Centennial Address: Emotion, Reason, and the Progress of Law

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Many of you will recall a well-known story about former President George W. Bush's first encounter with Russian President Vladimir Putin. The former president famously said about Putin: "I looked the ·man in the eye. I found him to be very straightforward and trustworthy. We had a very good dialogue. I was able to get a sense of his soul."

The notion of looking into Putin's eyes and seeing his soul met with substantial scorn, maybe just because of a widespread consensus that former President Bush had misread former President Putin's soul (an article at the time was headlined: *Bush Looks into Putin's Soul, Fails to See Tyrant*), but also because the entire soul-reading enterprise sounds mystical, irrational, and inappropriate for questions of governance. And if so, perhaps it is surprising how much stock the legal system places in the ability to resolve questions of deep character by looking into the eyes of litigants and witnesses, reading their body language, and evaluating other aspects of what the legal system calls "demeanor" and "credibility."

As the trial scholar Robert Burns has observed, we tend to hold in our minds two contradictory conceptions of the trial process. One views the legal search for truth as something factual and empirical; there is an answer out there and we need to logically deduce it from the evidence. Witnesses are either right or wrong. They are either accurate or inaccurate, either telling the truth or lying. The other conception views evidence as subject to interpretation and evaluation, and recognizes that perspectives, emotions, values, and worldview will influence fact-finding on issues of culpability and accountability. Any trial lawyer worth her salt knows that proving up a case through dry, deductive logic will rarely carry the day unless accompanied by a compelling story with believable characters. Not only do trial lawyers know this; so does anyone who watches courtroom dramas on TV—

persuasion matters, and jurors are persuaded not just by the evidence but also by the story it tells and whether that story is coherent and compelling. We tend to hold both of these views of the trial simultaneously, but we tend to idealize the linear, factual model. The other model tends to be viewed as somewhat disreputable—reserved for juries because they are laypeople and not trained lawyers, and for showboating trial lawyers manipulating these jurors by playing on their basest instincts.

No complex system will ever live up to its idealized version. But it is cause for concern when the ideal blinds us to the real—to actual problems we may be able to address through available means like jury instructions, voir dire, or judicial training. And there is an even deeper issue here—whether the concept of legal decision making as logical, deductive, and affectless is ideal at all. Even if we could, should we banish empathy, or emotion, or storytelling, from the courtroom? Sometimes the law seems to unabashedly favor this option. For example, the advisory committee's notes to Rule 403 of the Federal Rules of Evidence, the main rule for sorting out the probative from the prejudicial, explain that "unfair prejudice means an undue tendency to suggest a decision on an improper basis, commonly an emotional one." The language is revealing: evidence is excluded if it "stirs" or "inflames" the jury's emotions, or causes the jurors to abandon their mental processes and give expression to their emotions. This legal formula reflects the folk knowledge view of emotions as hot, chaotic, unpredictable flashes of feeling that interfere with our ability to think coolly and rationally. Yet the law's deep-seated ambivalence on the role of emotion, empathy, and storytelling is well illustrated by considering one of our system's most deeply venerated values: the importance of demeanor evidence.

One of the primary functions of legal institutions is to create rules and procedures to guide the deliberative process. For juries, for example, we have rules of evidence that keep some sorts of information from jurors entirely because they are too prejudicial, or not relevant. We let jurors consider other evidence, but instruct them on how much weight to give it—or even tell them occasionally to disregard evidence they have already heard. In doing so, we make distinctions between what is legal or extralegal, between the probative and the prejudicial. These are legal distinctions, but they are premised, at least implicitly, on assumptions about how people decide, and how their decision-making process can be guided and improved.

Some of these assumptions are easy to identify and amenable to empirical testing—like the assumption that instructing a jury to disre-

gard evidence will lead the jury to disregard evidence. Unsurprisingly (to anyone who has ever made an effort *not* to think about some forbidden thing), studies have shown that such instructions usually backfire. People think even more about the forbidden topic. In such situations, it seems reasonable that the legal system ought to take into account the fact that it is engaging in a practice that elicits precisely the opposite reaction from the one it is meant to elicit, and ought to consider reforming its practice—perhaps by instructing jurors about the difficulties of disregarding evidence, or perhaps by instructing them much earlier in the process, before the inadmissible evidence has had a chance to color their view of the rest of the trial.

Likewise, the legal system ought to take into account the fact that much of what gets communicated in the courtroom is nonverbal, and that this communication is also amenable to study and testing. Yet demeanor evidence, the mainstay of the trial system, straddles the two conceptions of the trial in a problematic way—one that has so far prevented all sorts of interesting and important connections between evidence law and the cognitive sciences.

Black's Law Dictionary defines demeanor this way. It includes the tone of voice in which a witness's statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his expression of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or seeming levity. Or, as one evidence scholar summarized it "everything that is not captured by a cold evidentiary record."

What is the purpose of demeanor evidence? Why do we prefer live witnesses testifying in open court? What value does it add to a cold evidentiary record? In some countries—Holland for example—most evidence is introduced via documents. Our system, however, puts tremendous faith in the power of observing a witness testify in open court. It puts tremendous faith in the ability to evaluate demeanor. Demeanor evidence itself is viewed as a crucial way to assess credibility, character, and other such attributes. This preference for live testimony is enshrined in the Sixth Amendment's Confrontation Clause and the Federal Rules of Civil Procedure. Permitting a victim to testify from behind a barrier so that her facial expressions cannot be seen deprives the defendant of his right of confrontation. A defendant who, because of psychotropic drugs, is unable to communicate facial expressions, behavior, manner, and emotional responses, has been deprived of the right of confrontation. A visually impaired juror may be

excluded because of an inability to read facial expressions. Likewise, the ability of the fact-finder at the trial level to observe these non-verbal cues and attributes is one of the primary reasons for appellate court deference to the findings of the trial court. Whereas the appellate court is confined to the "cold record," the trial court can observe facial expression, attitude, body language and other such cues at close range. In these and multiple other ways, the law expresses its belief in the power of demeanor evidence. So what is it that is being evaluated here that makes live testimony so much preferable to reading testimony on paper, or even to hearing it without seeing it?

The law tends to use mystical and unquantifiable language when describing demeanor, calling it an elusive and incommunicable imponderable. This sort of language about the imponderable and the incommunicable is the sort of language law often uses to describe internal processes, emotional reactions, and other things it regards as unscientific and unquantifiable. It tells us that a whole realm of human behavior is a black box—impervious to study. And that is dangerous. The upshot of this attitude is not to banish these so-called "imponderables" from the legal system. It is, instead, to allow them to operate without scrutiny. And in fact, demeanor evidence is not imponderable at all. There is increasing knowledge about how we read facial and body language, how we understand the motivations and intentions of others, and how those capacities might be improved. The legal system can make these decisions in light of a growing body of psychological and neuroscientific evidence on decision making, or else in ignorance of it.

A while ago a handful of legal scholars published articles demonstrating that most of us are not very good at reading demeanor to figure out who is telling the truth. The problem is that this research only skims the surface of courtroom dynamics. It seems to subscribe to the factual, empirical model of the trial—witnesses are either right or wrong, truth tellers or liars. It only examines the thinnest slice of what is getting communicated through facial expression and body language, appearance and tone of voice, and other such factors. And it barely hints at the problems of sorting out the relevant from the irrelevant and the probative from the prejudicial in the information we get—or think we get—from demeanor.

These questions are not merely academic. Consider the following recent issues that will require resolution:

(1) Recently, a Muslim woman who was plaintiff in a civil suit in Michigan had her case dismissed because she would not testify without wearing her niqab (a scarf and veil covering the entire face ex-

cept for the eyes). The judge reasoned that without seeing the plaintiff's face he could not judge the veracity of her testimony.

(2) A proposed Illinois Supreme Court rule would make it acceptable to require incarcerated criminal defendants to participate in their trials via videoconferencing rather than in person. The Chicago Council of Lawyers opposes the rule. They base their opposition, in part, on empirical evidence that *videoconferencing technology reduces the jury's or judge's empathy for the defendant, and that this lack of empathy leads to more severe sentencing.*

(3) Empirical research demonstrates that one of the most important factors in whether a capital defendant is sentenced to death is whether he shows appropriate remorse in the courtroom. Jurors expect to be able to evaluate from facial expression and body language the level of remorse not only of defendants who testify, but even of defendants who don't—and are simply present in the courtroom. Yet there is no good evidence that remorse can be judged from facial expression or body language.

A common thread tying these evidentiary issues together is the power of nonverbal communication and other factors that are not reflected in a written trial transcript. Another, unfortunately, is the legal system's failure to consult the growing body of scientific and social scientific knowledge about the operation of empathy, the ability to read emotion through facial expression and body language, and other work that breaks open the black box of demeanor evidence.

First of all, it is not just the demeanor of witnesses that gets evaluated in a courtroom. It is the demeanor of the judge, the other jurors, the "off-stage" actors like bailiffs and clerks, as well as the families and others sitting in the spectator's seats. Secondly, it is not just truth or falsity, or accuracy or inaccuracy, that are being evaluated. It is character. And therein lies the complication. Our evaluation of character is a complex amalgam of factors, some of them clearly legally relevant (candor and trustworthiness), some of the clearly irrelevant (attractiveness, race, class, ethnicity), and some of them both difficult to categorize and difficult to split off (likeability, familiarity). It might be comforting to believe that we are capable of evaluating the relevant things, while cordoning off "extralegal" or irrelevant factors like class, race, ethnicity, attractiveness, familiarity, and likeability. But we are not—at least not without assistance.

The overarching issue, from the standpoint of cognitive psychology and neuroscience, is how we come to understand the internal states of other people. As the philosopher and law professor Jeffrie Murphy

once said with typical dry wit, the law often behaves as if it has a window into the soul. He was skeptical, observing that issues of deep character are matters about which the state is probably incompetent to judge—it cannot even deliver the mail very efficiently, after all. Tennessee Williams once lyrically observed how cloudy the glass is through which we look at one another, distorted as it is by our own egos.

Yet in law, as in life, we must constantly try to predict the internal states, motivations, and intentions of others. How do we do this? There are several fascinating strands of research in the cognitive sciences and social sciences, which I can touch on but briefly.

One thing we know is that the quest for understanding begins with the basic capacity for empathy. In brief, empathy is the recognition that others have thoughts, desires, motives, and intentions different from one's own, and the capacity to infer the internal states of others. Empathy is not sympathy—it is not in itself the desire to help another. Despite the impression given at the recent judicial confirmation hearings of Justices Elena Kagan and Sonia Sotomayor, empathy is not something we can choose to bring into the legal system, or not. Just as we are always speaking in prose, we are always using empathy— though we are not always using it very well. Empathy is an essential capacity for interpersonal relations. The lack of empathy is one of the central deficits of autism. The lack of empathy is also, when coupled with lack of remorse, a central characteristic of the psychopath. The well-functioning person cannot operate without empathy.

Humans, unlike other creatures, have complex internal lives, and to survive and thrive we must be able to communicate them among ourselves. As the neuropsychologist Jonathan Cole wrote that the human face enables empathy. Humans first gained knowledge of the cognitive states of others through the ability to read facial expressions and body language.

This is a powerful explanation for the value added by demeanor evidence and in-court testimony more generally. They do give us information. They do facilitate empathy. Thus something important may well be lost if we require a defendant to testify via videoconference instead of in person, or permit a litigant to testify with her face covered. But these are in part empirical questions, and once we see that empathy is at work here, we can begin investigating some important issues. If we are reading the desires, intentions, and motivations of others, how well are we doing it?

One very hot topic in the cognitive sciences right now is the study of our ability to read emotions from facial expressions. In the first place,

it is not at all clear that emotions can be correlated with specific physiological measures. Even if there are some emotions that can be "read" via facial expression, studies show that this varies tremendously from one context to another. Researchers have found a weak correlation between facial expression and predicted emotion outside the lab. And thus far, there has been little if any research on how the courtroom in general, or being on a jury or on trial in particular, would affect the expression of emotion. Yet this idea that decision makers can read emotion in the courtroom is entrenched, despite the fact that getting it wrong can have serious consequences.

Secondly, and more promisingly, there is a rich vein of study on the dynamics of empathy, which shows that empathy can be not only studied but educated. Empathy is a capacity that not everyone possesses in equal measure. Some have more empathic accuracy than others. Empathy is selective. It tends to flow most easily toward those like us, or toward those in whose shoes we can imagine ourselves. People tend to impute their own internal states to those they perceive as similar (part of their in-group), but resort to bias and stereotypes to infer the internal states of those they view as dissimilar (or part of an outgroup). There is ample evidence that empathy is more effortful across racial lines. Empathic accuracy is also challenged by other differences, including ethnicity, age, and class—what the scholar Craig Haney calls "empathic divides." Yet in the legal system, much turns on empathic accuracy.

For example, whether a defendant shows appropriate remorse may make the difference between life and death; yet, we have no particular facility for gauging remorse. Several studies have found the defendant's perceived remorse (based on in-court observations of the defendant even in cases in which he never testifies) to be one of the major factors influencing whether he is sentenced to death. Read accounts of murder trials and you will more often than not run into a reference to whether the jury or judge found the defendant appropriately remorseful. In the trial of Scott Peterson, the prosecution portrayed his unflinching behavior as he sat silently at the witness table as the cool calculation of a killer. In Scott Sundby's book detailing his interviews with men and women who had served on a capital jury, Sundby noted that the jury paid as much attention to the defendant's demeanor as to the evidence. Jurors became increasingly angry at what they perceived as the defendant's nonchalant, arrogant attitude as he sat in the courtroom. It called to mind, first, a New Yorker cartoon that was amusing only because it was so accurate, in which a lawyer advises his client: "Make eye contact with the jury, but not

homicidal maniac eye contact." More seriously, it recalls something Karla Faye Tucker, before she was executed in Texas, told the writer Beverly Lowry about her capital murder trial: "Her lawyer had told her to try to look dignified and calm and so she was trying to look unmoved by the proceedings and when she did they said she was cold, and when she smiled at her father the press reported that she had smiled at someone else, so she never looked out in the courtroom again." She was right to be concerned. Studies show that a defendant who appears emotionally involved, sorry, or sincere during trial is less likely to be sentenced to death than a defendant who appears bored or uninvolved. One problem is there is no evidence supporting the view that we can evaluate remorse from demeanor. And there is some very disturbing evidence to the contrary. William Bowers and his coauthors have documented the impact of an empathic divide between races on the ability to evaluate remorse and other attributes. For example, they reported that after observing the same defendant and interpreting the same mitigating evidence, black jurors saw a disadvantaged upbringing, remorse, and sincerity, while white jurors saw incorrigibility, a lack of emotion, and deceptive behavior.

One final strand of research I will briefly mention involves feeling and display rules. We evaluate the feelings of others in light of implicit, often unconscious assumptions about what one ought to feel in certain circumstances and how one ought to express those feelings. Several studies, for example, have found that decision makers find rape accusers more credible if they testify with a high degree of emotionality. The failure to exhibit strong emotion violated an expectation about how a credible rape victim would express her feelings.

It might be comforting to believe that we are capable of evaluating the relevant aspects of character, while cordoning off "extralegal" or irrelevant factors. But even as to those factors whose irrelevance seems pretty obvious, we need assistance. Take attractiveness, which several scholars have quite reasonably argued is irrelevant to judging demeanor. It is not only that people do take it into account, which they do, it is also that it colors their evaluation of other attributes. The "halo effect" leads people to assume the witness is not only more attractive but also more credible. And the converse is also true— obesity, for example, has been linked to less favorable verdicts. These influences often don't operate on a conscious level, and this lack of conscious influence poses a real challenge for the legal system. The standard ham-handed approach of simply instructing jurors *not* to take something into consideration is likely to be inadequate, especially if the jury does not think it is doing the forbidden thing in the

first place. But how to overcome improper influences is a rich topic, and one we can focus on quite productively once we acknowledge the scope of those influences. There is a substantial and growing body of psychological research showing that even our subconscious assumptions—our empathy deficits, stereotypes, and unconscious biases—can be educated. And there is much more to learn about how to structure our legal institutions to bridge empathic divides.

Jeffrie Murphy, who has written some powerful critiques of the legal system's reliance on evaluating remorse, has suggested that we ought to declare remorse irrelevant—to simply instruct judges and juries to disregard it. I think this would be impossible; there is a deep-seated human need to evaluate remorse when faced with wrongdoing. But juries and judges can be made aware of the limitations of facial expression and other indicia of demeanor in evaluating remorse. This is just one specific aspect of my larger point. We have the capacity for comprehending the intention and motivations of others. These tools are imperfect, but they are amenable to correction and guidance. We have much more to learn, and we have many tools at our disposal, including jury instructions, expert witnesses, judicial training, reforming the rules for jury selection and composition, to name a few. The alternative, a legal system that operates free of the messy, chaotic effort to understand and evaluate human intentions, motivations and character, is not something we ought to aim for—even if we could.