, *supra* note 4, at 5; accord Pillsbury, *supra* note 20, at 677 ("We use emotion to synthesize chaotic reality and give it personal meaning. Emotion provides the basic means for relating the inner subjective self to the outer objective world.")

46. See Bayer, *supra* note 6, at 1042 ("The quintessence of emotions is that they provide the cues that we must stop what we are doing, pay attention, consider what is happening around us, and adopt a course of response."); Pillsbury, *supra* note 20, at 677 ("Emotions direct our attention to certain aspects of a situation, suggest certain approaches.")

47. Welch, *supra* note 5, at 73.

48. See generally John T. Cacioppo et al., *The Affect System Has Parallel and Integrative Processing Components: Form Follows Function*, 76 *J. Personality & Soc. Psychol.* 839, 839 (1999) ("The affect system has been sculpted by the hammer and chisel of adaptation and natural selection to differentiate hostile from hospitable stimuli and to respond accordingly."); Matthew C. Keller & Randolph M. Neese, *The Evolutionary*

### B. *Somatic Markers and Salience*

Antonio Damasio tells the story of a patient who had suffered damage to a portion of the brain governing affective responses. To schedule the patient's next appointment, Damasio suggested two possible dates. Damasio describes what happened next:

The patient pulled out his appointment book and began consulting the calendar. . . . For the better part of a half-hour, the patient enumerated reasons for and against each of the two dates: previous engagements, proximity to other engagements, possible meteorological conditions, virtually anything that one could reasonably think about concerning a simple date. . . . [He took] us through a tiresome cost-benefit analysis, an endless outlining and fruitless comparison of options and possible consequences. It took enormous discipline to listen to all of this without pounding on the table and telling him to stop . . . .<sup>49</sup>

If one thinks about it for a moment, one might well ask why we all do not struggle to select a course of action when faced with a choice. Whether the choice concerns trivial matters such as whether to walk or drive to work, or more significant matters such as whether to change careers, the possibly relevant factors quickly mushroom when one tries to identify them all. Consider my decision about whether to walk or drive to work—when one contemplates the world of logical possibilities, the list of relevant factors seems endless. If I walk, will I get too cold or too warm? Will I be too tired to walk home at the end of the day? What if I need to carry something bulky when I leave the office? Will I get hit by a car while crossing a street? Will an acquaintance detain me in a conversation I would rather avoid? Will an emergency arise during the day requiring me to have transportation? Are the shoes I am wearing comfortable for walking? If I drive, will I have difficulty finding parking? Will my health suffer as a result of the lack of exercise? What about the impact on the environment? What if I hit a pedestrian who decided to walk to work?

Such scenarios illustrate what some philosophers have called “the frame problem”: when faced with a choice on which seemingly innumerable factors might logically bear, how do decision makers quickly identify the factors worth considering, weigh them against one another, and make what by all accounts is a rational decision?<sup>50</sup> In two ways, emotions go a long

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*Significance of Depressive Symptoms: Different Adverse Situations Lead to Different Depressive Symptom Patterns*, 91 *J. Personality & Soc. Psychol.* 316, 317 (2006) (“Affect states . . . were shaped by [natural] selection to deal with the challenges posed by certain situations.”).

49. Damasio, *supra* note 25, at 193.

50. See de Sousa, *supra* note 22, at 193 (“The philosophers’ frame problem, roughly, is how to make use of just what we need from this vast store [of potentially relevant] information, and how not to retrieve what we don’t need.”). Ronald de Sousa elaborates,

What gives rise to the philosophers’ frame problem is that we need to know whether a consequence will turn out to be relevant *before drawing it*. If it is relevant and we have not retrieved it, we may act irrationally. But if it is irrelevant and we have already drawn it, we have already wasted time. This is the problem at

way toward providing the answer. The first way concerns Damasio's theory of somatic markers and the second way concerns the related matter of salience.

### 1. Somatic Markers

To explain why his patient struggled to choose an appointment date and why most of us find such decisions relatively easy, Damasio offers an hypothesis that builds upon the insight that our emotions are based in large part on our immediate appraisals.<sup>51</sup> When a person faces a choice, Damasio writes, the number of potentially relevant factors might be immense—if the person tried to deliberate about each and every one of them, her decision-making process would consume an inordinate amount of time, as when Damasio's patient spent half an hour trying to decide between two alternative dates for an appointment.<sup>52</sup> Damasio argues that, absent an affective disorder of the sort that afflicted his patient, it is our emotions that help us sort through the morass. Before the decision maker deliberates about her alternatives, her affective system greatly reduces the number of options that will receive sustained consideration, thus enabling her to focus her attention on a more manageable number of possibilities.

When a person with a normally functioning brain ponders a decision, Damasio explains, her brain “reacts to the situation by rapidly creating scenarios of possible response options *and* related outcomes.”<sup>53</sup> The decision maker might not be fully aware of each of the scenarios her brain reviews; “the scenarios are made of multiple imaginary scenes, not really a smooth film, but rather pictorial flashes of key images in those scenes, jump cut from one frame to another, in quick juxtapositions.”<sup>54</sup> The brain tags many of these images with what Damasio calls “somatic markers”—the instant the decision maker's brain creates an image of a possible choice and its potential outcome, her brain may “mark” it with a positive or a negative emotion—complete with the emotion's accompanying physiological (i.e.,

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its most virulent: How do we know without finding out what not to find out if we know?

*Id.* at 194; accord Scott Hendricks, *The Frame Problem and Theories of Belief*, 129 *Phil. Stud.* 317, 317 (2006) (“The frame problem is a research problem. When we figure out how human beings effortlessly recover information relevant to their present conditions, we will have solved it.”). Others, including specialists in artificial intelligence, sometimes use the term “frame problem” to refer to phenomena not relevant here. See Evans, *supra* note 4, at 501 (noting that the term is used in different ways, but that de Sousa and others use it to describe the problem “of when to stop listing what the possible consequences of action will be”); Hendricks, *supra*, at 318–19 (noting that philosophers and specialists in artificial intelligence use the term in different ways).

51. See *supra* notes 32–35 and accompanying text (discussing appraisals).

52. See Damasio, *supra* note 25, at 171–72, 192–94; *supra* note 49 and accompanying text.

53. See Damasio, *supra* note 25, at 170.

54. *Id.*

“somatic”) response—producing something akin to a positive or negative “gut feeling.”<sup>55</sup>

Suppose that you are the decision maker and your brain has attached a negative somatic marker to the image of one of your options and its possible outcome. Damasio describes the result:

What does the *somatic marker* achieve? It forces attention on the negative outcome to which a given action may lead, and functions as an automated alarm signal which says: Beware of danger ahead if you choose the option which leads to this outcome. The signal may lead you to reject, *immediately*, the negative course of action and thus make you choose among other alternatives. The automated signal protects you against future losses, without further ado, and then allows you *to choose from among fewer alternatives*. There is still room for using a cost/benefit analysis and proper deductive competence, but only *after* the automated step drastically reduces the number of options.<sup>56</sup>

Alternatively, if a positive somatic marker is attached to an option, “it becomes a beacon of incentive,” pulling the decision maker toward choosing that course of conduct.<sup>57</sup> By reducing the number of options about which we consciously deliberate, our emotions thus make the decision-making process far more manageable than it otherwise would be. “You may think of it,” Damasio writes, “as a system for automated qualification of predictions, which acts, whether you want it or not, to evaluate the extremely diverse scenarios of the anticipated future before you.”<sup>58</sup>

## 2. Salience

Not only do emotions automatically sort through the decision maker’s alternatives—rapidly discarding some and retaining others—they often render certain features of the alternatives especially salient, as well.<sup>59</sup>

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55. *See id.* at 173; *see also supra* notes 36–39 and accompanying text (discussing emotions’ physiological dimension).

56. Damasio, *supra* note 25, at 173.

57. *Id.* at 174.

58. *Id.*; *see also* Evans, *supra* note 4, at 503–05 (citing Damasio’s theory with approval and stating that “[e]motions prevent us from getting lost in endless explorations of potentially infinite search spaces by providing us with both the right kind of test and the right kind of search strategy for each kind of problem we must solve”); Melissa L. Finucane et al., *The Affect Heuristic in Judgments of Risks and Benefits*, 13 *J. Behav. Decision Making* 1, 2 (2000) (stating that Damasio’s theory provides “[o]ne of the most comprehensive and dramatic theoretical accounts of the role of affect in decision making” and using it to create the authors’ own theory of affect heuristics); Greenspan, *supra* note 21, at 208 (endorsing Damasio’s theory and stating that “[e]motions serve to ‘mark’ practically significant thoughts with bodily (and hence affective) indicators of past experience,” thus aiding practical reasoning).

59. *See de Sousa, supra* note 22, at xv (“[E]motions are among the mechanisms that control the crucial factor of *salience* among what would otherwise be an unmanageable plethora of objects of attention, interpretations, and strategies of inference and conduct.”); Hanoch, *supra* note 24, at 8 (“Focusing and directing our attention is one of the fundamental roles played by our emotions.”).

Yaniv Hanoch explains, “Parameters receiving low emotional values are ignored, for they have no (or less) significance for the evaluator, while parameters receiving high emotional values are brought to the front of our attention.”<sup>60</sup> Emotions thus underscore certain reasons for choosing one course of action rather than another. Philosopher Karen Jones explains,

On any given occasion for choice, there will typically be a large number of considerations that could intelligibly count for or against a choice of action. But the agent does not have all these features in mind: certain features strike an agent as mattering; others do not; and thus an agent comes to inhabit a world that is shaped and structured into a world of reasons.<sup>61</sup>

When deciding whether to walk to work, for example, your emotions might not prompt you to consider whether you might accidentally hit a pedestrian or whether an emergency might require you to have prompt access to transportation. My emotions might render those factors highly salient, however, if I recently have been involved in a car-pedestrian collision or if I have a friend who is gravely ill.

Once our emotions have rendered specific dimensions of a choice particularly salient, there are at least two different courses of action we might take. First, we might find those features so overwhelmingly compelling that we quickly deem sustained deliberation unnecessary.<sup>62</sup> If a colleague insults me during a faculty meeting, I might feel so angry that I immediately choose to respond with a hostile reply, even if, in hindsight, I conclude that a more neutral response would have better served my overall interests. Immediate, reflection-free responses are not always regrettable, however; if they were, the process of natural selection presumably would have done a better job of weeding out our capacity to make them.<sup>63</sup> If I see a man down the street pointing a gun at me, for example, I will immediately duck, run, or hide, delaying any ponderous reflections until the circumstances are more accommodating.

Alternatively, we might allow for a period of reflection between the onset of the emotion and the time when we make our decision. If we do so, the

60. Hanoch, *supra* note 24, at 18.

61. Karen Jones, *Emotional Rationality as Practical Rationality*, in *Setting the Moral Compass* 333, 339 (Cheshire Calhoun ed., 2004).

62. *See id.* at 341 (“[S]ometimes emotions preempt deliberation by presenting a single consideration as of overwhelming importance, and we act straightaway and without reflection.”). Yaniv Hanoch gives an example:

In cases of high emotional intensity (such as finding one’s partner unfaithful), agents are incapable of contemplating a wide range of options (e.g., should I take my partner to court or settle this with my own hands?), or of assigning probabilities (what are the chances that I will be convicted?) or utilities (is it worth serving time in jail?) to each option. Instead, a single option overrides all others . . . and determines the agent’s subsequent actions.

Yaniv Hanoch, *One Theory to Fit Them All: The Search Hypothesis of Emotion Revisited*, 56 *Brit. J. Phil. Sci.* 135, 137 (2005).

63. *See supra* note 48 (noting the role of natural selection in shaping our affective systems).



features to which our emotions have attached will figure prominently in our deliberations, while the features that our emotions have *not* made salient will receive comparatively little consideration.<sup>64</sup> Of course, the mere fact that we deliberate about salient features does not necessarily mean that we will take the action toward which the accompanying emotions initially push.<sup>65</sup> But the features that our emotions have highlighted will receive consideration—and the more intense the emotions, the more salient those features will be, and thus the more attention those features will receive.

The attention and consideration that a decision maker gives to the salient features of a choice will sometimes be less than evenhanded. Because a person's emotions rest in large part on his or her appraisals of the stimuli to which he or she is exposed,<sup>66</sup> the very existence of those emotions will strike the person as evidence of the truth of the appraisals on which the emotions are based. As psychologists Gerald Clore and Karen Gasper explain, "[E]motional feelings provide internal, felt evidence that an object or situation has the attributes implied by the emotion."<sup>67</sup> If we immediately feel offended by a friend's remarks, for example, we are more likely to conclude that the remarks were indeed out of line. Moreover, once a person senses an emotion's arrival, he or she may set out on a quest for further evidence that will vindicate the appraisal on which the emotion is based—and the manner in which the person engages in that evidentiary search might not be outcome-neutral. Clore and Gasper write, "Once an emotion is experienced, the system no longer operates as a scientist carefully weighing the pros and cons of the belief implied by the emotion. Instead, the emotional person acts like a prosecutor or a defense lawyer seeking by any means to find evidence for the belief."<sup>68</sup> In other words, our emotions often "commit" us to particular beliefs, and we quickly rise to those commitments' defense.<sup>69</sup>

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64. See de Sousa, *supra* note 22, at 195 ("For a variable but always limited time, an emotion limits the range of information that the organism will take into account, the inferences actually drawn from a potential infinity, and the set of live options among which it will choose."); *id.* at 200 (stating that emotions' "essential role lies in establishing specific patterns of salience relevant to inferences").

65. See Jones, *supra* note 61, at 341 ("Considerations that emotions lead us to experience as reason giving claim a place among the starting points of deliberation. That claim can be rejected . . ."); see also *supra* text following note 47 (noting that we may consciously reject the appraisal on which an emotion is based).

66. See *supra* notes 32–35 and accompanying text (discussing appraisals).

67. Gerald L. Clore & Karen Gasper, *Feeling Is Believing: Some Affective Influences on Belief, in Emotions and Beliefs: How Feelings Influence Thoughts*, *supra* note 5, at 10, 28.

68. *Id.* at 33; see also *id.* at 25 ("We are suggesting that beliefs are adjusted to be compatible with internal evidence in the form of feelings, just as they are adjusted to be compatible with external evidence in the form of perceptual experience. . . . In this sense, we assert that feeling is believing."); Frijda & Mesquita, *supra* note 40, at 53 (stating that some beliefs "are formed to justify or explain one's emotional appraisal").

69. Clore & Gasper, *supra* note 67, at 32–33; see also *id.* at 33 ("Emotions of love, jealousy, anger, and fear represent commitments to particular beliefs, which the person 'tests' through selective attention to data.").

It is in this way, Karen Jones explains, that our emotions “can ‘run away’ with us. Evidence that might count against my anger will be interpreted through the lens of my anger.”<sup>70</sup> This often creates a cycle: as the person experiencing the emotion locates what he or she regards as evidence justifying the appraisal on which the emotion is based, the emotion only intensifies. “When walking home after an angry interchange,” write psychologists Nico Frijda and Batja Mesquita, “thoughts continue which carry the angry action readiness further and find novel faults with one’s antagonist,” thus making the anger even more deeply felt.<sup>71</sup> As those emotions and beliefs strengthen one another, we may find that we have little interest in hearing contrary evidence, that “we are all too willing to weigh the evidence in a way favorable to our pursuits, [and that] we are disinclined to explore trains of thought that lead elsewhere.”<sup>72</sup> As a result, once beliefs have become caught up with emotions in this mutually reinforcing relationship, the beliefs can be powerfully resistant to change.<sup>73</sup> These beliefs, in turn, can then serve as reasons for choosing one course of action rather than another.

### C. *Motivation to Act*

Emotions also influence the decision-making process by directly urging us to take certain kinds of action. First, emotions can prompt us to take inward action, in the form of making changes in our beliefs, attitudes, or values. Psychologist Eddie Harmon-Jones observes that cognitive dissonance (that is, dissonance between beliefs, attitudes, and values to which we are at least tentatively committed) can create a negative emotional state, prompting us to make whatever cognitive changes are necessary in order to resolve the dissonance and thereby quell the accompanying negative emotion.<sup>74</sup>

Second, an emotion can prompt us to act if we perceive that the action will either reduce the unpleasant physiological sensations associated with the emotion or sustain the emotion’s pleasant physiological sensations.<sup>75</sup> If my conduct causes you to terminate all contact with me, and I find that the loss of your company causes me to suffer grief, I might apologize to you for my conduct, even if I believe that the conduct was appropriate—by apologizing, I am hoping to restore our good relations, thereby dispelling my grief.

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70. Jones, *supra* note 61, at 336; see also Sherman, *supra* note 4, at 3 (noting that emotions are sometimes criticized for seemingly “fastening on evidence that is too restrictive, relying on standards of evidence that are too lax”).

71. Frijda & Mesquita, *supra* note 40, at 54.

72. *Id.* at 67.

73. *Id.* at 67–68.

74. See Eddie Harmon-Jones, *A Cognitive Dissonance Theory Perspective on the Role of Emotion in the Maintenance and Change of Beliefs and Attitudes*, in *Emotions and Beliefs: How Feelings Influence Thoughts*, *supra* note 5, at 185, 185–90 (advancing this theory).

75. Cf. Greenspan, *supra* note 32, at 162 (noting that we sometimes take action in order to quell the unpleasant physical dimensions of an emotion).

Third, an emotion can sometimes create a powerful desire to express the emotion through our behavior, such that failing to express the emotion will itself create a feeling of discomfort.<sup>76</sup> The expression “needing to vent” often seems entirely apt: an emotion can create such a strong feeling of internal pressure that we feel we might burst if we don’t somehow “get it out.” If I feel deeply grateful to you for an act of kindness that you have shown me, my feelings of gratitude might strongly impel me to display my gratitude through my behavior. If I feel deeply angry at you because I believe you have wronged me, I might find that it feels nearly impossible to “move on” until I have told you how I feel.

Fourth, as Patricia Greenspan insightfully observes, we can strategically use our emotions as “commitment devices,” boosting our resolve to behave or refrain from behaving in a particular way.<sup>77</sup> Although we cannot create emotions within ourselves at a whim, we can help spark them into existence by creating “the conditions under which they would arise.”<sup>78</sup> There are numerous occasions when we might lay the groundwork for such emotions in order to help us carry out an action effectively. If we know that we experience the negative emotions of guilt and self-loathing whenever we break our promises, for example, we might promise to carry out an action—thereby putting into place the conditions for guilt or self-loathing—if we fear that, when the time comes, we might otherwise lack the resolve to act in the way that we should.<sup>79</sup> Similarly, if I am a supervisor facing the task of firing an employee who is well liked but unreliable, the unpleasant task might be easier to carry out if, just before my meeting with the employee, I try to stir up the negative emotions that are associated with all of the times that the employee has let me or the company down.

### III. EMOTIONS IN THE JURY BOX

Based on these research findings, we can identify a variety of ways—many desirable, but some undesirable—emotions influence jurors’ decisions.<sup>80</sup> In some instances, jurors are influenced by emotions that are generated during the decision-making process itself; in other instances, jurors are influenced by emotions that arise upon hearing or seeing particular items of evidence. I separate all of these emotions into three categories: those that relate to jurors’ efforts to make demeanor-based assessments of witnesses’ credibility, those that relate to jurors’ efforts to

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76. See *id.* at 162–65 (making this observation); *id.* at 174 (“Emotion makes a requirement of action harder to resist, in short, by making it an object of discomfort.”).

77. Greenspan, *supra* note 21, at 216.

78. *Id.* at 215.

79. See *id.* at 216–17 (offering this example).

80. In addition to the research I cite in the following discussion, the reader can find a small number of additional studies concerning the effects of emotions on jurors’ judgments. See, e.g., Carolyn Semmler & Neil Brewer, *Effects of Mood and Emotion on Juror Processing and Judgments*, 20 *Behav. Sci. & Law* 423, 433 (2002) (finding that jurors who are saddened by the testimony they hear in mock trials are better able to detect and recall inconsistencies in the testimony).

construct coherent narratives that account for all of the credible evidence to which they have been exposed, and those that relate to jurors' willingness to render a verdict that is faithful to the facts that they believe the evidence has established.

### A. *Evaluating the Credibility of Witnesses*

Anglo-American law has long operated under the belief that, when trying to determine whether a witness is telling the truth, it is useful for the fact-finder to observe the witness's demeanor.<sup>81</sup> The U.S. Supreme Court has explained, for example, that the primary reason appellate courts defer to fact-finders' credibility determinations is that only the finder of fact "can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."<sup>82</sup> In both civil and criminal cases, jurors are routinely instructed that they are free to decide whether to believe each witness's testimony and that, when deciding whom to believe, they should pay attention to the manner in which each witness speaks and behaves while on the witness stand.<sup>83</sup> Research on secondary emotions<sup>84</sup> and salience<sup>85</sup> suggests ways in which emotions play important roles in helping jurors make those credibility determinations.

We rarely enjoy learning that we have been deceived. To the contrary, the discovery that we have been lied to usually provokes an emotional mix of anger, resentment, and surprise. Our desire to minimize those unpleasant emotional sensations and to mitigate the other undesirable consequences of

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81. See James P. Timony, *Demeanor Credibility*, 49 *Cath. U. L. Rev.* 903, 904–05 (2000) ("For hundreds of years, judges or juries have decided the credibility of testimony on the demeanor of [witnesses], including the witness's appearance, attitude, and manner."); Olin Guy Wellborn III, *Demeanor*, 76 *Cornell L. Rev.* 1075, 1077 (1991) ("The importance of demeanor as an indicator of credibility is commonly cited as a premise of the general requirement of live testimony, the hearsay rule, and the right of confrontation.").

82. *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985); see also *California v. Green*, 399 U.S. 149, 158 (1970) (stating that viewing a witness's demeanor helps the jury assess that witness's credibility); *Lin v. Gonzalez*, 446 F.3d 395, 400 (2d Cir. 2006) (stating that "[d]emeanor is virtually always evaluated subjectively and intuitively," and thus fact-finders' credibility determinations are "accorded great deference").

83. See, e.g., 3 Kevin F. O'Malley et al., *Federal Jury Practice and Instructions: Civil* § 101.43, at 56 (5th ed. 2000) [hereinafter O'Malley, *Civil*] ("You may believe everything a witness says, part of it, or none of it. In considering the testimony of any witness, you may take into account many factors, including . . . the witness' appearance and manner while testifying . . ."); *id.* § 105.01, at 161 ("You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies . . . . Consider each witness' . . . demeanor or manner while testifying."); 1A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions: Criminal* § 15.01, at 350 (5th ed. 2000) [hereinafter O'Malley, *Criminal*] ("You, as jurors, are the sole and exclusive judges of the credibility of each of the witnesses called to testify in this case . . . . In making your assessment . . . you should . . . [c]onsider each witness' . . . appearance and manner while on the witness stand.").

84. See *supra* notes 37–39 and accompanying text (discussing primary and secondary emotions).

85. See *supra* notes 59–73 and accompanying text (discussing salience).

being deceived gives rise, in turn, to a desire to be able to know when someone is attempting to deceive us, so that we can respond appropriately at the outset. Although studies have shown that children's lie-detection abilities are rather poor, by our teenage years we usually have begun to accumulate experiences that help us determine whether someone is being dishonest.<sup>86</sup>

Taken together, the separate bodies of research on emotions and lie detection suggest that, as we mature, we synthesize our past experiences in an effort to thwart attempts by others to deceive us. Our brains search for patterns or common denominators in those instances in which we believe we were the victims of deceit, as well as in instances in which we have tried to deceive others, so that we will be better able to tell in the future whether someone is trying to be deceptive. The results of this ongoing synthesis may provoke a "gut feeling" that someone is being dishonest with us on a particular occasion. This feeling manifests itself as emotional sensations of uneasiness and wariness, sensations that warn us that if we trust the person with whom we are speaking, we might live to regret it. Of course, our cautionary emotions will sometimes be caused by the substance of what the person is saying—the person's factual assertions, for example, might conflict with things we know to be true. On other occasions, however, the feeling of uneasiness will arise not from what the speaker is saying, but from the manner in which he or she is saying it—it will arise, in other words, from the speaker's demeanor. More specifically, our sensations of uneasiness and wariness may be triggered because the person's demeanor contains salient features that our brains have learned to associate with deception and its emotional aftermath.<sup>87</sup> Our emotions thus signal to us that deception may be afoot and that we should examine the speakers' words and motives with particular care.<sup>88</sup>

Psychological research has admittedly demonstrated that our ability to make demeanor-based assessments of credibility is far from infallible—something that is hardly surprising when one considers that many lies go undetected, making it hard for us to learn from those experiences. Researchers have found, for example, that facial expressions and lack of eye contact do not betray deception as reliably as people commonly believe; indeed, studies indicate that people are better able to detect deception "when they do not have access to facial cues than when they do."<sup>89</sup>

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86. See Bella M. DePaulo et al., *Deceiving and Detecting Deceit*, in *The Self and Social Life* 323, 350–60 (Barry R. Schlenker ed., 1985) (discussing the development of children's ability both to detect lies and to minimize the risk that their own lies will be detected).

87. See *supra* notes 59–73 and accompanying text (discussing salience).

88. See *supra* notes 32–35 and accompanying text (discussing appraisals).

89. Miron Zuckerman et al., *Verbal and Nonverbal Communication of Deception*, 14 *Advances in Experimental Soc. Psychol.* 1, 39 (1981); *accord id.* at 27 (discussing this research); see also Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, *Law & Contemp. Probs.*, Autumn 1988, at 243, 264 (citing this research and stating that "the law . . . might improve the ability of jurors to assess credibility by covering the faces of witnesses with masks"). Bella DePaulo and her coauthors elaborate,

(Researchers believe that this is because people have a fairly high measure of control over their facial movements, even when they are lying.<sup>90</sup>) Other aspects of demeanor, however, do serve as a reasonably reliable basis for determining whether a speaker is being deceptive. An increase in the pitch of one's tone of voice, increased hesitancy in one's speech, and an increase in the number of grammatical and other speech errors, for example, all have been shown to correlate with deception.<sup>91</sup> Such indicators help to explain why observers' rate of successful lie detection is greater than chance, with speech errors and tone of voice providing the most reliable indications of deceit.<sup>92</sup>

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[S]ome of our favorite cultural stereotypes about liars do not withstand the test provided by the existing empirical data. For example, the studies that have been conducted so far do not support the notion that liars have shifty eyes—nor even shifty bodies; neither glances nor shifts in posture occur significantly more often when people are lying compared to when they are telling the truth.

DePaulo et al., *supra* note 86, at 339.

90. See DePaulo et al., *supra* note 86, at 330 (stating that “senders generally are successful at controlling their facial expressions so as to fool perceivers”); Zuckerman et al., *supra* note 89, at 39 (stating that “facial cues seem to be faking cues”).

91. See Zuckerman et al., *supra* note 89, at 38–39 (summarizing these findings). DePaulo and her coauthors write,

[L]iars blink their eyes more often, they have pupils that are more dilated, and they exhibit more adaptors (self-manipulating gestures, such as rubbing or scratching). They also give shorter, higher-pitched, and more hesitant answers that are cluttered with grammatical errors, repetitions, slips of the tongue, and other disfluencies. . . . Senders who are about to tell a lie take more time to plan their performance than do those who are about to tell the truth.

DePaulo et al., *supra* note 86, at 339.

92. See Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 Neb. L. Rev. 1157, 1195 (1993) (“Most of the behaviors received through the auditory channel that were associated with perceptions of deception were also observed during actual deception: increases in speech hesitations, speech errors, and in the pitch of a speaker’s voice.”); Zuckerman et al., *supra* note 89, at 26–27 (presenting some of the relevant statistical data); see also Blumenthal, *supra* (stating that tone of voice is a better indicator of deception than facial expressions); DePaulo et al., *supra* note 86, at 327 (“Across dozens of studies, deception accuracy usually exceeds chance, although rarely by an impressive margin.”); *id.* at 329 (stating that “the voice can send a variety of different messages, [and] . . . is highly salient” and that “tone of voice cues are much more difficult for senders to control than either words or facial expressions”). Some writers overstate the extent to which empirical studies cast doubt on people’s ability to make demeanor-based credibility determinations. See, e.g., Consolidation Servs. v. KeyBank Nat’l Ass’n, 185 F.3d 817, 821 (7th Cir. 1999) (“Much pious lore to the contrary notwithstanding, ‘demeanor’ is an unreliable guide to truthfulness.”); Blumenthal, *supra*, at 1159 (“The studies establish that typical subjects are unable to use the ‘manner and conduct’ of a speaker to successfully detect deceptive information on any reliable basis.”); Saks, *supra* note 89, at 263 (noting the analysis performed by Zuckerman and his colleagues and stating that “[d]ecisions about whether a statement is the truth or a lie are made about as well as if one were tossing a coin”); Wellborn, *supra* note 81, at 1075 (“According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness.”). See generally Michael L. Seigal, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 Nw. U. L. Rev. 995, 1012 (1994) (criticizing Wellborn for flirting with the “absurd outcome” that juries simply be given “a packet of written materials” instead of live testimony).

Therefore, when jurors find themselves instinctively feeling that a witness is lying on a particular occasion, that feeling may be the result of efforts by the jurors' affective systems to alert them that demeanor-based indicators of deception are present. A juror might not consciously realize that the raised pitch of a witness's voice is what prompted her to feel uneasy—she might only be conscious of a gut sense that something is not right—but her brain might nevertheless have sensed the presence of that salient feature and caused her to feel cautionary emotions. The law continues to place great confidence in these affective mechanisms, giving jurors free rein to make whatever demeanor-based credibility determinations they reasonably deem appropriate. Here, in the domain of one of the jury's most closely protected functions, we thus find emotions playing a central role.

## B. *Constructing a Coherent and Comprehensive Narrative*

### 1. The Multiplicity of Narrative Options

Trial lawyers widely regard the jury-selection process as critically important to the outcome of a case.<sup>93</sup> The importance of that selection process derives in large part from the fact that reasonable people often disagree about the inferences that should be drawn from particular items of evidence.<sup>94</sup> When deciding which inferences to draw from the evidence and how to cast their votes, jurors typically try to construct a narrative that satisfactorily accounts for all of the credible evidence they have seen and heard.<sup>95</sup> In constructing those narratives, they draw heavily from their own

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93. See, e.g., Chris F. Denove & Edward J. Imwinkelried, *Jury Selection: An Empirical Investigation of Demographic Bias*, 19 Am. J. Trial Advoc. 285, 285 (1995) ("Pick the right jury, and the battle is half won. But select the wrong jury, and the case is lost before evidence is even heard."); Herald Price Fahringer, "Mirror, Mirror on the Wall . . .": *Body Language, Intuition, and the Art of Jury Selection*, 17 Am. J. Trial Advoc. 197, 197 (1993) (stating that "[j]ury selection is the most significant part of any trial" and that "experts in the field believe that eighty-five percent of the cases litigated are won or lost when the jury is selected"); William C. Slusser et al., *Batson, J.E.B., and Purkett: A Step-by-Step Guide to Making and Challenging Peremptory Challenges in Federal Court*, 37 S. Tex. L. Rev. 127, 129 (1996) ("Picking a jury is perhaps the most important part of any jury trial.").

94. Cf. Albert J. Moore, *Inferential Streams: The Articulation and Illustration of the Trial Advocate's Evidentiary Intuitions*, 34 UCLA L. Rev. 611, 616 (1987) ("[T]he same item of circumstantial evidence may often reasonably be seen as either proving or disproving one's case, depending upon the particular inferences the jurors draw.").

95. See Reid Hastie, *Emotions in Jurors' Decisions*, 66 Brook. L. Rev. 991, 994 (2001) (stating that jurors make decisions by trying to create "a coherent, comprehensive story to summarize the situation implied by credible evidence"); Nancy Pennington & Reid Hastie, *Reasoning in Explanation-Based Decision Making*, 49 Cognition 123, 123-26 (1993) (describing the story-driven, "explanation-based decision making" method that jurors typically use when confronting large bodies of evidence); *id.* at 127 ("The story that is accepted is the one that provides the greatest coverage of the evidence and is the most coherent, as determined by the particular juror."); cf. Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 Mich. L. Rev. 241, 245-46 (2006) (positing

past experiences.<sup>96</sup> Indeed, jurors often are expressly instructed that, when trying to make sense of the evidence, they should rely upon their common sense and their own experiences with the way the world typically works.<sup>97</sup> Because one person's common sense and experiences may differ markedly from another's, different individuals may reach very different conclusions about the importance and implications of the same items of evidence.

Consider, for example, a case in which a white police officer is accused of using racially motivated excessive force when arresting a black suspect. What inferences should the jury draw from credible testimony that, in the years preceding the incident, witnesses repeatedly heard the officer use racial slurs? Based on their own differing experiences, one juror might conclude that those are "just words" and are of little use when determining how the speaker would physically treat people of different races, while another juror might believe there is a significant correlation between racist speech, racist beliefs, and racist conduct.<sup>98</sup> As a result, if evidence of the racial slurs is deemed admissible,<sup>99</sup> the verdict in such a case may turn at

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that "jurors decide whether to acquit not through mechanical probability calculations, but on the basis of their ability to imagine a scenario in which the defendant is factually innocent").

96. See Pennington & Hastie, *supra* note 95, at 126 (stating that, when building their stories, jurors draw from three sources—the evidence presented during the trial, their prior experiences in comparable situations, and their general "expectations about what makes a complete story").

97. See O'Malley, Civil, *supra* note 83, § 101.40, at 49 (proposing similar instructions in civil cases); O'Malley, Criminal, *supra* note 83, § 12.02, at 130 ("[G]ive the evidence a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings."); *id.* § 12.03, at 132 ("You are permitted to draw from the facts which you find have been proved such reasonable inferences as you feel are justified in the light of your experience and common sense."); see also Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. Rich. L. Rev. 419, 438 & n.116 (2006) (citing numerous cases endorsing jurors' reliance upon everyday experiences and their common sense); Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 29 Law & Soc. Inquiry 39, 47 (2003) (stating that "[t]he legal doctrine of circumstantial evidence . . . allows a jury to draw reasonable inferences from the evidence, inferences that stem from common sense and everyday experiences").

98. See *infra* notes 105–18 and accompanying text (discussing this hypothetical in greater detail).

99. Compare *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1132–35 (4th Cir. 1988) (holding that the trial court erred when it excluded evidence of an employer's use of racial slurs, in a case involving a claim of racial discrimination in hiring), *Caudill v. Commonwealth*, 120 S.W.3d 635, 663 (Ky. 2003) (holding that the trial court did not err when it admitted evidence of the defendant's use of a racial slur, in a case involving charges that the defendant killed an African-American woman), *cert. denied*, 542 U.S. 922 (2004), and *De La Beckwith v. State*, 707 So. 2d 547, 578–80 (Miss. 1997) (holding that the trial court did not err when it admitted evidence of the defendant's use of racial slurs, in a case involving charges that the defendant killed an African-American civil rights leader), *cert. denied*, 525 U.S. 880 (1998), with *MCI Express, Inc. v. Ford Motor Co.*, 832 So. 2d 795, 800–01 (Fla. Dist. Ct. App. 2002) (holding that the trial court erred when it admitted evidence that an automobile lessee's chief executive officer used a racial slur when referring to the poor driving abilities of his own employees, in a case involving the lessor's defense that the lessee's employees had caused the disputed defects in the cars), and *Tate v. State*,



least in part on the experiences of the individuals who are placed in the jury box.

When one considers scholars' recent research on emotions, it becomes apparent that, to a large extent, a lawyer's quest to seat the ideal jurors is a quest to seat individuals whose affective systems are likely to render them favorably disposed toward the inferences that the lawyer will ask them to draw from the evidence presented at trial. In any given case, there might be innumerable logically possible narratives that would account for some or all of the evidence; as when Professor Damasio's patient struggled to choose an appointment date,<sup>100</sup> it would take the jury weeks, months, or a lifetime fully to consider each and every one of those possible narratives. But jurors' affective systems will not permit them to be overwhelmed by all of those logical possibilities. Rather, jurors will focus their attention on those narratives that their experience-based common sense leads them to regard as plausible. In important respects that I shall now describe, the content of the experience-based common sense that jurors apply will be shaped by jurors' emotions.

## 2. The Influence of Somatic Markers and Cognitive Dissonance

Building on Damasio's theory that a decision maker's brain uses somatic markers to whittle the field of choices down to a manageable number,<sup>101</sup> we can hypothesize that, as jurors search for a narrative that persuasively accounts for all of the credible evidence they have seen and heard, their brains will rapidly contemplate scores of different ways to assemble the evidentiary puzzle into a story to which the juror might be willing to commit. Many of those narrative options will immediately be rejected without jurors' sustained, conscious attention, while others will be retained for more careful consideration. Emotions will play a central role in that sifting process.

Because cognitive dissonance creates a negative emotional state,<sup>102</sup> a juror's brain will attach a negative somatic marker to narrative options that create such dissonance; if that marker is sufficiently strong, it will prompt the juror to focus her attention on other possibilities. A narrative option will create cognitive dissonance if it entails conflicts between items of testimony that the juror would otherwise be inclined to believe; conflicts between evidentiary inferences that the juror would otherwise be inclined to draw; conflicts between the juror's sense of how the world ordinarily works and how people ordinarily behave, on the one hand, and how the witnesses

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784 So. 2d 208, 213–15 (Miss. 2001) (holding that the trial court erred when it admitted evidence that the defendant used a racial slur when pulled over by an African-American police officer, in a case involving charges that the defendant assaulted an African-American man who had trespassed onto his property).

100. See *supra* note 49 and accompanying text (recounting this anecdote).

101. See *supra* notes 51–58 and accompanying text (describing Damasio's theory of somatic markers).

102. See *supra* note 74 and accompanying text (discussing cognitive dissonance).

or attorneys are suggesting that the world worked or people behaved in the particular case at hand; and conflicts between the juror's confidence in the narrative option that his or her brain is considering and the juror's understanding of the requirements of the applicable standard of proof.<sup>103</sup>

When a juror contemplates a narrative option that creates cognitive dissonance and her brain triggers an accompanying negative emotional reaction, the juror might not immediately be able to trace the dissonance to its causal source. But she will nevertheless have an emotion-generated instinct that something is not right, prompting her either to consider ways in which the narrative might be modified or to discard the narrative altogether and start anew with an entirely different story. If there is one piece of the evidentiary puzzle that does not seem to fit, for example, the juror might reexamine the credibility of the evidence's source. If two pieces of credible evidence initially seem to point in different directions, the juror might more carefully consider ways in which the evidence might be harmonized. If the juror ultimately cannot construct a narrative to which she is willing to commit with the level of certainty required by the applicable standard of proof, she will consider voting against the party on whom the burden of proof has been placed.<sup>104</sup> Throughout that process, cognitive dissonance and its accompanying negative emotions will usefully prod the juror to examine the evidence and its implications with care.

### 3. The Influence of Appraisals and Salience

In addition to the emotions associated with cognitive dissonance, jurors often will experience emotions directly in response to particular items of evidence. These evidence-triggered emotions will exert a powerful influence on the narrative options that the jurors construct and evaluate.

Consider, again, the hypothetical scenario in which a police officer is accused of using racially motivated excessive force, and the alleged victim wishes to introduce evidence that, in preceding years, witnesses often overheard the officer use racial slurs.<sup>105</sup> Now imagine two different jurors,

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103. Jurors also will experience cognitive dissonance if there are conflicts between what they believe the applicable substantive law demands and what they believe broader principles of justice require. This dissonance might prompt the juror to exercise her power of nullification and vote in the defendant's favor, even though she believes that the plaintiff or the prosecution has carried its burden of proof. *See generally* Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 Iowa L. Rev. 467, 497–505 (2001) (providing an overview of jurors' power of nullification). Here, the juror may have constructed a subnarrative in which the plaintiff or prosecution has satisfied its burden of proof, but that subnarrative is placed within a larger narrative in which the juror believes that the substantive law is imposing unwarranted demands and that it is appropriate for the juror to prevent what she regards as an injustice.

104. The juror will not necessarily vote against the burden-bearing party, however. A juror might vote in favor of the burden-bearing party for reasons having nothing to do with the persuasiveness of the evidence presented at trial. The juror might believe, for example, that the burden-bearing party's opponent is generally a bad person who deserves to suffer.

105. *See supra* notes 98–99 and accompanying text (introducing this hypothetical).

X and Y, and how they might respond to that evidence. Juror X grew up in a racially homogenous community and has not had significant exposure to racially charged language. Her experience with racial slurs is largely limited to popular songs she has heard, many of which are sung by individuals of the same race that the language has historically been used to denigrate. Because of the nature of those experiences, X does not find the testimony concerning the officer's language especially salient, nor does it cause her immediately to appraise the officer in any particular way. In the end, X does not ascribe much importance to the testimony, and she is disinclined to use the evidence to draw inferences that are significant to the outcome of the case. The testimony will play little, if any, role in the narrative options that X constructs and considers.

Juror Y, however, was raised in a community marked by racial tension; he has had dozens of experiences in which racially hateful words were closely associated with threatened or actual acts of violence. For Y, therefore, the testimony about the police officer's words is highly salient. Upon hearing the evidence and finding it credible, Y rapidly appraises the officer as a person capable of racial violence.<sup>106</sup> This appraisal, in turn, generates an emotional mix of fear and anger; the physiological sensations associated with those emotions immediately alert Y that he has, in fact, appraised the officer in this way.<sup>107</sup> As a result, Y is much more inclined than X to draw significant inferences from the testimony. The stronger Y's emotional response to the evidence, the more salient he will find it, and thus the more attention he will give it.<sup>108</sup> When Y considers possible narratives, therefore, the testimony about the officer's speech may play an important role. If Y finds that narratives in which the testimony is significant do not square well with evidence that he already finds credible, he might ultimately decide not to ascribe much importance to the testimony. But Y's experiences and their correlating emotions will indeed prompt Y at least to consider narratives in which the officer's use of racial slurs has implications for how the case should be decided.

We cannot say, in the abstract, whether Juror X or Juror Y is more likely to construct a narrative that matches what actually transpired between the police officer and the suspect. If X and Y both have well-functioning brains and are well adapted to the worlds in which they live, then presumably the emotional salience patterns that have emerged out of their different sets of experiences are reasonably well suited to helping X and Y thrive in their respective environments. In that sense, we can assume as a general matter that the emotions X and Y experience are frequently based upon reasonable appraisals. What we do not know, however, is the extent to which X's and Y's experiences provide them with a representative

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106. See *supra* notes 32–35, 43–48 and accompanying text (discussing appraisals).

107. See *supra* notes 32–39 and accompanying text (discussing appraisals and physiology).

108. See *supra* notes 59–73 and accompanying text (discussing salience).

sampling of the way the larger world usually works. If the experiences of either X or Y are highly idiosyncratic when judged against the backdrop of what usually happens in the wider world, then, as a juror, X or Y will have an undesirable tendency to regard significant evidence as insignificant or to regard insignificant evidence as significant. If X is naïve and comes from an unusually sheltered environment, for example, then her experiences may provide a poor basis for determining how people in the larger world ordinarily behave, and she might too greatly discount the importance of witnesses' testimony about the officer's use of racial slurs. If Y comes from an unusually combative community and believes that racial slurs correlate far more frequently with physical violence than they actually do, then he might attach great weight to evidence that would be better relegated to the case's periphery.

Because we do not know whether Juror X or Juror Y has the more accurate view of the world, the rationally preferable scenario may be one in which they both serve on the jury and benefit from one another's collective experiences and resulting patterns of appraisals and emotional salience. Together they will consider a broader range of narratives than they would if they were deciding the case alone. The broader the range of narratives that they consider, the more likely it is that they will consider narratives that closely match the events that actually transpired between the officer and the suspect. Drawing from their contrasting backgrounds and reactions to the evidence, they can test their differing narratives' evidentiary accounts on one another, prodding one another to consider narratives in which each item of evidence gets greater or lesser weight or is interpreted in one manner rather than another. If either X's or Y's experiences are highly idiosyncratic, the other jurors can respond accordingly when X or Y tries to persuade the other jury members that the narrative he or she has constructed provides a comprehensive and coherent account of what happened.<sup>109</sup> We are thus well served by readings of the Constitution under which both civil and criminal juries must contain multiple members and must reach their verdicts with either near or total unanimity.<sup>110</sup>

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109. Cf. Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 498 (1966) (positing that "the group nature of the jury decision will moderate and brake eccentric views"); Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. Chi. Legal F. 33, 54 ("There is . . . an empirical basis for the beliefs that larger groups such as full juries . . . provide more competition among views and thus more stimulation and better testing of ideas and reactions . . .").

110. With respect to criminal trials, see *Apodaca v. Oregon*, 406 U.S. 404, 411–12 (1972) (plurality opinion) (holding that the Sixth Amendment does not require a unanimous verdict in state criminal jury trials); *Johnson v. Louisiana*, 406 U.S. 356, 369–71 (1972) (Powell, J., concurring) (providing the swing vote and concluding that the Sixth Amendment requires unanimity in federal criminal jury trials); *Williams v. Florida*, 399 U.S. 78, 86 (1970) (holding that the Sixth Amendment does not guarantee a twelve-person jury in criminal trials and that Florida did not violate the Sixth Amendment when it seated a six-person jury in a criminal case); and Kenneth Katkin, "Incorporation" of the Criminal Procedure Amendments: *The View from the States*, 84 Neb. L. Rev. 397, 454 (2005) ("Today, only four states permit nonunanimous verdicts in criminal cases."). With respect to civil trials, see

Even if a juror's experiences are nonidiosyncratic and thus provide a reasonably accurate sampling of the way the world often works and the way people often behave, however, we are not guaranteed that the juror's emotions will impel him or her toward an accurate verdict. There is an obvious difference between the way the world works and people behave as a general matter, and the way the world worked and people behaved on a particular occasion. Even when a juror's particular emotions are based upon generally accurate appraisals, therefore, problems arise if a juror is too strongly committed to those appraisals, and he or she thus fails to consider narratives in which those appraisals are inaccurate. Research suggests that this is indeed a risk. When a juror experiences the physiological sensations of an emotion, she often will regard those sensations as evidence of the accuracy of the appraisal on which the emotion is based, and she might thus commit herself to that appraisal before evaluating all of the available evidence.<sup>111</sup> Moreover, the juror might seek to vindicate her commitment to that appraisal by selectively screening the available data, seizing upon evidence that supports the appraisal and discounting or ignoring evidence that undercuts it.<sup>112</sup>

In our hypothetical, for example, when Juror Y feels the physiological sensations of fear and anger after hearing credible witnesses testify about the officer's use of racial slurs, he may regard those sensations as evidence that the officer is capable of committing racially motivated violence. If those emotions are strongly felt, Juror Y may seek to vindicate that appraisal by listening selectively to the rest of the evidence presented in the case, focusing on evidence that suggests the officer behaved violently and glossing over evidence that suggests the officer behaved reasonably. That selective reading of the evidence may only strengthen Y's confidence in his initial appraisal, triggering a mutually reinforcing relationship between Y's emotions and beliefs that will make it difficult to persuade Y that his appraisal is false.<sup>113</sup> When Y constructs possible narratives to account for the evidence, he may overly discount the credibility of evidence that conflicts with his emotional appraisal, he may try to force items of evidence into narrative roles for which they are poorly suited, and he may ignore the

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*Colgrove v. Battin*, 413 U.S. 149, 152–60 (1973) (holding that the Seventh Amendment does not guarantee a twelve-person jury in civil cases, and that the District of Montana did not violate the Seventh Amendment when it seated a six-person jury in a civil case); *Am. Publ'g Co. v. Fisher*, 166 U.S. 464, 467–68 (1897) (holding that the Seventh Amendment requires unanimity in federal civil jury trials); and Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* 675 n.5 (6th ed. 2002) (predicting that, if the issue were to arise today, the Court would reverse *American Publishing* and hold that the Seventh Amendment does not require unanimity in civil jury trials).

111. See *supra* notes 66–67 and accompanying text (discussing the experience of an emotion as itself evidence of the accuracy of the appraisal on which the emotion is based).

112. See *supra* notes 68–73 and accompanying text (discussing the selective search for evidence that supports an appraisal).

113. See *supra* notes 70–73 and accompanying text (discussing this mutually reinforcing relationship).

extent to which the evidence that supports his appraisal is actually quite thin.<sup>114</sup>

Despite the fact that a range of emotional phenomena can usefully push jurors in rational, truth-discovering directions, therefore, the law has a strong interest in prodding jurors to examine the appraisals on which their emotions are based. Rather than naïvely tell jurors to ignore their emotions, we need to encourage jurors to engage in what Samuel Pillsbury calls “emotional self-examination,”<sup>115</sup> reserving Rule 403 for those instances in which we believe such encouragement would be ineffectual.<sup>116</sup> As several philosophers have pointed out, our emotions can indeed be evaluated for their own kind of rationality, using criteria under which emotions are deemed rational if they are based upon appropriate or fitting appraisals.<sup>117</sup> Rather than tell Juror Y to ignore his emotions altogether—advice that is not only futile, but is counterproductive to the extent that Y’s emotions push his thinking in rationally useful directions—we would do far better to tell Y to reflect on his emotions, to try to identify the appraisals on which those emotions are based, to think carefully about whether those appraisals are warranted by the witnesses’ testimony about the officer’s use of racial slurs, and to think carefully about whether those appraisals are consistent with all of the other evidence that Y has seen and heard.<sup>118</sup>

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114. Cf. John Lawrence Hill, *Exploitation*, 79 Cornell L. Rev. 631, 676 (1994) (“[T]he desire to believe in something may affect one’s evaluation of the evidence for its truth.”); Sherman, *supra* note 4, at 12 (“Aspects of reality may be disregarded or under- or overvalued, and attention focused on slender probabilities. There may be a selective gaze which long outlasts its ‘objective’ warrant . . .”).

115. Pillsbury, *supra* note 20, at 703; accord Leslie Paul Thiele, *The Heart of Judgment* 197 (2006) (“[B]eing under the influence of a particular mood or emotion is not in itself an impediment to good judgment. Being unaware of our moods and emotions, their causes and effects, is the real problem.”).

116. See *supra* note 7 and accompanying text (noting Rule 403’s authorization of the exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice”); cf. Welch, *supra* note 5, at 78 (“Inappropriate uses of affective argumentation [in public-policy debates] would be those that . . . provoke action without the mediation of choice and judgment.”).

117. See, e.g., Nussbaum, *supra* note 19, at 62 (“[The rationality of emotions can] be assessed by inspecting the relevant beliefs or judgments. These may be either true or false, either appropriate or inappropriate to their object, and they may be either rational or irrational.”); see also Allen, *supra* note 4, at 330 (stating that emotions’ rationality can be judged based upon “the rationality of the assessment of the situation”); *id.* at 327 (pointing out that it is rational to be afraid of a fierce dog); *id.* at 326 n.13 (stating that phobias and obsessions give rise to irrational emotions); Greenspan, *supra* note 21, at 210 (pointing out that we commonly distinguish “between reasonable and unreasonable emotional reactions, appropriate and inappropriate in what seems to be roughly a rational sense, having to do with some notion of fit to the circumstances that constitute grounds or evidence for emotion”); Jones, *supra* note 61, at 341 (“An emotion *E* in situation *S* is rational for agent *A* if and only if *E* enables *A* to form a rational framing of *S*.”). Others characterize the rationality of emotions in narrower terms. See, e.g., McCullagh, *supra* note 29, at 53 (“Particular emotions are only rational if they have been rationally cultivated.”).

118. Cf. Franklin Strier, *Reconstructing Justice: An Agenda for Trial Reform* 122–23 (1994) (suggesting that, rather than exclude potentially prejudicial evidence, trial judges sometimes should admit the evidence and explain to jurors why the evidence should be

### C. Expressing Emotions Through Verdicts

Serving on a jury and deciding whether to deprive another person of his or her life, liberty, or property can be an extraordinarily difficult experience. As the Supreme Court has acknowledged, “Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal.”<sup>119</sup> Not surprisingly, former jurors frequently report experiencing physical illnesses and psychosocial difficulties as a result of the time they spent in the jury box.<sup>120</sup> To speed their return to normal daily activities, jurors might be tempted to seek the easiest way out and hand down the verdict that causes them the least amount of stress. The Court has recognized, therefore, that one of evidence’s important functions is to “sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.”<sup>121</sup>

Evidence is able to serve this emboldening function precisely because of its power to evoke emotions. When jurors experience strong emotions upon hearing or seeing particular items of evidence, they may feel a need to express those emotions through their verdict—indeed, failing to find an adequate means of expressing those emotions might itself create a physiological feeling of discomfort.<sup>122</sup> Feeling compelled to express the emotions that jurors experience as a result of viewing gruesome photographs of a murder victim’s body, for example, can usefully counteract the emotions that jurors feel when they contemplate separating a nice-looking, well-dressed criminal defendant from his family for the rest of his life.<sup>123</sup>

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handled with special care). For a brief review of the seemingly sparse literature concerning the possible effectiveness of jury instructions on how to handle emotionally powerful evidence, see Feigenson & Park, *supra* note 42, at 156 (noting that recent studies have shown mixed results with respect to legal decision makers’ likely ability to “follow instructions not to be improperly influenced by their emotions”).

119. *Old Chief v. United States*, 519 U.S. 172, 187 (1997).

120. See, e.g., Thomas L. Hafemeister & W. Larry Ventis, *Juror Stress: What Burden Have We Placed on Our Juries?*, 56 *Tex. B.J.* 586, 586–90 (1993) (discussing anecdotal evidence of juror stress and resulting difficulties); Stanley M. Kaplan & Carolyn Winget, *The Occupational Hazards of Jury Duty*, 20 *Bull. Am. Acad. Psychiatry L.* 325, 325–32 (1992) (reporting the results of a study of jurors from four criminal trials); James E. Kelley, *Addressing Juror Stress: A Trial Judge’s Perspective*, 43 *Drake L. Rev.* 97, 115 (1994) (stating, on the basis of questionnaires sent to former jurors in criminal cases, that “jurors in serious criminal cases suffer stress symptoms as a result of jury service”); Monica K. Miller & Brian H. Bornstein, *Juror Stress: Causes and Interventions*, 30 *T. Marshall L. Rev.* 237, 241 (2004) (“To some extent, the symptoms that jurors experience are similar to the stress experienced by actual crime victims and are often the same symptoms used to diagnose mood or anxiety disorders, though the severity of symptoms generally falls short of a diagnostic threshold.”).

121. *Old Chief*, 519 U.S. at 187.

122. See *supra* note 76 and accompanying text (discussing the need to express emotions).

123. For a recent discussion of the ways in which viewing gruesome photographs might influence jurors’ decisions, see David A. Bright & Jane Goodman-Delahunty, *Gruesome*

To put it somewhat differently, evidence-induced emotions can serve as Patricia Greenspan's "commitment devices."<sup>124</sup> Jurors can use their emotions to boost their resolve to render a verdict that is faithful to the facts established by the evidence, despite the stress that rendering such a verdict might cause. When an abused spouse is wavering about whether to leave the husband whom she still loves, her friends might remind her of all of the times he grossly mistreated her, hoping to revive some of the emotions that those abusive episodes caused the spouse to suffer. When the husband is later facing criminal assault charges and jurors are trying to reinforce their determination to follow where the evidence leads, even though it will result in the father of young children being sent to prison, the jury similarly can draw from the emotions they experienced when hearing evidence of that abuse.

There is a risk, of course, that the emotions that particular items of evidence provoke will be so strong, and that jurors' commitment to the appraisals on which those emotions are based will be so unyielding, that jurors will not fairly evaluate all of the evidence presented in the case and will choose to express their strongly felt emotions through a verdict that does not accurately reflect all of the proven facts.<sup>125</sup> If jurors are exceedingly outraged by the photographs of the murder victim's body and they immediately appraise the defendant as a heinous monster, they might feel that returning a guilty verdict would be the only satisfying means of expressing, relieving, or "getting out" those deeply felt emotions, no matter what the other evidence in the case tends to prove.

Again, Rule 403 is available when the judge believes this is a particular threat.<sup>126</sup> Before seizing upon Rule 403 too quickly, however, one should consider two additional points. First, jurors' affective systems do not leave jurors' reactions to emotionally charged evidence entirely unchecked. If a juror has doubts about a murder defendant's guilt in a case in which jurors have seen graphic photographs of the victim's body, for example, she may feel anticipatory guilt, shame, and cognitive dissonance when contemplating voting to convict.<sup>127</sup> The juror is even more likely to

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*Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 *Law & Hum. Behav.* 183 (2006). David Bright and Jane Goodman-Delahunty conclude that viewing gruesome photographs in mock criminal trials increases the conviction rate, but that viewing neutral photographs exerts a comparable effect. *See id.* at 197–200. They attempt to explain the former by stating that feelings of anger cause mock jurors to want to blame the defendant, *see id.* at 198–99, and they attempt to explain the latter by hypothesizing that photographic evidence "may be more easily encoded and subsequently recalled at judgment," *id.* at 197.

124. *See supra* notes 77–79 and accompanying text (discussing the use of emotions as commitment devices).

125. *See supra* notes 68–69 and accompanying text (discussing commitments to appraisals).

126. *See supra* notes 115–18 and accompanying text (discussing Rule 403's availability when a judge believes jurors will not fairly scrutinize the appraisals on which their emotions are based).

127. *See supra* note 74 and accompanying text (discussing cognitive dissonance and its related negative emotions).



experience those cautionary affective phenomena if she has internalized the court's instructions on the standard of proof. By emphasizing the importance of such instructions to the jury, a court can usefully help to ensure that jurors will anticipate experiencing unpleasant emotions if they flout those instructions' requirements.<sup>128</sup>

Second, there may be instances—particularly when a judge thinks that the Rule 403 question is a close one—when a judge should admit relevant but emotionally powerful evidence. This evidence may be admitted so long as the judge believes that jurors' emotional reactions will subside after a short "cooling off" period or the judge is able to make specific suggestions about ways jurors might usefully vent some of their emotions before trying to assemble the evidentiary puzzle.<sup>129</sup> Jurors certainly need to deliberate while the evidence is still fresh in their minds, and practical restraints would make it difficult to provide cooling-off periods of great length. Judges might nevertheless find ways to help ensure that, when jurors begin their deliberations, they have relieved some of their emotional "heat" by means other than immediately returning with an emotion-venting verdict.

#### CONCLUSION

When one considers the complexity that marks the many ways in which emotions influence jurors' decisions, one readily sees that broadly framed legal and ethical declarations against emotions in the courtroom are hopelessly simplistic. It might be intellectually easiest to condemn fact-finders' emotions in sweeping and categorical terms, but such condemnations are naïve, unhelpful, and ultimately futile. The sooner that legal commentators abandon the ancient reason-emotion dichotomy and join those in related disciplines who are taking a far more nuanced approach to the subject,<sup>130</sup> the better able they will be to help identify rules and practices that promote accurate, rational decision making by jurors.

Of course, the law's fear of emotional influences is not wholly unfounded. When emotions prompt us to find certain features of a situation overwhelmingly salient, for example, they can lead us to act impulsively, even though we might conclude in hindsight that we should have refrained from acting until we had more carefully assessed all of the situation's

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128. Cf. Kalven & Zeisel, *supra* note 109, at 498 (positing that one reason jurors usually render verdicts with which presiding judges agree is that the jury "has been invested with a public task, brought under the influence of a judge, and put to work in solemn surroundings").

129. Cf. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 Yale L.J. 763, 795–97 (1983) (acknowledging that the law of contracts might justifiably provide a "cooling off" period—a brief period immediately following a contract's formation during which one or both parties may terminate the agreement—if there is a likelihood that one of the parties was "influenced by strong and potentially distorting passions" at the time he or she entered the agreement).

130. See *supra* notes 2–13, 20–25 and accompanying text (discussing the reason-emotion dichotomy and other disciplines' rejection of it).

relevant factors.<sup>131</sup> Even when we do delay our response, we sometimes too readily commit ourselves to the appraisals on which our emotions are based, causing us to focus selectively on evidence that supports those appraisals and to ignore evidence that undercuts them.<sup>132</sup> This selective screening of the available data can lead, in turn, to a mutually reinforcing relationship between our emotions and our beliefs, making our beliefs powerfully resistant to change.<sup>133</sup> With such dangers in mind, judges, legislators, and scholars should explore ways in which jurors might be encouraged carefully to examine the appraisals underlying their emotions, in order better to ensure that those appraisals are truly warranted.<sup>134</sup>

It is also clear, however, that it would be virtually impossible for jurors to make rational decisions without the aid of their emotions. Emotions help jurors assess the credibility of witnesses,<sup>135</sup> they help jurors construct and evaluate narratives that account for all of the credible evidence that they have seen and heard,<sup>136</sup> and they help embolden jurors to carry out the difficult task of following the evidence wherever it leads, even when it means issuing verdicts that will deprive a person of his or her life, liberty, or property.<sup>137</sup> Needless to say, those are absolutely critical functions. It is time for the legal community to recognize that emotions frequently belong in the courtroom, just as they belong in any setting in which human beings endeavor to make rational decisions.

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131. *See supra* note 62 and accompanying text (discussing impulsive decisions).

132. *See supra* notes 66–69 and accompanying text (discussing commitments and appraisals).

133. *See supra* notes 70–73 and accompanying text (discussing the potential for a mutually reinforcing relationship between emotions and beliefs).

134. *See supra* notes 115–18 and accompanying text (noting the potential usefulness of such encouragement).

135. *See supra* notes 81–92 and accompanying text (discussing emotions' role in making demeanor-based assessments of credibility).

136. *See supra* notes 93–118 and accompanying text (discussing emotions' role in constructing coherent and comprehensive narratives).

137. *See supra* notes 119–29 and accompanying text (discussing emotions' role in emboldening jurors).