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# Tell Us a Story but Don't Make it a Good One: Embracing the Tension Regarding Emotional Stories and the Federal Rule of Evidence 403

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# TELL US A STORY BUT DON'T MAKE IT A GOOD ONE: EMBRACING THE TENSION REGARDING EMOTIONAL STORIES AND THE FEDERAL RULE OF EVIDENCE 403

*Cathren Koehlert-Page\**

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## INTRODUCTION

Dave looked at Jimmy.

“Don’t look at him. Look at me.” The big cop breathed loudly through his nostrils.

...

“Where you live, son?”

“Rester Street.”

...

“Your mother home?”

"Yes, sir." A tear fell down Dave's cheek and Sean and Jimmy looked away.

...

The cop opened up the back door . . . .

...

"Get in," the cop said. "Or you want I should throw the cuffs on you?"

"I—"

The cop . . . slapped the top of the open door. "Get the fuck inside."

Dave climbed into the backseat, bawling.

...

Sean's father frowned . . . .

...

"[H]ow'd you know they were cops?"

...

An hour later, in Sean's kitchen, two other cops asked Sean and Jimmy a bunch of questions, and then a third guy showed up and drew sketches of the men in the brown car . . . .

...

You felt different when something was stolen as opposed to simply misplaced. You felt it in your chest that it was never coming back. That's how [Jimmy] felt about Dave.<sup>1</sup>

Every time I show the movie version of the above scene from *Mystic River* to my class during a discussion of legal narrative, my first and second year law students, most of whom have not yet

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<sup>1</sup> DENNIS LEHANE, *MYSTIC RIVER* 13-16, 18 (2001).

taken evidence, empathize with Dave.<sup>2</sup> Some of them also empathize with Dave's parents, the other boys, and the police.

Then, we skip to a later portion of the movie. Students learn that Dave escaped from his abductors, grew up, and had a son of his own.<sup>3</sup>

We then view a few scenes where Jimmy, now an adult, learns that his daughter has just been murdered.<sup>4</sup> Then some students report that they empathize with Jimmy while some empathize with others.

"What if I tell you that Dave, the little boy who was kidnapped, is one of the primary suspects in the murder?" I ask.

They do not want it to be Dave. However, despite their feelings of empathy, most of them typically see how it could be Dave. His traumatic experience might have warped him.

That is part of the beauty of both the movie and the book.<sup>5</sup> Readers and viewers see through all three points of view: Jimmy's, Sean's, and Dave's.<sup>6</sup> People feel for Dave and do not want it to be him as clues connecting him to the murder unfold.<sup>7</sup> But they accept that it could be.<sup>8</sup> They empathize with Sean, the police officer investigating the crime, and Jimmy, the father planning vigilante action against his daughter's killer.<sup>9</sup>

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<sup>2</sup> See *MYSTIC RIVER* (Warner Bros. 2003).

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See generally LEHANE, *supra* note 1; *MYSTIC RIVER*, *supra* note 2. See also A.O. Scott, *Film Festival Review: Dark Parable of Violence Avenged*, N.Y. TIMES (Oct. 3, 2003), <http://www.nytimes.com/movie/review?res=9904E2DA173CF930A35753C1A9659C8B63> ("You want to feel sorry for him, but he also scares you."); Roger Ebert, *Mystic River*, ROGEREBERT.COM (Oct. 8, 2003), <http://www.rogerebert.com/reviews/mystic-river-2003> (discussing how the "day in the past lingers" for viewers).

<sup>6</sup> See Scott, *supra* note 5 ("You want to feel sorry for him, but he also scares you."); Ebert, *supra* note 5 (discussing how the "day in the past lingers" for viewers). See generally LEHANE, *supra* note 1; *MYSTIC RIVER*, *supra* note 2.

<sup>7</sup> See generally LEHANE, *supra* note 1; *MYSTIC RIVER*, *supra* note 2.

<sup>8</sup> See Scott, *supra* note 5 ("You want to feel sorry for him, but he also scares you."); Ebert, *supra* note 5 (discussing how the "day in the past lingers" for viewers). See generally LEHANE, *supra* note 1; *MYSTIC RIVER*, *supra* note 2.

<sup>9</sup> See generally LEHANE, *supra* note 1; *MYSTIC RIVER*, *supra* note 2.

It is an emotionally evocative work.<sup>10</sup> Students sometimes get misty-eyed during those first scenes, and I will admit that I cried for almost an hour after viewing the movie for the first time.

The author of the book and the screenwriter trusted their audiences to see all points of view and to keep an open mind until the conclusion was revealed. Indeed, that is part of the success of this Academy Award winning screenplay.<sup>11</sup>

Our legal system, however, does not similarly trust juries to be reasonable when presented with emotionally evocative evidence. Federal Rule of Evidence 403 permits the exclusion of evidence if its probative value is outweighed by the danger of unfair prejudice.<sup>12</sup> The term “unfair prejudice” is often interpreted to mean “emotionally evocative,” and opinions regarding this rule seem to indicate that emotion itself threatens reason.<sup>13</sup> However, research indicates that emotion actually plays an important part in our reasoning.<sup>14</sup> Moreover, predicting how evidence will impact jurors involves some guesswork.

Thus, this Article proposes that judges edit their opinions regarding Federal Rule of Evidence 403 to make it clear that emotion itself is not the danger and to recognize the imperfection inherent in predicting the emotional effect of evidence on the jury. Such revisions will provide clear guidance to attorneys so that they may tell the stories that best aid their clients.<sup>15</sup> Moreover,

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<sup>10</sup> See generally LEHANE, *supra* note 1; MYSTIC RIVER, *supra* note 2.

<sup>11</sup> See generally LEHANE, *supra* note 1; MYSTIC RIVER, *supra* note 2.

<sup>12</sup> See FED. R. EVID. 403.

<sup>13</sup> See *State v. Maurer*, 770 P.2d 981, 984 (Utah 1989) (explaining that the unfair bias is often considered to be an emotional bias); see also *United States v. Gamble*, 290 F. App'x 592, 595 (4th Cir. 2008) (referring to the “risk of arousing the emotions”); *Kesterson v. Jarrett*, 704 S.E.2d 878, 885-86 (Ga. Ct. App. 2010) (referring to “prejudicing the jury with the emotional nature of the scenes”). See generally Teneille R. Brown, *The Affective Blindness of Evidence Law*, 89 DENV. U. L. REV. 47 (2011).

<sup>14</sup> See generally ANTONIO R. DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (Quill 2000) (1994).

<sup>15</sup> Cf. RUTH ANNE ROBBINS, STEVE JOHANSEN & KEN CHESTEK, *YOUR CLIENT'S STORY* 39-41 (2013) (encouraging attorneys to craft narratives); John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1248 (2006) (discussing how evidence law is “complexly ambivalent” in part because it both excludes and includes emotions).

this shift would support a more emotionally healthy society<sup>16</sup> and would also establish a more feministic approach to judicial opinions.<sup>17</sup>

Part I of this Article discusses the tension between the advice to tell stories that evoke emotion at trial and the language in opinions regarding Federal Rule 403 that suggest emotion is undesirable at trial. Part II explains the importance of emotion in both legal reasoning and storytelling. Part III discusses how courts have embraced some emotion-evoking, critically relevant evidence, but generally still seem to indicate that emotion itself is an ill to be guarded against in legal reasoning. Part IV proposes revisions to opinions regarding Rule 403. The Article then concludes that no bright line rule can address these issues but that judicial opinions themselves can provide more clarity and honesty regarding the impact of emotion on juries.

I. THERE IS A TENSION BETWEEN THE NOTION THAT ONE MUST TELL AN EMOTIONALLY EVOCATIVE STORY AT TRIAL AND THE NOTION THAT EVOKING GREAT EMOTION AT TRIAL IS UNDULY PREJUDICING.

The most effective legal story will speak to the jury's reason and emotion to convince the jury members of the client's position.<sup>18</sup> Yet the more such a story sways the emotions of the jury, the more likely it is that judges might label the components

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<sup>16</sup> Cf. APHRODITE MATSAKIS, *I CAN'T GET OVER IT: A HANDBOOK FOR TRAUMA SURVIVORS* 65-66 (2d ed. 1996) (discussing how trying to push down emotions can make them erupt even more violently); NATHANIEL BRANDEN, *THE SIX PILLARS OF SELF-ESTEEM* 90-101 (1994) (explaining that accepting our emotions including our negative emotions is the first step to healing negative emotions); ALICE MILLER, *THE DRAMA OF THE GIFTED CHILD* 9-14 (Ruth Ward trans., 1981) (explaining how creating an environment where children are not allowed to share their emotions causes later emotional problems and psychological disturbances).

<sup>17</sup> See Leubsdorf, *supra* note 15, at 1245 (explaining that evidence law values reason over emotion and thus reflects the patriarchal view of emotion as lesser); Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 129-30 (1996) (discussing how valuing reason over emotion in evidence law is an adoption of the traditional view that emotion is female and lesser); see also Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965, 1007 (2012) (explaining that emotionality is perceived as a feminine trait).

<sup>18</sup> See generally ROBBINS ET AL., *supra* note 15.

of that story as unduly prejudicial.<sup>19</sup> This conflict creates an inherent and confusing tension between the advice to tell emotionally evocative stories<sup>20</sup> and the proscription against unduly prejudicial evidence.<sup>21</sup>

Storytelling scholars have recognized that a good story, such as the one above, can make a difference in litigation.<sup>22</sup> Applied Legal Storytelling scholar Brian Foley writes, "Tell me facts and maybe I will hear a few of them. Tell me an argument and I might consider it. Tell me a story and I am yours. That is why every persuasive enterprise from the Bible to television commercials relies on story."<sup>23</sup> Professor Ken Chestek has tested this idea and performed a study where he sent two different sets of briefs to judges and had them rate which one they found more persuasive.<sup>24</sup> The briefs that were "storytelling" briefs were overwhelmingly the ones that judges found more persuasive.<sup>25</sup> Thus, legal skills scholars have lauded the role of metaphor,<sup>26</sup> the

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<sup>19</sup> See, e.g., *State v. Guthrie*, 461 S.E.2d 163, 188-89 (W. Va. 1995); *State v. Davidson*, 613 N.W.2d 606, 623 (Wis. 2000).

<sup>20</sup> See generally ROBBINS ET AL., *supra* note 15 (advising lawyers to craft legal narratives).

<sup>21</sup> See, e.g., *Guthrie*, 461 S.E.2d at 188-89; *Davidson*, 613 N.W.2d at 623; cf. Leubsdorf, *supra* note 15, at 1247 ("evidence law appears to be engaged in a peripheral and symbolic attempt to exclude emotion from trials").

<sup>22</sup> See generally ROBBINS ET AL., *supra* note 15. See Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS'N LEGAL WRITING DIRECTORS 1, 3 (2010); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459, 478-80 (2001) (discussing two parties' competing truths); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53, 60 (2008) (stating that traditional legal modalities are incomplete); Ann T. Greeley, *Understanding Jury Psychology Through Research: A Powerful Technique for Your Trial Preparation Arsenal*, BRIEF, Spring 2010, at 48, 50; see also *Old Chief v. United States*, 519 U.S. 172, 189 (1997) (explaining that jurors may understand evidence better after hearing a coherent story).

<sup>23</sup> Foley & Robbins, *supra* note 22, at 465 (citing DAVID BALL, *THEATER TIPS AND STRATEGIES FOR JURY TRIALS* 66 (1994)).

<sup>24</sup> See Chestek, *supra* note 22, at 10-18.

<sup>25</sup> *Id.* at 18-22.

<sup>26</sup> See generally Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275 (2011).



hero's journey,<sup>27</sup> endowed objects,<sup>28</sup> point of view techniques,<sup>29</sup> character development,<sup>30</sup> and more in legal narratives.

Yet, these storytelling techniques are bound to evoke any range of emotions.<sup>31</sup> This evocation of emotion was labeled by Aristotle as pathos and is one of the three forms of persuasion.<sup>32</sup> In fact, the best told stories may likely evoke emotion without the reader or listener even realizing that artful storytelling skill is at work. Therefore, scholars and judges alike are concerned regarding whether any of these emotions are unduly prejudicial.<sup>33</sup>

This issue comes under judicial scrutiny in decisions involving Federal Rule of Evidence 403.<sup>34</sup> Rule 403 permits the exclusion of evidence if its probative value is outweighed by the

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<sup>27</sup> See generally Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767 (2006).

<sup>28</sup> See generally Cathren Koehlert-Page, *Like a Glass Slipper on a Stepsister: How the One Ring Rules Them All at Trial*, 91 NEB. L. REV. 600 (2013); see also James Parry Eyster, *Lawyer as Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy*, 14 J. LEGAL WRITING INST. 87 (2008).

<sup>29</sup> See generally Cathren Koehlert-Page, *Come a Little Closer so I Can See You My Pretty: The Use and Limits of Fiction Techniques for Establishing an Empathetic Point of View in Appellate Briefs*, 80 UMKC L. REV. 399 (2011).

<sup>30</sup> See generally ROBBINS ET AL., *supra* note 15.

<sup>31</sup> See, e.g., Monica K. Miller et al., *How Emotion Affects the Trial Process*, 92 JUDICATURE 56, 57 (2008) (discussing how the testimony at the trial of Timothy McVeigh evoked tears from the jury); see also Koehlert-Page, *supra* note 28 (analyzing the use of effective storytelling techniques in the McVeigh trial).

<sup>32</sup> See generally ARISTOTLE, *THE ART OF RHETORIC* (G.P. Goold ed., John Henry Freese trans., Harvard University Press 1982) (1926); see also Marcel Becker, *Aristotelian Ethics and Aristotelian Rhetoric*, in ARISTOTLE AND THE PHILOSOPHY OF LAW: THEORY, PRACTICE AND JUSTICE 109 (Lisbeth Huppel-Cluysenaer & Nuno Coelho eds., 2013); Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85, 86-91 (1994).

<sup>33</sup> See generally Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959 (2003) (discussing the prejudicial risks of emotion in 9/11 cases); Reid Hastie, *Emotions in Jurors' Decisions*, 66 BROOK. L. REV. 991, 993 (2001); Richard M. Thompson II, *The Perfect Storm: Rule 404(b), Unequivocal Stipulations, and Old Chief's Dicta on Narrative Integrity and Evidentiary Richness*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 55 (2011); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 274 (1996). See also *Old Chief v. United States*, 519 U.S. 172 (1997); James Joseph Duane, "Screw Your Courage to the Sticking Place": *The Roles of Evidence, Stipulations, and Jury Instructions in Criminal Verdicts*, 49 HASTINGS L.J. 463 (1998).

<sup>34</sup> See FED. R. EVID. 401, 403.

danger of unfair prejudice.<sup>35</sup> Specifically, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>36</sup> If the evidence is relevant, it will prejudice the jury or juror.<sup>37</sup> Thus, prejudice itself is allowed, but unfair prejudice is problematic.<sup>38</sup> Even then, unfair prejudice is only problematic when the danger of such prejudice outweighs the probative value of the evidence.<sup>39</sup> The term “unfair prejudice” is often interpreted to mean “emotionally evocative.”<sup>40</sup>

Thus, on one hand, attorneys are supposed to tell an emotionally evocative story if they want to succeed at trial. On the other hand, they cannot present evidence that is too emotionally evocative or such evidence could be unfairly prejudicial. This standard is confusing to say the least.

## II. EMOTION IS AN INTEGRAL PART OF THE REASONING PROCESS AND IS A KEY COMPONENT IN STORYTELLING.

Despite Rule 403’s proscriptions, emotion plays an integral role in our decision-making, regardless of whether we are aware of that emotion. However, sometimes the term “emotional story” is interpreted to mean a story that uses a lot of words like “lament,” “sorrow,” or “hatred,” making the story itself seem more conclusory. However, when readers or viewers experience a truly effective story, the story is so skillful that they may be unaware of how it has aroused their emotions. Yet, an effective story will arouse the audience’s emotions. However, interpretations of Rule

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<sup>35</sup> See FED. R. EVID. 403.

<sup>36</sup> *Id.*

<sup>37</sup> See *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979).

<sup>38</sup> See *id.*

<sup>39</sup> See *Old Chief v. United States*, 519 U.S. 172 (1997).

<sup>40</sup> See *State v. Maurer*, 770 P.2d 981, 984 (Utah 1989) (explaining that the unfair bias is often considered to be an emotional bias); see also *United States v. Gamble*, 290 F. App’x 592, 595 (4th Cir. 2008) (referring to the “risk of arousing the emotions”); *Kesterson v. Jarrett*, 704 S.E.2d 878, 885-86 (Ga. Ct. App. 2010) (referring to “prejudicing the jury with the emotional nature of the scenes”). See generally *Brown*, *supra* note 13.

403 seem to imply that emotion itself impairs reasoning despite the fact that emotion and reasoning are not truly separate and despite the fact that the storyteller most effectively arouses emotion when appearing not to do so.<sup>41</sup> While the ultimate decision regarding Rule 403 in these cases might be just, the opinions' language regarding emotion provides clumsy guidance to attorneys and inaccurately captures the true role of emotion.

Nonetheless, emotions will be involved. Even judges report that cases evoke their emotions.<sup>42</sup> In many instances, it is good that emotion impacts judges. Cognitive research now indicates that the reasoning and emotional centers of our brains must actually communicate with one another for us to reach decisions.<sup>43</sup> Additionally, emotions serve an evolutionary purpose and are a part of a more compassionate and just society.<sup>44</sup> Therefore, embracing emotion as a part of legal reasoning and creating emotional awareness in legal reasoning is desirable.

*A. Some jurists may react with irritation to the term "emotion" because narratives that include terms that reference emotions, terms like "happy" or "sad," are often conclusory.*

Some legal scholars, judges, and decision-makers may react to the term "emotion" itself because it can be shorthand for a sappy and conclusory tale. However, often times stories readily labeled as "emotional" are not the kind of stories that effectively evoke emotion, other than the irritation of the reader.<sup>45</sup> These

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<sup>41</sup> The trial court has wide discretion in excluding emotional evidence, which is relevant if the judge deems that it may confuse issues or inflame the jury. See *United States v. Ravich*, 421 F.2d 1196, 1204-05 (2d Cir. 1970).

<sup>42</sup> See Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1576-82 (2012).

<sup>43</sup> See generally DAMASIO, *supra* note 14; RICHARD S. LAZARUS & BERNICE N. LAZARUS, *PASSION AND REASON: MAKING SENSE OF OUR EMOTIONS* 198-215 (1994) (discussing how emotion is inherent in the reasoning process).

<sup>44</sup> See generally LAZARUS & LAZARUS, *supra* note 43, at 199-205 (discussing how emotion is inherent in the reasoning process); MATSAKIS, *supra* note 16 (discussing how fear is an evolutionary response that protects us); Brown, *supra* note 13, at 47-48 (discussing how we should not wish for our judges to be psychopathic); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1576 (1987) (making the case for empathy in legal reasoning).

<sup>45</sup> See Tim Wynne-Jones, *Ten Questions to Ask a Novel Revision*, TIMWYNNIE-JONES.COM, <http://www.timwynne-jones.com/pages/tenquestions.html> (last visited Feb.

stories reference terms that signify emotion.<sup>46</sup> For instance, the following testimony contains several terms that tell us how the witness feels: “Oh God we miss her. I keep on reliving the last minutes of her beautiful life. We could not help her . . . How much did our Tracy suffer? Our lives are destroyed by the loss . . . our hearts went with her.”<sup>47</sup> Words like “miss,” “beautiful,” “suffer,” “destroyed,” “loss,” and “hearts went with her,” explain an overall impression or feeling. Readers might picture the witness from outside, but many readers still may not experience these feelings for themselves upon reading the words. Various fiction-writing experts have criticized this type of storytelling.<sup>48</sup>

*B. In contrast, readers or viewers may be less likely to be aware of the emotions aroused in a more effective emotionally evocative narrative.*

Readers or viewers might not be as readily aware of the techniques used to evoke emotion in a story that effectively does so. A gifted storyteller will often evoke feelings from the audience by showing them an experience, rather than telling.<sup>49</sup> In fact, research tends to support this literary truism.<sup>50</sup> In one study of mock trials, one group of jurors was shown photographs of a permanent injury, whereas others were simply told about the

15, 2015) (discussing the use of emotion signifying words such as “angry and hurt” do not have as much effect as letting the reader see how the character feels through actions or words since such words are too abstract to evoke feelings on their own); Tim Wynne-Jones, MFA in Writing for Children & Young Adults Lecture: Tell It Slant (July 2006) (explaining that words like love do not capture emotional “quicksilver” the way that objective correlative does) [hereinafter Speech].

<sup>46</sup> See *supra* note 45.

<sup>47</sup> Miller et al., *supra* note 31, at 56.

<sup>48</sup> See, e.g., ORHAN PAMUK, THE NAIVE AND THE SENTIMENTAL NOVELIST 104-18 (Nazim Dikbas trans., 2010); Speech, *supra* note 45 (explaining that words like love do not capture emotional “quicksilver” the way that objective correlative does); see also Cathren Kochlert-Page, *A Look Inside the Butler’s Cupboard: How the External World Reveals Internal State of Mind in Legal Narratives*, 69 N.Y.U. ANN. SURV. AM. L. 441 (2013).

<sup>49</sup> See Greeley, *supra* note 22, at 51 (explaining that jurors want to be shown evidence rather than be told what to conclude); ROBERT MCKEE, STORY 199, 334-35, 345, 370 (1997).

<sup>50</sup> See Miller et al., *supra* note 31, at 57.

injury.<sup>51</sup> The group that was shown photographs awarded a higher amount of damages.<sup>52</sup>

In fiction, emotion and state of mind can be shown and evoked without using emotion-signifying words.<sup>53</sup> For example, in the novel *SOLD* by Patricia McCormick, Lakshmi has been sold into prostitution.<sup>54</sup> One day, an American man pays to see her. Instead of wanting sex, the man tells her that if she is being kept against her will she can be free.<sup>55</sup> Her madam has told her that Americans will sometimes trick a woman into escaping so that they can later shame her in the streets, so Lakshmi refuses him.<sup>56</sup> Regardless, he gives her his card.<sup>57</sup>

It is a small thing, flimsy and light, but I know it is enough to earn me a beating if Mumtaz or Shilpa sees it.

If I put it in the trash in the kitchen, the others will see.

If I throw it out the window, Mumtaz might see.

And so I take this dangerous card and hide it under the mat on the floor.

Until I can think of a better way to get rid of it.<sup>58</sup>

McCormick could have told us what Lakshmi was thinking and feeling by saying instead, "I am desperate to escape from this brothel, but I am terrified that all of the threats that have been made to me are true. Still, I do not want to give up on escape just yet. So I am going to hold on to this card until I can determine the truth. But I am afraid to even admit any of these things to myself because I am so confused." This conclusory passage would not reproduce Lakshmi's experience; nor would it be as likely to evoke feeling in the reader. Telling us how Lakshmi feels is not as convincing as showing us.

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<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See Wynne-Jones, *supra* note 45.

<sup>54</sup> See PATRICIA MCCORMICK, *SOLD* 48, 52-54, 74-75, 102-07 (2006).

<sup>55</sup> See *id.* at 203-05.

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> *Id.* at 206.

Similarly, an emotionally evocative legal narrative will burrow into showing details in chronological order so that the story unfolds as though the reader was there.<sup>59</sup> For example, in *Rousan v. Roper*, the court burrowed into key details when describing the killing of the elderly Charles and Grace Lewis.<sup>60</sup> Thus, the opinion may evoke emotion without ever using terms like “sad,” “suffer,” “loss,” or “horror.”

[William] Rousan, his son, Brent . . . and his brother, Robert . . . decided to steal cattle from . . . Charles and Grace Lewis.

Rousan parked the truck approximately two miles from the Lewis farm. . . . The three men then approached on foot to within viewing distance of the Lewis residence and sought cover behind a fallen tree.

The three men lay in wait until the Lewises returned to their residence that afternoon. Charles Lewis mowed the lawn, while Grace Lewis talked on the phone to the couple's daughter. Brent became impatient and said he wanted to “do it.” Rousan instructed Brent to remain behind the tree while he and Robert secured the house. Before Rousan reached the house, however, Charles Lewis spotted Brent and shouted at him. Brent shot Charles Lewis six times with the rifle, causing his death. Inside the house, Grace Lewis told her daughter on the phone that she heard gunfire and hung up. When Grace ran out the front door to investigate, Brent shot her several times, fracturing both of her arms. Grace turned and ran back into the house. Rousan followed. Rousan placed a garment bag over Grace's head and the upper part of her body, picked her up, carried her back outside and placed her on the ground. At that point, Grace was still alive. Rousan instructed Brent to “finish her off.” Brent fired one shot into Grace's head. That shot was fatal.<sup>61</sup>

Without ever using words like “disturbing,” the court managed to convey what might be a disturbing or upsetting story

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<sup>59</sup> See Koehlert-Page, *supra* note 29, at 416.

<sup>60</sup> See *Rousan v. Roper*, 436 F.3d 951 (8th Cir. 2006).

<sup>61</sup> *Id.* at 954-55.

in the narrative above.<sup>62</sup> The court slowly builds up to the killing itself by beginning with the plan to steal the cattle and building suspense as the men park and lay in wait.<sup>63</sup> From there, the story unfolds in small pieces as the men secure the house and are spotted by Charles Lewis.<sup>64</sup>

Some of the key details in the narrative establish empathy.<sup>65</sup> Charles Lewis is mowing the lawn, and his wife is on the phone with her daughter.<sup>66</sup> Thus, Charles and Grace Lewis are all of us or our parents or our neighbors.<sup>67</sup> They are doing those things that we might all ordinarily do in our day, so we can identify with them.<sup>68</sup>

Having identified with the Lewises, as readers, we then feel the impact of what comes next as the court includes disturbing key details. Brent shoots Charles six times.<sup>69</sup> Grace's death is more drawn out, and so the readers' emotions are drawn out as well.<sup>70</sup> Brent shoots her several times fracturing her arms.<sup>71</sup> When Grace runs back to the house,<sup>72</sup> readers might feel some desperation in her attempt at escape along with some hope that she might make it. Then Rousan places Grace in the garment bag.<sup>73</sup> At that point, some readers may be imagining what it might feel like to be stuffed inside a garment bag while suffering bullet wounds and fractures. The court drives that last moment home by telling readers that Grace was still alive.<sup>74</sup>

Not only do these details establish empathy, but they also foster a sense of verisimilitude. The scene seems real, and the concrete details that all seem to fit so well together establish credibility.

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<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See id.* at 961-62.

<sup>66</sup> *See id.* at 955.

<sup>67</sup> *Cf. id.*

<sup>68</sup> *Cf. id.*

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> *See id.*

<sup>73</sup> *See id.*

<sup>74</sup> *See id.* at 955, 962.

Yet, this narrative includes just the facts without embellishment. Some readers may simply react to the wrongness of the killing without being aware of their own emotions or at least being unaware that narrative skill was used to include and arrange the facts in a manner that would evoke emotion.

*C. Judges and jurors may sometimes be unaware of how they are impacted by emotion.*

If a storyteller uses subtle techniques like those in the *Rousan* opinion, the audience members may not realize that the storytelling techniques impacted their feelings. In fact, in the example above regarding photographs' effect on juror decision-making, the jurors reported that the photographs did not influence them despite the fact that their verdict differed from that of the other jury.<sup>75</sup> Like these jurors, other decision-makers who experience emotions after hearing a skillfully told story are likely to believe that these feelings were arrived at independently. In fact, audience members with less awareness of their own emotional states may not even realize that emotions play a role in their opinions at all. The same lack of awareness may be true with respect to judges.

In fact, a myth of the unemotional judge or juror seems to permeate our legal system.<sup>76</sup> As Professor Terry Maroney points out, going back as far as the 1600s, Thomas Hobbes asserted that the "ideal judge is divested 'of all fear[], anger, hatred, love, and compassion.'"<sup>77</sup> This sentiment lingers on as Justice Sonia Sotomayor testified in "her Supreme Court confirmation hearing that judges 'apply law to facts. We don't apply feelings to facts.'"<sup>78</sup> Indeed, the notion that she would have to testify about her emotional detachment to qualify as a justice reveals what our system expects of our judges.

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<sup>75</sup> See Miller et al., *supra* note 31, at 57.

<sup>76</sup> See Brown, *supra* note 13, at 60-61; Chin, *supra* note 42, at 1580-81; see also Leubsdorf, *supra* note 15, at 1245 (explaining that our system in some ways gives homage to valuing reason over emotion).

<sup>77</sup> Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 630-31 (2011) (quoting THOMAS HOBBS, *LEVIATHAN* 203 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651)).

<sup>78</sup> *Id.*



In fact, the state of emotional detachment is in and of itself an emotional state.<sup>79</sup> It is not truly an emotionless state, but rather a state without empathy for the emotions of others.<sup>80</sup> The person experiencing the state may still feel his or her own emotions.<sup>81</sup> These are simply divorced from empathy for other people's emotions.<sup>82</sup>

Some judges do acknowledge that they experience emotions when they engage in legal reasoning.<sup>83</sup> Some note a tension between the choice of being emotionally chaotic and being detached.<sup>84</sup>

Either you're going to remain a decent person and become terribly upset by it all because your emotions—because your feelings are being pricked by all of this constantly or you're going to become—you're going to grow a skin on you as thick as a rhino, in which case I believe you're going to become an inadequate judicial officer because once you lose the human—the feeling for humanity you can't really—I don't believe you can do the job.<sup>85</sup>

Ninth Circuit Chief Judge Alex Kozinski tells the story of how he balanced the concerns above in two cases that evoked strong emotions in him.<sup>86</sup> He examined his emotions, channeled them, and integrated them into his decision.<sup>87</sup>

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<sup>79</sup> Cf. MARTHA STOUT, *THE SOCIOPATH NEXT DOOR* 52-63 (2005) (describing the process by which people detach from other human beings and explaining that the process can be catalyzed by fear).

<sup>80</sup> *See id.*

<sup>81</sup> *See id.*

<sup>82</sup> *See id.*

<sup>83</sup> *See generally* RICHARD A. POSNER, *HOW JUDGES THINK* 119 (2008); Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485, 1493 (2011).

<sup>84</sup> *See generally* POSNER, *supra* note 83.

<sup>85</sup> Sharyn Roach Anleu & Kathy Mack, *Magistrates' Everyday Work and Emotional Labour*, 32 J.L. & SOC'Y 590, 612, 614 (2005) (asserting that judges' emotional labor also is monitored by the public and lawyers, and sometimes by higher courts); *see also* Maroney, *supra* note 83, at 1500, 1555.

<sup>86</sup> *See* Maroney, *supra* note 83, at 1497-98.

<sup>87</sup> *See id.*

Thus, most audiences will experience some emotion upon making a decision even when they are not aware of it.<sup>88</sup> Some audience members may feel the emotion of detachment, but they are still electing one emotion over another.<sup>89</sup>

*D. Nonetheless, emotion is an integral part of our reasoning.*

Emotion is inherently tied to our thinking and reasoning, and it works upon the human animal even when we are unaware of it.<sup>90</sup> Emotions influence both what people reason about and how they reason.<sup>91</sup> People require emotion to make decisions.<sup>92</sup> For instance, neuroscientist Antonio Damasio tells the story of a patient, Elliot, whose rational frontal cortex was cut off from the emotional parts of his brain after a tumor was removed.<sup>93</sup> Elliot was no longer able to make the most minor decisions, such as which day to schedule an appointment.<sup>94</sup> He could not hold a steady job, and his wife and children left him.<sup>95</sup>

*E. A legal system with emotional awareness forms part of the foundation of a compassionate society.*

Therefore, we know that emotion will play a role in a decision; moreover, emotion's role is not inherently bad.<sup>96</sup> Rather, the harm comes from emotion that is without reasonable

<sup>88</sup> See Kari Edwards & Tamara S. Bryan, *Judgmental Biases Produced by Instructions to Disregard: The (Paradoxical) Case of Emotional Information*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 849, 850-51 (1997); see also Brown, *supra* note 13, at 66-67.

<sup>89</sup> Dispassion is not apathy. Apathy is a lack of feeling emotion, interest, or concern. Dispassion is being unaffected by passion, emotion, or bias rather than the lack of such traits.

<sup>90</sup> See Brown, *supra* note 13, at 47 (pointing out the old belief that we think with our brains and feel with our heart); see also Bhismadev Chakrabarti & Simon Baron-Cohen, *In the Eyes of the Beholder: How Empathy Influences Emotion Perception*, in THE SCIENCE OF SOCIAL VISION 216, 216 (Reginald B. Adams, Jr. et al. eds., 2011).

<sup>91</sup> See generally DAMASIO, *supra* note 14.

<sup>92</sup> See *id.*

<sup>93</sup> See *id.* at 35; see also ROBBINS ET AL., *supra* note 15, at 27-28.

<sup>94</sup> See DAMASIO, *supra* note 14, at 36-37.

<sup>95</sup> See *id.* at 37.

<sup>96</sup> See LAZARUS & LAZARUS, *supra* note 43, at 199-205 (discussing how emotion is inherent in the reasoning process).

foundation or emotion not channeled towards reasonable solutions.<sup>97</sup>

In fact, a high level of emotional awareness can be a desirable trait in a judge. For instance, Judge Denny Chin notes that judges cannot be completely removed from their emotions and that judges, in fact, receive and read multiple emotionally evocative letters pertaining to their cases.<sup>98</sup> Chin writes:

We were selected to be judges [or jurors] because of our experiences in life, and because of the wisdom, good judgment, and sense of justice that hopefully we have developed as a result of those experiences. It would make no sense for us to set aside these attributes once we reach the bench.<sup>99</sup>

Chin is correct that emotion can be a good thing. Empathy spurs people to help the poor, take care of the sick, and rescue the wounded.<sup>100</sup> In fact, evolutionary psychologists contend that our emotions exist to preserve our own survival.<sup>101</sup> If we feel no fear, then we have little incentive to protect ourselves from death.<sup>102</sup> Likewise, joy can play a role in motivating us to exercise, eat certain desirable foods, and seek sunlight.<sup>103</sup> Love, compassion, attachment, and empathy can spur us to form social and familial bonds that further our survival as well.<sup>104</sup> Our friends, family, and

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<sup>97</sup> See *id.* at 200-01 (discussing how emotion that is not processed can lead to impulsive behavior and crimes).

<sup>98</sup> See Chin, *supra* note 42, at 1580-81.

<sup>99</sup> *Id.* at 1565.

<sup>100</sup> See LAZARUS & LAZARUS, *supra* note 43, at 116-29.

<sup>101</sup> See *id.*; see also Barbara L. Fredrickson, *The Broaden-and-Build Theory of Positive Emotions*, 359 PHIL. TRANSACTIONS 1367, 1367-68 (2004) (discussing evolutionary foundations of various emotions).

<sup>102</sup> See Mary C. Lamia, *The Complexity of Fear*, PSYCHOL. TODAY (Dec. 15, 2011), <http://www.psychologytoday.com/blog/intense-emotions-and-strong-feelings/201112/the-complexity-fear> ("The emotion of fear is felt as a sense of dread, alerting you to the possibility that your physical self might be harmed, which in turn motivates you to protect yourself.")

<sup>103</sup> See MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* 179 (1990); cf. Fredrickson, *supra* note 101, at 1369 (discussing how joy can motivate playing and creativity).

<sup>104</sup> See LAZARUS & LAZARUS, *supra* note 43, at 116-18.

colleagues help us to build better shelter, accomplish more work, and obtain better resources than we would on our own.<sup>105</sup>

The particular emotional state mistaken for an emotionless state, detachment, can in some instances be a bad thing for society.<sup>106</sup> Detachment from others is a trait of sociopathy.<sup>107</sup> Indeed, serial killers frequently have some form of attachment disorder or sociopathy.<sup>108</sup> Although not all sociopaths are serial killers, their disorder is associated with various other criminal activities or a lack of humanitarianism.<sup>109</sup>

Thus, it would seem odd that we would wish our judges or jurors to emulate the emotional state of a sociopath.<sup>110</sup> Indeed, the idea of an adversarial legal system seems to carry within it the concept of two competing points of view, for each of which the litigants seek empathy.<sup>111</sup>

Nonetheless, certain other emotional consequences could be problematic for the decision-maker as well. A decision maker who reacts based on emotion before hearing the full story is not fair. Moreover, a decision-maker who is so angry or depressed that he or she fails to devise a fair solution is not only being unfair but is also likely making a potentially destructive decision.

Therefore, while emotion in and of itself is not bad and can even be good, reason and principles of fairness must still come into the decision as well. Therefore, law professor Teneille Brown advocates for a more nuanced approach to emotion in legal

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<sup>105</sup> See *id.* at 118.

<sup>106</sup> See generally DAMASIO, *supra* note 14.

<sup>107</sup> See STOUT, *supra* note 79, at 7 (explaining that sociopaths have no genuine interest in emotionally bonding and that their proclaimed affection is “hallow and transient” in nature); see also Brown, *supra* note 13, at 47 (discussing detachment as a trait of psychopathy); LAZARUS & LAZARUS, *supra* note 43, at 126 (mentioning that society refers to a person with no compassion or empathy as a sociopath).

<sup>108</sup> See JAMES ALAN FOX & JACK LEVIN, *EXTREME KILLING: UNDERSTANDING SERIAL AND MASS MURDER* 62-64 (2005). See generally STOUT, *supra* note 79.

<sup>109</sup> See generally STOUT, *supra* note 79 (discussing sociopaths who manipulate, steal, torture animals, and lie about coworkers). See also *Inside the Mind of a Sociopath*, NPR (June 19, 2013, 11:55 AM), <http://www.npr.org/2013/06/19/193099258/inside-the-mind-of-a-sociopath> (discussing the ability of sociopath to function in society).

<sup>110</sup> See Brown, *supra* note 13, at 47-48. Professor Brown contends that we should not wish for jurists to emulate psychopaths.

<sup>111</sup> See Kahan & Nussbaum, *supra* note 33, at 274.

decision-making.<sup>112</sup> She calls for an evidentiary approach that recognizes that emotion is not always improperly biasing and that reason and emotion are interdependent.<sup>113</sup> The opinions on Rule 403 themselves could reflect a more nuanced view of the role of emotion than they currently do.

III. ALTHOUGH FEDERAL RULE 403 OUTCOMES THEMSELVES REVEAL THAT EMOTIONALLY EVOCATIVE EVIDENCE IS NOT INHERENTLY A PROBLEM, THE LANGUAGE OF OPINIONS EXCLUDING SUCH EVIDENCE SEEMS TO SUGGEST THAT IT IS.

Unfortunately, the courts' opinions regarding Federal Rule of Evidence 403 seem to contradict each other and indicate that great emotion itself is the danger.<sup>114</sup> On the one hand, some courts seem to embrace evidence that evokes emotion around a relevant consideration.<sup>115</sup> Moreover, some legal standards even seem to call for an emotional reaction; for instance, "outrageous conduct" seems to imply that the fact-finders themselves might react with some indignation.<sup>116</sup> However, at times, the courts seem to label emotionally evocative evidence as the danger.<sup>117</sup> While these opinions can be reconciled based on the facts and the outcomes,

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<sup>112</sup> See *Brown*, *supra* note 13, at 128-29.

<sup>113</sup> See *id.* at 129-30.

<sup>114</sup> See, e.g., *United States v. Hernandez*, 975 F.2d 1035, 1041 (4th Cir. 1992) (stating that Rule 403 limits "jury emotionalism or irrationality" (quoting *United States v. Greenwood*, 796 F.2d 49, 53 (4th Cir. 1986))).

<sup>115</sup> See, e.g., *United States v. Kelly*, 722 F.2d 873, 878 (1st Cir. 1983) (holding that evidence regarding revenge remarks was admissible to prove the fear element of extortion); *State v. Smith*, 857 S.W.2d 1, 6-7 (Tenn. 1993) (admitting testimony about a pool of blood over a Rule 403 objection); cf. *Leubsdorf*, *supra* note 15, at 1246 (providing instances where evidence law "prizes passion").

<sup>116</sup> RESTATEMENT (SECOND) OF TORTS § 46 cmt. (1965) ("Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'); *Croom v. Younts*, 913 S.W.2d 283, 286 (Ark. 1996) (describing the outrageous conduct standard in Arkansas).

<sup>117</sup> See, e.g., *Hernandez*, 975 F.2d at 1041 (stating that Rule 403 limits "jury emotionalism or irrationality" (quoting *Greenwood*, 796 F.2d at 53)).

they provide unclear guidance<sup>118</sup> and could reflect a more accurate and healthier view regarding the role of emotions.<sup>119</sup>

*A. Where the legal standard involves proof of an emotional state or the issue at stake is inherently emotional, courts will typically admit critically relevant, emotionally evocative evidence without mentioning emotion.*

Courts will typically admit relevant emotion evoking evidence over a Rule 403 objection where the legal standard itself includes either an emotional consideration or state of mind.<sup>120</sup> Additionally, even when the legal standard does not include an emotional consideration or state of mind, courts will sometimes admit emotionally evocative evidence.<sup>121</sup> In particular, sometimes the evidence required to prove elements of causes of action like murder or rape will be inherently emotionally charged.<sup>122</sup> Sometimes in these cases, the courts do not mention the “e-word,” emotion, at all, despite the fact that the evidence is likely to arouse emotions.<sup>123</sup>

Some cases call for evidence regarding emotional states, such as fear, and the courts lean towards allowing emotion-evoking

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<sup>118</sup> Cf. Leubsdorf, *supra* note 15, at 1248 (discussing how evidence law is “complexly ambivalent” in part because it both excludes and includes emotions).

<sup>119</sup> Cf. MATSAKIS, *supra* note 16, at 65-66 (discussing how trying to push down emotions can make them erupt even more violently); BRANDEN, *supra* note 16, at 90-101 (explaining that accepting our emotions including our negative emotions is the first step to healing negative emotions); MILLER, *supra* note 16, at 9-14 (explaining how creating an environment where children are not allowed to share their emotions causes later emotional problems and psychological disturbances).

<sup>120</sup> See, e.g., *Kelly*, 722 F.2d at 878 (holding that evidence regarding revenge remarks was admissible to prove the fear element of extortion).

<sup>121</sup> See, e.g., *State v. Smith*, 857 S.W.2d 1, 6-7 (Tenn. 1993) (admitting testimony about a pool of blood over a Rule 403 objection).

<sup>122</sup> See, e.g., *id.* (admitting testimony about the pool of blood found at a murder scene in a case for murder); *United States v. Wexler*, 79 F.2d 526, 529-30 (2d Cir. 1935) (observing that in a criminal trial, it is impossible to expect those involved not to show some sort of feeling since the stakes in such cases are so high and the participants are charged with emotions); see also Leubsdorf, *supra* note 15, at 1247 (explaining the ways in which various cases are emotionally charged).

<sup>123</sup> See, e.g., *Smith*, 857 S.W.2d at 6-7 (admitting testimony about the pool of blood found at a murder scene in a case for murder).

testimony into evidence in such scenarios.<sup>124</sup> Thus, where fear is a factor in determining whether an element of a claim is met, the courts may admit emotion-evoking testimony.<sup>125</sup> For example, in *United States v. Kelly*, the court admitted evidence of fear to prove that witnesses acted because they were afraid of Senator Kelly.<sup>126</sup> In *Kelly*, Senator James Kelly was being prosecuted for extortion under the Hobbs Act, section 1951 of Title 18.<sup>127</sup> Under the act, "extortion" was defined to include "the obtaining of property from another . . . induced by . . . fear."<sup>128</sup> The state presented evidence that that victim was afraid that the Senator could cause problems for the victim's business.<sup>129</sup> The victim testified that one of Senator Kelly's pet expressions was that he and his Irish friends did not get mad—they got even.<sup>130</sup> Since fear was relevant to the determination of extortion, the court held that this testimony was not more prejudicial than probative.<sup>131</sup>

Similarly, where proof of an emotional state provides evidence of a legal issue, the evidence regarding the emotion is typically admitted. For example, while it is not strictly necessary to prove an emotional state to demonstrate lack of credibility, proof of an emotional state can sometimes provide evidence regarding credibility. For instance, in *United States v. Keys*, the court admitted evidence of fear to prove witnesses lacked credibility because they were afraid.<sup>132</sup> In that case, the defendant, Michael Keys, was a prison inmate convicted of knowingly possessing a weapon while in prison.<sup>133</sup> Upon transferring Keys to another part of the prison, officers performed a routine search of his possessions, including his pillowcase, and found a "shank," which is "a razor blade melted into a toothbrush

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<sup>124</sup> See, e.g., *Kelly*, 722 F.2d at 878 (holding that evidence regarding revenge remarks was admissible to prove the fear element of extortion).

<sup>125</sup> See, e.g., *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See *id.* at 874.

<sup>128</sup> *Id.* at 875 (quoting 18 U.S.C. § 1951(b)(2) (2012)).

<sup>129</sup> See *id.* at 877.

<sup>130</sup> See *id.*

<sup>131</sup> See *id.* at 878.

<sup>132</sup> See *United States v. Keys*, 899 F.2d 983, 987 (10th Cir. 1990).

<sup>133</sup> See *id.* at 985.

handle to form a knife."<sup>134</sup> In defense of his charge, to prove that he did not knowingly possess the weapon, Keys presented the testimony of the range orderly and Keys's cellmate that Keys had left his pillowcase and other items behind and that they had gathered the items and given them to Keys.<sup>135</sup> However, the prosecution attacked these witnesses' credibility with evidence of Key's statement that he controlled sixty "soldiers" in the prison who would do favors for him, including breaking the law.<sup>136</sup> The Tenth Circuit determined that the relevance of this evidence outweighed any prejudice because the evidence demonstrated that the witnesses could be testifying out of fear.<sup>137</sup>

In other instances, courts seem to allow emotion-evoking testimony into evidence where it proves a person's state of mind, even if that state of mind itself is not explicitly labeled as an emotional state.<sup>138</sup> For example, in *United States v. Cockerham*, the court allowed in description of a neck wound in part to illustrate that a defendant was not insane.<sup>139</sup> In that case, the defendant, James Cockerham, stipulated to all of the facts of the murder, did not contest them, and presented an insanity defense.<sup>140</sup> The prosecution put on evidence that the defendant had murdered a seven year old girl.<sup>141</sup> The girl was exsanguinated from a deep slash across the neck.<sup>142</sup> She had also been strangled and scalded and had suffered a bash on the skull and injuries from a sexual assault.<sup>143</sup> The defendant argued that certain evidence, such as the detailed description of the girl's neck wound, was unfairly prejudicial, particularly given the stipulations.<sup>144</sup> The court acknowledged sympathy with all parties and even questioned the advisability of admitting the description.<sup>145</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> *See id.* at 985-86.

<sup>136</sup> *See id.* at 986.

<sup>137</sup> *See id.* at 987.

<sup>138</sup> *See, e.g.,* *United States v. Cockerham*, 476 F.2d 542 (D.C. Cir. 1973).

<sup>139</sup> *See id.* at 545.

<sup>140</sup> *See id.* at 543.

<sup>141</sup> *See id.*

<sup>142</sup> *See id.*

<sup>143</sup> *See id.*

<sup>144</sup> *See id.* at 545.

<sup>145</sup> *See id.*



However, the court held that as a whole the trial court did not abuse its discretion in allowing the evidence because it tended to both “establish elements of the crime and to show[] circumstantially that [the defendant] perpetrated the crime in a manner inconsistent with his defense of insanity.”<sup>146</sup> Thus, the probative value of the evidence “sufficiently outweighed the danger of unfair prejudice to justify its admission.”<sup>147</sup>

Likewise, when elements of proof involve inherently emotionally evocative subject matter, courts will admit emotionally arousing evidence.<sup>148</sup> For example, in murder cases, the question of whether the person was killed does not call for an emotional determination. However, the proof of this element is likely to arouse emotions.<sup>149</sup> For instance, in *State v. Smith*, the court held Rule 403 did not require exclusion of evidence regarding a pool of blood in a murder trial.<sup>150</sup> In that case, the defendant, Leonard Smith, was tried for the murder of a shopkeeper’s wife, Mrs. Webb.<sup>151</sup> On direct examination, the sheriff testified that the “small country store [was] in disarray, a lot of blood, things moved around. At the end of the counter . . . there was a pooling of coagulated blood and just general disarray.”<sup>152</sup> He further stated that, when he searched for the bullet, he measured the blood and that it was “about an inch deep.”<sup>153</sup> Other witnesses testified regarding the blood as well.<sup>154</sup> The court held that the evidence regarding the blood had probative value “essential to the State’s case and was not in any manner gruesome or inflammatory.”<sup>155</sup>

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<sup>146</sup> See *id.*

<sup>147</sup> See *id.*

<sup>148</sup> See, e.g., *State v. Smith*, 857 S.W.2d 1, 6-7 (Tenn. 1993).

<sup>149</sup> See generally Susan A. Bandes, *Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty*, 33 VT. L. REV. 489 (2009) (mentioning that murder can sometimes arouse emotions).

<sup>150</sup> See *Smith*, 857 S.W.2d at 7.

<sup>151</sup> See *id.* at 4-5.

<sup>152</sup> *Id.* at 6.

<sup>153</sup> *Id.*

<sup>154</sup> See *id.*

<sup>155</sup> See *id.* at 7.

In all of these cases, the evidence could likely arouse emotions.<sup>156</sup> However, the courts allowed the evidence in over objections regarding unfair prejudice and made little or no mention of the emotional impact of the evidence.<sup>157</sup> While emotion was either a part of the standard itself or inherent to the particular cause of action,<sup>158</sup> some could find a subtext in the courts' silence regarding emotion. Some might argue it is as though emotion is so frowned upon in legal reasoning that the courts might not want to acknowledge it.

*B. When excluding evidence due to the risk of unfair prejudice, the courts often label the emotionally evocative nature of the evidence as the problem.*

The opinions above allowing emotionally evocative evidence and the opinions excluding such evidence create confusion that needs to be resolved with more nuanced language in the opinions. When courts exclude evidence based on Rule 403's proscription against unfair prejudice, they often seem to indicate that emotion is a danger to be guarded against in legal reasoning.<sup>159</sup> Nonetheless, the evidence in the cases above seems emotionally evocative.<sup>160</sup> Additionally, the advice to tell a good story, one which will appeal to pathos, seems prevalent.<sup>161</sup> Thus, there seems to be tension between the opinions allowing emotionally

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<sup>156</sup> See generally *United States v. Keys*, 899 F.2d 983 (10th Cir. 1990); *State v. Smith*, 857 S.W.2d 1 (Tenn. 1993); *United States v. Cockerham*, 476 F.2d 542 (D.C. Cir. 1973); *United States v. Kelly*, 722 F.2d 873 (1st Cir. 1983).

<sup>157</sup> See *Keys*, 899 F.2d at 987; *Smith*, 857 S.W.2d at 7; *Cockerham*, 476 F.2d at 545; *Kelly*, 722 F.2d at 878.

<sup>158</sup> See *Keys*, 899 F.2d at 987; *Smith*, 857 S.W.2d at 7; *Cockerham*, 476 F.2d at 545; *Kelly*, 722 F.2d at 878.

<sup>159</sup> See *Leubsdorf*, *supra* note 15, at 1254; *Brown*, *supra* note 13, at 48; see, e.g., *State v. Guthrie*, 461 S.E.2d 163, 188-89 (W. Va. 1995).

<sup>160</sup> See generally *United States v. Keys*, 899 F.2d 983 (10th Cir. 1990); *State v. Smith*, 857 S.W.2d 1 (Tenn. 1993); *United States v. Cockerham*, 476 F.2d 542 (D.C. Cir. 1973); *United States v. Kelly*, 722 F.2d 873 (1st Cir. 1983).

<sup>161</sup> See generally *ROBBINS ET AL.*, *supra* note 15; *Chestek*, *supra* note 22. See *Foley & Robbins*, *supra* note 22, at 478-80 (discussing two parties' competing truths); *Rideout*, *supra* note 22, at 60 (stating that traditional legal modalities are incomplete); *Greeley*, *supra* note 22, at 50; see also *Old Chief v. United States*, 519 U.S. 172, 189 (1997) (explaining that jurors may understand evidence better after hearing a coherent story).

arousing evidence,<sup>162</sup> the advice to tell a story,<sup>163</sup> and the opinions excluding emotionally evocative evidence.<sup>164</sup> Although the facts and outcomes of the opinions excluding the emotionally evocative evidence reveal how these conflicting authorities can be reconciled, the opinions themselves need to be clearer.<sup>165</sup> Emotion itself is not the culprit. Rather, the problem arises when marginally relevant evidence is likely to arouse extreme emotions regarding irrelevant considerations.

Moreover, not only do these opinions seem to suggest that emotion itself is not the culprit, but the opinions also could be more transparent regarding the speculative nature of the courts' assessment regarding how likely the evidence is to overwhelm the jurors with emotions. We cannot truly be certain what will trigger emotions in a given individual. In some instances, an individual's emotions may be informative.<sup>166</sup>

Nonetheless, authority regarding Federal Rule of Evidence 403 labels emotion as an ill to be guarded against. The advisory committee noted that evidence should be excluded when it "entail[s] risks . . . [of] inducing decision on a purely emotional basis."<sup>167</sup> To exclude the evidence due to unfair prejudice, the defendant must demonstrate that:

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<sup>162</sup> See generally *United States v. Keys*, 899 F.2d 983 (10th Cir. 1990); *State v. Smith*, 857 S.W.2d 1 (Tenn. 1993); *United States v. Cockerham*, 476 F.2d 542 (D.C. Cir. 1973); *United States v. Kelly*, 722 F.2d 873 (1st Cir. 1983).

<sup>163</sup> See *Old Chief*, 519 U.S. at 189 (explaining that jurors may understand evidence better after hearing a coherent story).

<sup>164</sup> See, e.g., *Guthrie*, 461 S.E.2d at 188-89; *State v. Davidson*, 613 N.W.2d 606, 623 (Wis. 2000).

<sup>165</sup> Compare *Guthrie*, 461 S.E.2d at 188-89 (excluding evidence regarding defendant's prejudices because it might sway the jury), and *United States v. Layton*, 767 F.2d 549, 556 (9th Cir. 1985) (excluding a tape of the last hour of a suiciding group's life), with *Kelly*, 722 F.2d at 878 (admitting evidence to meet fear element of the claim).

<sup>166</sup> See *Fredrickson*, *supra* note 101, at 1367-68 (discussing evolutionary foundations of various emotions); *LAZARUS & LAZARUS*, *supra* note 43, at 198-215; *MATSAKIS*, *supra* note 16, at 3 (discussing how fear is an evolutionary response that protects us); *Brown*, *supra* note 13, at 48 (discussing how we should not wish for our judges to be sociopathic); *Henderson*, *supra* note 44, at 1576 (making the case for empathy in legal reasoning).

<sup>167</sup> FED. R. EVID. 403 advisory committee's note.

the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.<sup>168</sup>

When courts do decide to exclude evidence due to unfair prejudice, they often speculate as to the impact that emotionally evocative evidence will have on the jury.<sup>169</sup> In particular, the courts may guess at the personal emotions specific to individual jurors based on things such as the juror's race or sex.<sup>170</sup> For example in *State v. Guthrie*, the court overturned a first degree murder conviction because the unfair prejudice of evidence regarding the defendant's bigotry and sexism outweighed the relevance.<sup>171</sup> In that case, the defendant stabbed his co-worker, Steven Todd Farley, in the neck and killed him.<sup>172</sup> Farley and Guthrie worked together as dishwashers at Danny's Rib House.<sup>173</sup> On the night of the killing, the victim was teasing the defendant who seemed to be disgruntled.<sup>174</sup> Farley told Guthrie to "lighten up."<sup>175</sup> He snapped the dish towel at the defendant a few times.<sup>176</sup> It flipped the defendant on the nose.<sup>177</sup> Guthrie became enraged.<sup>178</sup> He removed his gloves and started towards Farley.<sup>179</sup> Farley responded, "Ooo, he's taking his gloves off."<sup>180</sup> Guthrie drew a knife from his pocket and stabbed Farley in the neck.<sup>181</sup> As Farley fell to the floor, Guthrie stabbed him again in the arm.<sup>182</sup>

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<sup>168</sup> *Davidson*, 613 N.W.2d at 623 (quoting *State v. Gray*, 590 N.W.2d 918, 931 (Wis. 1999)).

<sup>169</sup> See, e.g., *Guthrie*, 461 S.E.2d at 189; *Layton*, 767 F.2d at 556.

<sup>170</sup> See, e.g., *Guthrie*, 461 S.E.2d at 189.

<sup>171</sup> See *id.*

<sup>172</sup> See *id.* at 171.

<sup>173</sup> See *id.*

<sup>174</sup> See *id.*

<sup>175</sup> *Id.*

<sup>176</sup> See *id.*

<sup>177</sup> See *id.*

<sup>178</sup> See *id.*

<sup>179</sup> See *id.*

<sup>180</sup> *Id.*

<sup>181</sup> See *id.*

<sup>182</sup> See *id.*

"Mr. Farley looked up and cried: 'Man, I was just kidding around.'"<sup>183</sup> "The defendant responded: 'Well, man, you should have never hit me in my face.'"<sup>184</sup>

At trial, it was revealed that Guthrie, a veteran, had "a host of psychiatric problems."<sup>185</sup> He had panic attacks several times a day, and he was fixated on his nose, which he was frequently examining in the mirror.<sup>186</sup>

Guthrie's attorneys introduced evidence that Guthrie was a "good, quiet, Bible-reading man."<sup>187</sup> The state failed to object to this evidence.<sup>188</sup>

Rather, the state responded to this evidence by introducing evidence regarding Guthrie's prejudices.<sup>189</sup> The prosecutor asked Guthrie's father whether Guthrie had said that "men were better than women and women should stay at home, that whites were better than blacks, and whether the two of them discussed the Ku Klux Klan."<sup>190</sup>

The court reversed the conviction for first degree murder and held that the prejudicial impact regarding Guthrie's prejudices outweighed the probative value of the evidence.<sup>191</sup> Neither Guthrie's Bible-reading nor his racial and sexual prejudices were relevant to the murder while the murder and the description of what sounds like post-traumatic stress disorder were relevant and emotionally evocative. However, to say that the racial prejudice is more prejudicing than the Christianity is to engage in speculation regarding the jury's future emotional reactions and responses to those reactions.

Interestingly, even the relevant evidence regarding the murder and the defendant's psychological issues was emotionally evocative.<sup>192</sup> The details regarding the killing itself and the victim's last words are likely to provoke a reaction. Most humans

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *See id.* at 172.

<sup>186</sup> *See id.*

<sup>187</sup> *Id.* at 186.

<sup>188</sup> *See id.* at 188.

<sup>189</sup> *See id.* at 185-86.

<sup>190</sup> *Id.* at 185.

<sup>191</sup> *See id.* at 189.

<sup>192</sup> *See id.* at 172.

can empathize with a murder-victim in that most humans likely do not want to be killed themselves.

Likewise, the evidence regarding Guthrie's psychological issues is not only empathy-provoking, but it also resonates on a logical level. If Mr. Guthrie's flight or fight response had kicked in at the moment of the killing, his ability to monitor his behavior was likely impaired if not non-existent.<sup>193</sup> It seems that Mr. Guthrie may have acquired his disorder as a result of his military service to the country.<sup>194</sup> Thus, the case seems to point to failure of the system to properly care for veterans upon their return; it is possible that the killing could have been preventable with appropriate care.<sup>195</sup> Thus, some may shift their blame to the system as opposed to Guthrie.

In fact, my own experience may play an informative role in my belief that people like Guthrie should be treated clinically rather than punitively. The evidence that sounds to me like a veteran's post-traumatic stress disorder makes me feel compassion for Guthrie. As a child protection advocate, I am familiar with post-traumatic distress, but I also have a more personal connection that influences my reasoning. My favorite cousin was a two-time Iraq war veteran who was called up for a third tour of duty in Afghanistan in 2012. He did not return. He killed himself with a knife. I loved my cousin and grieved for his death. Although to some my personal emotions might mean that I have arrived at my beliefs through an improper manner, to others it means that I have specialized knowledge and experience that has helped me to understand these issues.

Thus, before we even reach the evidence that is of questionable relevance, an emotionally fueled reasoning process

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<sup>193</sup> See generally MATSAKIS, *supra* note 16 (explaining that post-traumatic stress results from a life threatening trauma that causes the fight or flight instinct to kick in).

<sup>194</sup> See *Guthrie*, 461 S.E.2d at 172.

<sup>195</sup> See generally Mark A. McCormick-Goodhart, *Leaving No Veteran Behind: Policies and Perspectives on Combat Trauma, Veterans Courts, and the Rehabilitative Approach to Criminal Behavior*, 117 PENN ST. L. REV. 895 (2013); Madeline McGrane, *Post-Traumatic Stress Disorder in the Military: The Need for Legislative Improvement of Mental Health Care for Veterans of Operation Iraqi Freedom and Operation Enduring Freedom*, 24 J.L. & HEALTH 183, 184 (2010).

occurs. That process itself can vary from person to person. With respect to the more tangential relevance, the same is true.

The more tangential evidence regarding the Bible reading itself does have the potential to play on the personal biases of jurors.<sup>196</sup> Surely, in Virginia, it was likely that there were Christians on the jury, and some Christians may be more likely to either forgive other Christians or deem them to be otherwise good persons. However, under the Constitution, our court system should not treat Christians any more favorably than those of other religious beliefs.<sup>197</sup>

Nonetheless, it is also true that the evidence regarding Guthrie's prejudices could potentially upset jurors and cause them to base their decision on how dislikable he was.<sup>198</sup> Personally, I would feel dislike towards someone who was prejudiced against black people. It is easier to convict someone we dislike and easier to imagine ill of them.<sup>199</sup>

However, predicting what will be upsetting is also fraught with problems. In determining whether this evidence regarding the prejudices should be admitted, the court explained that Rule 403 guards against arousing the "passions" of the jury and that it curbs the tendency of juries to convict for emotional reasons as opposed to convicting based on actual guilt.<sup>200</sup> The court also mentioned that there were two women and a black person on the

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<sup>196</sup> See *Oliver v. Quarterman*, 541 F.3d 329, 344 (5th Cir. 2008) (The court held that the jury consulting the Bible during their deliberations violated the Sixth Amendment. The Fifth Circuit considered the Bible an improper external influence.); see also Monica K. Miller et al., *Bibles in the Jury Room: Psychological Theories Question Judicial Assumptions*, 39 OHIO N.U. L. REV. 579 (2013); Amanda C. Shoffel, *The Theocratic Jury Room: Oliver v. Quarterman and the Burgeoning Circuit Split on Biblical Reference and Influence in Capital Sentencing*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 113 (2010).

<sup>197</sup> See *supra* note 196.

<sup>198</sup> "Clarence Darrow once said, 'Jurymen seldom convict a person they like, or acquit one that they dislike. 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.'" Robert V. Wells, *The Nature of Meaning: The Role of the Trial Lawyer in Creating and Shaping Meaning*, 32 AM. J. TRIAL ADVOC. 297, 358 (2008) (quoting EDWIN H. SOUTHERLAND & DONALD R. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 442 (7th ed. 1966)).

<sup>199</sup> See *supra* note 198 and accompanying text.

<sup>200</sup> *State v. Guthrie*, 461 S.E.2d 163, 188-89 (W. Va. 1995).

jury.<sup>201</sup> The fact the court thought it was likely that the jury would be predisposed against Guthrie because two jurors were women and one was black is interesting; I am not black, and yet, I am capable of disliking someone who has ties to the Ku Klux Klan. It is possible that there are also black people who are capable of liking someone despite his ties to the Ku Klux Klan. In fact, if someone walked into a dinner party and said, "Mexican people love x and hate y," most people would find that statement rather offensive. It is a generalization about the Mexican people.

Thus, the difficulty arises regarding where to draw the line regarding potentially prejudicing evidence. What is emotional for one person may not be so for another. For instance, Ninth Circuit Chief Judge Alex Kozinski tells the story of a case involving a defendant whose life veered off track when she made one mistake, becoming a drug mule.<sup>202</sup> This story reminded Judge Kozinski of one big mistake he made when he accidentally allowed his infant son to wander into traffic.<sup>203</sup> However, for some people this story could be neutral.

With respect to both the Bible-reading evidence and the evidence regarding prejudices, the two could cancel each other out or either one could potentially be more prejudicial than the other. If we accept the court's reasoning that people are more likely to be prejudiced about evidence pertaining to their particular group,<sup>204</sup> then it is possible that the Bible-reading evidence is likely more prejudicing. Christianity is the majority religion,<sup>205</sup> whereas black people are a minority race, and minorities and women also constituted a minority of the jury. Therefore, some might contend that the court is guarding against less widely shared prejudices, as opposed to those that are commonly held.

Some might even argue that the court's reasoning is a holdover from the time that neither black people nor women were

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<sup>201</sup> *Id.* at 185-86.

<sup>202</sup> See Maroney, *supra* note 83, at 1498.

<sup>203</sup> See *id.*

<sup>204</sup> See *Guthrie*, 461 S.E.2d at 188-89.

<sup>205</sup> See CIA, THE WORLD FACTBOOK (2008), available at <https://www.cia.gov/library/publications/download/download-2008/>.



allowed on juries.<sup>206</sup> The court's opinion could reflect old patriarchal notions that black people and women are like emotional children who need to be protected from their own predispositions to irrationality.<sup>207</sup>

Ultimately, jurists cannot accurately predict which evidence will hit insurmountable emotional triggers for juries. Basing the predictions on the experience of the jury can be problematic too. Rather, the courts engage in gross guesswork that itself may be based on prejudices regarding what one group of persons is likely to find offensive and what another is not.

However, even when the predictions are not based on individual jurors, deeming great emotion as the enemy of reason is problematic and involves guesswork. For example, in *United States v. Layton*, the court's language seems to indicate that emotion itself is a problem.<sup>208</sup> In that case, the state was trying Lawrence Layton for several related crimes. The first was conspiracy to murder a congressman and a foreign dignitary; the others were aiding and abetting the murder of the congressman and aiding and abetting the attempted murder of the foreign dignitary.<sup>209</sup> The court held that a tape of the last hour of the Jonestown mass suicide was inadmissible.<sup>210</sup> Layton belonged to the People's Temple, which Jim Jones founded.<sup>211</sup> The approximately 1,200 members of the People's Temple settled in an area that they named Jonestown in the Republic of Guyana.<sup>212</sup>

On November 17 and 18, 1978, Congressman Leo Ryan and his party investigated and then arranged for the departure of

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<sup>206</sup> See Hunter, *supra* note 17, at 129-30 (discussing how valuing emotion over reason in evidence law is an adoption of the traditional view that emotion is female and lesser); Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 329 (1995) (discussing the public distrust of juries generally).

<sup>207</sup> See Hunter, *supra* note 17, at 129-30 (discussing how valuing emotion over reason in evidence law is an adoption of the traditional view that emotion is female and lesser); Dooley, *supra* note 206, at 337-38 (explaining that once women were allowed on the jury the language regarding Rule 403 mimicked the rhetoric of protecting the emotional and irrational woman from the harsh realities of life).

<sup>208</sup> See, e.g., *United States v. Layton*, 767 F.2d 549, 556 (9th Cir. 1985).

<sup>209</sup> See *id.* at 551.

<sup>210</sup> See *id.* at 550.

<sup>211</sup> See *id.*

<sup>212</sup> See *id.*

Jonestown residents who desired to return to the United States.<sup>213</sup> Layton boarded one of the departing planes.<sup>214</sup>

As one of the planes was taxiing down the runway, a tractor-trailer cut in front of the one plane and pursued the other.<sup>215</sup> Some People's Temple members shot at one of the planes and hit some of the people inside and outside of the plane.<sup>216</sup> One of the members shot and killed Congressman Ryan.<sup>217</sup> Others were wounded.<sup>218</sup> The defendant, Layton, insisted that the other plane take off.<sup>219</sup> Then, he drew a revolver and shot two of the passengers.<sup>220</sup>

During the trial, it also came out that Layton blamed his sister, Debbie Blakey, for his mother's death.<sup>221</sup>

After the shooting, Jim Jones encouraged his followers to drink poison and commit suicide.<sup>222</sup> Jones taped the last hour of their lives.<sup>223</sup> During the tape, Jones said, "There's one man there, who blames, and rightfully so, Debbie Blakey, for the murder, for the murder of his mother and . . . he'll stop that pilot by any means necessary. He'll do it. That plane will come out of the air. There's no way you fly a plane without a pilot."<sup>224</sup>

Later Jones learned of the shooting and said during the tape:

The Congressman's dead, the Congressman lays dead, many of our traitors are dead, they're all laying out there dead. . . . I didn't but, but my people did. My people did. They're my people . . . and they, they've been provoked too much . . . . They've been provoked too much. What's happened here's been to, this has been an act of provocation . . . .<sup>225</sup>

Dying children screamed in the background of the tape.<sup>226</sup>

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<sup>213</sup> *See id.* at 551.

<sup>214</sup> *See id.*

<sup>215</sup> *See id.*

<sup>216</sup> *See id.*

<sup>217</sup> *See id.*

<sup>218</sup> *See id.*

<sup>219</sup> *See id.*

<sup>220</sup> *See id.*

<sup>221</sup> *See id.* at 555.

<sup>222</sup> *See id.* at 553.

<sup>223</sup> *See id.* at 552-53.

<sup>224</sup> *Id.* at 552.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 551.

The government argued that Jones's statements proved a conspiracy between him and Layton.<sup>227</sup> However, the Ninth Circuit determined that the tape led to only very tenuous inferences regarding a conspiracy and that the sound of the dying children in the background posed too great a risk of clouding the jury's judgment.<sup>228</sup>

Although the outcome of this case is most likely fair, the language in the court's opinion creates confusion and negatively labels emotion. The court was concerned with the "distracting emotional impact on the jury and the effect it would have in confusing the issues."<sup>229</sup> The court stated, "[I]t is unlikely that a jury instruction could effectively mitigate the emotional impact and distracting effect of the Tape."<sup>230</sup>

The problem with the court's reasoning is that these sentences make it sound as though great emotion in and of itself is a danger to be guarded against, something that does not belong in a court room.

The difficulty is not with emotion itself. For instance, if a jury is determining whether someone committed murder, it should be expected that they will be upset about the murder itself once it is proven. Rather, the problem is that jurors might feel anger, sadness, or compassion over the dying children and want to find someone to blame. Layton is the closest target for them to blame. However, the trial is not a trial for the murder of the children.<sup>231</sup> It is a trial for the conspiracy to kill Congressman Ryan.<sup>232</sup>

Additionally, the court has engaged in guesswork when it states, "The discussion of the impending mass suicide set against the background cacophony of innocent children who have apparently already been given poison would distract even the most conscientious juror from the real issues in this case."<sup>233</sup>

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<sup>227</sup> See *id.* at 551, 555.

<sup>228</sup> See *id.* at 555-56.

<sup>229</sup> *Id.* at 556.

<sup>230</sup> *Id.*

<sup>231</sup> See *id.* at 551.

<sup>232</sup> See *id.*

<sup>233</sup> *Id.* at 556.

Yet, this cacophony did not distract the court, which also heard the tape.<sup>234</sup> If the jury was given a curative instruction reminding them that they were there to determine conspiracy, we do not know what the result would be. Although the court has legal training,<sup>235</sup> as mentioned in the section on the role of emotion in our reasoning above, even judges feel emotion.<sup>236</sup>

Although likely the correct result was reached in this case, it is nonetheless possible that the discomfort regarding the dying children should be transferred to Layton. We should be upset that Layton and others killed the people trying to escape Jonestown just before the mass suicide. Likewise, we should be upset that a group of people committed mass suicide and killed their own children. Layton was a part of this group, and he was a killer. While the inferences based on Jones's references to Layton were slight, combined with the totality of the circumstances, the inferences grow stronger. It seems that he is part of a mindset that would conspire to kill these people. I believe that it is more likely than not that he did. However, my belief is not beyond a reasonable doubt because the inferences were slight. Nonetheless, this example raises the question regarding whether we are ignoring the important truths told by our intuition when we disconnect from our emotions.<sup>237</sup>

#### IV. THIS PROBLEM CAN BE ADDRESSED BY EDITING OPINIONS TO REFLECT THE NUANCES OF EMOTIONAL REASONING.

Ultimately, jurists cannot accurately predict which evidence will hit insurmountable emotional triggers for juries, or whether

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<sup>234</sup> See *id.* at 552-56. See Beth Z. Shaw, *Judging Juries: Evaluating Renewed Proposals for Specialized Juries from a Public Choice Perspective*, 2006 UCLA J.L. & TECH. 3, 33 (noting that more educated people still frequently have a difference of opinion in determining legal matters). But see Dooley, *supra* note 206, at 329-30 (discussing the public distrust of juries generally).

<sup>235</sup> See Leubsdorf, *supra* note 15, at 1254 (noting that the legal system implies that judges have superior cognitive abilities to juries); Shaw, *supra* note 234, at 33 (noting that more educated people still frequently have a difference of opinion in determining legal matters).

<sup>236</sup> See Chin, *supra* note 42, at 1580-81; see also Leubsdorf, *supra* note 15, at 1254 (noting that judges may react emotionally to cases at trial as well).

<sup>237</sup> Cf. Henderson, *supra* note 44, at 1576 (explaining that empathy is a way of knowing).

juries may actually be keenly using their evolutionary instincts to determine what might have actually happened. However, to abandon the gatekeeping role of judges would be to ignore the standards established by a cause of action. For instance, if a court is determining whether someone murdered another person, then the court is determining whether the defendant has killed a person with "malice aforethought."<sup>238</sup> To allow in evidence that veers too far away from this standard would be to abandon the purpose of the court. Thus, a standard is needed.

One could argue that all relevant evidence should be allowed even if it is emotionally prejudicial. Then the court could offer curative instructions telling the jury to identify the source of their emotions and determine whether those emotions are relevant to the legal issue at stake. However, the psychological evidence suggests that once a person is told to set aside an emotion, the person fixates on it more.<sup>239</sup>

Although that means that we may be stuck with our imperfect system for the time being, we can shift to small improvements by recognizing that emotion itself is not the enemy. Rather, making irrelevant conclusions based on extreme emotions is the problem. Future judicial opinions regarding Rule 403 could be edited to recognize the importance of emotions and the uncertainty regarding their effect. First, courts must establish that it is not emotion itself that is the problem. Second, in so doing, the courts might become more aware that their reasoning will be imperfect, not because they are bad at reasoning, but because it is the nature of predicting how another person might be swayed by emotion. Once cultivating that awareness, the opinions could reflect that the solution was simply "as good as it gets" as opposed to an absolute.

For instance, the *Layton* case mentioned above could be edited to reflect these ideas as follows:

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<sup>238</sup> See 18 U.S.C. § 1111 (2012).

<sup>239</sup> See MATSAKIS, *supra* note 16, at 65; BRANDEN, *supra* note 16, at 90-101 (explaining that accepting our emotions including our negative emotions is the first step to healing negative emotions); MILLER, *supra* note 16, at 9-14 (explaining how creating an environment where children are not allowed to share their emotions causes later emotional problems and psychological disturbances).

It is right that the jury should feel emotions regarding the killing of the victims as well as empathy for exculpating evidence regarding Layton himself. These emotional considerations are an integral part of human reasoning and cannot, and should not, be walled off in a trial for murder. Moreover, it is with humility that we acknowledge all courts engage in rough guesswork when we try to determine how evidence will emotionally impact others and how juries may process that emotional impact.

Nonetheless, given the Constitutional rights at stake, too great an inferential leap is required to conclude that the tape proves a conspiracy. The nexus between that leap and the propensity of the tape to raise irrelevant concerns is too large.

The tape discusses an impending mass suicide, and cries of dying children echo in the background. These children were poisoned.

It is natural to feel compassion, sadness, and outrage in response to the mass suicide and to the dying children. It would also be natural to want to find someone to blame for mass suicide and the dying children. In this trial, the jury has the power to enact consequences of blame on Layton alone. Moreover, evidence blaming Jim Jones or others in his party has not been the focus of this trial, so Layton is the only available target. However, Layton is not on trial for killing the children or convincing his comrades to commit suicide. He is on trial for the conspiracy to kill Congressman Leo Ryan and Richard Dwyer. Thus, it is unlikely that a jury instruction could effectively mitigate the temptation to convict Layton on an improper basis.

This shift would provide litigants with better guidance with respect to storytelling and emotion, support a more emotionally healthy society,<sup>240</sup> and also establish a more feministic approach

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<sup>240</sup> Cf. MATSAKIS, *supra* note 16, at 65-66 (discussing how trying to push down emotions can make them erupt even more violently); BRANDEN, *supra* note 16, at 90-101 (explaining that accepting our emotions including our negative emotions is the first step to healing negative emotions); MILLER, *supra* note 16, at 9-14 (explaining how creating an environment where children are not allowed to share their emotions causes later emotional problems and psychological disturbances).

to judicial opinions.<sup>241</sup> New law students are often afraid that evoking emotion is unfair or prohibited. Language like “appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish” is misleading.<sup>242</sup> It is likely to lead some lawyers and judges to believe that emotion itself is the danger and can be confusing for new law students, many of whom initially believe emotion is not allowed. Thus, lawyers may hesitate to evoke emotion at trial when in fact they will do so whether they intend to or not. They best serve their clients when they tell a good story. This revision provides them with more clear guidance so that they can tell the stories that aid their clients the most.

Moreover, this shift would support a society that embraces emotion along with logic as an integral part of the human experience and human reasoning. Instructions to disregard an emotion often lead people to think about it more.<sup>243</sup> Moreover, emotion is a part of our reasoning as explained by Damasio’s work.<sup>244</sup> It’s a part of our conscience and our survival instinct.<sup>245</sup> By shifting the discussion so that emotion is not labeled as the villain, judges would encourage and support the embracing of emotion, as well as the processing of emotion to determine how different emotions push us in different directions.

Finally, this shift would be feministic as society’s disparagement of emotion aligns with the patriarchal belief that labels emotion as belonging to the feminine and thus lesser.<sup>246</sup>

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<sup>241</sup> See Hunter, *supra* note 17, at 129-30 (discussing how valuing emotion over reason in evidence law is an adoption of the traditional view that emotion is female and lesser); Dooley, *supra* note 206, at 337-38 (explaining that once women were allowed on the jury the language regarding Rule 403 mimicked the rhetoric of protecting the emotional and irrational woman from the harsh realities of life).

<sup>242</sup> State v. Davidson, 613 N.W.2d 606, 623 (Wis. 2000) (quoting State v. Gray, 590 N.W.2d 918, 931 (Wis. 1999)).

<sup>243</sup> Brown, *supra* note 13, at 99.

<sup>244</sup> See generally DAMASIO, *supra* note 14.

<sup>245</sup> See Fredrickson, *supra* note 101, at 1367-68 (discussing evolutionary foundations of various emotions); LAZARUS & LAZARUS, *supra* note 43, at 198-215; MATSAKIS, *supra* note 16, at 3 (discussing how fear is an evolutionary response that protects us); Brown, *supra* note 13, at 47-48 (discussing how we should not wish for our judges to be sociopathic); Henderson, *supra* note 44, at 1576 (making the case for empathy in legal reasoning).

<sup>246</sup> See Leubsdorf, *supra* note 15, at 1245 (explaining that evidence law values emotion over reason as part and thus reflects patriarchal view of emotion as lesser);

During Justice Sonia Sotomayor's confirmation hearings, she was questioned regarding whether she would be emotionally biased.<sup>247</sup> Many might believe that such a question towards a female judicial candidate is biased in old patriarchal ideas that emotion is feminine and lesser. Justice Sotomayor replied to the question: "judges 'apply law to facts. We don't apply feelings to facts.'"<sup>248</sup> Perhaps she had to prove to Congress and to the world that she would not be "emotional" as her sex was believed to be. However, emotion does not belong solely to women and is not a weakness in a human being, a judge, or a lawyer. It is the lack of awareness regarding how our emotions are driving us that can pose problems, not the emotion itself, which as a component of our reasoning ability is actually a strength. By recognizing these ideas in judicial opinions, judges will counter the notions that emotion is feminine and lesser; rather it is human and important.

### CONCLUSION

As our understanding regarding the role emotion plays in our reasoning grows, that understanding should be reflected in the interpretations of Rule 403 to provide better guidance to attorneys, to embrace a healthier attitude towards emotions,<sup>249</sup> and to establish greater honesty. Emotion and reasoning are not truly separate, and some emotion, including dispassion, is

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Hunter, *supra* note 17, at 129-30 (discussing how valuing emotion over reason in evidence law is an adoption of the traditional view that emotion is female and lesser); Dooley, *supra* note 206, at 337-38 (explaining that once women were allowed on the jury the language regarding Rule 403 mimicked the rhetoric of protecting the emotional and irrational woman from the harsh realities of life); *see also* Dolovich, *supra* note 17, at 1007 (explaining that emotionality is perceived as a feminine trait).

<sup>247</sup> *See* Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 3 (2009); Kathryn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 OHIO N.U. L. REV. 263, 264 (2010); Maroney, *supra* note 77, at 631.

<sup>248</sup> Maroney, *supra* note 77, at 631; *see also* Davis, *supra* note 247, at 3; Abrams, *supra* note 247, at 264.

<sup>249</sup> *Cf.* MATSAKIS, *supra* note 16, at 65-66 (discussing how trying to push down emotions can make them erupt even more violently); BRANDEN, *supra* note 16, at 90-101 (explaining that accepting our emotions including our negative emotions is the first step to healing negative emotions); MILLER, *supra* note 16, at 9-14 (explaining how creating an environment where children are not allowed to share their emotions causes later emotional problems and psychological disturbances).



associated with all of our thoughts and actions. When people attempt to shut off certain emotions, they tend to experience those emotions more rather than less. When people are unaware that emotions are driving their actions, they are more likely to be led by those emotions. Additionally, a great amount of guesswork is involved in speculating about the emotions that various pieces of evidence may evoke in jurors. Thus, it is impossible to eliminate emotion from the equation or to predict the emotional effect of evidence with complete accuracy.

Moreover, it is not desirable to eliminate emotion from legal reasoning. To be effective decision-makers, it is not necessary to eliminate our emotions. At times, our emotions can lead to better decisions. Our emotions can be informative.<sup>250</sup> They can form the basis of a more compassionate society. The emotions involved in story are how we learn and process.

Thus, decisions regarding Rule 403 need to be written to reflect our new understanding. With respect to Rule 403, while the outcome of many cases regarding Rule 403 might remain the same, the opinions regarding the emotional nature of those cases should reflect greater awareness regarding the role of emotions in our decisions.

In the end, many of the outcomes may still remain the same, but the judiciary as a cultural force will help to build a more compassionate and healthier society by recognizing the importance of our emotions.

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<sup>250</sup> See Fredrickson, *supra* note 101, at 1367-68 (discussing evolutionary foundations of various emotions); LAZARUS & LAZARUS, *supra* note 43, at 198-215; MATSAKIS, *supra* note 16, at 3 (discussing how fear is an evolutionary response that protects us); Brown, *supra* note 13, at 47-48 (discussing how we should not wish for our judges to be sociopathic); Henderson, *supra* note 44, at 1576 (making the case for empathy in legal reasoning).