

## Emotional Fact-Finding

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### I. INTRODUCTION

Our legal system is deeply inconsistent in regard to the role that emotions can and should play at trial. To the extent our rules of evidence discuss emotions at all, they characterize them as an improper influence on jury decision-making.<sup>1</sup> When judges address emotions in the context of jury instructions, they are usually cautioning jurors that they must suppress their feelings and decide cases without reference to “sympathy” or other emotional influences.<sup>2</sup> Likewise, when evidence scholars have created models of how jurors decide cases, emotions usually play little, if any, role in their accounts.<sup>3</sup> Indeed, it is usually assumed that “[t]o label an influence ‘emotional’ is to say it is inappropriate—the very opposite of the reasoned discourse on which the legal system is premised.”<sup>4</sup>

Conversely, there are times when emotions are treated as a valuable part of the trial process. In classes on legal writing and trial advocacy,

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1. See, e.g., FED. R. EVID. 403 advisory committee’s note (allowing judges to exclude evidence based on “unfair prejudice” and defining that term to mean an “undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one”).

2. See, e.g., FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT §§ 1.01, 3.13, 7.24 (2009) [hereinafter SEVENTH CIR. JURY INSTRUCTIONS]; VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 131 (1986) [hereinafter JUDGING THE JURY] (quoting Judge Jerome Frank’s description of “Mr. Prejudice” as a “thirteenth juror” that judges must always reckon with, along with his companion, “Miss Sympathy”).

3. See discussion *infra* Part III.

4. Susan A. Bandes, *Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty*, 33 VT. L. REV. 489, 493 (2009).

we teach law students to frame arguments to convince the reader, not just with logic and precedent, but also with moral and emotional weight. Likewise, when lawyers take cases to trial, they consider juror feelings from start to finish, using voir dire to search for sympathetic jurors,<sup>5</sup> and selecting their theories, evidence, and arguments to craft an emotionally compelling case.<sup>6</sup> From this perspective, it sometimes seems that, as Clarence Darrow observed, “the main work of a trial lawyer is to make a jury like his client, or, at least to feel sympathy for him; facts regarding the crime are relatively unimportant.”<sup>7</sup> Nor are advocates the only people who think that emotions should play a role in the process.<sup>8</sup> In fact, even judges will occasionally bless the inclusion of emotional influences as part of the trial process, such as in the context of capital sentencing.<sup>9</sup>

This tension creates a curious impasse. Lawyers view the trial as an emotional battleground, in which they must compete for a jury’s sympathy. Judges, by contrast, usually see such influences as improper, but view their role in restraining these skirmishes as a limited one, based on the widespread understanding that they should err on the side of liberal inclusion of as much relevant evidence as possible.<sup>10</sup> As a result, jurors find themselves positioned awkwardly in the middle, caught between advocates who strive to engage their feelings and judges who demand that they perform heroic feats of emotional control.

One would hope that the academic literature would be immune to such polarized views on a topic this important, but one would be wrong. On the one hand, scholars frequently assume that emotional influences

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5. See, e.g., Alafair S. Burke, *Prosecutors & Peremptories*, 97 IOWA L. REV. 1467, 1478 (2012) (quoting advice from one manual for prosecutors about how they can “shape the jury in [their] favor”); NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 95 (2007) (recounting a training provided by one assistant district attorney to new prosecutors, in which he “urg[ed] them to look for conviction-prone jurors who are predisposed to accept the government’s claims at face value”).

6. See, e.g., H. Mitchell Caldwell & Janelle L. Davis, *Timeless Lessons from the Masters*, 35 AM. J. TRIAL ADVOC. 19, 32–35 (2011) (collecting advice from veteran trial lawyers regarding ways that advocates can “find and exploit the pathos” in a case).

7. JUDGING THE JURY, *supra* note 2, at 131.

8. See, e.g., 151 CONG. REC. S10,366 (daily ed. Sept. 22, 2005) (statement of Sen. Obama) (arguing that, in hard cases, “the critical ingredient is supplied by what is in the judge’s heart”).

9. See Teneille R. Brown, *The Affective Blindness of Evidence Law*, 89 DENV. U. L. REV. 47, 80–81 (2011) (discussing the law’s ambivalent embrace of emotions in that context, in which “[j]urors are told to simultaneously use emotion to show mercy, but remove emotion for all other sentencing purposes”).

10. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 4:12 (4th ed. 2010) (collecting cases).

are distinct and separable from a process of reasoned decision-making, and that the best fact-finding process would be one where emotional influences are minimized, if not excluded altogether.<sup>11</sup> On the other hand, there are many who have argued that the problem is not that we have too much emotion in the process, but too little. These authors believe that judges who feel a broader scope of empathy for the suffering of others will make fairer decisions.<sup>12</sup> And while a small number of scholars have recently taken some steps to bridge this divide, they have found it easier to criticize existing views than to offer constructive suggestions as to how the system could be reformed.<sup>13</sup>

In this article, I hope to bridge the gap between those who would exclude emotion from the trial and those who wish it to take a more central place. As I will explain, emotions sometimes aid and sometimes hinder good decision-making. Furthermore, these effects will persist even if juries try to resist their pull, because most emotional influences occur automatically at an unconscious level of our minds. Using this more nuanced picture, I suggest some ways that judges could use existing rules to better manage emotions in the courtroom, as well as reforms to existing rules and practices to give judges more guidance and encouragement in doing so.

My account of emotional influences at trial draws on the dual process model of cognition, which posits that we regularly draw on two very different kinds of mental resources. One kind of thinking, frequently labeled “System 1,” is the domain of intuitive judgments and actions, which we can perform rapidly and without perceiving any mental effort. This cognitive system is active during every moment of

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11. See, e.g., PAUL THAGARD, *HOT THOUGHT: MECHANISMS AND APPLICATIONS OF EMOTIONAL COGNITION* 155–56 (2006) (maintaining that “if emotional bias helps to prevent the jury from arriving at true answers, then . . . [its] influence . . . would seem to be normatively inappropriate” and that in an ideal system the influence of emotion should be “minor” compared to “the rational assessment” of the evidence); LARRY LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY* 51–54 (2006) (attacking the idea that the reasonable doubt standard should depend on the strength of a juror’s conviction because their subjective feelings are “apt to be ill founded, prejudicial, and irrational” when compared with the outcome of a rational process of “reasoning through the evidence”); see also D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and “Legitimate Moral Force”*: *Keeping the Courtroom Safe for Heartstrings and Gore*, 49 *HASTINGS L.J.* 403, 445 (1998) (asserting that “the horror of the crime changes the operational notion of what constitutes a reasonable doubt”).

12. See, e.g., Richard A. Posner, *Emotions Versus Emotionalism in Law*, in *THE PASSIONS OF LAW* 309, 310 (Susan A. Bandes ed., 1999); ROBIN WEST, *NARRATIVE, AUTHORITY, & LAW* 247–48, 258–59 (1993).

13. See generally discussion, *infra* Part II.C.

our waking lives, and it allows us to perform dazzling mental feats without even realizing their complexity. With its help, we can navigate our way through traffic, discern the emotional state of another person based on their tone of voice, or recognize distant faces in a crowd, swiftly and effortlessly.<sup>14</sup> System 1 seems to accomplish much of this magic by being a powerful pattern-learning and pattern-recognizing machine.<sup>15</sup> With repeated experiences or by practicing complicated actions, we can automate the processes of recognizing similar scenarios and responding to them appropriately. Even more strikingly, we can learn to recognize and respond to patterns even when we cannot consciously perceive them or describe their structure.<sup>16</sup>

System 2, by contrast, is the realm of deliberative rationality. Unlike System 1, this kind of thinking takes place within conscious awareness; it is able to apply new rules and to manipulate abstract symbol structures, and it can focus its attention on a particular target and resist distractions or temptations.<sup>17</sup> When we are solving a math problem, analyzing an intricate statutory scheme, restraining our automatic desire to eat tasty things, or awkwardly practicing a new and unlearned skill, we engage in a very different kind of mental processing than occurs effortlessly within System 1. In all of these settings, we cannot accomplish our task unless our mind remains fixed on a single topic and we proceed slowly and carefully. The great power of System 2 enables us to solve problems that are entirely unfamiliar to us and to perform actions that we have never

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14. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 19–24 (2012) (introducing key features of System 1 and System 2).

15. See *id.* at 50–58; TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS 24–27 (2002) (comparing implicit learning, which is “learning without effort or awareness of exactly what has been learned” to explicit learning, which is “effortful” and “conscious”); Eliot R. Smith & Jamie DeCoster, *Dual-Process Models in Social and Cognitive Psychology: Conceptual Integration and Links to Underlying Memory Systems*, 4 PERSONALITY & SOC. PSYCHOL. REV. 108, 111 (2000); Steven A. Sloman, *The Empirical Case for Two Systems of Reasoning*, 119 PSYCHOL. BULL. 3, 4 (1996) (claiming that “associative reasoning inherits a property of associative systems” by computing on the “basis of similarity and temporal structure”). *But see* Jonathan St. B. T. Evans, *Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition*, 59 ANN. REV. PSYCHOL. 255, 261 (2008) (doubting that some versions of the dual-process framework, such as the heuristic/systematic processing account, can be reconciled with associationism).

16. See, e.g., Arnaud Destrebecqz & Axel Cleeremans, *Can Sequence Learning Be Implicit? New Evidence with the Process Dissociation Procedure*, 8 PSYCHONOMIC BULL. & REV. 343, 347–49 (2001) (concluding that “awareness is not always necessary for learning to occur”); Antoine Bechara et al., *Deciding Advantageously Before Knowing the Advantageous Strategy*, 275 SCI. 1293, 1293–96 (1997) (suggesting that “nonconscious biases guide behavior before conscious knowledge does”).

17. See KAHNEMAN, *supra* note 14, at 22–24.

learned in the past. Unfortunately, this power comes at a significant cost, because maintaining such focus both limits our ability to attend to other matters and saps our mental energies. The longer we employ this resource, the more tired we will become and the less energy we will find that we have available for other tasks.<sup>18</sup>

Applied to fact-finding, the dual-process framework illustrates the ways that a judge or juror's intuitive feelings and deliberative thoughts will interact as she tries to resolve a case.<sup>19</sup> As I will explain later, emotions have many functions at the System 1 level that are not commonly understood. Emotions do not merely bias a decision-maker towards one party and against another. Rather, as jurors listen to evidence, their emotions automatically shape what aspects of the witness's testimony and demeanor they notice and which of these details they overlook and forget.<sup>20</sup> Later, when jurors deliberate, the emotions that they have associated with particular parties and facts in the case will shape what details of the evidence they remember, and what conclusions they find palatable. Depending on the source and type of emotion, these effects will sometimes heighten their ability to render good decisions, and at other times undermine it. But the critical point is that trying to separate the products of emotion from those of reason will generally be futile, because emotions are an inherent component of rational fact-finding, rather than something that competes with or undermines it.<sup>21</sup>

Given the inextricable link between emotions and reasoning, the dominant judicial responses to juror emotion are inadequate. First, recognizing the pervasiveness of emotionally resonant evidence makes it

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18. See Martin S. Hagger et al., *Ego Depletion and the Strength Model of Self-Control: A Meta-Analysis*, 136 PSYCHOL. BULL. 495, 496 (2010) (stating a major tenet of the strength model is that “engaging in acts of self-control draws from a limited ‘reservoir’ of self-control that, when depleted, results in reduced capacity for further self-regulation”); E.J. Masicampo & Roy F. Baumeister, *Toward a Physiology of Dual-Process Reasoning and Judgment: Lemonade, Willpower, and Expensive Rule-Based Analysis*, 19 PSYCHOL. SCI. 255, 259 (2008) (noting “System 2 decision making may involve analyses that are expensive and effortful”).

19. See generally Mark Spottswood, *The Hidden Structure of Fact-Finding*, 64 CASE W. RES. L. REV. 131, 171–93 (2013) [hereinafter *Hidden Structure*] (articulating the roles that the two systems might play as a jury hears evidence and deliberates towards a verdict); Mark Spottswood, *Bridging the Gap Between Bayesian and Story-Comparison Models of Juridical Inference*, 13 LAW, PROBABILITY & RISK 47, 47–49 (2014) [hereinafter *Bridging the Gap*] (arguing that this model provides a better framework for analyzing many questions of evidentiary policy than pre-existing accounts of juridical inference).

20. See discussion, *infra* Part IV.

21. See ANTONIO R. DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* xvi–xvii (2005); GERD GIGERENZER, *GUT FEELINGS: THE INTELLIGENCE OF THE UNCONSCIOUS* 36–38 (2007).

obvious that excluding all such evidence will be either futile or counterproductive. Second, recognizing that jurors cannot fully separate their emotions from their deliberative judgments, and that trying to do so will sap their mental energies, implies that judges are unlikely to achieve good results by resorting to limiting instructions that direct jurors to suppress their feelings. Jurors have a limited ability to control what they feel, and too much effort spent controlling their feelings will distract them from carefully considering the details of the case before them. Taken together, these two insights suggest that, rather than trying to exclude all emotional influences at trial, judges should intervene selectively when feelings are likely to be disruptive, and they should draw on a broader set of tools to dampen such feelings before they arise.

On the practical front, I suggest a number of reforms designed to improve the legal system's handling of emotions at trial. First, I propose a taxonomy that judges and other analysts can draw on to distinguish problematic emotional impacts from beneficial ones. Second, I outline several ways that judges can use their trial management discretion to limit emotional impacts without excluding the underlying evidence. Third, I propose a revised Rule 403, which would help draw judges' attention to these available alternatives and make the need for their use more apparent. Fourth, I recommend that trial judges receive instruction on how emotions influence cognition when they are first appointed to the bench, in order to narrow the gap between judicial common sense and scientific understanding. And finally, I suggest a means by which parties may raise objections to emotionally inflammatory evidence at bench trials without revealing that information to the presiding judge. Reforms like these would move the legal system towards a more balanced treatment of emotions at trial, in which feelings are both acknowledged and accepted as part of the process, but where their potential to undermine the accuracy of fact-finding is reduced.

This article will proceed as follows. Part II provides background on the existing literature on emotional influences at trial. Part III will describe my own dual-process model of fact-finding and show its capacity to provide a more nuanced understanding of the role that emotions play in the trial process. Part IV will draw on this framework to offer practical suggestions for reform of the trial process.

## II. FACTS AND FEELINGS IN LEGAL DISCOURSE

Disagreements over the role of emotion within the law, in general, and within trials more specifically, span the history of legal discourse.

To simplify things and introduce the questions to be considered in this Article, I will review this voluminous literature and identify three major families of views one encounters within it. I shall refer to the oldest, and still dominant, set of assumptions as the “classical” view. Those who subscribe to this viewpoint see emotions as dangerous forces that are likely to corrupt the fact-finding process by displacing the role of cool, unemotional reason. The classical view can be contrasted usefully with two other theoretical positions. A competing approach, which I will label the “Humean” view, suggests that emotions may lend wisdom of their own to legal decision-making, that they are usually too powerful to resist in any event, and that attempts to silence or ignore them will tend to worsen the quality of justice. A third alternative offers a synthesis of the two positions, urging that the value of emotions in fact-finding will vary depending on the situation, in some cases improving the quality of justice and in others worsening it. This “contextual” viewpoint draws more directly from cognitive psychology and neuroscience research, which suggest that emotions and moods are critical to the normal operation of human reasoning, but also malleable in response to external forces, making us potentially susceptible to manipulation and errors. This third approach is far more promising than either the classical or the Humean perspectives, but it remains at an early stage of development.

#### *A. The Classical View*

Many writers, both past and present, find it normatively intolerable for emotions to play a significant role in shaping trial outcomes, and urge that any such influences should be suppressed.<sup>22</sup> This view has roots stretching back to antiquity. Aristotle, for instance, argued that law should be “an intellect devoid of desire.”<sup>23</sup> Passion and emotion, he warned, are inherently corrupting, even in the hands of the best of us.<sup>24</sup> Fairness and justice, in this framing, are the products of cold-hearted rationality, not feelings. This view found many other notable adherents in Western moral philosophy. Those in the Kantian tradition frequently urge that moral decisions must follow from principles of logic and reason

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22. See generally Jeremy A. Blumenthal, *A Moody View of the Law: Looking Back and Looking Ahead at Law and the Emotions*, 56 EMOTION AND THE LAW: PSYCHOLO. PERSP. 185 (2010) (providing an overview of the literature on emotions and their legal repercussions, including research finding that the two do not mix well).

23. ARISTOTLE, 3 POLITICS 1287a (translation by the author).

24. *Id.*

regardless of our emotional feelings,<sup>25</sup> and Christian theology has often viewed giving in to emotional temptations as a form of sinfulness and imperfection.<sup>26</sup> Such views have helped to create a dominant cultural narrative in which emotions operate as “an untrustworthy force that cripples judgment.”<sup>27</sup>

With so many powerful and influential proponents, it should come as no surprise that a similar normative vision became embedded in modern American legal discourse.<sup>28</sup> For example, John Henry Wigmore, in writing what was perhaps the most influential treatise on Anglo-American evidence ever published,<sup>29</sup> articulated several rationales for rules that exclude some evidence from the jury’s consideration. Among his reasons for exclusion, he included the fact that, amidst the “surging emotions” of a courtroom, a jury may easily be led astray.<sup>30</sup> Likewise, the Federal Rules of Evidence, which have served as a model for most state codes of evidence,<sup>31</sup> strongly embody the classical view. For instance, the frequently invoked “catch-all” exclusionary provision, Rule 403, gives trial judges wide discretion to exclude evidence whenever the

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25. See, e.g., CHRISTINE M. KORSGAARD, *THE CONSTITUTION OF AGENCY: ESSAYS ON PRACTICAL REASON AND MORAL PSYCHOLOGY* (2008) (discussing Kant’s famous denial that there was any moral worth in an action motivated by an emotion of sympathy rather than by reason); Christine M. Korsgaard, *Morality and the Distinctiveness of Human Action*, in *PRIMATES AND PHILOSOPHERS* 98, 112 (2006) (arguing that resisting the pull of one’s desires and emotions is a central part of what it means to be moral).

26. JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* 24 (1998); William Wainwright, *Concepts of God*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* § 2 (Edward N. Zalta ed., Spring ed. 2013), available at <http://plato.stanford.edu/entries/concepts-god/#Imp> (discussing the theological doctrine of “impassibility,” according to which God is said to be a being too perfect to be touched by suffering or other emotive states); see also C.S. LEWIS, *MERE CHRISTIANITY* 132–33 (1952) (suggesting that one cannot “get eternal life by simply feeling the presence of god,” but must “learn[] and think[] about the Christian doctrines”). But cf. Robert Roberts, *Emotions in the Christian Tradition*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* § 2 (Edward N. Zalta ed., Summer ed. 2011), available at <http://plato.stanford.edu/archives/sum2011/entries/emotion-Christian-tradition/> (arguing that emotions such as gratitude, compassion, and contrition are seen as a positive and moral force in much Christian thinking).

27. Brown, *supra* note 9, at 55.

28. See generally John Leubsdorf, *Presuppositions of Evidence Law*, 91 *IOWA L. REV.* 1209, 1245–46 (2006) (discussing the “familiar proposition that evidence law . . . seeks trials governed by reason rather than emotion”).

29. See WILLIAM TWING, *THEORIES OF EVIDENCE: BENTHAM & WIGMORE* 109 n.1 (1985). (describing Wigmore’s extensive influence in the legal field).

30. *Id.* at 157.

31. Thomas J. Reed, *Admitting the Accused’s Criminal History: The Trouble with Rule 404(b)*, 78 *TEMP. L. REV.* 201, 212 (2005) (noting that “[f]orty-one states, the District of Columbia, the Virgin Islands, and Guam have adopted the Federal Rules of Evidence in one form or another”).



danger of “unfair prejudice” may outweigh its probative value. In case we had any doubts as to what the drafters meant by the term “unfair prejudice,” the advisory committee’s notes clarify that such prejudice arises when decisions rest on an “improper basis, commonly, though not necessarily, an emotional one.”<sup>32</sup> Going along with this guidance, numerous cases uphold the authority of district judges to exclude evidence whenever they think that it will inspire strong emotions that lead to irrational decision-making.<sup>33</sup> The mainstream view held by judges and lawmakers, put simply, is that the “appropriate role for . . . emotion generally in legal judgment is no role at all.”<sup>34</sup>

The classical viewpoint is rarely defended explicitly in modern scholarship, but it often operates as an unstated assumption when scholars are making other arguments. Larry Laudan, in his study of the epistemic rationality of criminal trial practices, seeks to draw a sharp line between *objective* questions concerning the logical strength of evidentiary inferences and the *subjective* strength of a juror’s belief in guilt or innocence. The latter, in his view, is irrelevant to any question of interest in a criminal trial, and as a result he castigates judges for instructing jurors to rely on their subjective doubts when deciding whether to convict.<sup>35</sup> Other scholars seem to assume, in a similar way, that feelings and reason are opposing forces, and that any emotional influence is generally a harmful one.<sup>36</sup>

### B. *The Humean View*

The classical view tends to dominate in the legal world, but it does not go unquestioned. The philosopher David Hume offered a striking counterpoint to the classical distrust of emotionality: “Reason is, and

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32. See FED. R. EVID. 403 advisory committee’s note.

33. See, e.g., *United States v. Ham*, 998 F.2d 1247, 1252 (4th Cir. 1993) (finding that “implications of child molestation, homosexuality, and abuse of women unfairly prejudice a defendant” because such things are highly inflammatory); see generally MUELLER & KIRKPATRICK, *supra* note 10, at § 4.13 (collecting authority for the proposition that the “greatest danger” that 403 protects against is the “injection of powerful emotional elements” into a trial).

34. Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 13 (1997).

35. LAUDAN, *supra* note 11, at 51–54.

36. See, e.g., THAGARD, *supra* note 11, at 153–56 (2006) (treating emotional “valence” as a separate force from reason within his model of legal fact-finding, and suggesting that the process would function best if such influences were kept to a “minor” influence in comparison with “rational assessment of . . . competing hypotheses”); Risinger, *supra* note 11, at 445–46 (worrying that strong emotions encourage jurors to apply shifting standards as to what constitutes a “reasonable” doubt).

ought only to be, the slave of the passions,” because “[a]bstract or demonstrative reasoning” cannot tell us what ends are worth pursuing absent input from our fears and desires.<sup>37</sup> This anti-classical view posits that, without feelings, we can have no goals, and thus nothing to direct our reason towards. In such a framing, any attempts to exclude emotion from the process of decision-making can only render the resulting decisions either pointless or perverse. In this worldview, removing the feelings from fact-finding leads to arbitrariness rather than accuracy.

Although the Humean view is less dominant in legal practice and discourse than the classical view, it does have strong defenders. One notable judicial champion is Richard Posner. As Posner sees it, there can be “no action without emotion,” because emotions are necessary to motivate us towards particular ends.<sup>38</sup> Emotions can sometimes lead judges to make bad decisions, such as when a “person has given undue salience to one feature of the situation and its associated emotional stimulus, neglecting other important features.”<sup>39</sup> But judges, in his view, can best combat these tendencies not by trying to silence the voice of emotion, but rather by drawing on a broader range of emotional stimuli. As he sees it, emotions will often lead judges to make bad decisions if judges narrowly confine their attention to what they see in the courtroom, because it will be easier to feel empathy for “a well-represented litigant pleading before you” than absent or less-eloquent parties who may be equally affected by a decision in the case.<sup>40</sup> But because emotions are necessary for any judicial action to be taken, the remedy for this is not a “cold” detachment but rather a broadened sense of empathy, which can enable the judge to engage in an “imaginative reconstruction of the feelings and interests of absent persons potentially affected by the judge’s decision.”<sup>41</sup> Thus, rather than suppress their emotions, Posner urges judges to try to feel both deeply and *broadly*, in order to give appropriate weight to all the issues at stake in a case.

Robin West has endorsed a similar view, although her account emphasizes the importance of deep empathetic engagement with individual litigants rather than a broad scope of sympathy. West notes

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37. DAVID HUME, A TREATISE OF HUMAN NATURE § 2.3.3, at 265–66 (Norton & Norton eds., 2007).

38. Posner, *supra* note 12, at 310.

39. *Id.* at 311.

40. *Id.* at 324.

41. *Id.*

that members of disadvantaged groups often face a particular challenge.<sup>42</sup> Those in power may have a radically incomplete understanding of the challenges that historically subjugated groups experience, both because their own lives do not include similar challenges and because the disadvantaged may tend to conceal the differences in their own lives as a way of blending in and getting along.<sup>43</sup> As she sees it, “when empathic understanding is most urgently needed, it is hardest to achieve.”<sup>44</sup> But West does not see this problem as insurmountable; rather, through the power of “metaphor and narrative,” we may hope to “understand what was initially foreign.”<sup>45</sup> Thus she, along with other writers in the narrativist tradition,<sup>46</sup> views the trial as a forum in which “rich descriptions of our uniquely private and subjective lives” can help “an otherwise silenced litigant to win the sympathy of someone in a position of power.”<sup>47</sup>

It has been rare for judges or rule-makers to rely on a Humean conception of emotion. Still, one does find such tendencies on occasion. For example, during the sentencing phase of capital cases, the official position on emotions is “more is more.” Judges routinely admit a wide array of emotionally charged evidence without inquiring overmuch into its non-emotional relevance. Thus, for instance, in *Payne v. Tennessee*, the Supreme Court held that it was generally appropriate for prosecutors to introduce evidence regarding the “emotional impact of the crimes on a victim’s family” during the sentencing phase of a capital murder trial.<sup>48</sup> Although a prior decision had characterized such evidence as irrelevant to the “blameworthiness of a particular defendant” whenever the defendant was unaware of the victim’s family circumstances,<sup>49</sup> the *Payne* Court saw things differently. “By turning the victim into a ‘faceless

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42. See WEST, *supra* note 12, at 258 (noting, as an example, the difficulty for a “member of the racial majority in a racist society to empathize with the . . . pain of a racial minority”).

43. *Id.* at 247–48, 258–59.

44. *Id.* at 258; see also Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1990–92 (2012) (noting some limitations on judges’ abilities to empathize with others).

45. WEST, *supra* note 12, at 259.

46. See generally Kenworthy Bilz, *We Don’t Want to Hear It: Psychology, Literature, and the Narrative Model of Judging*, 2010 U. ILL. L. REV. 429, 435–441 (surveying this tradition).

47. WEST, *supra* note 12, at 338; see also Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 825–30 (1993) (expressing a similar sentiment, but also worrying that such tactics will often be ineffective, given that “insiders” will often be “defensive or dismissive”).

48. 501 U.S. 808, 817 (1991).

49. *Booth v. Maryland*, 482 U.S. 496, 504–05 (1987), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991).

stranger at the penalty phase of a capital trial,” the Court worried the exclusion of victim impact evidence “deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.”<sup>50</sup> The Court, in other words, took the rather Humean position that the remedy for potential emotional prejudice arising in the mitigation case was emotionally charged counter-evidence, rather than exclusion.

### *C. Contextual Accounts of Emotion*

So far, we have seen two strongly opposed visions of the role of emotions in the trial process. Proponents of the classical view perceive passions as corrosive of neutrality and fairness. In contrast, a few authors have urged that the arousal of empathy can overcome innate tendencies towards biased decision-making. In more recent years, however, there has been an emergence of a third wave of legal scholarship on trial emotions, which seeks to paint a more nuanced picture of the field. In this new tradition, authors have stressed the need for close attention to the specific context in which emotional states arise, arguing that the impact of emotional arousal is hard to predict and situationally variable. Unfortunately, however, authors propounding the contextual view have displayed a tendency towards passivity, in which they rightfully denounce orthodox views about emotion but fail to suggest useful reforms to existing practices.

One common point of agreement in the contextual tradition is that emotional arousal is a complex thing that defies simple, categorical labels. Jeremy Blumenthal’s brief overview of recent law and emotions research provides an instructive example. After noting the well-entrenched classical and Humean positions, he notes a nascent shift toward work that subjects common sense assumptions about emotional cognition to rigorous testing based on “solid, sophisticated psychological theory.”<sup>51</sup> Blumenthal’s review illustrates the need for caution before one makes sweeping statements about these topics. As he explains, modern psychological theory regarding the emotions is a complex terrain, offering many fine distinctions that an unwary reader might miss:

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50. *Payne*, 501 U.S. at 825 (quoting *S. Carolina v. Gathers*, 490 U.S. 805, 821 (1989) (O’Connor, J., dissenting)).

51. Blumenthal, *supra* note 22, at 188.

For instance, a chronic and persistent *mood* might have different behavioral implications than a more focused and transitory *emotion*, even if we gave similar labels to both states.<sup>52</sup> Likewise, emotions with similar *valence*—such as fear, anger, and disgust, all of which we would label as “negative” emotions—may also require separate analysis if we are to anticipate their effects.<sup>53</sup> And psychologists have explored yet another fault line, showing that *anticipated emotions*,<sup>54</sup> meaning our expectations regarding our future feelings, both motivate our actions and yet often fail to line up with reality.<sup>55</sup> Finally, we must remember that, even as psychology helps to illustrate central tendencies in emotional cognition, its descriptions of general tendencies may obscure individual *differences* in emotional expression and self-control abilities.<sup>56</sup>

The result of taking this complexity into account is that we must be wary of simple “solutions” to the “problem” of emotions in the trial process. Thus, as Blumenthal summarizes, the common judicial assumption that people can suppress the effects of their moods and emotions when thinking about a case turns out to be neither clearly true nor clearly false. Instead, what we see is subtle situational variance. Attempts to suppress feelings work better for some emotions than others, may result in an overcorrection that does more harm than good, and may also deplete reserves of self-control, which can lead to other defects in judgment and reasoning.<sup>57</sup> Indeed, such considerations have led some to doubt the practical value of any categorical recommendations that we might make in this arena.<sup>58</sup>

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52. See generally Blumenthal, *supra* note 22.

53. For instance, anger seems to induce a quicker, more reactive decision-making style, while sadness pushes us towards slower, more deliberative thinking. Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1224, 1265–66 (2012) [hereinafter *Angry Judges*].

54. See Blumenthal, *supra* note 22, at 190–91 (noting research on anticipatory emotions).

55. See Luigi Leone et al., *Emotions and Decision Making: Regulatory Focus Moderates the Influence of Anticipated Emotions on Action Evaluations*, 19 COGNITION & EMOTION 1175, 1177 (2005).

56. See Blumenthal, *supra* note 22, at 204.

57. *Id.* at 197.

58. See, e.g., Neal Feigenson, *Emotional Influences on Judgments of Legal Blame*, in EMOTION AND THE LAW: PSYCHOLOGICAL PERSPECTIVES 45, 89 (Brian H. Bornstein & Richard L. Wiener eds., 2011) (worrying that “gauging the effects of particular emotions, from particular sources, on ultimate judgments” may be “highly, perhaps impossibly, complex”); see also Toni M. Massaro, *Show (Some) Emotions*, in THE PASSIONS OF LAW 80, 104 (Susan A. Bandes ed., 1999) (urging that we “should be extremely wary of any reform based on an assumption that legal rules or public officials can and should manipulate particular emotions to produce predictable behavioral responses,” in critiquing proposals for shaming punishments in criminal cases).

Other voices in this new wave of law and emotions scholarship take a more optimistic view, and have tried to capture some of the complexities revealed by the psychological research and apply it to legal problems. One important line of thinking has emphasized the complex and dynamic interactions that may occur between factual judgments and emotional feelings during a trial. In both the traditional and the Humean models of emotion at trial, there is a relatively straightforward chain of causation at work: A fact-finder hears the evidence and decides what they believe occurred. They then react emotionally to their vision of the facts (and possibly to other, “incidental” factors as well), and that emotional reaction may affect their verdict decisions, either for the better (in the Humean account) or for the worse (in the classical model).

Neal Feigenson has suggested that this picture is far too simple, because “emotional feelings influence which facts decision-makers will attend to, how much time they will spend poring over them, and how they will interpret and categorize them.”<sup>59</sup> This does not necessarily lead to poor decision-making, because feelings may be aroused in an appropriate way based on evidence and may therefore focus factual reasoning in a helpful way. Despite this positive potential, the role of emotion in factual reasoning also has a number of potential downsides. First, if emotion is aroused by purely incidental factors, any effect it has is unlikely to promote accurate verdicts.<sup>60</sup> Second, we may feel emotions for case-specific reasons that are nevertheless unjustifiable, such as a party’s “similarity to the observer” or mere “likeability,” which might undermine both the accuracy of verdicts and the system’s ability to treat litigants as equally as possible.<sup>61</sup> Thus, we see a murkier picture than was presented by the earlier models: Emotion does not merely alter what we want to do given the facts of a case, but it may also change our perceptions of the facts themselves. Feigenson therefore concludes that the law’s distrust of arguments to sympathy “seems to get it right,” but worries that sympathy’s effects “may vary depending on the type of the case,” making it risky to offer any “unequivocal conclusions.”<sup>62</sup> Other

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59. Feigenson, *supra* note 34, at 62.

60. See, e.g., Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 281–282 (2012) (showing that positive or negative character evaluations tended to bias purely factual judgments on completely unrelated characteristics, such as the extent to which an individual’s conduct was a cause-in-fact of resulting harm).

61. See Feigenson, *supra* note 34, at 53–55, 64.

62. *Id.* at 78.

theorists agree that emotions will shape factual construal during the trial itself, but focus more on the ways that emotions might help make decision-making more accurate.<sup>63</sup>

Terry Maroney has added another layer of nuance by emphasizing that decision-makers have a broader set of options than either suppressing their feelings or letting them take over. In a series of articles, Maroney has explored two closely related questions. First, how might judges distinguish between the positive and negative effects of emotion on their own thinking?<sup>64</sup> And second, how should judges respond when they feel that they are likely to be influenced in a negative way by a strong feeling?<sup>65</sup> On the former question, she sees great value in the kind of feelings that are rationally rooted in evidence and that dispose a decision-maker to take appropriate action.<sup>66</sup> On the latter question, she has urged that, even when they are faced with emotions that are likely to have negative impacts on their judgment, judges will reach better decisions by acknowledging those feelings and engaging in active management strategies than by trying to suppress them.<sup>67</sup> At least if decision-makers have the training and willingness to cooperate, Maroney's model offers us some hope of obtaining some benefits from emotional influences on cognition while avoiding its downsides.<sup>68</sup>

Finally, Reid Hastie has likewise endorsed a view that emphasizes the utility of emotions engendered by trial stimuli. He articulates a dichotomy between "incidental emotions" that are caused by factors outside the trial process, such as grief following the death of a family

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63. See Brown, *supra* note 9, at 47, 49, 94–95 (explaining that tasks such as credibility evaluation require more "than merely calculating others' feelings . . . but rather involve[] the triggering of an appropriate emotional response in the observer"); Todd Pettys, *The Emotional Juror*, 76 FORDHAM L. REV. 1609, 1626–29 (2007) (similarly emphasizing the importance of emotion in credibility determinations, but focusing instead on its power to mark particular demeanor cues with special salience).

64. See, e.g., *Angry Judges*, *supra* note 53, at 1249–71 (offering a set of criteria for judges to use in distinguishing between appropriate and inappropriate anger).

65. See *id.* at 1272–82 (discussing judicial anger management techniques); see also Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CAL. L. REV. 1485, 1509–28 (2011) [hereinafter *Emotional Regulation*] (exploring ways that judges can mitigate strong feelings more broadly).

66. *Angry Judges*, *supra* note 53, at 1250–64.

67. *Emotional Regulation*, *supra* note 65, at 1509–28.

68. Maroney has engaged in an admirable effort in this direction, through her participation in recent training programs for federal judges. See *Terry Maroney to Present at Orientation Program for New Federal Judges*, *Faculty News*, VANDERBILT LAW SCHOOL (Feb. 4, 2013), <http://law.vanderbilt.edu/news/terry-maroney-to-present-at-orientation-program-for-new-federal-judges/>.

member, and “decision-relevant emotions” that arise due to features of the case itself.<sup>69</sup> Hastie quickly concedes that, if incidental emotions are influencing the outcome of cases, such effects are “certainly detrimental” to the proper goals of the trial process.<sup>70</sup> But he is ambivalent, rather than overtly critical, regarding the influence of decision-relevant emotions. For instance, he acknowledges reports that many jurors find their task to be stressful, but then emphasizes that moderate levels of stress may promote “the most effective, adaptive levels of performance.”<sup>71</sup> Similarly, he discusses in detail the possibility that jurors will be guided in their determinations by “anticipated emotions,” meaning their expectations regarding the way that different possible outcomes will make them feel.<sup>72</sup> Thus, if the evidence regarding a party’s conduct makes a juror angry, that juror may feel a desire to punish that party, while evidence that provided a basis for sympathy might lead to lenience.<sup>73</sup> In both cases, such decisions would be a way for jurors to obtain “relief from the current somewhat negative emotional state.”<sup>74</sup> But except in the “rare” cases involving “sparse” or “inchoate” evidence, where Hastie worries that emotions will take the place of rational comparisons between the parties’ stories, he declines to offer guidance as to *when* emotional influences are likely to be veridical and when they are likely to undermine trial judgment.<sup>75</sup>

The existing landscape, therefore, can be summarized as follows. The still-dominant classical view, which is employed by most judges and lawyers, as well as by some in the academy, characterizes emotions as a corrosive force, which is destructive of good trial inference. A countervailing group of theorists take the opposing, Humean position, arguing that excluding or limiting emotional engagement tends to corrode the system’s ability to render just verdicts, primarily by blinding judges or jurors to the human costs of their decisions. Finally, an emerging tradition seeks a more nuanced synthesis between these extremes. Writers in this new group focus on the complex interactions between emotions and cognition, and emphasize that the costs and benefits of emotional arousal vary situationally, depending on the issues,

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69. Reid Hastie, *Emotions in Jurors’ Decisions*, 66 BROOK. L. REV. 991, 1001–04 (2001).

70. *Id.* at 1002.

71. *Id.* at 1003.

72. *Id.* at 1004–05.

73. *Id.*

74. *Id.* at 1006.

75. *Id.* at 1009.



individuals, and specific emotions at play. Although these scholars focus their attention on a variety of questions, they broadly agree on the following points: (1) excising emotion from trial inference is not realistically achievable, (2) emotions often function adaptively to facilitate accurate judgments in the trial context, and (3) despite these adaptive functions, some kinds of emotional arousal, either based on incidental factors or arising out of trial stimuli, may nevertheless be problematic. Despite their incorporation of modern psychological insights, however, these writers have not tended to use their research as a platform for concrete and implementable law reform proposals.

### III. A DUAL PROCESS FRAMEWORK FOR UNDERSTANDING THE ROLE OF EMOTIONS IN FACT-FINDING

Like other scholars who have rejected both the Classical and the Humean views of emotion, I will argue that emotions can sometimes further, and sometimes obstruct, accurate decision-making at trial. However, in order to make this basic insight more concrete, and enable us to make some fairly reliable predictions about what effects a particular emotion might have within the trial process, I will first provide a descriptive account of the roles that emotion can play as jurors listen to individual pieces of trial evidence over time, and then combine to deliberate regarding the appropriate verdict. This account will draw on the dual-process tradition in cognitive psychology research, which isolates and separately analyzes two different kinds of thought processes: a fast, unconscious, and automatic “System 1” and a slower, more effortful “System 2.” In previous work, I have relied on this research to articulate a dual-process model of evidential inference.<sup>76</sup> In this section, I will elaborate and extend upon that model to account for the interactions between evidence items, emotional arousal, and factual judgments at trial.

Before I proceed any further, I must pause briefly to give a few words of caution regarding the theory I am about to develop. Initially, I must emphasize that the basic account I will be developing here is intended to be descriptive, rather than normative, in nature. It will be much easier to identify meaningful reform proposals if we separate out two questions: What effects do emotions have on fact-finding judgments, and (of those effects) which ones do we approve of and which ones

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76. See generally *Hidden Structure*, *supra* note 19; *Bridging the Gap*, *supra* note 19.

trouble us? The first category of questions is descriptive, and relies primarily on psychological data and theory. The second category is normative in nature, and will require a different set of tools, including both epistemic theorizing about what forms of inference maximize the reliability of judgments, and consideration of what other values, besides accuracy, we wish to maximize in the trial process. For clarity, I will reserve the normative questions until after the basic descriptive model has been elaborated.

I must also stress the distinction between a *theory* of emotion at trial and the *reality* of such things. As I discussed above, one of the challenges that modern law and emotions scholarship faces is that the points of clear agreement often get lost in a thicket of details. For the sake of analyzing the efficacy of legal rules and evaluating potential improvements to them, it may be more helpful to propose general rules that are approximately right than to posit theories so nuanced that they cannot be conveniently summarized. In pursuing a course like this, of course, we run the risk that some simplifications may turn out to be problematic, either because the general theory makes small errors in a large number of cases or because it fails spectacularly in some narrow and unanticipated area. Likewise, to the extent we rely on psychological data as a basis for theorizing, there is always a risk that some new and radical paradigm shift will pull the rug out from under our feet.<sup>77</sup> But both of these challenges can be made manageable so long as we are suitably modest and mindful of the inherent limits of our task: To the extent at all possible, we will do best if we limit ourselves to relying on well-confirmed theories that rest on a large body of experimental evidence, if we avoid taking sides in active psychological controversies, and if we are wary of extrapolating experimental results too far from the domain in which they have been developed.<sup>78</sup> With these caveats in mind, then, I will develop a theory of how emotions are likely to function at trial.

#### *A. An Introduction to Dual-Process Models of Cognition*

Dual-process models were developed by psychologists and neuroscientists in an attempt to explain certain features of human

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77. Cf. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 12–22, 102–03 (3d ed. 1996).

78. See Kathryn Zeiler, *Cautions on the Use of Economics Experiments in Law*, 166 J. INSTITUTIONAL & THEORETICAL ECON. 178, 184–88 (2010).

thinking, based both on numerous experiments and on reflective consideration regarding the nature of cognition. Initially, such theories were developed as a way to explain the patterns of errors that participants in experiments would make on certain kinds of tasks, which would disappear when participants were encouraged to slow down and reason carefully.<sup>79</sup> One common theory regarding such mistakes is that they revealed our use of two different kinds of reasoning systems: a “heuristic” system, which applied simple rules that would sometimes be helpful and sometimes lead us astray, and an “analytic” system, which could perform more complicated modes of reasoning and restrain the errors of the first system when activated.<sup>80</sup> Over time, however, this simple model has been complicated by data showing that sometimes, the quick, intuitive answer to a problem is remarkably accurate, and that reasoning more analytically does not always lead us to better decisions.<sup>81</sup> As a result, the modern approach to describing these systems uses more neutral language that does not privilege either form of cognition: The quick, intuitive form of problem solving is labeled as a group of “Type 1 processes,” which we collectively can label as “System 1,” while the slower, more deliberative kind of reasoning involves “Type 2 processes” that we can label as “System 2.”<sup>82</sup> Thus, each “System” comprises a family of related modes of thinking and problem solving, with common characteristics, which sometimes work in relative independence of one another and at other times work in tandem.<sup>83</sup>

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79. See, e.g., Amos Tversky & Daniel Kahneman, *Heuristics and Biases: Judgment Under Uncertainty*, 185 *SCIENCE* 1124, 1130–31 (1974) (describing three such patterns: the representativeness heuristic, the availability heuristic, and the anchoring-and-adjustment heuristic).

80. See, e.g., Jonathan St. B. T. Evans, *Heuristic and Analytic Processes in Reasoning*, 75 *BRIT. J. PSYCHOL.* 451 (1984).

81. See generally GERD GIGERENZER, *ADAPTIVE THINKING: RATIONALITY IN THE REAL WORLD* 166–98 (2002) (providing data and theory in support of the idea that, on the many everyday tasks in which we face both limited time and limited information when solving a problem, simple heuristic solutions can outperform more detailed and systematic thinking).

82. See KAHNEMAN, *supra* note 14, at 20–21 (outlining the two types of reasoning); Peter Carruthers, *An Architecture for Dual Reasoning*, in *IN TWO MINDS: DUAL PROCESSES & BEYOND* 109, 109–112 (Jonathan St. B. T. Evans & Keith Frankish eds., 2009); Keith Frankish, *Systems and Levels: Dual-System Theories and the Personal-Subpersonal Distinction*, in *IN TWO MINDS: DUAL PROCESSES AND BEYOND* 89, 96–102 (Jonathan St. B. T. Evans & Keith Frankish eds., 2009); see also Keith Frankish & Jonathan St. B. T. Evans, *The Duality of Mind: A Historical Perspective*, in *IN TWO MINDS: DUAL PROCESSES & BEYOND* 15–18 (2008) (tracing the origin of the “System 1/System 2” locution to KEITH E. STANOVICH, *WHO IS RATIONAL?: STUDIES OF INDIVIDUAL DIFFERENCES IN REASONING* (1999)); JONATHAN ST. B.T. EVANS & DAVID E. OVER, *RATIONALITY AND REASONING* 141–146 (1996) (providing an early use of the “dual systems” terminology).

83. See KAHNEMAN, *supra* note 14, at 22–29.

System 1 comprises the domain of fast, automatic cognition. We use this form of reasoning constantly, usually without realizing that we are doing any thinking at all. When you recognize a familiar face, read a sentence in a language you speak fluently, or step on your brakes when you notice a car slowing ahead of you in traffic, you probably do not perceive any process of analyzing a problem and choosing an appropriate answer or response. Rather, you just know, without knowing how you know it, that the face is familiar, that the words comprise a recipe for quiche, and that you had better slow down before an accident occurs. It is easy to conclude that this sort of thinking is only used for “easy” problems, but that belies both the computational complexity of the challenges involved,<sup>84</sup> as well as the fact that even “expert” skills can become fluid and automatic with sufficient practice.<sup>85</sup> What ties these mental activities together, therefore, is not that they are “easy” problems in any computational sense, but that they *feel* easy because we do not perceive the cognitive labor involved in obtaining the answers.

System 2, by contrast, is the domain of slow, effortful thinking. If you try to compute the sum of 378 and 533 in your head, you will probably notice that this task feels nothing like the System 1 processes discussed in the preceding paragraph. First of all, you will find that you need to focus your attention in order to complete the task; if you become distracted, you will not arrive at an answer at all.<sup>86</sup> Second, you will find that completing the task seems to require mental *effort*; the more tired you are, the harder you will find it to finish, and the more readily you will seize on an excuse not to do it at all.<sup>87</sup> Third, you will also notice that you experience internal awareness of the *steps* involved in

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84. All of these tasks have bedeviled researchers in computer science, who have labored mightily to design machines that can do what people find intuitive and easy. See, e.g., Navin Prakash et al., *Emerging Trends of Face Recognition: A Review*, 2 WORLD APPLIED PROGRAMMING 242, 244–45 (2011) (describing the challenges that have complicated the design of effective facial recognition software, such as the difficulty of writing code that can accommodate variations in lighting and position).

85. KAHNEMAN, *supra* note 14, at 240–42 (describing the conditions under which experts can acquire highly accurate intuitions regarding complex problems).

86. *Id.* at 22–23.

87. See Martin S. Hagger et al., *Ego Depletion and the Strength Model of Self-Control: A Meta-Analysis*, 136 PSYCHOL. BULL. 495, 496 (2010); E.J. Masicampo & Roy F. Baumeister, *Toward a Physiology of Dual-Process Reasoning and Judgment: Lemonade, Willpower, and Expensive Rule-Based Analysis*, 19 PSYCHOL. SCI. 255, 259–60 (2008) (noting the “expensive and effortful” nature of System 2 reasoning); see generally Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501, 538–43 (2012) (reviewing literature on the strength model of self-control).

computing the answer.<sup>88</sup> You might visualize the images of the numbers you are manipulating in your mind's eye, or perhaps you might "think aloud" and hear yourself working out the steps of the summation. This indicates that you are holding information in your working memory systems and manipulating it consciously. It is important to note that these three features often go together: We frequently find that some mental tasks require focused attention, feel effortful, and require conscious contemplation to complete. When these features are present, we say that we are engaging in Type 2, rather than Type 1, modes of thinking.

One key insight of dual-process theory is that these two systems sometimes generate different answers to problems. We have all, no doubt, found ourselves in situations where we tend automatically towards one action or conclusion, but find ourselves expending effort in order to reach a different outcome.<sup>89</sup> Dual-process theory predicts (based on experimental data) two important features of such conflicts. First, because System 1 cognition is automatic and effortless, while System 2 cognition requires work, you will tend to follow the System 1 response unless you focus your attention on the task in an active way and exercise self-control.<sup>90</sup> But simply activating a System 2 process does not guarantee that we will resist a System 1 impulse or intuition. System 1 plays a role in selecting the arguments we will consider, and shapes how we will feel about different conclusions, leading us naturally into patterns of *motivated reasoning*. When this occurs, we use our conscious cognitive resources, not to deduce an abstract answer to a problem, but rather to justify the answer that already feels right—sometimes without

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88. See Frankish, *supra* note 82, at 92–93; EVANS & OVER, *supra* note 82, at 154.

89. I experience the feeling regularly when trying to resist the urge to eat all the cookies I find within my reach, an urge that persists even when I do not feel hungry and have no earthly need for more calories. But if that does not strike a chord with you, you might try focusing on the period at the end of this footnote for as long as you can. Your automatic impulse will no doubt be to turn away towards more interesting tasks, but you can, through the exercise of conscious processes of self-control, fix your attention in one spot. The discomfort you will feel as you try and resist your own intuitive impulses will illustrate the internal experience of a dual-system conflict.

90. See KAHNEMAN, *supra* note 14, at 22–24 (noting that System 2 will function "less well, or not at all" when a person is inattentive); Daniel Kahneman & Shane Frederick, *A Model of Heuristic Judgment*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING 267, 279–80 (noting that variations in attentiveness correlate with success on reasoning problems that demand System 2 involvement); STANOVICH, *supra* note 82, at 110–11 (discussing the role of willpower in "override failures," in which System 2 fails to inhibit an automatic but incorrect or undesirable System 1 response).

even realizing that we are doing so!<sup>91</sup> As a result, when our intuition is likely to steer us wrong, deliberative, System 2 thinking can only save us if we are motivated to use it in a way that resists our automatic impulses.

As I have argued previously,<sup>92</sup> this model provides an excellent foundation for analyzing the ways that judges and juries use evidence when deciding cases. A few points are worth noting. First, during the trial itself, a substantial amount of information processing likely occurs automatically, at the System 1 level, because judges and juries typically assume a relatively passive role as evidence is presented during an adversarial trial.<sup>93</sup> System 2 likely plays a role in keeping jurors focused on the evidence and avoiding distracting thoughts, but beyond that it seems unlikely that most judges or juries spend a majority of their time during trial thinking about the evidence in an active, conscious way.<sup>94</sup>

Instead, what mostly occurs during this phase is that the fact-finders are exposed to a deluge of information, some of which is retained as explicit memories, but far more of which is processed in a primarily implicit manner. System 1 has a powerful capacity for learning and then recognizing patterns, so that when we encounter things together in our lives, we learn to expect them to co-occur in the future.<sup>95</sup> Indeed, many of the seemingly miraculous computational feats of System 1 can be explained in terms of such pattern-learning and pattern-recognizing abilities.<sup>96</sup> What this implies is that, as the trial goes on, new evidence items and concepts that arise during the trial are integrated into a pre-existing associative network, forming an implicit model of the case. This

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91. See Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 818 (2001); see generally Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977) (collecting many examples of unconsciously confabulated explanations of associatively determined behaviors).

92. See *Hidden Structure*, *supra* note 19, at 171–93.

93. See *id.* at 171–72 (hypothesizing that during a trial, System 2 involvement is primarily directed to maintaining focus on the evidence items “because of the largely passive nature of the jury and judicial instructions encouraging them to refrain from decision until the parties have finished presenting their cases”).

94. See *id.* at 172, 188.

95. See KAHNEMAN, *supra* note 14, at 114–17 (discussing our innate tendency to search for patterns in data); HOWARD MARGOLIS, PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT 39–41 (1987) (describing our automatic tendencies to engage in “pattern-seeking, pattern-dominated cognition”).

96. See KAHNEMAN, *supra* note 14, at 240–42 (describing the use of pattern learning to solve complex problems in areas such as chess, clinical psychology, and medicine); see also GIGERENZER, *supra* note 21, at 107–33 (describing scenarios in which recognition-driven heuristics can outperform more analytic modes of thinking in making inferences).

model, in turn, creates intuitive feelings regarding what case-related events transpired in the past and who is responsible for them. Importantly, however, System 1 does not tend to discriminate very much between relevant and irrelevant inputs; rather, it processes all of our sensory data in the same, systematic way regardless of how we would analyze it at a more rational or deliberative level. This can lead us to have intuitions about case outcomes that would be hard to defend in the abstract.

Once the evidence-presentation phase of a trial has ended, System 2 takes on a more active role, as judges write opinions and juries deliberate towards a verdict. At this point, several different things may occur. First, by reasoning in a systematic and conscious way, fact-finders may realize that their intuitions about a case are misguided, leading them to reach a result different than what System 1 would have generated on its own. But in many cases, deliberative reasoning may be used, either knowingly or unconsciously, to justify the results that “feel right,” in a manner that is biased towards defending a System 1 conclusion rather than resisting it. As a result, when a trial environment presents stimuli that are likely to create problematic intuitions, we must be cautious before we assume that deliberation alone will resolve the problem. Indeed, it is often possible to observe outcomes that are very hard to defend analytically, despite the fact that those outcomes were produced by substantial deliberation and analysis.<sup>97</sup>

### *B. Integrating Emotional Influences Within a Dual-Process Framework*

In addition to its other attractive properties, a dual-process model of trial decision-making provides a natural way to conceptualize the roles that emotions play in shaping a jury’s verdict choices. The model predicts that emotions, when aroused, will influence a fact-finder’s decisions in multiple ways: They will shape the kinds of associations that our fact-finder will form in response to testimony, they will help direct the focus of her attention among competing possible candidates for

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97. See *Hidden Structure*, *supra* note 19, at 188–193 (describing the ways that a jury might have employed System 2 resources to find a man guilty of raping and murdering a young girl despite the admission of exonerating DNA evidence in the same case); see also Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 *GEO. L.J.* 281, 311–312 (2013) (discussing a jury’s decision, after lengthy deliberations, to convict Mark Jensen of murdering his wife based on fairly weak and circumstantial evidence, as an example of a circumstance where narrativist reasoning can allow a jury to “make events appear *more* linear than they are”).

consideration, and they will ultimately shape the attractiveness of competing stories when she reasons actively about the case. Emotions, in other words, shape both System 1 and System 2 cognitive processes during trials. Furthermore, the model situates itself among other contextual approaches, in that it neither rigidly condemns all emotional influences, like the classical framework, nor uncritically encourages them, as in the Humean account. Rather, emotions will sometimes help our fact-finder reach accurate decisions and at other times they will undermine that goal, depending on her background experiences, on the mode and manner in which evidence is presented to her, and on the extent to which she is motivated to either give in to or resist her impulses.

### 1. What Are Emotions?

Before proceeding further, it may help to clarify a question that lurks in the background of this discussion: What, precisely, is an emotion? On one level, the answer to this question may seem obvious—we have all felt emotions before and can all relate to some aspects of what that experience is like. At the same time, deeper reflection shows that emotions are highly complex states of affairs, some aspects of which are transparent to introspection and some of which hide from our internal perception. Some felt emotions may correspond cleanly to the labels employed in everyday conversation, but this will not always be the case.<sup>98</sup> Emotional states exist at a crossroads between our bodies and our minds, and mediate between our perceptions, our knowledge of the world, and our goals.

Prototypical emotional experiences combine a number of features together.<sup>99</sup> First, emotions resemble other kinds of mental activity, in that they involve measurable *changes in neural activity* that arise in response to particular kinds of stimuli.<sup>100</sup> For instance, if I were to encounter a snake while walking in the woods, specific patterns of neural activity would arise in a predictable way: Signals from my optic nerves,

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98. See JEROME KAGAN, WHAT IS EMOTION?: HISTORY, MEASURES, AND MEANINGS 112–13 (2007) (noting that English-language folk labels for emotional states fail to account for the subjective experience of “emotional blends” and also do not neatly track the underlying biological states that are a central part of emotional experience).

99. See *id.* at 23 (elaborating a model of emotions that combines brain states, changes in feeling with “sensory qualities,” cognitive processes that interpret and label those feelings, and “preparedness for, or display of, a behavioral response”).

100. *Id.* at 23–24.



which represent the basic size and shape of the snake, would be passed simultaneously to both my amygdala and to my visual cortex. While the cortical regions were analyzing the stimulus, eventually prompting a conscious perception of a snake-shaped object, the amygdala would be swiftly passing activation on to areas of the brain that tend to freeze my muscles, lower my heart rate, redirect blood-flow away from processes like digestion, and release cortisol, a stress hormone, into my bloodstream.<sup>101</sup> This pattern of neural activation represents some part of the emotion we call fear: Triggering the amygdala with a small shock will generate some of these responses even in the absence of snakes or other fearful stimuli, while brain damage to the amygdala would inhibit those arousal patterns even in the presence of frightening displays.<sup>102</sup> In other words, we can say both that someone who feels afraid probably has an unusually active amygdala at that point in time, and that in the absence of such activity, that person would not feel as afraid. Clearly, then, we can identify increases in neural activity in particular brain regions as one important correlate of emotional responses.<sup>103</sup>

Next, another core component of emotions involves *subjective experience*; regardless of what brain areas are involved, we all know that fear *feels* a certain way, and we can recognize that state when we are in it.<sup>104</sup> What is notable about the subjective experience of emotion, on reflection, is that although we think of emotions as mental states, much of what we are “feeling” when our emotions are aroused are changes occurring in our bodies. Thus, when I see the snake I will likely feel an increase in my heartbeat and breathing rate, tightness in my stomach, and dryness in my mouth. In fact, experiencing such bodily states is an important part of what it means to *feel* afraid.<sup>105</sup>

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101. See LEDOUX, *supra* note 26, at 159–69; John Tooby & Leda Cosmides, *The Evolutionary Psychology of the Emotions and Their Relationship to Internal Regulatory Variables*, in HANDBOOK OF EMOTIONS 114, 118–19 (Michael Lewis et al. eds., 3d ed. 2010).

102. LEDOUX, *supra* note 26, at 298.

103. See DAMASIO, *supra* note 21, at 139–42.

104. See KAGAN, *supra* note 98, at 42–50 (discussing how sensations contribute to a detected feeling).

105. LEDOUX, *supra* note 26, at 132–33. Some theorists have placed this experience at the center of what it means to experience emotion. William James famously proposed that there was no “mind-stuff” involved in emotional experience aside from perceptions of our bodies’ responses to stimuli. William James, *What Is An Emotion*, 9 MIND 188, 193 (1884). More recently, Antonio Damasio has argued, on the basis of studies of people with particular forms of brain damage, that perceiving the states of our bodies is a necessary (although not sufficient) condition for emotional experience. In what he calls the “somatic-marker hypothesis,” he argues that when particular experiences tend to be associated with good or bad consequences, emotional feelings become

This leads us to the third crucial component of emotional experience, which is a *cognitive appraisal* connecting our feelings with some facts about the world. What our brains are doing, and how we feel in an experiential sense, can be analyzed in different ways depending on the context in which we find ourselves, and thus the labels we ascribe to feelings can help shape our experience of them.<sup>106</sup> For instance, we ascribe *valence* to emotional experiences, construing some of them as positive and others as negative.<sup>107</sup> As a result, the way we frame an affective experience can shape the way we label it.<sup>108</sup> Thus, both the experience of meeting a threatening stranger in a dark alley and the experience of sitting in a roller-coaster car as it slowly ascends towards a speedy descent would likely affect me very similarly at both the neural and somatic levels: Just as when I saw the snake, such experiences would likely cause my pulse to race and my gut to tighten, mediated by increased neural firing in my amygdala. But because of the differing contexts, I would likely construe the first experience as terror, and the second experience as pleasurable excitement. Similarly, we might experience a slowed pulse, feelings of physical fatigue, and low levels of stress in different ways depending on the context: If we had just sat down in an arm-chair after a long day at work, we might construe the experience positively, as a form of contentment, whereas if we felt the same way in the middle of our day off we might see the same state as a mild depression. What this means is that our emotional experiences are shaped by our beliefs and expectations regarding what it is appropriate to feel in a particular context, in addition to brute physical facts about our bodily states.

The fourth and final ingredient in core emotional experiences is an *action tendency*. One distinguishing feature of emotional experiences is that they tend to be associated with particular impulses to act, or not act. Take, for instance, the closely related emotions of fear and anger: Both involve heightened arousal, muscular tension, and are experienced as unpleasant in most situations. However, they differ importantly in terms of their associated action tendency. Fear encourages us to freeze and

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associated with recurrences of those or similar events, and help guide our choices by “highlighting” these options as deserving special attention. DAMASIO, *supra* note 21, at 173–74.

106. See KAGAN, *supra* note 98, at 44–45.

107. Paula M. Niedenthal, *Emotion Concepts*, in HANDBOOK OF EMOTIONS, *supra* note 101, at 587.

108. See *id.* (noting that emotion concepts are “fundamental to the development of an individual’s behavioral repertoire”).

then seek to flee (physically or metaphorically) from the object that aroused its sensations, while anger inspires us to approach its object and do battle. Likewise, construing a calm, low-arousal state as contentment would lead us to be open towards others and to new experiences, while experiencing the same state as depression might incline us towards avoidance instead.<sup>109</sup> Of course, such impulses are not inevitably followed. We often overcome our fears, repress our rage, and break out of depressions through a combination of emotional self-regulation and the exercise of willpower. That is why these are labeled as action *tendencies* rather than as inevitabilities.

Finally, it is important to note that these action tendencies can extend out of the domain of decisions about *what to do*, and have effects on *how we think* as well. For instance, when we are afraid, we will be faster to notice and identify threats, and we will be more likely to construe ambiguous stimuli as threatening.<sup>110</sup> More generally, experiencing an emotion will tend to focus our attention on matters that are congruent with that state, and will also shape our perceptions of ambiguous stimuli. As a result, people who are already afraid will be more likely to both notice dangerous things and to construe safe things as dangerous,<sup>111</sup> just as people who are currently enraged will easily notice rudeness in others and may see rudeness even where none was intended.<sup>112</sup> Furthermore, these effects will persist into the future, because increasing the salience of information in our environment will also shape which facts in our environment we commit to memory.<sup>113</sup> As a result, changing our

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109. Margaret E. Kemeny & Avgusta Shestyuk, *Emotions, the Neuroendocrine and Immune Systems, and Health*, in HANDBOOK OF EMOTIONS, *supra* note 101, at 661, 666–67 (discussing the association between depression and behavioral disengagement).

110. Arne Öhman, *Fear and Anxiety: Overlaps and Dissociations*, in HANDBOOK OF EMOTIONS, *supra* note 101, at 709, 715–17.

111. *Cf.* Joseph P. Forgas, *Affect in Legal and Forensic Settings: The Cognitive Benefits of Not Being Too Happy*, in EMOTION AND THE LAW: PSYCHOLOGICAL PERSPECTIVES, at 13, 33–36 (Brian H. Bornstein & Richard L. Wiener eds., 2009) (describing experiments in which participants were asked to make “shoot/don’t shoot” decisions based on brief exposures to photographs, based on whether the person in the photo was holding a gun or some other object, and documenting a higher rate of mistaken “shoot” decisions when a black or Muslim person was pictured).

112. *See Angry Judges*, *supra* note 53, at 1226–27 (discussing the impact of anger on judges, including its tendency to “shorten[]” a judge’s “fuse,” making it more likely that the judge will react negatively to provocations by the parties before her). *Cf.* Tooby & Cosmides, *supra* note 101, at 131–32 (discussing the functional role of anger as a means of encouraging us to defend ourselves from threats to our welfare by inflicting costs on other, weaker individuals who compete with us for valuable resources).

113. *See Pettys*, *supra* note 63, at 1632–36 (discussing the impact of salience on two hypothetical jurors); Elizabeth A. Kensinger & Daniel L. Schacter, *Memory and Emotion*, in

emotional states will change the facts we see, hear, and remember, even if we are exposed to otherwise identical information. For the purpose of a theory of fact-finding, such *cognitive* influences of emotion must take center stage.

## 2. Emotional Influences in Dual-Process Fact-Finding

Emotional states, therefore, are best understood as a mix of neurological patterns, bodily feelings and sensations, cognitive appraisals, and tendencies to act and think in particular ways.<sup>114</sup> With this clarified picture in hand, we can now consider how emotions are likely to shape and modify judge and jury reasoning, as seen through the lens of the dual-process model. The dual-process model allows emotions to play a role at multiple levels: By activating particular branches in our System 1 associative networks, emotions will naturally shape which evidence items a juror notices, how ambiguous evidence is construed, and which items of evidence form durable memory traces, even if a juror is not consciously focused on the emotion or aware of such effects.<sup>115</sup> During the evidence-presentation phase of the trial, emotions will also play a role at the level of System 2, by making it either easier or harder for jurors to steadily maintain their focus on the evidence items being presented.<sup>116</sup> Later, at the deliberation phase, both felt and anticipated emotions will shape the balance between intuitive and deliberative reasoning.<sup>117</sup> Emotions will also shape which evidence items are easy to recall and which fade from attention during the deliberation process.<sup>118</sup> Finally, emotions will play a special role at this stage by encouraging *motivated reasoning*, based on the feelings of cognitive dissonance that arise when we try to consciously resist our intuitive judgments.<sup>119</sup>

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HANDBOOK OF EMOTIONS, *supra* note 101, at 601, 602–04 (noting that positive and negative events are more likely to be recognized than neutral ones).

114. See KAGAN, *supra* note 98, at 42–50.

115. See Feigenson, *supra* note 34, at 61 (asserting that “emotional feelings influence which facts decision-makers will attend to, how much time they will spend poring over them, and how they will interpret and categorize them”).

116. See *Emotional Regulation*, *supra* note 65, at 1507.

117. See Forgas, *supra* note 111, at 20–21 (discussing the influence of differing moods on information-processing styles).

118. See Pettys, *supra* note 63, at 1632–36 (asserting that “evidence-triggered emotions will exert a powerful influence on the narrative options that the jurors construct and evaluate”); Kensinger & Schacter, *supra* note 113, at 601, 602 (describing how individuals often remember more emotional events than nonemotional ones).

119. See KAHNEMAN, *supra* note 14, at 103 (noting that “the dominance of conclusions over

We would expect that emotions could be aroused by a wide array of factors, some of which we think of as evidence and some of which we would consider entirely irrelevant to the goals of the trial process. Consider, for instance, a juror who was feeling angry while listening to a particular piece of testimony. First, that anger might be aroused in a way that is closely tied to the informational content of the witness's testimony. If, for instance, the witness testified that he witnessed the defendant harming his child, anger would be a natural response on the part of a listener. But many other things besides evidence might give rise to a similar feeling. Perhaps the juror is getting annoyed with a lawyer who is objecting to questions that the juror would like to hear answered; alternatively, the juror might be frustrated by the fact that the trial is taking a long time, and focus his anger on the person of the judge who is regulating the proceedings. Such emotions would be aroused by features of the case, but not by the evidence itself. Finally, jurors might experience emotions that have nothing at all to do with the case itself. Thus, our juror might be angry because of a fight he had with his wife that morning, or because the testimony reminded him of an unpleasant childhood experience. In short, fact-finders will naturally experience emotional responses to the evidence, to non-evidential features of the trial process, and to entirely extraneous events.

The dual-process approach, unlike previous approaches to modeling trial inference, helps us articulate the ways that these emotions are likely to influence a juror's thinking about the case. We can and should distinguish between the ways that emotions impact System 1 and System 2 reasoning. First, let us consider the System 1 effects. Recall that System 1 is relatively indiscriminating in its use of inputs; it tends to incorporate everything we sense into its general-purpose, pattern-detection approach to problem solving, and to nudge us towards judgments and decisions that were associated with similar patterns in the past.<sup>120</sup> When we model System 1 in this way, we would expect that our own emotions would be just another piece of data to be included as

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arguments is most pronounced where emotions are involved").

120. See KAHNEMAN, *supra* note 14, at 50–58; WILSON, *supra* note 15, at 24–27 (comparing implicit learning, which is “learning without effort or awareness of exactly what has been learned” to explicit learning, which is “effortful” and “conscious”); Eliot R. Smith & Jamie DeCoster, *Dual-Process Models in Social and Cognitive Psychology: Conceptual Integration and Links to Underlying Memory Systems*, 4 PERSONALITY & SOC. PSYCHOL. REV. 108, 111 (2000); Steven A. Sloman, *The Empirical Case for Two Systems of Reasoning*, 119 PSYCHOL. BULL. 3, 4 (1996). *But see* Evans, *supra* note 15, at 261 (doubting that some versions of the dual-process framework, such as the heuristic/systematic processing account, can be reconciled with associationism).

potential pattern-pieces, so that a juror who was feeling a strong emotion would be unconsciously primed to see and recognize inputs that tended to correlate with that emotion in their past experiences. In other words, emotional states bias subsequent information processing in a direction that is congruent with past emotional experiences.<sup>121</sup>

What this means in practice is that a fearful juror will be more likely to notice threatening stimuli,<sup>122</sup> to interpret ambiguous stimuli as threatening,<sup>123</sup> to incorporate a record of these threatening perceptions into long-term memory,<sup>124</sup> and to remember past instances involving threatening stimuli.<sup>125</sup> Conversely, a juror who is feeling happy will tend to notice positive stimuli, to encode ambiguities in positive ways, and to recall and form memories with a positive valence. Because System 1 activity is automatic and unconscious, this could occur regardless of whether the emotion was aroused by relevant or irrelevant stimuli, so that jurors feeling different feelings would end up seeing the evidence itself in a different light, even if they did not consciously connect their feelings with the evidence in front of them.

Experimental and observational data confirm exactly this tendency in our decision-making. Our moral and factual judgments are regularly shaped by our emotions, even when we are not aware of such effects or the reason that we are feeling a particular emotion. For example, one group of investigators induced disgust in experimental subjects by means of bad smells, a messy room, and other irrelevant interventions. When the participants were then asked to evaluate whether described conduct was moral or immoral, they became more likely to view the conduct as immoral compared to others who had not been artificially disgusted.<sup>126</sup> In light of the theory described above, this should not be surprising: We are often disgusted by immoral conduct, and so feeling disgusted should encourage us—at the associative, System 1 level—to classify ambiguous

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121. See Niedenthal, *supra* note 107, at 593–94.

122. See Öhman, *supra* note 110, at 715–17 (noting that fearful or anxious individuals are more likely to focus on threatening information in their environments).

123. See Forgas, *supra* note 111, at 33–36.

124. See Kensinger & Schacter, *supra* note 113, at 602–04.

125. See Pettys, *supra* note 63, at 1632–36 (describing a hypothetical juror who has had “experiences in which racially hateful words were closely associated with threatened or actual acts of violence”); Hastie, *supra* note 69, at 1007–08 (asserting that “if a juror is in an angry emotional state, he or she is likely to attend to, or retrieve from memory, information that is negative . . .”).

126. See Simone Schnall et al., *Disgust as Embodied Moral Judgment*, 34 PERSONALITY AND SOC. PSYCHOL. BULL. 1096, 1097–1104 (2008).

stimuli as immoral and to be more watchful for evidence of immoral behavior.

Other researchers have observed similar patterns with other kinds of emotions. To give just a small selection of examples, consider the following experimental and observational results:

- People who are artificially induced to feel *excited* are more likely to evaluate members of the opposite sex as attractive.<sup>127</sup>
- People whose moods have been elevated by an artificially induced smile (by the simple expedient of holding a pen cross-wise in their mouths) are more likely to classify a described event as pleasant rather than unpleasant, or to find a joke funny.<sup>128</sup>
- We generally find it pleasing to interact with attractive people. As a result, we are likely to interpret ambiguous behavioral cues from those people in a more positive, mood-congruent manner, which leads us to rate them as more honest and more competent than less attractive others.<sup>129</sup>
- When participants held a warm cup of coffee in their hands while meeting another person, they became more likely to judge the other person as warm and caring than would otherwise be the case.<sup>130</sup>

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127. WILSON, *supra* note 15, at 100–02. Wilson describes a classic experiment in which male subjects were approached in a park by a young woman with a questionnaire. Excitement was induced by interviewing the subjects on a bridge over a chasm, while controls were interviewed on a park bench. The subjects who were induced to feel excited found the same woman more attractive than randomly selected controls, as measured by the frequency with which they asked for her phone number. *Id.*

128. Paula M. Niedenthal, *Embodying Emotion*, 316 SCIENCE 1002 (2007) (describing the impacts on judgment); James D. Laird, *Self-Attribution of Emotion: The Effects of Expressive Behavior on the Quality of Emotional Experience*, 29 J. OF PERSONALITY AND SOC. PSYCHOL. 475 (1974) (showing that forming a smile elevates mood, even when the person smiling is unaware that they are doing so). For a broader catalogue of such effects, see Barbara A. Spellman & Simone Schnall, *Embodied Rationality*, 35 QUEEN'S L.J. 117 (2009).

129. Marc-André Reinhard & Siegfried L. Sporer, *Content Versus Source Cue Information as a Basis for Credibility Judgments: The Impact of Task Involvement*, 41 SOC. PSYCHOL. 93, 95–97 (2010); Markus M. Mobius & Tanya S. Rosenblat, *Why Beauty Matters*, 96 AM. ECON. REV. 222, 233–34 (2006). There may be other contributing factors leading to this same effect in addition to emotional influences; to some extent, beauty itself may prime other positive associations directly through networks of conceptual relation. See Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827 (2011).

130. Lawrence E. Williams & John A. Bargh, *Experiencing Physical Warmth Promotes Interpersonal Warmth*, 322 SCIENCE 606 (2008).

- When study participants learn that a defendant in a hypothetical case has engaged in past immoral behavior, the dislike they felt towards him made them more likely to see his case-related conduct as a cause of harm to other parties, even though all evidence of causation was the same.<sup>131</sup>

In short, the emotions that judges and jurors feel are likely to induce some changes in the ways that they will process evidence at the unconscious level, following a general pattern of mood congruence, regardless of whether the emotion is induced by case-relevant or incidental causes.<sup>132</sup> Whether this *matters* in the sense of influencing outcomes is a more difficult question, and one that we cannot answer easily by reference to simple, artificial experimental scenarios. For one thing, the effect sizes in many of the experiments I have described are relatively small, suggesting that emotions generally operate as a gentle nudge on our decisions, rather than a forthright shove in a particular direction.<sup>133</sup>

Moreover, we should be appropriately cautious before we apply these results to legal fact-finding, and in particular, we should assess the extent to which special features of that situation may counteract these effects. The trial process, after all, involves a competition between opposing advocates, each of whom have incentives to try to activate emotions in ways that may induce fact-finders to prefer their story over the story of their opponents. Furthermore, trials take time, from hours to months, and over the course of an entire trial it is likely that jurors would experience a wide array of emotions. These aspects of the trial process make it different from the typical settings in which psychology experiments take place, and it is at least possible that the distinction makes a difference.

This leads to two potentially overlapping possibilities. First, emotions might minimally impact actual verdict decisions by design, if advocates are evenly matched in their abilities to prime particular emotional responses and to predict which emotions will favor their cases. Second, emotions might be irrelevant by chance rather than by design. If emotionally induced biases in decision-making are scattered in an approximately random way over the course of a trial, then they should tend to cancel each other out on average—although this effect will not

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131. Nadler & McDonnell, *supra* note 60, at 291.

132. Niedenthal, *supra* note 107, at 593–94.

133. See KAHNEMAN, *supra* note 14, at 55–58.



always occur, by virtue of its being merely statistically probable rather than necessarily true.<sup>134</sup> Thus, although we know, based on substantial experimental science and observation, that emotions do influence the way we think, the extent to which emotional arousal actually alters real-life verdict decisions remains a contingent empirical question, which we cannot answer by reference to existing psychological data on its own.

Nevertheless, there are good reasons to believe that, in at least some cases, emotions do impact trial outcomes. Let us first consider the possibility that many small effects, averaged over the course of a long trial, will tend to cancel each other out probabilistically. Although this might be possible in theory, it may often fail to be realized in practice because initial nudges will tend to create cascading effects, leading to coherent patterns of emotional activation that tend to be biased towards extremes rather than maintaining an even balance. Such *coherence shifts* are likely to occur because fact-finders do not encounter new pieces of information in isolation, but rather in the context of both prior factual knowledge and emotional arousal. As Dan Simon has explained:

Throughout the decision-making process, the mental representation of the considerations undergoes gradual change and ultimately shifts toward a state of coherence with either one of the decision alternatives. Due to these coherence shifts, at the culmination of the process, the decision-maker's mental model is skewed toward conformity with the emerging decision. As the hard case morphs into an easy one, the decision follows easily and confidently.<sup>135</sup>

To understand how emotional influences might lead to a coherence cascade, imagine a juror who is observing a witness testify. Early on, some aspect of the witness's appearance, demeanor or testimony might inspire either feelings of trust or distrust. If these initial cues inspire warm emotions towards the witness, our juror might be inclined to interpret subsequent statements in such a way as to support the witness's credibility; if the juror instead feels hostile to the witness, her attention might be drawn instead towards potential contradictions in the testimony. This can lead to either an upward or downward cascade in the credibility evaluation. Small levels of initial trust encourage the juror to both attend more carefully to subsequent cues indicating trustworthiness, and to

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134. See Adrian Vermuele, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1500 (2007).

135. Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 517 (2004).

unconsciously interpret subsequent testimony in a way that explains away contradictions and biases, whereas small levels of initial distrust supports an opposing cascade.<sup>136</sup> Of course, this is not an inexorable process. A witness who initially seemed trustworthy might later be caught in a clear lie, while in some cases initial distrust might be overcome by sufficient manifestations of trustworthiness. But it does imply that we should be cautious before assuming that small emotional influences will simply cancel each other out. Instead, emotions that are aroused early in the process may exert an outsized effect, inducing coherence shifts that are not easily undone by subsequent information or feelings.

What about the alternative possibility, that emotions will exert no influence because competition by opposing advocates will keep them cleanly in balance? This, too, looks doubtful upon closer examination. One problem involves disparities in advocacy quality. If some lawyers are better than others at inspiring emotions that favor their case, then we should expect to see emotions having an impact in at least those cases involving disparate lawyering quality. Another problem arises because advocacy alone might not be enough to level the playing field; in some cases, emotionally arousing evidence is not distributed evenly, or even in ways that mimic the underlying merits of the cases. Prosecutors, for instance, frequently have access to a wide array of gruesome crime scene details in murder cases, which even innocent defendants may be unable to match.<sup>137</sup> Finally, as discussed above, emotionally arousing evidence introduced early on in a case is likely to have a stronger effect than counter-evidence that cannot be introduced until later. This means that, even in cases involving equally matched advocates and evidence that is balanced in terms of its emotionally affecting qualities, jurors may still be influenced toward one outcome rather than another by the mere fact that one party got the first chance to inspire feelings that favored its case.

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136. See Spottswood, *supra* note 129, at 844–48 (describing the cognitive mechanisms by which a party's appearance might produce credibility cascades); Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 592–96 (2008) (describing cases in which jurors interpreted subtle and ambiguous cues regarding the demeanor of non-testifying defendants as either highly sympathetic or untrustworthy); see also S. E. Asch, *Forming Impressions of Personality*, 41 J. ABNORMAL & SOC. PSYCHOL. 258, 270 (1948) (reporting experiments showing the powerful effects of early information in shaping our judgments of other people's character).

137. See DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 172–73 (2012) (reviewing experiments showing the power of graphic crime scene photographs to alter verdict decisions in simulated cases, even when the information revealed by the photographs had little relevance).

In short, although the extension of experimental data regarding emotional influences on cognition to the trial environment does involve empirically contingent assumptions, those assumptions are plausible, given the nature of coherence shifts as jurors encounter numerous items of evidence in sequence.

So far, I have focused on the ways that emotional influences might bias the assimilation of evidence within System 1 processing, but this is not the whole story. We should also expect that emotions will influence the way that the juror uses System 2 processes to either focus her attention or reason analytically about the case. Some of these effects will be straightforward and in line with the aspirations of the classical view. Thus, if a judge has exhorted a jury not to consider a particular fact in its deliberations, jurors who start to incorporate that fact into their deliberations may start to feel discomfort or anxiety based on their failure to obey authoritative instructions. Likewise, jurors might feel anxious about the possibility that they will wrongly decide the case, and this anxiety might also motivate them to engage in careful and systematic consideration of the evidence.<sup>138</sup>

When jurors feel distress in relation to a particular emotion, System 2 may become involved as they try to redirect their feelings down a different path. Thus, jurors who notice that they are in the grips of a powerful emotion may find themselves motivated to try to attain a calmer, more detached frame of mind so as not to render a biased decision. To do so, they might employ a number of consciously motivated strategies of emotional self-regulation: They might, for instance, try to distract themselves by focusing on something more calming until they can consider the evidence with a more neutral state of mind.<sup>139</sup> Alternatively, jurors might try to quiet their feelings by quieting the expression of those feelings in their bodies, such as by taking slow, deep breaths to slow their heart rate, or by adopting a calm, neutral facial expression. All of these approaches involve the use of System 2 resources to focus the reasoning process on the content of approved evidence and to resist tempting, but potentially dangerous, conclusions.

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138. See THAGARD, *supra* note 11, at 166 (explaining the idea of proof beyond a reasonable doubt in terms of our anticipation of negative emotional consequences arising out of a wrongful conviction).

139. See James J. Gross, *Emotion Regulation: Conceptual and Empirical Foundations*, in HANDBOOK OF EMOTION REGULATION 3, 10 (2010) (discussing “attentional deployment” strategies of emotional self-regulation).

This picture is too rosy, however. When we consider the ways that System 2 will interact with our emotions, we should be wary of concluding too readily that reason will always triumph over emotion. For one thing, our ability to reason analytically about evidence is contingent on our ability to accurately recall the evidence that has been presented. But moods and emotions impact what facts come to our minds when we try to remember the past.<sup>140</sup> Thus, although a juror may assume that thinking about the evidence in a slow and systematic way will exclude the effects of emotions on her deliberations, this will not always be the case. If our juror is feeling anxious or fearful while deliberating, she may find it easier to recall threatening items of evidence than non-threatening ones; if she is feeling disgusted, evidence of norm violations or bodily contaminations may come to mind faster than evidence that is not so tainted. And even if a juror is able to maintain a very calm emotional state while thinking systematically about the evidence, the intricate link between emotion and cognition at the System 1 level means that her memories about the case will be inextricably bound up with the feelings she felt while watching the witnesses testify. Through such effects, even an apparently dispassionate chain of analysis will end up being shaped by emotional factors, because of the central role of emotion in shaping the ways the jurors remember and construe the vast spectrum of information they perceived during trial.<sup>141</sup> For this reason, we should resist the temptation to simplify the idea of dual-process thinking into the idea that System 1 involves emotions and System 2 restrains them. Instead, emotions shape thinking at both levels.

What is more, when we consider the role of both systems, we can also see why trying too hard to resist one's feelings can actually be

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140. See Feigenson, *supra* note 34, at 61–62 (noting that, generally, “emotional feelings influence which facts decision-makers will attend to, how much time they will spend poring over them, and how they will interpret and categorize them”); Pettys, *supra* note 63, at 1633–36; Kensinger & Schacter, *supra* note 113, at 602–04 (discussing emotion’s influence on what an individual will remember).

141. This tendency would be exacerbated, to some extent, in jury cases, given that judges often refuse to allow juries access to the transcript of trial proceedings during their deliberations, which inhibits their ability to check the accuracy of their memories. See, e.g., *United States v. Guy*, 924 F.2d 702, 708 (7th Cir. 1991) (holding that a trial court did not err by refusing to allow a jury to review portions of the trial transcripts during deliberations, and that such matters lie “purely within the trial court’s discretion”); *State v. Lawrence*, 530 S.E.2d 807, 824 (N.C. 2000) (trial court did not err by denying a jury’s request to review transcripts and by instructing them that “it is your duty to recall the evidence as the evidence was presented”); see also Chad Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 454–55 (2004) (discussing the challenges faced by jurors who must rely only on their memories of testimony).

counterproductive because such efforts will tend to displace other valuable forms of System 2 cognition. System 2 is both low-capacity, meaning that it cannot do many things at once, and ego-depleting, meaning that we “run out of steam” if we try to sustain too much analytic processing at a stretch. Once we recall that the emotional self-regulation strategies discussed above will require some System 2 resources,<sup>142</sup> it should become obvious that such self-control processes do not only *use* some of those resources, but they actively *compete* with other System 2 processing for cognitive space.<sup>143</sup> Experimental evidence confirms this prediction: Participants who work hard to suppress their feelings exhibit deficits in memory as well as other cognitive skills.<sup>144</sup> On reflection, I suspect that most readers will have experienced effects like these at some point in their own past. In the wake of an event arousing strong emotions, such as a death in the family or the break-up of a relationship, we can find it hard to focus on mentally demanding tasks *even when* we are trying hard to maintain a relatively calm emotional tone because the mental focus required to suppress emotionally arousing thoughts crowds out other activity and eventually wears us down. In a highly charged case, we can imagine similar effects occurring in jurors who are trying as hard as they can to be dispassionate; the mere effort involved in maintaining a neutral feeling tone may make it harder to think deeply about the case, in comparison with a case that did not arouse such strong feelings in the first place.<sup>145</sup> The end result would be that even jurors who successfully suppressed potentially biasing emotional responses would have less mental energy to spare for complicated reasoning tasks, which could also be a source of outcome errors.

Finally, one specific emotional pattern may play a particularly important, problematic role once judges and juries are engaged in deliberative reasoning about a case. When intuition and analysis start to clash, most people will experience some anxiety and discomfort.<sup>146</sup>

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142. See Gross, *supra* note 139, at 8 (noting that the “majority of examples” of emotional regulation that he discusses involve effortful and conscious attempts to “down-regulate negative emotions”).

143. *Emotional Regulation*, *supra* note 65, at 1546 (noting the effects of this competition, including distorted memories).

144. Gross, *supra* note 139, at 11.

145. Bilz, *supra* note 46, at 463–64.

146. See KAHNEMAN, *supra* note 14, at 80–81 (noting that we tend to deploy System 2 in a biased fashion to confirm our intuitive judgments); WILSON, *supra* note 15, at 95–97 (surveying neuroscientific evidence that the conscious mind will confabulate reasons for judgments even when those judgments were actually caused by unrelated factors); Nisbett & Wilson, *supra* note 91, at

Simply put, it is emotionally unpleasant to spend mental effort trying to justify a conclusion that feels wrong. As a result, we often encounter the phenomenon of *motivated cognition*, in which System 2 resources are deployed to justify an intuitive conclusion rather than in an attempt to independently evaluate its validity.<sup>147</sup> Such outcomes are not inevitable; by mentally rehearsing the steps of reasoning leading to a contrary conclusion, we may sometimes be able to retrain our intuitions so that they line up with our higher-order beliefs.<sup>148</sup> But because System 2 reasoning is effortful, we are particularly unlikely to persist in it when doing so involves the extra discomforts of maintaining a state of cognitive dissonance. As a result, when judges and jurors start reasoning deliberatively about the proper outcome in a case, they may often find themselves searching their memories (or the record) for evidence supporting a conclusion that they have already made at the intuitive level of System 1, rather than going through the facts in a more even-handed manner. Such tendencies, it would seem, are inherent in any human-driven dispute resolution system, although we might expect them to be moderated, to some extent, by adversary presentation (which may feature contrary evidence that the fact-finder would otherwise tend to ignore) or by reason-giving requirements, such as a judge's duty to justify certain decisions with written opinions (which may force the fact-finder to analyze the parties' arguments in some detail before they can be rejected).

For all these reasons, the dual-process model of fact-finding behavior looks like a promising framework for analyzing the complex ways that emotions may influence fact-finders. First, emotional states, whether aroused by incidental or relevant stimuli, will shape the associative model that is built over the course of a trial by System 1 processes, both by guiding attention towards aspects of the evidence that are congruent

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243–44 (providing similar evidence based on psychological experiments).

147. See STANOVICH, *supra* note 82, at 110–11 (discussing the role of willpower in reducing such “override failures”). To be clear, I do not mean to suggest in the discussion above that “intuition” is emotionally driven and “analysis” is not. Instead, as discussed above in the text, both processes will be shaped by emotional influences. But to the extent that intuitive and deliberative thinking might tend to point in different directions, such as in a case involving a defendant who “seems guilty” despite having strong analytical evidence of innocence, the concept of motivated cognition provides one mechanism by which intuitions can win the contest. See *generally Hidden Structure*, *supra* note 19, at 171–93.

148. Cf. Leslie S. Greenberg, *The Clinical Application of Emotion in Psychotherapy*, in HANDBOOK OF EMOTIONS, *supra* note 101, at 88, 88–89, 92–95 (discussing emotion-focused therapy, which uses a combination of emotional management strategies and cognitive reflection to redirect and reframe persistent negative feelings).

with the dominant mood-state, and by changing the ways that ambiguous details will be construed. Second, emotional effects will be magnified in situations where jurors are encountering a witness or a factual scenario for the first time, given the phenomenon of coherence shifts, but will be milder if they arise only once a juror has already developed a well-structured associative model of that person or event. Third, emotional states will also shape the ways that System 2 draws on this associative model as judges and jurors shift into more deliberative modes of processing the evidence. Affective states will influence what facts about the case come most easily to mind, what elements are used to fill gaps in the parties narratives, as well as the extent to which System 2 processing is used to either re-examine intuitively attractive conclusions or instead to justify and defend them. Finally, because the use of System 2 is effortful and mentally draining, attempts to suppress or control emotions may be unsuccessful, and even when such efforts succeed, they will tend to diminish a juror's capacity to engage in careful and deliberative reasoning regarding the evidence.

#### IV. TOWARDS A MORE BALANCED APPROACH TO REGULATING EMOTIONS AT TRIAL

Thus far, the discussion has been merely descriptive. I have tried, for the sake of simplicity, to focus on *how* emotions will influence reasoning, without getting drawn into discussions of whether such influences will improve or worsen the quality of verdicts. Now, with a reasonably good model of how emotions shape judgments, we can turn to these more difficult questions.

In this section, I offer an analytical framework for determining when emotional influences are likely to be helpful, when they will be harmful, and when their impacts will be mixed. Using this framework, I survey a number of ways that judges could use their existing powers under the rules of evidence to strike a better balance between positive and negative emotional effects. Following that, I propose reforms that might give judges both the encouragement and the knowledge that they need to engage in a more sophisticated kind of emotional management during trials. To this end, I suggest three significant changes to current practice: First, we should enact a revised version of Federal Rule of Evidence 403 (and similar state rules) that creates a duty to intervene in more cases, but offers judges more options than simply excluding evidence when intervention is necessary. Second, we should make a short course of training in emotional cognition a standard part of the educational process

that new trial judges undergo when they first begin their duties. Third, we should provide a more meaningful process for litigants who wish to object to emotionally prejudicial evidence within the context of bench trials.

*A. A Typology of Trial Emotions*

In place of global trust or distrust in emotional influences within the trial process, which are equally foolish, a more sophisticated approach would give free rein to those emotional influences that help fact-finders make good decisions, while channeling or preventing those emotions that are harmful. If that level of nuance is to become courtroom reality, the first step must be to provide courts with guidance so that they can tell the difference between good and bad emotional influences. To this end, I develop a typology of trial emotions. In constructing this framework, I start with Hastie's distinction between *incidental emotions*, which are caused by factors entirely unrelated to the trial and are therefore rarely an aid to the process, and *decision-relevant emotions*, which arise as a response to the trial itself, and therefore have more mixed effects. I divide decision-relevant emotions into several sub-categories so that we can demarcate when they are likely to help the fact-finding process and when they are likely to hamper it. The first category consists of "task-congruent emotions," which are those feelings that are naturally associated with learning about another person's illegal conduct. These kinds of feelings generally promote accurate fact-finding, and suppressing them would be either futile or counterproductive. The second category consists of decision-relevant emotions that are nonetheless "task-incongruent." These are emotions that are produced by the evidence, but that arise from features of the case *other than* proof of the conduct that forms the basis of alleged guilt or liability. Such emotions are almost always unhelpful. Finally, we must consider "hybrid emotions," which are task-congruent for some purposes but which are also likely to have task-incongruent impacts. Such emotions require special measures if we wish to ensure that trials are as accurate as possible.

Let us start with Hastie's concept of "incidental emotions." As he defined the category, it includes the "ambient mood or emotional state . . . at the time of the decision," which arises based on factors other



than the evidence in the case or the stress of making a decision.<sup>149</sup> He offers the examples of jurors who are “angry . . . because she has heard her favorite baseball team lost an important game, or . . . happy . . . because he had a positive interaction with his children over breakfast.”<sup>150</sup> As Hastie sees it, the influence of incidental emotions is generally “maladaptive” because such emotions are essentially random and unrelated to the facts of a particular case.<sup>151</sup>

Nevertheless, we have good reason to think that incidental emotions can alter verdict decisions. Multiple laboratory studies demonstrate that altering baseline mood states can affect factual construal. For instance, Jennifer Lerner, Julie Goldberg, and Philip Tetlock performed an experiment in which research participants were asked to make liability judgments regarding a personal injury suit.<sup>152</sup> Some of the participants were first put into an angry mood state by watching a short film in which two bullies violently attack a young boy.<sup>153</sup> The anger that this induced in participants, although irrelevant to the hypothetical civil case, increased their willingness to find the defendant liable and increased their recommended damages award.<sup>154</sup> Nor are such findings a mere artifact of laboratory experiments. Judges, when they speak candidly, sometimes acknowledge that they have been subject to similar effects.<sup>155</sup> And researchers have observed dramatic swings in real-world sentencing decisions based on the length of time that judges have been sitting on the

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149. Hastie, *supra* note 69, at 1000.

150. *Id.*

151. *Id.* at 1002.

152. Jennifer S. Lerner et al., *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 PERS. & SOC. PSYCHOL. BULL. 563, 564 (1998).

153. *Id.* at 566.

154. *Id.* at 570; *see also* Julie H. Goldberg et al., *Rage and Reason: The Psychology of the Intuitive Prosecutor*, 29 EUR. J. SOC. PSYCHOL. 781, 789–90 (1999) (replicating and extending these results).

155. An excellent example is found in Judge Alex Kozinski’s essay, *Teetering on the High Wire*, 68 U. COLO. L. REV. 1217, 1219 (1997). In that essay, Judge Kozinski describes a case he presided over as trial judge, in which a young woman plead guilty to cocaine trafficking. The judge had recently gone through a very frightening event in which his toddler-age son had left the house and wandered into traffic. The judge found that the recent, intense experience of being “spared [from] the tragic consequence of [his] error” made it seem as if he should “err[] on the side of forgiveness” when it came to sentencing the defendant, and so he gave a very light sentence of six months in jail, community service, and five-years probation. *Id.* As the judge acknowledges, such influences can seem troubling, given that he might have been feeling a radically different set of impulses if “one of [his] sons had been addicted to drugs, or God forbid, died as a result of a drug overdose[.]” *Id.* at 1220.

bench without a break, suggesting that even relatively prosaic mood states like boredom and hunger can influence outcomes at trial.<sup>156</sup>

Obviously judges and jurors are human beings, not robots, and cannot suppress all their incidental emotions during a trial. Further, it is quite hard to say, from a theoretical perspective, what sort of baseline emotional state is best for fact-finding. But leaving those deeper complexities to the side for now, it is easy enough to concur with Hastie to this extent: When incidental emotions are powerful enough, and when the specific emotions in question may be associated with a particularly problematic decisional tendency, they are certainly an unwelcome addition to the trial environment. Thus, we can imagine many circumstances when such influences would best be excluded to the extent possible. A newly grieving juror might be excused from duty, for instance, while a mindful judge who just had an episode of “road rage” while driving in heavy traffic might do well to postpone the afternoon’s hearings until he could drink a calming cup of tea.

What, then, of Hastie’s contrasting category of “decision-relevant emotions?” Hastie’s exploration of this theme was brief, focusing primarily on the stress of deciding a case and the anticipatory feelings that might arise as jurors contemplate the possible consequences of different verdicts.<sup>157</sup> But there are many other emotional states that might arise, not for incidental reasons, but as a consequence of the trial process itself, which I shall now consider in turn.

Let us first consider a category that I call “task-congruent emotions.” Such emotions are those that arise from evidence showing that a party has either done the harm, or suffered wrongs, that are at issue in the trial, and which tend to influence the fact-finder to either punish, or compensate, the party in accordance with the law’s demands. As an example, consider some of the feelings reported by a juror in the trial of Rodney King’s civil suit against the City of Los Angeles over his widely publicized beating at the hands of Los Angeles Police Department officers. During the trial, the jurors watched the video of the savage

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156. See generally Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT’L ACAD. SCI. 6889 (2011). The observed variance was quite large. The study focused on Israeli judges who were sitting on panels to hear prisoners’ requests for parole or sentence modifications. When the judges were freshly back from a break, they granted such requests most of the time; towards the end of a lengthy session, the grant rate dropped to nearly zero. See *id.* at 6889–90.

157. See Hastie, *supra* note 69, at 1002–06 (exploring how anticipated emotions play a central role in decision making).

assault, in which officers hit King repeatedly with batons, kicked him, and shocked him with a stun gun. As a result, one juror reported feeling intense emotions in relation to the case: She “broke down in tears on several occasions,” she felt “sick to her stomach,” and she said she was “haunted” by King’s screams on the tape.<sup>158</sup> Another juror reported that he found it difficult to sleep during the trial.<sup>159</sup> Clearly, these jurors (who ultimately voted for a \$3.8 million award against the City)<sup>160</sup> were feeling a potent mix of compassion for King, anger at the officers, and sorrow regarding the overall incident. But we should hesitate before concluding that there was anything corrupting or maladaptive about such feelings. When one encounters evidence of norm violations by others, particularly dramatic and violent ones, anger, grief, and sympathy are natural responses. Furthermore, as discussed above, these emotions are typically adaptive: They help us notice and remember particular items of evidence that reveal law violations, and they motivate us to aid the person who is suffering and to take action against the wrongdoers. Thus, we have every reason to think that the task-congruent emotions felt by the King jurors encouraged them to do exactly what the law required them to do, which was to compensate King while punishing the parties who were responsible for his harm.<sup>161</sup>

More generally, we should be cautious before concluding that there is anything normatively problematic about task-congruent emotions at trial. A trial is, by its essence, often an intense experience. When wrongdoing has occurred, jurors are likely to get angry or upset about it, and such feelings are likely to help them do their jobs. If we told them to suppress their feelings, they would probably be unable to do so, and would most likely just go on feeling what they were feeling while remaining silent about it. But suppose, for a moment that they *could* suppress strong emotions when learning of strong evidence of norm violations; what would be the result? Quite plausibly, in the absence of bad feelings about a defendant’s conduct, jurors would be less motivated

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158. John L. Mitchell & Tina Daunt, *King Jury’s Voice of Reason Carried a Private Burden: Trial: Forewoman Juggled Her Courtroom Duties With Beliefs Formed During Marriage to an Ex-Black Panther*, L.A. TIMES (June 3, 1994), [http://articles.latimes.com/1994-06-03/news/mn-65530\\_1\\_jury-room](http://articles.latimes.com/1994-06-03/news/mn-65530_1_jury-room).

159. *Id.*

160. Seth Mydans, *Rodney King Is Awarded \$3.8 Million*, N.Y. TIMES (April 20, 1994), <http://www.nytimes.com/1994/04/20/us/rodney-king-is-awarded-3.8-million.html>.

161. See *Angry Judges*, *supra* note 53, at 1262 (noting that the emotion of anger can “narrow[] and focus[] attention and “motivate[] responsive action”).

to sanction him, regardless of the formal dictates of the law.<sup>162</sup> Indeed, as studies of patients with impaired abilities to experience emotion have shown, people who cannot experience emotional states do not become hyper-rational Vulcans, but rather become supremely indecisive.<sup>163</sup> At trial, this would be likely to result, not in unusually accurate verdicts, but instead in an unusually large number of mistrials, as affectless jurors would find themselves too indecisive to reach verdicts.

Of course, this is not to say that task-congruent emotion could never lead jurors astray. If jurors learn a biased, misleading or incomplete version of the facts, which give a false sense of a party's guilt or innocence, then that emotion will be prompting them to do something problematic. But notice that the problem here is not the emotion itself, but rather the skewed evidentiary portrait that prevented the feelings from becoming aligned with the underlying facts of the case. This insight lets us sharpen our definition of task-congruent emotion somewhat, and stipulate that an emotion is task-congruent only when the strength of the emotion corresponds with the strength of the evidence that inspires it. Thus, evidence that strongly shows guilt may be congruent with similarly strong feelings of anger, whereas weak evidence of guilt would no longer be congruent with a similarly vengeful emotion. Indeed, this last point may go some way towards explaining our pervasive distrust of character-propensity proof.<sup>164</sup> Learning, for example, that a defendant charged with forgery was previously convicted of child molestation would tend to only weakly show his guilt. Even if the prior crime evidences some general tendency towards lawless behavior, the two offenses are so far apart that the inference cannot be a strong one. But the prior crime evidence would tend to greatly disturb and anger most jurors, given the extremely disturbing acts involved. Thus, even though the evidence does show guilt to some extent, and the emotion encourages a finding of guilt, the correspondence between the strength of the emotion and the strength of the evidence is so low that we would not wish to encourage it. As such, we should not include it within the category of accuracy-furthering, task-congruent emotions.

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162. See Posner, *supra* note 12, at 310 (noting that “[t]here is no action without emotion”).

163. See DAMASIO, *supra* note 21, at 170–73 (noting that those who try to make decisions based purely on reason, will “take an inordinately long time” or perhaps will not even reach a decision, instead getting “lost in the byways of [] calculation”).

164. See, e.g., FED. R. EVID. 404–05, 608–09.

That helps us elucidate the next category in our typology, which we can call “task-incongruent emotion.” An emotion felt during trial would be task-incongruent when two things are true: First, the emotion tends to influence decision-making in the case, and second, the intensity of the emotion fails to track changes in the probability that a party engaged in disputed wrongdoing or suffered disputed harms. The character proof discussed above is task-incongruent, because the strength of the feeling is vastly greater than the probative force of the underlying evidence.

To this initial example, we might add many more types of trial emotions that are usually thought to be problematic. For instance, it has been observed that parties who have an attractive appearance usually fair better in court cases than those who are unattractive.<sup>165</sup> Unless the defendant is charged with impersonating a supermodel, however, it is doubtful that their appearance has much relation to their guilt. As a result, the good feelings a juror feels towards a party on account of their beauty would be task-incongruent. Likewise, if a juror was favorably disposed towards a party because that party reminded them of a well-liked friend or family member, those feelings would also be task-incongruent. Or similarly, if a jury takes a liking to a particularly charming attorney who is representing a party, and as a result finds it easier to vote in that party’s favor, we will be worried, because there is little reason to think that attorney charm correlates with a client’s guilt or innocence. Once we have this dichotomy in place, we can see that, to the extent the classical view of emotions at trial seems attractive, it is because many of the emotions that come to mind when we think of jurors being moved towards a verdict by their feelings are, in fact, task-incongruent.

In fact, a bit of reflection shows that the earlier category of “incidental emotions,” which was first explored by Hastie,<sup>166</sup> could actually be analyzed as one subtype of task-incongruency. Emotions are incidental to the trial process when they arise for reasons wholly unrelated to the evidence, such as if a judge were to decide a case while grieving for the death of a close relative. To the extent that such feelings do not influence judgments of guilt or liability, they need not concern us.

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165. Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1038 (2009) (collecting studies). Cf. Marc W. Patry, *Attractive but Guilty: Deliberation and the Physical Attractiveness Bias*, 102 PSYCHOL. REP. 727, 728 (2008) (noting the general effect, but adding the caveat that defendants who “used their attractiveness in the execution of a crime” may be punished more harshly than otherwise-similar, less-attractive defendants).

166. Hastie, *supra* note 69, at 1000–02.

But to the extent that they do, they fit the model of task-incongruency perfectly, because the strength of such emotions would not track the underlying likelihoods that parties either engaged in charged conduct or were harmed by it. As a result, I suggest that the congruency and incongruency divide is a more useful analytic tool than the distinction between incidental and decision-relevant feelings.

Last but not least, we must account for the possibility that some kinds of trial emotions will overlap between the two categories described above. Such “hybrid” emotions will present courts with unique challenges if they are to be managed with an eye toward accurate fact-finding. The first, and most obvious, example of a hybrid trial emotion arises when a party testifies, so that emotional responses have the potential to simultaneously impact credibility and guilt or liability judgments. Because of such emotional spillover, criminal defendants must often wrestle with the choice of whether or not to waive their right to testify, knowing that if they do take the stand, they take the risk that evidence used to impeach them may also cause a jury to dislike them more generally.<sup>167</sup>

For another example of a hybrid trial emotion, consider the common scenario in which a tort plaintiff, who is suing a wealthy corporate defendant, puts on evidence of his extreme pain and suffering as part of his case for damages. The compassion and sorrow that a judge or juror might feel while learning such facts is quite appropriate in the context of calculating the extent of the plaintiff’s harm, because the greater the injuries, the more intense the emotion is likely to be, leading fact-finders who feel greater sympathy to become more generous.<sup>168</sup> But these same sympathetic feelings are task-incongruent when we consider other questions at issue in the case, such as whether the defendant took reasonable steps *ex ante* to prevent the injury.<sup>169</sup> As I shall discuss in more detail below, the intense emotions that are appropriate to the task of assessing damages may also encourage jurors to see liability where none exists, either out of a deliberate desire to aid the victim or as a result of subtler, unconscious processes that attempt to knit scattered trial

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167. See FED. R. EVID. 609(a)(1)(B) (authorizing the admission of some prior convictions for the purpose of impeaching criminal defendants); Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants With Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 294–96 (2008) (noting the difficult decision defendants must face).

168. See Feigenson, *supra* note 34, at 16 (noting that it is appropriate in some cases for jurors to consider sympathy when determining damages).

169. *Id.* at 57–64.

impressions into a coherent whole. Once again, we see the problem that an emotion can be simultaneously useful for one trial purpose and counterproductive with respect to another.

Finally, to see a different way that emotions could have hybridized influences, consider the complex functioning of emotions in the process of determining a witness's credibility. It is the rare trial in which all witnesses are equally trustworthy; rather, credibility evaluation is a central part of a fact-finder's task. In connection with this, feelings of trust or distrust towards particular witnesses are an important contributor towards credibility determinations. Jurors, after all, must collate many different kinds of facts in arriving at a credibility decision, ranging from the witness's demeanor on the stand, to inconsistencies in her story, to her more general character as an honest or dishonest person.<sup>170</sup> Nor is there any straightforward protocol by which conflicts between these different kinds of evidence are ordinarily resolved; rather, jurors will have to decide whether a prior inconsistent statement weighs more heavily than her transparent and innocent demeanor on the stand, or whether a witness's financial bias towards one party in the case is more important than either of the foregoing. It is precisely when jurors must balance a large number of factors, without any overall guiding principle, that we should expect that intuition and feelings will play a strong role in producing the overall judgment, by shaping what the jurors notice, commit to memory, and recall most easily when they start to deliberate. As a result, credibility related emotions deserve special attention in any broader theory of emotional fact-finding.

Unfortunately, it is hard to lump in credibility related emotions as either usually helpful, like task-congruent emotion, or usually unhelpful, like incongruent emotion. On the one hand, it is clear that in some cases, feelings of distrust will be clearly tied to real variations in a witness's honesty. For example, if a witness is shown to have taken a bribe in exchange for her testimony, or if she is repeatedly caught in lies under oath, jurors will probably feel angry and distrustful towards that witness, and such feelings will likely further their overall weighing of the evidence in the case. To the extent that distrust arises from evidence that actually indicates dishonesty, it would be task-congruent. But by contrast, if jurors develop a distrust of a witness purely based on subtle

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170. See FED. R. EVID. 404(a), 608, 609 (carving out broad exceptions to the general bar on character propensity evidence so that a witness's character for truthfulness can be the subject of proof at trial).

defects in her demeanor credibility, experimental evidence suggests that such feelings are likely to bear little relation to the witness's actual honesty or dishonesty, making the feeling largely incongruent to the task at hand.<sup>171</sup> Similarly, there are reasons to doubt that prior acts of dishonesty are very predictive of a witness's willingness to lie on the stand in a particular case, even if they produce strong feelings in jurors.<sup>172</sup> Unfortunately, the trust or distrust that a juror feels towards a particular witness will often arise from a blend of these sources, making it partially congruent and partially incongruent.

Perhaps most troubling, there is a strong potential for coherence shifts based on initial feelings of trust or distrust with respect to a particular witness. Given that many of the cues involved in deciding whether to trust someone are fairly ambiguous in nature, we can easily imagine that small initial prompts towards favorable or unfavorable feelings can lead witnesses to subsequently magnify the importance of congruent cues and dismiss contrary evidence.<sup>173</sup> Accordingly, the normative value of credibility related emotions in the trial process is hard to determine. Some amount of reliance on them seems inescapable, and when credibility calls are easy they probably contribute to accurate fact-finding, but when the cues are more ambiguous or when multiple cues point in different directions, the feelings may lack a strong connection to the underlying honesty of the witness.

Thus, in this section we have developed what will serve as a useful analytic framework when we are trying to assess the appropriate judicial response to the varying emotions that arise at trial. When judges encounter strong *incidental emotions*, which arise from circumstances external to the trial process, they should recognize the risk that such influences will corrupt the fact-finding process. When they consider *task-congruent emotions*, the strength of which vary in response to the

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171. See Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214, 229–30 (2006) (collecting and analyzing over 200 deception studies to conclude that both experts and non-experts have an accuracy rate below fifty-five percent in demeanor-based credibility evaluations, with no significant gain being realized by expertise); Siegfried L. Sporer & Barbara Schwandt, *Moderators of Nonverbal Indicators of Deception: A Meta-Analytic Synthesis*, 13 PSYCHOL. PUB. POL'Y & L. 1, 26 (2007) (reviewing the literature and concluding that lay people are systematically mistaken when asked what demeanor cues reliably indicate deception).

172. See Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 763–764 (2008) (noting that such an "inference is unjustifiable when the prior conduct is unrelated to truthfulness").

173. See Simon, *supra* note 135, at 517.



likelihood that a party is guilty or liable and which tend to promote a decision in accordance with the law, they should consider such emotions to be a fair and proper part of the trial process, rather than a problem to be solved. Conversely, when features of the trial are likely to give rise to *task-incongruent emotions*, which may influence a decision but whose strength bears little relation to probabilities of guilt or innocence, judges should use the tools at their disposal to either prevent the emotions from arising or to mitigate the harm they may cause. Finally, when it comes to *hybrid emotions*, judges must strike a balance between furthering the aspects of the emotional experience that are task-congruent without also allowing those emotions to contaminate other judgments to which they do not properly relate. Hopefully, with a better understanding of these matters in hand, judges will be better able to decide when trial emotions are something to be encouraged, when they should be prevented or suppressed, and when a more nuanced strategy is required.

*B. Using Existing Rules to Better Regulate Emotions at Trial*

Now that we have made some traction in identifying when trial emotions are likely to help the process and when they are likely to hinder it, we can consider what judges might do under existing rules and practices to help realize a better balance of good and bad emotions in the courtroom. For the sake of simplicity, I will focus on the Federal Rules of Evidence, given that most states largely conform their own rules to that model.<sup>174</sup> I will consider two rules in particular: The first, which I have already discussed, is Rule 403, which authorizes judges to exclude evidence whenever “its probative value is substantially outweighed by a danger of . . . unfair prejudice.”<sup>175</sup> The drafters indicated that the idea of unfair prejudice was largely synonymous with an emotional (rather than a reasoned) decision,<sup>176</sup> and trial judges regularly use this rule when they worry that the emotional impact of evidence will corrode the fairness of the jury’s decision.<sup>177</sup> The second, Rule 611, directs courts to exercise control over the “mode and order of examining witnesses and presenting

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174. Reed, *supra* note 31, at 212.

175. FED. R. EVID. 403.

176. See FED. R. EVID. 403 advisory committee’s note.

177. See, e.g., *United States v. Ham*, 998 F.2d 1247, 1252 (4th Cir. 1993) (outlining rule 403 and its availability to trial courts). See generally MUELLER & KIRKPATRICK, *supra* note 10, at § 4.13 (collecting authority for the proposition that the “greatest danger” against which 403 protects is the “injection of powerful emotional elements” into a trial).

evidence” in order to “make those procedures effective for determining the truth.”<sup>178</sup> This rule, unlike Rule 403, gives judges more ways to manage the emotional environment of a trial than mere exclusion of evidence, but it omits any specific reference to the concept of “unfair prejudice,” with the result that judges are less likely to look to this rule when confronting emotionally intense evidence. This is unfortunate, because closer attention to regulating the mode and order of proof may allow judges to prevent or mitigate a substantial amount of problematic emotional influences, without the high costs that attend the total exclusion of evidence.

Exclusion is strong medicine, and as a result there is a widespread consensus that Rule 403 should be used only sparingly, giving effect to a liberal policy in favor of admitting as much relevant evidence as possible.<sup>179</sup> On one level, this may seem like a sensible policy, given that the effects of many emotions at trial may be uncertain, and indeed, in the case of hybrid emotions, may seem to blend both good and bad effects. From this perspective, excluding relevant evidence on the ground that it may arouse the jury’s passion is trading away a certain benefit (its informational value) to prevent an uncertain harm (emotionally mediated prejudice). Judges more often prefer to rely on limiting instructions,<sup>180</sup> which provide at least some possibility of preventing the potential harms, and which do not require the exclusion of any evidence.

There are multiple problems with this approach, however. First, although limiting instructions can have some beneficial effects if they are used sparingly and if their rationale is clearly communicated to the jury,<sup>181</sup> the more they accumulate the harder it will be for the jury to keep them all in mind. Second, even if jurors try to put their emotions to one side, their feelings are likely to influence who they believe, what facts they recall, and what stories they find to be reasonable. Their emotions, therefore, can still shape their judgment even when they are trying their hardest to reason analytically. Third, the dual-process model shows us

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178. FED. R. EVID. 611(a).

179. See MUELLER & KIRKPATRICK, *supra* note 10, at § 4:12 (collecting cases).

180. See FED. R. EVID. 105 (outlining the availability of limiting instructions for use by judges); Edward J. Imwinkelried, *Impoverishing the Trier of Fact: Excluding the Proponent’s Expert Testimony Due to the Opponent’s Inability to Afford Rebuttal Evidence*, 40 CONN. L. REV. 317, 336 (2007) (explaining that admission with a limiting instruction that eliminates prejudice is preferred over exclusion).

181. See David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 423–39 (2013) (reviewing studies of evidentiary instruction).

that suppressing emotions increases the cognitive load in System 2, which creates a real risk that the jurors will be less willing or less able to carefully evaluate the evidence, making them more likely to make judgments driven primarily by the automatic, intuitive System 1. But the biggest problem with this approach is that it represents a missed opportunity, because there are more ways to mitigate or prevent emotional prejudice than the two most common remedies of exclusion and limiting instructions. To the extent that judges, in applying Rule 403 as their primary means of emotional control, assume otherwise, they leave many of their best tools locked away.

What if, instead, judges thought to exercise their broader set of prerogatives under Rule 611, as well as a few other rules, when trying to limit the force of emotional evidence? If they were to do so, and if they had internalized the understanding of emotional cognition that I have advanced in this article, they would realize that there are a number of ways that they can admit evidence while blunting some of its problematic emotional effects.

First, judges could prevent emotions from setting off problematic coherence shifts by exercising discretionary control over the order and timing of proof. As I explained above, one of the ways that a dual-process account of emotional fact-finding differs from ordinary judicial common sense is that it emphasizes the unconscious cognitive processing that jurors are putting in while sitting silently and listening to the evidence in a case. Even if they do not perceive themselves to be thinking or deciding anything, they are building an implicit model that links the people and events in the case into a semi-coherent whole, as well as deciding which witnesses they can trust. Because this process is iterative over time and biased in favor of coherence, relatively small *initial* prompts can have larger subsequent effects, at least when the evidence is close enough to be ambiguous.<sup>182</sup> But this is most likely to occur if the fact-finder has not yet developed a strong associative model of the facts that are connected with that particular emotion. For instance, if jurors learn an unsavory fact about a witness shortly after he takes the stand, the distaste they feel as a result may prompt them, at an unconscious level, to search for reasons why that witness should not be

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182. See Simon, *supra* note 135, at 519. (“[C]oherence shifts polarize perceptions of the evidence. Jurors with a slight initial inclination to acquit or convict are likely to amplify their perception of the case, so that evidence that is weakly probative of guilt can be transformed to create mental models that strongly support either innocence or guilt.”).

believed. If, however, they hear the same information at a later point within the witness's testimony, then the feelings are less likely to sway their overall trust in the witness.

Thus, one way that judges can mitigate emotional prejudice, short of exclusion, is to manage the taking of testimony so that damaging information is elicited only after other relevant facts. Note, however, that this is *not* a strategy that should be applied in all cases where evidence may give rise to strong emotions. It would make no sense, for instance, to delay evidence that the defendant committed a murder in order to shield that defendant from emotional "prejudice," because such feelings would be congruent to the task of assessing the accused's guilt of the crime. Rather, it is only when evidence, despite its relevance, is likely to give rise to task-incongruent emotions, that it should be delayed in order to mitigate those impacts.

Of course, deciding how to do this will sometimes be easy, but not always. When the incongruent feelings in question are most likely to affect levels of trust in particular witnesses, then the natural structure of examinations already achieves this end to a significant extent, in that most impeaching evidence will be brought out during cross-examination rather than on direct. When the emotions in question are likely to have complicated spillover effects on central questions in the case, however, the management challenge becomes greater.

Consider, for instance, the scenario that arises in many tort trials where both questions of causation and the extent of damages are going to be vigorously litigated. Hearing detailed accounts of a plaintiff's suffering early in a case may induce sympathy, sorrow, and anger in the jury, leading them to search, whether consciously or unconsciously, for a wrongdoer to punish.<sup>183</sup> At the same time, the extent of damages is often orthogonal to questions of the defendant's responsibility, such as in cases where a toxic exposure certainly caused harm to the plaintiff,<sup>184</sup> but in which many possible defendants might be the unique cause of that exposure. Although plaintiffs are generally given latitude to order their case in any way they see fit, this creates a real risk that, by starting with evidence that is primarily relevant to damages before proceeding to

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183. See MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* 74–78, 120–122 (1980) (explaining that sympathy comes from a sense of identity with the victim and that sympathy for a victim can even cause a person to wrongly find themselves to blame).

184. See Edith Green & Brian Bornstein, *Precious Little Guidance: Jury Instruction on Damage Awards*, 6 *PSYCHOL. PUB. POL'Y & L.* 743, 756 (2000).

address complicated issues regarding the defendant's responsibility, the plaintiff might be inducing the jury to favor interpretations of the causation evidence that make the defendant responsible for the harm. Here, a judge might do well to use their powers under Rule 611 to demand that the plaintiff order her proof so as to argue causation questions before damages. And sometimes, such as in cases where the causation question is doubtful and the emotions are likely to be particularly intense, judges might be well advised to take things a step further, and use their discretionary authority to bifurcate the trial into separate liability and damages phases.<sup>185</sup>

Second, judges could prevent emotions from becoming attached to inappropriate referents by exercising discretionary control over who is present in the courtroom when those emotions are aroused—although sometimes, this will require the cooperation of the parties. Earlier, I discussed the tendency of System 1 to allow emotions that arise for one reason to influence other, unrelated judgments. A negative mood elicited by a bad smell, for instance, can make people judge other people's behavior more harshly.<sup>186</sup> If we add in System 1's tendency to incorporate observed patterns of experience into new unconscious expectations, we face a troubling prospect: If the jurors experience strong emotions in the presence of a party, they may come, over time, to associate those feelings with that party, even if the feelings arose for largely unrelated reasons. The situation is analogous to a person who, after enjoying a particular food for years, becomes violently ill after eating it at a favorite restaurant. Even if he knows, intellectually, that the food did not cause the illness, because his dining companions shared the dish and did not become ill, he may develop a strong association between that taste and the subsequent nausea, which spoils his enjoyment of the dish in the future.

Imagine, then, a similar kind of process that might occur at trial. A person accused of murder might rest his defense theory on an alibi, trying to convince the jury that someone else, rather than him, committed the crime. The prosecutor, however, would not limit herself to rebutting the alibi evidence, even if the defendant was willing to concede that the victim was murdered. Rather, the prosecutor would typically offer evidence describing the details of the murder, so that the jury could find in their favor regarding all the elements of the crime and develop a full

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185. See FED. R. CIV. P. 42(b).

186. Schnall, *supra* note 126, at 1097–1104.

picture of the events at issue in the case.<sup>187</sup> If these facts are particularly gruesome, then the jury may find themselves frequently feeling disgusted and outraged in the defendant's presence. When it comes time to evaluate his credibility or other evidence suggesting that he was not the culprit, then it is possible that they will find themselves unconsciously primed to see him as a murderer because they have previously often felt these strong, negative emotions in his presence.<sup>188</sup>

Note, however, that it is not simply the fact that the jury is angry that a murder took place that creates the prejudicial, task-incongruent effect of these emotions. Ordinarily, after all, when we discover that there has been a murder, our first impulse is to punish *whoever actually did it*, rather than another person who is innocent. As a result, there is no reason to expect that any arousal of the jury's disgust or anger in relation to the murder would necessarily be vented on the defendant. Rather, a key contributor to this tendency would be that the jury experienced these feelings while the defendant was in the room and while he provided a natural target for their attention. To return to the dining analogy, one does not ordinarily develop food-related revulsions every time one becomes ill; instead, this would usually occur only when there was a close connection, in time and space, between eating a particular food and getting sick.

Happily, judges—through a combination of discretionary orders, juror admonishment, and suggestions to the parties—may be able to mitigate such effects. First, one potential means toward mitigating this kind of associative emotional cross-contamination would be to encourage the parties to absent themselves from the courtroom while emotionally intense evidence is being offered. After all, if the parties are not present, the potential associations are likely to be weaker. Of course, some parties have a right to be present during court proceedings,<sup>189</sup> so this procedure will often require their consent. Likewise, there may be some risk that the jurors would draw negative inferences from the absence of the parties. However, if the court were to explain to the jurors that the

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187. *Cf.* *Old Chief v. United States*, 519 U.S. 172 (1997) (where the defendant offers to admit to evidence of a prior criminal conviction but the prosecution instead seeks admittance of the entire record of prior conviction).

188. *See Hidden Structure*, *supra* note 19, at 180–83 (describing the role of such effects in producing a wrongful conviction in the case of *People v. Rivera*, No. 92 CF 2751 (Ill. 19th Cir. Ct. May 8, 2009), *rev'd* 962 N.E.2d 53 (Ill. App. Ct. 2011)).

189. *See* U.S. CONST. amend. VI; FED. R. EVID. 615; *Helminski v. Ayerst Labs*, 766 F.2d 208 (6th Cir. 1985) (holding that injured plaintiff was excluded improperly from the courtroom when the plaintiff was excluded based only on plaintiff's described condition).

parties were absenting themselves in response to the court's own suggestion, this would be unlikely to occur.

Such a strategy would work particularly well if judges use their other powers to calm the intensity of the jurors' emotions before the proceedings are resumed. Scheduling inflammatory testimony to occur shortly before the end of a day would give the jurors a night to cool off before testimony is resumed. In addition, judicial admonitions might encourage jurors to take steps to control their own feelings. If properly motivated, we can often calm our feelings and return ourselves to a more neutral state.<sup>190</sup> Thus, a juror who has been told that their duty is to decide the case based on the evidence, and who has been warned that the intense feelings they feel with respect to one aspect of the case should be kept separate from unrelated issues, might be willing to take steps on their own to calm their feelings, and might be more likely to question their intuitions when it comes time to deliberate. Thus, by separating the juror's experience of emotionally arousing evidence from the parties in space, time, and motivation, courts might be able to get the probative benefits of such information while avoiding its prejudice.

Third, courts can mitigate the intensity of task-incongruent emotions, in some cases, by requiring parties to admit evidence in less affecting forms. In the above example involving graphic crime scene evidence where the primary defense is one of alibi, often the same facts that a photo or video could reveal may also be conveyed to the jury through testimony, perhaps with the assistance of less affecting demonstrative aids. This, I must make clear, would not be an appropriate restriction in all cases; if the primary question in a murder trial was whether the act was intentional, for instance, the strong emotions that arise from seeing the scene might indeed further the process of evaluating whether the crime was "heinous" or "malicious" within the meaning of a relevant statutory definition.<sup>191</sup> But when the facts are only tangentially relevant in the case, such as when they are necessary to complete the prosecutor's overall narrative but not essentially disputed by the defendant, those same emotions may undermine the jury's ability to fairly consider the alibi testimony. Thus, presenting the same information in a less intense form might allow the prosecutor to convey his story without undermining

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190. Gross, *supra* note 139, at 6–10 (discussing various methods by which individuals prevent or regulate unwanted emotions); *Emotional Regulation*, *supra* note 65, at 1509–28.

191. See SIMON, *supra* note 137, at 173, 345 n.198 (identifying that in some statutes, determining whether a murder was intentional can be based on the "heinousness" of the crime).

the defendant's opportunity to have his defense considered in an even-handed way.

For an instructive example of how this sort of active emotional management can work to improve the process, consider Judge Carl Rubin's management of a large, consolidated trial involving the drug Bendectin.<sup>192</sup> In that case, nearly a thousand plaintiffs alleged that they suffered from birth defects caused by their mother's use of the drug. These allegations presented a classic problem of hybrid emotion: The injuries suffered by the plaintiffs were quite relevant to assessing their damages, but were completely irrelevant to the difficult questions of scientific causation at issue in the case. Moreover, the stakes of this were particularly intense in the context of a large, consolidated trial proceeding. To address this, Judge Rubin thoughtfully combined two of the strategies discussed above. First, he issued an order that trifurcated the case, with proof of causation occurring first so that the jury could evaluate the expert testimony on that question without feeling strong emotions of sympathy for the plaintiffs that were incongruent to that task.<sup>193</sup> Second, he issued an order excluding any young or visibly deformed plaintiffs from the courtroom, and made provisions for them to monitor the case by closed-circuit television from another room, in case the jury should be strongly moved by their appearance to search for reasons why the defendant might in fact be liable.<sup>194</sup> The jury subsequently concluded that the plaintiffs had failed to prove causation, a conclusion which was in accord with the weight of scientific evidence on the question.<sup>195</sup> Such measures were strong medicine (particularly the exclusion of parties from the courtroom),<sup>196</sup> but given the high stakes of

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192. See *In re Bendectin Litigation*, 857 F.2d 290, 296 (6th Cir. 1988).

193. *Id.*

194. *Id.*

195. *Id.*; see David E. Bernstein, *Learning the Wrong Lessons from "an American Tragedy": A Critique of the Berger-Twerski Informed Choice Proposal*, 104 MICH. L. REV. 1961, 1963–67 (2005) (surveying the relevant scientific studies at the time of the litigation and explaining that “a review of the relevant medical literature finds a consensus that Bendectin is not a teratogen”).

196. The Sixth Circuit did not reverse the exclusion, but it did opine that it probably would violate a subsequently announced rule (which it declined to apply retroactively). The new rule barred the exclusion of any non-consenting plaintiff who “can assist counsel and understand the proceedings . . . regardless of prejudicial impact,” and directed courts to use limiting instructions instead. *In re Bendectin Litigation*, 857 F.2d at 324 (citing *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir. 1985)). Perhaps there are reasons, grounded in dignitary interests or the legitimacy of the trial process, why we might wish to follow such a rule, but at least in cases like the Bendectin MDL, we should be cognizant of the possibility that we will pay an accuracy penalty for doing so.



the question and the significant possibility of influence by incongruent emotion, it is likely that those measures were critical to achieving an accurate outcome at trial.

*C. Empowering and Encouraging Judges to Respond Appropriately to Emotionally Potent Evidence*

Of course, judges have, at present, the power to do all of these things, based on their authority under Federal Rule of Evidence 611 and Federal Rule of Civil Procedure 42. To the extent that they understand the value of preventing or mitigating the arousal of task-incongruent emotions, they may already pursue this objective under that rule, which allows them to take such measures whenever it helps to “make . . . [trial] procedures effective for determining the truth.”<sup>197</sup> Judges may not use trial management techniques to curtail the dangerous aspects of emotions as often as we would like; however, the problem is not that judges lack sufficient authority. What judges do lack, however, are three things. First, courts receive relatively little encouragement towards using their authority to shape the emotional content of trials, because the existing rules channel them towards one extreme option—the total exclusion of an item of evidence—which they are naturally reluctant to employ. Second, judges receive little training in the ways that emotions can influence fact-finding, and thus they are likely to fall back on common sense and intuition to decide when emotions are worth worrying about. Unfortunately, the dominant common sense approach to this question seems to be the mistaken classical view. As a result, judges too easily fall prey to a common pair of mistakes: Judges tend to view most emotions as dangerous, but they also tend to assume that the danger can be controlled by a fact-finder’s act of will. And finally, judges lack a means of effectively pursuing these strategies in the many cases that are tried to a bench, due to the lack of a meaningful process by which parties can raise objections in that context. Accordingly, the best means of reforming judicial management of trial emotions would be a three-pronged approach, combining rule reform, judicial education, and a new procedure for raising evidentiary objections during bench trials.

The first step would be rule reform, with the aim, not of giving new powers to judges, but instead of encouraging them to deploy a broader

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197. FED. R. EVID. 611(a)(1).

set of solutions when confronted with potential emotional prejudice. To this end, we could rewrite Rule 403 along the following lines:

Revised Rule 403:

- a. When the probative value of evidence is outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence, the court should take appropriate action.
- b. Unfair prejudice includes the activation of strong emotions that are likely to incline the fact-finder towards an unjust decision, such as when the party's identity or aspects of the evidence result in unfair favoritism towards or against the party. Strong emotions that are tied to a jury's perception that a party committed charged conduct should not generally be viewed as giving rise to prejudice, however.
- c. When the improper effects of evidence outweigh its probative value, the court should consider, and apply as appropriate, the following means of mitigating that prejudice:
  1. Requiring a party to delay admitting the prejudicial evidence until the jury has formed a clearer picture of related facts from less prejudicial sources of information.
  2. Scheduling a recess or continuance in the proceedings following the introduction of the evidence, so that the fact-finder can return to a calmer state before considering further evidence.
  3. Encouraging the parties to absent themselves from the courtroom while emotionally affecting evidence is presented, to avoid giving rise to associations between the evidence and a party.
  4. Exercising the discretionary authority to bifurcate a trial or sever the cases of co-parties.
  5. Requiring the party offering an inflammatory piece of evidence to present it in a less prejudicial form.
  6. Giving limiting instructions that impress upon the jury's mind the reasons why they should avoid letting a particular emotion impact their reasoning about other issues in the case.

- d. When the improper effects of evidence substantially outweigh its probative value, despite any corrective measures the court could employ, it should be excluded.

This revision is meant to accomplish several objectives. First, it explicitly encourages judges to mitigate emotional prejudice by less severe means than total exclusion and more effective measures than limiting instructions. Second, the revised rule signals to judges that they have a duty to explore these means whenever they believe that the prejudicial impacts of evidence are likely to be more powerful than its rational force, unlike the present rule, which applies only when prejudice “substantially” outweighs probity. And third, it guides judges towards some specific alternative options, and clarifies the difference between emotions in general and task-incongruent emotions in particular.

But this rule reform, although it would be helpful on its own, would work best if combined with an effort to help judges better understand the subtle ways that emotions and cognition interact. Law schools do not typically provide this sort of instruction to lawyers in training, nor is it a standard component of the information provided to most new judges when they take the bench.<sup>198</sup> Despite this lack of training, we expect judges, on a daily basis, to determine when the emotional impact of evidence will outweigh its helpful qualities. This might be acceptable if the bulk of psychological research on emotions amounted to mere common sense, but sadly that is not the case. Most judges, I would hazard to say, would be surprised to learn that feeling too little emotion can be as harmful as feeling too much. Likewise, it is common to think that emotions influence our preferences a fair amount, but have relatively little impact on what we perceive, what we remember, or how we analyze facts held in mind. Finally, the proliferation of limiting instructions in modern trials seems to ignore the real possibility that too much cognitive effort expended towards emotional suppression and control can make it harder for jurors to reason carefully about the facts in the case, and perversely make them *more* susceptible to emotional influences that have already occurred.<sup>199</sup> Thus, the rule reform I describe above would function even better if new trial judges could receive a short

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198. *Emotional Regulation*, *supra* note 65, at 1520. The FJC has recently taken a very encouraging step in this direction, which one hopes will serve as a model for similar projects at the state level. See *Maroney*, *supra* note 68.

199. *Emotional Regulation*, *supra* note 65, at 1534–35, 1539.

course of training in emotional psychology, just as they currently receive other forms of instruction.

Finally, the current regime is clearly suboptimal because it treats judges as if they have a mystical superiority in terms of their levels of emotional control. Although the rules of evidence apply equally to judge and jury trials, at least on paper,<sup>200</sup> attorneys make far fewer evidentiary objections during bench trials. Given that the same judge acts as evidentiary decider and fact-finder in the typical bench-trial, this should not be surprising, especially in the context of emotionally inflammatory evidence. Since many judges take pride in their prudence and self-control, parties risk alienating judges by suggesting that they would be influenced by their feelings in addition to the facts. Furthermore, lawyers know that judges will learn of the underlying facts by the arguments on the objection, even if the judge eventually grants the objection. Thus, to the extent that lawyers believe that the judge might not be able to substantially restrain the effects of emotion on her thinking, it may seem fruitless to object, in the present system.

This dynamic, however, can and should be changed. First, numerous studies have shown that judges are no different from the rest of us when it comes to the interactions between their reasoning and their feelings. For judges, just like everyone else, exposure to inadmissible evidence can influence subsequent decisions.<sup>201</sup> Thus, in the many cases that are tried to the bench, it would be prudent to devise a regime that lets parties object to emotionally prejudicial evidence without alerting the fact-finding judge to the underlying facts. This could be done by appointing a magistrate or other judge who works at the same court to act as an adjunct during the window shortly before and during the trial, hearing evidentiary disputes that the parties would prefer not to bring before the deciding judge. If such motions are granted, parties could be subjected to contempt sanctions if they inform the fact-finding judge of facts that have been deemed inadmissible by the adjunct. This procedure might be slightly cumbersome, and indeed it would seem wise to exempt many of the evidence rules from its purview, so as to avoid collateral disputes over authentication or conditional relevance that risk protracting the

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200. See MUELLER & KIRKPATRICK, *supra* note 10, at § 1:3.

201. See, e.g., Jeffrey J. Rachlinski et al., *Altering Attention in Adjudication*, 60 UCLA L. REV. 1586, 1609–15 (2013) (noting that “judges are often influenced by evidence even after they have ruled it inadmissible”); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1251 (2005) (concluding that judges are generally unable to avoid the influence of relevant but inadmissible evidence).

overall proceedings. But if instituted, either through local rules or through broader procedural reforms, it could go a long way towards assuring parties that problematic emotional influences will not unduly sway a fact-finding judge during a bench trial.

## V. CONCLUSION

In this paper, I have offered a new way of thinking about the functions of emotions at trial. Existing accounts paint emotions, alternatively, as either a pernicious force that undermines reason, as a reliable means of making decisions fairer and more empathetic, or as a jumble of influences that is too complex to be meaningfully regulated by trial judges. By contrast, I have tried to offer a view that accounts for both the beneficial and harmful impacts of emotions, framed at a level of complexity that strikes a balance between respecting the underlying realities while still enabling real-world implementation.

Evidence at trial will inevitably induce emotional responses in fact-finders, whether the cases are being tried to judges or juries. Some of those emotions will aid fair decision-making, because they arise in response to indications of the presence or absence of wrong-doing and encourage fact-finders to respond appropriately to such wrong-doing through their verdict decisions. When such task-congruent emotions are activated, fact-finders will be better able to notice salient aspects of the evidence, to remember it in deliberations, and to arrive at an appropriate verdict decision at the conclusion of trial.

By contrast, other emotions can arise that do not have such beneficial effects. When the evidence causes a judge or jury to feel things that influence the way they perceive and evaluate the evidence, but which do not reflect the likelihood that the disputed misconduct actually occurred, then such emotions risk undermining the fairness and accuracy of factual and legal determinations. Importantly, these “task-incongruent” emotions will have effects on how evidence is perceived, assimilated, and remembered, and not just on what a juror wants to do at the close of the case. Luckily, judges have many strategies that can moderate such pernicious influences short of totally excluding inflammatory, but relevant, evidence. By the combination of rule reform and judicial education that I outline above, we should be able to realize a better balance between the beneficial and problematic effects of emotions in fact-finding.