Tell Us A Story, But Don't Make It A Good One: Resolving the Confusion Regarding Emotional Stories and Federal Rule of Evidence 403

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I. Introduction

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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.

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.

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I. Introduction

Dave looked at Jimmy.
“Don’t look at him. Look at me.” The big cop breathed loudly through his nostrils...”Where do 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. . .2

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 a bunch of 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.3

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 taken evidence, empathize with Dave. 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.4

We then view a few scenes where Jimmy, now an adult, learns that his daughter has just been murdered.5 Then students report that empathize with Jimmy, and some empathize with others.

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3 Id. at 16-18, 20.
5 Id.
“What if I tell you that Dave, that 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 do say that they can 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. Readers and viewers see through all three points of view, Jimmy’s, Sean’s, and Dave’s. People feel for Dave and do not want it to be him as clues connecting him to the murder unfold. But they accept that it could be. They empathize with Sean, the police officer investigating the crime, and Jimmy, the father planning vigilante action against his daughter’s killer.

It is an emotionally evocative work. 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 is revealed. Indeed, that is part of the success of this Academy Award winning screenplay.

However, our legal system 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. The term “unfair prejudice” is often interpreted to mean “emotionally evocative,” and opinions regarding this rule seem to indicate that emotion itself threatens reason. However, research indicates that emotion actually plays an

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7 See A.O. Scott, supra n. (“You want to feel sorry for him, but he also scares you.”); Ebert, supra n. (discussing how the day in the past lingers for viewers). See generally, LEHANE, supra n. 2; Mystic River, supra n. 4.
8 See generally, LEHANE, supra n. 2; Mystic River, supra n. 4.
9 See A.O. Scott, supra n. (“You want to feel sorry for him, but he also scares you.”); Ebert, supra n. (discussing how the day in the past lingers for viewers). See generally, LEHANE, supra n. 2; Mystic River, supra n. 4.
10 See generally, LEHANE, supra n. 2; Mystic River, supra n. 4.
11 See generally, LEHANE, supra n. 2; Mystic River, supra n. 4.
12 See generally, LEHANE, supra n. 2; Mystic River, supra n. 4.
13 Fed. R. Evid. 403.
14 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 Fed. Appx. 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.
important part in our reasoning. Moreover, predicting how evidence will impact jurors involves some guesswork. Thus, first, 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. Moreover, this shift would support a more emotionally healthy society and would also establish a more feministic approach to judicial opinions.

Part Two of this article discusses the tension between the advice to tell stories to evoke emotion at trial and the language in opinions regarding Federal Rule 403 that could lead some to believe that emotion is undesirable at trial. Part Three explains how emotion is an important part of both legal reasoning and storytelling. Part Four discusses how courts have embraced some emotion-evoking, critically relevant evidence, but, generally, the courts still seem to indicate that emotion itself is an ill to be guarded against in legal reasoning. Part Five proposes revisions to opinions regarding Rule 403. Part Six concludes this article.

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16 Cf. RUTH ANNE ROBBINS, KEN CHESTEK, AND STEVE JOHANSEN, YOUR CLIENT’S STORY (Wolters Kluwer 2013)(encouraging attorneys to craft narratives); Cf. 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).
17 Cf. APHRODITE MATSAKIS, I CAN’T GET OVER IT: A HANDBOOK FOR TRAUMA SURVIVORS 65-66 (Raincoast Books 1996)(discussing how trying to push down emotions can make them erupt even more violently); NATHANIEL BRANDON, SIX PILLARS OF SELF-ESTEEM 90-101 (Bantam Books 1990)(explaining that accepting our emotions including our negative emotions is the first step to healing negative emotions); and ALICE MILLER, THE DRAMA OF THE GIFTED CHILD 9-14 (Basic Books, Inc. 1981)(explaining how creating an environment where children are not allowed to share their emotions causes later emotional problems and psychological disturbances).
18 See Leubsdorf, supra n. 16 at 1245 (explaining that evidence law values emotion over reason as part and thus reflects patriarchal view of emotion as lesser); Rosemary C. Hunter, Gender in Evidence: Masculine Norms vs. Feminist Reforms, 19 HARV. WOMEN’S L.J. 127, 130 (1996)(discussing how valuing emotion over reason 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).
II. 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.19 Yet the more such a story sways the emotions of the jury the more likely it is that judges might label the components of that story as unduly prejudicial.20 This conflict creates an inherent and confusing tension between the advice to tell emotionally evocative stories21 and the proscription against unduly prejudicial evidence.22

Storytelling scholars have recognized that a good story, such as the one above, can make a difference in litigation.23 According to litigation strategist, David Ball, “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.”24 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.25 The briefs that were “storytelling” briefs were overwhelmingly the ones that judges found persuasive.26 Thus, legal skills scholars have

19 ROBBINS, supra n. 16.
20 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)(quoting In re Commitment of Franklin, 677 N.W.2d 276, 294 (Wis. 2004)).
21 See ROBBINS, supra n. 16 (advising lawyers to craft legal narratives).
22 See, e.g., Guthrie, 461 S.E.2d at 188-89; Davidson, 613 N.W.2d at 623 (quoting In re Commitment of Franklin, 677 N.W.2d 276, 294 (Wis. 2004)); cf. Leubsdorf, supra n. 16 at 1247 (“evidence law appears to be engaged in a peripheral and symbolic attempt to exclude emotion from trials”).
24 See, e.g., DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS 66-98 (1994); Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections Fnd1, 32 Rutgers L.J. 459, 483 (2001)
25 See Chestek, supra n. 23.
26 Id.
lauded the role of metaphor, the hero’s journey, endowed objects, point of view techniques, character development, and more in legal narratives.

Yet these storytelling techniques are bound to evoke any range of emotions. This evocation of emotion was labeled by Aristotle as pathos and is one of the three forms of persuasion. 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.

This issue comes under judicial scrutiny in decisions involving Federal Rule of Evidence 403. FRE 403 permits the exclusion of evidence if its probative value is outweighed by the danger of unfair prejudice. Specifically, “The 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.” If the evidence is relevant, it will prejudice the jury or juror. Thus, prejudice itself is allowed; it is only unfair prejudice that is problematic. Even then, unfair prejudice is only problematic when the

29 Cathren Koehlert-Page, Like a Glass Slipper on a Step Sister: How the One Ring Rules Them All at Trial, 91 NEB. L. REV. 60 (2013); see also James Parry Eyster,
31 ROBBINS, supra n.16.
32 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 judge); see also Koehlert-Page, supra n. 29 (analyzing the use of effective storytelling techniques in the McVeigh trial).
35 Fed. R. Evid. 401, 403.
36 Fed. R. Evid. 403.
37 Id.
38 U.S. v. McRae, 593 F.2d 700, 707 (5th Cir. 1979).
39 Id.
danger of such prejudice outweighs the probative value of the evidence.\textsuperscript{40} The term “unfair prejudice” is often interpreted to mean “emotionally evocative.”\textsuperscript{41}

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.

\textbf{III. Emotion is an integral part of the reasoning process and is a key component in storytelling.}

Despite 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 words like “lament,” “sorrow,” or “hatred,” so that the story itself seems 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 respect to Rule 403 seem to imply that emotion itself impairs reasoning.\textsuperscript{42} While the ultimate decision in these cases might be just, the 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.\textsuperscript{43} That our judges are impacted by emotion is in many instances a good thing. Cognitive research now indicates that the reasoning and emotional centers of our brains must actually communicate with one another for us to reach decisions.\textsuperscript{44} Additionally, emotions serve an evolutionary purpose and are a part of a more compassionate and just society.\textsuperscript{45} Therefore, embracing emotion as a part of legal reasoning and creating emotional awareness in legal reasoning is desirable.

\textsuperscript{40} See Old Chief, 519 U.S. 172.
\textsuperscript{41} See State v. Maurer, 770 P.2d at 984 (explaining that the unfair bias is often considered to be an emotional bias); see also Gamble, 290 Fed. Appx. at 595 (referring to the risk of arousing the emotions); Kesterson, 704 S.E.2d at 885-86 (referring to prejudicing the jury with the emotional nature of the scenes); Brown, supra n.14 at 131.

\textsuperscript{42} The trial court has wide discretion in excluding emotional evidence which is relevant if the judge deems that it may confuse issues or inflame jury. See United States v. Ravich, 421 F.2d 1196 (2d Cir. 1970).


\textsuperscript{44} DAMASIO, supra n.15; RICHARD LAZARUS, PASSION AND REASON: MAKING SENSE OF OUR EMOTIONS 198-215 (Oxford University Press, USA, 1994)(discussing how emotion is inherent in the reasoning process).

\textsuperscript{45} See LAZARUS, supra n.44 at 199-205 (discussing how emotion is inherent in the reasoning process); MATSAKIS, supra n.17 (discussing how fear is an evolutionary response that protects us); Brown, supra n.14 (discussing how we should not wish for our judges to be sociopathic); Lynne N. Henderson, Legality and Empathy, 85 Mich. L. Rev. 1574 (1987)(making the case for empathy in legal reasoning).
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 short-hand for a sappy and conclusory tale. However, often the type of story which may readily be labeled as “emotional” is not the kind of story that effectively evokes emotion, other than the irritation of the reader. These stories reference terms that signify emotion. 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.” “Miss,” “beautiful,” “suffer,” “destroyed,” “loss,” and “hearts went with her,” are all words that 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.

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 actually evoke feelings from the audience by showing them an experience rather than telling. In fact, research tends to support this literary truism. In one study of mock trials, one group of jurors was shown photographs of a permanent injury whereas others were simply told. The group that was shown photographs awarded a higher amount of damages.

46 See Tim Wynne-Jones, Eleven things You Need to Know, http://www.timwynne-jones.com/pages/eleventhings.html (last visited Jan. 31, 2014) (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, Professor, Vermont College of Fine Arts, Summer 2006 MFA WYCA Residency Lecture: Tell it Slant (Summer 2006)(on file with author) (explaining that words like love do not capture emotional “quicksilver” the way that objective correlative does).
47 Id.
48 Miller et. al., supra n.
49 See, e.g., ORHAN PAMUK, THE NAIVE AND THE SENTIMENTAL NOVELIST (Harvard University Press, 2010); Wynne-Jones, supra n.46 (explaining that words like love do not capture emotional “quicksilver” the way that objective correlative does); see also Cathren Koehlert-Page, A LOOK INSIDE THE BUTLER’S CUPBOARD: OBJECTIVE CORRELATIVES IN LEGAL NARRATIVES, N.Y.U. ANN. SURV. AM. L. (2014)
50 See Greeley, supra n.23 at 51 (explaining that jurors want to be shown evidence rather be told what to conclude); ROBERT MCKEE, STORY 199, 334-335, 345, 370.
51 See Monica K. Miller et. al., HOW EMOTION AFFECTS THE TRIAL PROCESS, 92 JUDICATURE 56, 57 (2008).
52 Id.
53 Id.
In fiction, emotion and state of mind can be shown and evoked without using emotion-signifying words. For example, in the novel, *Sold* by Patricia McCormick, Lakshmi has been sold into prostitution. One day, an American man pays to see her and instead of wanting sex he just tells her that if she is being kept against her will that she can be free. 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. However, he gives her his card.

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.

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.” However, 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.

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. For example in *Rousan v. Roper*, the court burrowed into key details when describing the killing of the elderly Charles and Grace Lewis, and, 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

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54 Wynne Jones, *supra* n.46.
55 *Patricia McCormick, Sold* 48, 52-54, 74-75, 102-107 (Hyperion 2006).
56 *Id.* at 203-205.
57 *Id.*
58 *Id.*
59 *Id.* at 206.
60 Koehlert-Page, *supra* n.30.
61 *See Rousan v. Roper*, 436 F.3d 951 (8th Cir. 2006).
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.\(^62\)

Without ever using words like “disturbing,” the court managed to convey what might be a disturbing or upsetting story in the narrative above.\(^63\) The court slowly builds up to the killing itself beginning with the plan to steal the cattle and building suspense as the men park and lay in wait.\(^64\) From there the story unfolds in small pieces as the men secure the house and are spotted by Charles Lewis.\(^65\)

Some of the key details included establish empathy.\(^66\) Charles Lewis is mowing the lawn, and his wife is on the phone with her daughter.\(^67\) Thus, Charles and Grace Lewis are all of us or our parents or our neighbors.\(^68\) They are doing those things that we might all ordinarily do in our day, so we can identify with them.\(^69\)

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.\(^70\) Grace’s death is more drawn out, and so the emotions we readers feel are drawn out as well.\(^71\) Brent shoots her several times fracturing her arms.\(^72\) When Grace runs back to the house,\(^73\) 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.\(^74\) At that

\(^{62}\) Id. at 955.
\(^{63}\) See id.
\(^{64}\) See id. at 954-55.
\(^{65}\) See id.
\(^{66}\) See id. at 961-62.
\(^{67}\) Id. at 955.
\(^{68}\) Cf. id.
\(^{69}\) Cf. id.
\(^{70}\) Id.
\(^{71}\) See id.
\(^{72}\) Id.
\(^{73}\) Id.
\(^{74}\) Id.
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.\footnote{See id. at 955, 962.}

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.

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 may be unlikely to attribute its feelings to the storytelling techniques. In fact, in the example above regarding the study of the affect of photographs on juror decision-making, the jurors reported that they were not influenced by the photographs despite the fact that their verdict differed from that of the other jury.\footnote{Monica K. Miller et. al., *How Emotion Affects the Trial Process*, 92 JUDICATURE 56, 57 (2008).} 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.\footnote{See id. at 955, 962.} As Professor Terry Maroney points out, going back as far as the 1600’s, Thomas Hobbes asserted that the “ideal judge is ‘divested of all fear[, anger, hatred, love, and compassion.’”\footnote{Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 630-31 (2011).} 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.’”\footnote{See id.} Indeed, the notion that she would have to testify to such emotionless to qualify as a justice reveals what our system expects of our judges.

In fact, the state of emotional detachment is in and of itself an emotional state.\footnote{Cf. MARTHA STOUT, THE SOCIOPATH NEXT DOOR 52-63 (Harmony 2006)(describing the process by which people detach from other human beings and explaining that the process can be catalyzed by fear).} It is not truly an emotionless state but rather a state without empathy for the emotions of others.\footnote{See id.}
The person experiencing the state may still feel his or her own emotions. These are simply divorced from empathy other people’s emotions.

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

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.

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. He examined his emotions, channeled them, and integrated them into his decision.

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

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

However, emotion is inherently tied to our thinking and our reasoning, and it works upon the human animal even when we are unaware of it. Emotions influence both what people reason about and how they reason. People require emotion to make decisions. For instance, neuroscientist Antonion 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

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82 See id.
83 See id.
84 See Richard A. Posner, How Judges Think 119 (2008); Maroney, supra n.78 at 1493.
85 Id.
86 Id.
87 See Maroney, supra n.78 at 1493-1494.
88 See id.
89 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 n.14 at 66-67.
90 Dispassion is not apathy. Apathy is a lack of feeling emotion, interest, or concern while dispassion is being unaffected by passion, emotion, or bias rather than the lack of such traits.
91 See Brown, supra n.14 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., Nalini Ambady, Ken Nakayama & Shinsuke Shimojo eds., 2010).
92 Damasio supra n.15.
93 Id.
removed. Elliot was no longer able to make the most minor decisions, such as which day to schedule an appointment. He could not hold a steady job after that, and his wife and children left him.

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. Rather, the harm comes from emotion that is without reasonable foundation or emotion not channeled towards reasonable solutions.

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. 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”.

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. In fact, evolutionary psychologists contend that our emotions exist to preserve our own survival. If we feel no fear, then we have little incentive to protect ourselves from death. Likewise, joy can play a role in motivating us to exercise, eat certain desirable foods, and seek sunlight. Love, compassion, attachment, and empathy can spur us to form social and familial bonds that further our survival as well. Our friends, family, and colleagues help us to build better

94 DAMASIO supra n.15; see also ROBBINS, supra n. 16 at 27-28.
95 Id.
96 Id.
97 LAZARUS, supra n.44 at 199-205 (discussing how emotion is inherent in the reasoning process).
98 See LAZARUS, supra n.44 at 200-01 (discussing how emotion that is not processed can lead to impulsive behavior and crimes).
99 Chin, supra n.43 at 1580-81
100 Id. at 1565.
101 LAZARUS, supra n.44 at 116-129.
102 Id. See also B.L. Frederickson, The Broaden and Build Theory of Positive Emotions, 349 PHILOSOPHICAL TRANSACTIONS: BIOLOGICAL SCIENCES 1367-68 (Sep. 29, 2004)(discussing evolutionary foundations of various emotions).
103 “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”.
104 MARTHA C. NUSSBAUM, LOVE’S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE, (Oxford University Press, NY, 1992); cf. Frederickson, supra n.102 at 1369 (discussing how joy can motivate playing and creativity).
105 LAZARUS supra n.44 at 116-118.
shelter, accomplish more work, and obtain better resources than we would on our own.

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

Thus, it would seem odd that we would wish our judges or jurors to emulate the emotional state of a sociopath. 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.

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

106 Id.
107 DAMASIO supra n.15.
108 See STOUT, supra n.80 (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 n.14 (discussing detachment as a trait of psychopathy); LAZARUS, supra n.44 at 126 (mentioning that society refers to a person with no compassion or empathy as a sociopath).
109 See JAMES ALLEN FOX & JACK LEVIN, EXTREME KILLING: UNDERSTANDING SERIAL AND MASS MURDER, (SAGE Publications, Inc., 2011); see also STOUT, supra n.80.
110 See STOUT, supra n.80 (discussing sociopaths who manipulate, steal, torture animals, and lie about coworkers); NPR, Inside The Mind Of A Sociopath. (June 13, 2013), http://www.npr.org/2013/06/19/193099258/inside-the-mind-of-a-sociopath. (discussing the ability of sociopath to function in society).
111 See Brown, supra n.14. Professor Brown also contends that we should not wish for jurists to emulate sociopaths.
112 Kahan & Nussbaum, supra n.34.
113 Brown, supra n.14 at.128-129.
114 Id. at 129-130.
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. On the one hand, some courts seem to embrace evidence that evokes emotion around a relevant consideration. 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. However, at times, the courts seem to label emotionally evocative evidence as the danger. While these opinions can be reconciled based on the facts and the outcomes, they provide unclear guidance and could reflect a more accurate and healthier view regarding the role of emotions.

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. Additionally, even when the legal standard does not include an emotional

115 See, e.g., United States v. Hernandez, 975 F.2d 1035, 1041 (4th Cir. 1992) (saying that Rule 403 limits “jury emotionalism or irrationality” (quoting United States v. Greenwood, 796 F.2d 49, 53 (4th Cir. 1986))).

116 See, e.g., United States v. Kelly, 722 F.2d 873 (1st Cir. 1983) (holding that evidence regarding revenge remarks was admissible to prove the fear element of extortion); United States v. Cockerham, 476 F.2d 542 (D.C. Cir. 1973) (admitting testimony about a pool of blood over a Rule 403 objection); cf. Leubsdorf, supra n. 16 at 1246 (providing instances where evidence law prizes passion).

117 See RESTATEMENT (SECOND) OF TORTS § 46 (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, 323 Ark. 95, 913 S.W.2d 283 (1996) (describing the outrageous conduct standard in Arkansas).

118 See, e.g., Hernandez, 975 F.2d at 1041 (saying that Rule 403 limits “jury emotionalism or irrationality” (quoting Greenwood, 796 F.2d at 53).

119 Cf. Leubsdorf, supra n. 16 at 1248 (discussing how evidence law is complexly ambivalent in part because it both excludes and includes emotions).

120 Cf. Matsakis, supra n. 17 at 65-66 (discussing how trying to push down emotions can make them erupt even more violently); Brandon, supra n. at 90-101 (explaining that accepting our emotions including our negative emotions is the first step to healing negative emotions); and Miller, supra n. 17 at 9-14 (explaining how creating an environment where children are not allowed to share their emotions causes later emotional problems and psychological disturbances).

121 See, e.g., Kelly, 722 F.2d 873 (holding that evidence regarding revenge remarks was admissible to prove the fear element of extortion).
consideration or state of mind, courts will sometimes admit emotionally evocative evidence. In particular, sometimes the evidence required to prove elements of causes of action like murder or rape will be inherently emotionally charged. 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.

Some cases call for evidence regarding emotional states, such as fear, and the courts lean towards allowing emotion-evoking testimony into evidence in such scenarios. Thus, where fear is a factor in determining whether an element of a claim is met, the courts may admit emotion-evoking testimony. For example, in *U.S. v. Kelly*, the court admitted evidence of fear to prove that witnesses did what because they were afraid of Senator Kelly. In *Kelly*, Senator James Kelly was being prosecuted for extortion under the Hobbs Act, section 1951 of Title 18. Under the act, “extortion” was defined to include “the obtaining of property from another. . . induced by. . . fear. . . .” The state presented evidence that that victim was afraid that the Senator could cause problems for the victim’s business. 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. Since fear was relevant to the determination of extortion, the court held that this testimony was not more prejudicial than probative.

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 *U.S. v. Keys*, the court admitted evidence of fear to prove that witnesses lacked credibility because they were afraid. In that case, the defendant, Michael Keys was a prison inmate convicted of knowingly possessing a weapon while in prison.

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123 See, e.g., *Cockerham*, 476 F.2d 542 (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 at 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* n. 16 at 1247 (explaining the ways in which various cases are emotionally charged).
124 See, e.g., *Cockerham*, 476 F.2d 542 (admitting testimony about the pool of blood found at a murder scene in a case for murder)
125 See, e.g., *Kelly*, 722 F.2d 873 (holding that evidence regarding revenge remarks was admissible to prove the fear element of extortion).
126 *Id.*
127 *Id.* at 874.
128 *Id.* at 875.
129 *Id.* at 877.
130 *Id.*
131 *Id.* at 878.
133 *Id.* at 985.
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 handle to form a knife.\textsuperscript{135} 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.\textsuperscript{136} 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 law.\textsuperscript{137} 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.\textsuperscript{138}

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.\textsuperscript{139} For example, in \textit{U.S. v. Cockerham}, the court allowed in description of a neck wound in part to illustrate that a defendant was not insane.\textsuperscript{140} 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.\textsuperscript{141} The prosecution put on evidence that the defendant had murdered a seven year old year.\textsuperscript{142} The girl was exsanguinated from a deep slash across the neck.\textsuperscript{143} She had also been strangled and scalded, and had suffered a bash on the skull and injuries from a sexual assault.\textsuperscript{144} The defendant argued that certain evidence, such as the detailed description of the girl’s neck wound, was unfairly prejudicial, particularly given the stipulations.\textsuperscript{145} The court acknowledged sympathy with all parties and even called the advisability of admitting the description into doubt.\textsuperscript{146} However, the court held that as a whole the trial court did not abuse it’s discretion in allowing the evidence because it tended to both to establish elements of crime and to show circumstantially that defendant perpetrated crime in a manner inconsistent with his defense of insanity.\textsuperscript{147} Thus, the probative value of the evidence thus sufficiently outweighed danger of unfair prejudice to justify its admission.\textsuperscript{148}
Likewise, when elements of proof involve inherently emotionally evocative subject matter, courts will admit emotionally arousing evidence. 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. For instance, in State v. Smith, the court held that Rule 403 did not require exclusion of evidence regarding a pool of blood in a murder trial. In that case, the defendant, Leonard Smith was on trial for the murder of a shopkeeper’s wife, Mrs. Webb. On direct examination, the sheriff testified that he arrived to find “a small country store 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.’” He further started that when he searched for the bullet, he measured the blood and that it was about an inch deep. Other witnesses testified regarding the blood as well. The court held that the evidence regarding the blood had probative value essential to case and was not in any manner gruesome or inflammatory.

In all of these cases, the evidence could likely arouse emotions. 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. While emotion was either a part of the standard itself or inherent to the particular cause of action, 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 Federal Rule 403’s proscription against unfair prejudice, they often seem to indicate that emotion is a danger to be guarded against in legal reasoning. Nonetheless, the evidence in the cases above

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149 See, e.g., State v. Smith, 857 S.W.2d 1, 4 (Tenn. 1993).
151 See id. at 6.
152 Id.
153 Id.
154 Id.
155 Id.
156 Id.
157 See Keys, 899 F.2d 983; Smith, 857 S.W.2d at 4; Cockerham, 476 F.2d 542; Kelly, 722 F.2d 873.
158 See Keys, 899 F.2d 983; Smith, 857 S.W.2d at 4; Cockerham, 476 F.2d 542; Kelly, 722 F.2d 873.
159 See Keys, 899 F.2d 983; Smith, 857 S.W.2d at 4; Cockerham, 476 F.2d 542; Kelly, 722 F.2d 873.
160 See Leubsdorf, supra n. 16 at 1254; Brown, supra n.14 ; see, e.g., Guthrie, 461 S.E.2d at 188-89.
seems emotionally evocative. Additionally, the advice to tell a good story, one which will appeal to pathos, seems prevalent. Thus, there seems to be tension between the opinions allowing in emotionally arousing evidence, the advice to tell a story, and the opinions excluding emotionally evocative evidence. 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. 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 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, their emotions may be informative.

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.” To exclude the evidence due to unfair prejudice, the defendant must demonstrate that “[t]he 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.”

161 See Keys, 899 F.2d 983; Smith, 857 S.W.2d at 4; Cockerham, 476 F.2d 542; Kelly, 722 F.2d 873.
162 See Robbins, supra n. 16; Chestek, supra n.23; 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, 472 (2001) (discussing two parties’ competing truths); Rideout, supra n. 23 at 60 (stating that traditional legal modalities are incomplete); Greeley, supra n.23 at 50; see also Old Chief, 519 U.S. 172 (explaining that jurors may understand evidence better after hearing a coherent story).
163 See Keys, 899 F.2d 983; Smith, 857 S.W.2d at 4; Cockerham, 476 F.2d 542; Kelly, 722 F.2d 873.
164 See Old Chief, 519 U.S. at 189 (explaining that jurors may understand evidence better after hearing a coherent story).
165 See, e.g., Guthrie, 461 S.E.2d at 188-89; Davidson, 613 N.W.2d at 623 (quoting In re Commitment of Franklin, 677 N.W.2d 276, 294 (Wis. 2004)).
166 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 (9th Cir.1985)(excluding a tape of the last hour of a suiciding groups’ life) with Kelly, 722 F.2d 873 (admitting evidence to meet fear element of the claim).
167 See Frederickson, supra n.102 at 1367-68 (discussing evolutionary foundations of various emotions); Lazarus, supra n.44 at 198-215; Matsakis, supra n. 17(discussing how fear is a evolutionary response that protects us); Brown, supra n.14 (discussing how we should not wish for our judges to be sociopathic); Henderson, supra n.45 (making the case for empathy in legal reasoning).
169 Davidson, 613 N.W.2d at 623 (Wis. 2000)(quoting In re Commitment of Franklin, 677 N.W.2d 276, 294 (Wis. 2004)).
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. 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. 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. In that case, the defendant stabbed his co-worker, Steven Todd Farley, in the neck and killed him. Farley and Guthrie worked together as dishwashers at Danny’s Rib House. On the night of the killing, the victim was teasing the defendant who seemed to be disgruntled. Farley told Guthrie to “lighten up.” He snapped the dish towel at the defendant a few times. It flipped the defendant on the nose. Guthrie became enraged. He removed his gloves and started towards Farley. Farley responded, “‘Ooo, he's taking his gloves off.’” Guthrie drew a knife from his pocket and stabbed the Farley in the neck. As Farley fell to the floor, Guthrie stabbed him again in the arm. “Mr. Farley looked up and cried: “Man, I was just kidding around.” The defendant responded: “Well, man, you should have never hit me in my face.”

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

Guthrie’s attorneys introduced evidence that Guthrie was a “good, quiet, Bible reading man.” The state failed to object to this evidence.

Rather, the state responded to this evidence by introducing evidence regarding Guthrie’s prejudices. The prosecutor asked Guthrie’s father whether Guthrie had said that “men

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170 See, e.g., *Guthrie*, 461 S.E.2d at 188-89; *Layton*, 767 F.2d 549.
171 See, e.g., *Guthrie*, 461 S.E.2d at 188-89.
172 Id.
173 Id.
174 Id.
175 Id.
176 Id.
177 Id.
178 Id.
179 Id.
180 Id.
181 Id.
182 Id.
183 Id.
184 Id. at 171.
185 Id. at 171.
186 Id. at 172.
187 Id. at 172.
188 Id. at 186.
189 Id. at 188.
190 Id. at 186.
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.”

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. 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 was 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. The details regarding the killing itself and the victim’s last words are likely to provoke a reaction. Most humans 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. It seems that Mr. Guthrie may have acquired his disorder as a result of his military service to the country. 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. 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 occurs. That process itself can vary from person to person. With respect to the more tangential relevance, the same is true.

The bible reading itself does have the potential to play on the personal biases of jurors.\textsuperscript{197} 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, Christians should not be treated any more favorably than those of other religious beliefs in our court system.\textsuperscript{198}

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.\textsuperscript{199} 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.\textsuperscript{200}

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.\textsuperscript{201} The court also mentioned that there were two women and a black person on the jury.\textsuperscript{202} That 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 the 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

\textsuperscript{198} \textit{Id}.
\textsuperscript{199} “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.” EDWIN H. SOUTHERLAND & DONALD R. CRESSEY, PRINCIPLES OF CRIMINOLOGY 442; Robert V. Wells, \textit{The Nature of Meaning: The Role of the Trial Lawyer in Creating and Shaping Meaning}, 32 Am. J. Trial Advoc. 297, 358 (2008)
\textsuperscript{200} SOUTHERLAND, \textit{supra} n.199; Wells, \textit{supra} n.199.
\textsuperscript{201} Guthrie, 461 S.E.2d at 188-89.
\textsuperscript{202} \textit{Id}. 
defendant whose life veered off track when she made one mistake, becoming a drug mule.\textsuperscript{203} This story reminded the Judge Kozinski of the one big mistake he made when he accidentally allowed his infant son to wander into traffic.\textsuperscript{204} 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,\textsuperscript{205} then it is possible that the bible-reading evidence is likely more prejudicing. Christianity is the majority religion\textsuperscript{206} 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 hold-over from the time that neither black people nor women were allowed on juries.\textsuperscript{207} 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.\textsuperscript{208}

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 \textit{United States v. Layton}, the courts’ language seems to indicate that emotion itself is a problem.\textsuperscript{209} In that case, the court held that a tape of the last hour of the Jonestown was inadmissible in Lawrence Layton’s trial for conspiracy to murder a congressman and the Deputy Chief of Mission of the United States in Guyana, aiding and abetting the murder

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\footnote{Maroney, supra n. 78 at 1497.} \footnote{Id.} \footnote{Id. at 188-89.} \footnote{CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2008), available at https://www.cia.gov/library/publications/download/download-2008/factbooka.zip.} \footnote{See Hunter, supra n.18 (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, \textit{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).} \footnote{See Hunter, supra n.18 (discussing how valuing emotion over reason in evidence law is an adoption of the traditional view that emotion is female and lesser); Gaston Dooley, supra n.207 (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).} \footnote{See, e.g., Layton, 767 F.2d 549.}
\end{footnotesize}
of the congressman, and aiding and abetting the attempted murder of the Deputy Chief of Mission. Layton belonged to the People’s Temple, which was founded by Jim Jones. The approximately 1,200 members of the People’s Temple settled in an area that they named Jonestown in the Republic of Guyana.

On November 17 and 18, 1978, Congressman Leo Ryan and his party investigated and then arranged for the departure of Jonestown residents who desired to return to the United States. Layton boarded one of the departing planes.

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

During trial, it also came out that Layton blamed his sister, Debbie Blakey, for his mother’s death.

After the shooting, Jim Jones encouraged his followers to drink poison and commit suicide. Jones taped the last hour of their lives. During the tape, Jones said,

There's one man there, who blames, and rightfully so, Debbie Blakey, . . . 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.

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....

Dying children screamed in the background of the tape.

The government argued that Jones’s statements proved a conspiracy between him and the Layton. 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.

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 “distracting emotional impact on the jury and the effect it would have in confusing the issues.” The court stated, “it is unlikely that a jury instruction could effectively mitigate the emotional impact and distracting effect of the Tape.”

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 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. It is a trial for the conspiracy to kill Congressman Ryan.

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.”

Yet, this cacophony did not distract the court, which also heard the tape. If the jury was given a curative instruction reminding them that they were there to determine

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225 Id.
226 Id. at 552-556.
227 Id. at 554-556.
228 Id. at 554-556.
229 Id. at 556.
230 Id.
231 Id. at 551-553.
232 Id.
233 Id. at 556.
234 Id. at 552-556. See generally Beth Z. Shaw, Judging Juries: Evaluating Renewed Proposals for Specialized Juries from A Public Choice Perspective, 2006 UCLA J. L. & Tech. 3, 70 (Fall 2006)(noting that
conspiracy, we do not know what the result would be. Although the court has legal training, as mentioned in the section on the role of emotion in our reasoning above, even judges feel emotion.

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.

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 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. 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.\textsuperscript{239}

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 FRE 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 \textit{Layton} case mentioned above could be edited to reflect these ideas as follows:

\begin{quote}
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 nor should not be walled off in a trial for murder. Moreover, it is with humility that we acknowledge that 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
\end{quote}

\textsuperscript{239} See MATSAKIS, supra n.17 at 65-66; BRANDON, supra n.17 at 90-101 (explaining that accepting our emotions including our negative emotions is the first step to healing negative emotions); and MILLER, supra n.17 at 9-14 (explaining how creating an environment where children are not allowed to share their emotions causes later emotional problems and psychological disturbances).
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, would support a more emotionally healthy society, and would also establish a more feministic approach to judicial opinions. 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. 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. As mentioned before, instructions to disregard an emotion often lead people to think about it more. Moreover, emotion is a part of our reasoning as demonstrated by the Damasio case. It’s a part of our conscience and our survival instinct. 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.

240 Cf. Matsakis, supra n.17 at 65-66 (discussing how trying to push down emotions can make them erupt even more violently); Brandon, supra n.17 at 90-101 (explaining that accepting our emotions including our negative emotions is the first step to healing negative emotions); and Miller, supra n.17 at 9-14 (explaining how creating an environment where children are not allowed to share their emotions causes later emotional problems and psychological disturbances).

241 See generally Hunter, supra n.18 at 130 (discussing how valuing emotion over reason in evidence law is an adoption of the traditional view that emotion is female and lesser); Gaston Dooley, supra n.207 at 339 (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).

242 See Davidson, 613 N.W.2d at 623 (quoting In re Commitment of Franklin, 677 N.W.2d 276, 294 (Wis. 2004)) (providing the source of the language and endorsing the language).

243 See Frederickson, supra n.102 at 1367-68 (discussing evolutionary foundations of various emotions); Lazarus, supra n.44 at 198-215; Matsakis, supra n.17 (discussing how fear is a evolutionary response that protects us); Brown, supra n.14 (discussing how we should not wish for our judges to be sociopathic); Henderson, supra n.45 (making the case for empathy in legal reasoning).

244 See Leubsdorf, supra n.16 1245 (explaining that evidence law values emotion over reason as part and thus reflects patriarchal view of emotion as lesser); Hunter, supra n.18 at 130 (1996) (discussing how valuing emotion over reason in evidence law is an adoption of the traditional view that emotion is female and lesser); Dooley, supra n.207 at 339 (explaining that once women were allowed on the jury the language regarding rule 403 mimicked the rhetoric of protecting the emotional and irrational woman.
During Justice Sonia Sotomayor’s confirmation hearings, she was questioned regarding whether she would be emotionally biased. 245 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.” 246 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 woman 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.

V. Conclusion

As our understanding regarding the role emotion plays in our reasoning grows, that understanding should be reflected in the interpretations rule 403 to provide better guidance to attorneys, to embrace a healthier attitude towards emotions, 247 and to establish greater honesty. Emotion and reasoning are not truly separate, and some emotion, including dispassion, is 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. 248 They can form the basis of

from the harsh realities of life). See also Dolovich, supra n.18 at 1007 (explaining that emotionality is perceived as a feminine trait).


246 Davis, supra n.245 at 3; Abrams, supra n.245 at 264; Maroney, supra n.78 at 631.

247 Cf. Matsakis, supra n.17 at 65-66 (discussing how trying to push down emotions can make them erupt even more violently); Brandon, supra n.17 at 90-101 (explaining that accepting our emotions including our negative emotions is the first step to healing negative emotions); and Miller, supra n.17 at 9-14 (explaining how creating an environment where children are not allowed to share their emotions causes later emotional problems and psychological disturbances).

248 See Frederickson, supra n.102 at 1367-68 (discussing evolutionary foundations of various emotions); Lazarus, supra n.44 at 198-215; Matsakis, supra n.17 (discussing how fear is a evolutionary response that protects us); Brown, supra n.14 (discussing how we should not wish for our judges to be sociopathic); Henderson, supra n.45 (making the case for empathy in legal reasoning).
a more compassionate society. The emotions involved in story are how we learn and process.

Thus, decisions regarding Federal Rule 403 need to be written to reflect our new understanding. With respect to Rule 403, while the outcome of many cases regarding 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.