

Unintended Consequences of Toying with Jurors' Emotions: The Impact of Disturbing Emotional Evidence on Jurors' Verdicts¹

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Despite the legal system's conventional story that our judicial process is devoid of emotions and based on pure reason (Bandes, 1999), attorneys have intuited the role of emotion in jurors' verdict decisions. Attorneys attempt to elicit emotions in jurors during opening and closing statements, or through the use of emotionally disturbing evidence. These attempts might, however, cause unintended changes to the way jurors process or interpret trial evidence. As psychologists, it is not our job to argue that emotion can (or should) ever be divorced from legal decision-making. Instead, we argue that it is important for attorneys to understand how emotion might change jurors' thinking processes in ways that attorneys might not expect. First, we explain how different types of emotional evidence influence jurors' verdicts, highlighting instances in which emotional evidence influences verdicts in the opposite direction that one would expect. Second, we explain how social psychological and neuroscience research about emotion in general can be applied to jury decision-making to inform attorneys about the less expected effects this evidence might have on how jurors process and interpret evidence in the trial. For a more extensive examination of these issues see Salerno and Bottoms (2009).

Emotional Evidence

Of course, both sides in a criminal case -- defense and prosecution -- attempt to sway jurors' emotions, and in turn, their verdicts. Prosecuting attorneys might flash as many gruesome post-mortem photographs as the judge will allow to make jurors angrier at the defendant. Defense attorneys might make appeals to jurors' empathy during closing statements. Disturbing evidence, such as autopsy photographs of children, has caused extreme reactions in jurors, such as crying or even vomiting (Rowan, 2007). Will jurors' heightened anger or disgust lead them to be more punitive toward a defendant? And if so, how? According to Rule 403 of the Federal Rules of Evidence (2006), "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Negative emotion can influence legal judgments, however, in both probative and prejudicial ways (for reviews see Feigenson & Park, 2006; Salerno & Bottoms, 2009). Thus, it is important to note that emotional evidence can affect jurors’ judgments through the legally desired *probative* channels or the legally untenable *prejudicial* channels. For example, the prosecution’s goal is obviously to present evidence (emotional or not) to increase punitiveness. Evidence, such as graphic crime scene photographs and victim impact statements, is presented to demonstrate the amount of harm inflicted by an offender, and in turn, increase punishment. If jurors become more punitive because of unique information about harm, the law considers that the evidence has had a probative effect. But if the evidence does not provide unique information about harm, or if it increases jurors’ emotions in informationally irrelevant ways and this outweighs the unique factual information – it could be considered legally prejudicial.

Prosecution evidence. Prosecutors are likely to try and elicit negative emotions (i.e., anger, disgust) in jurors in hopes of making them more likely to convict the defendant. One form of evidence that prosecutors might use to elicit strong emotion in jurors is gruesome photographs from a murder scene. Mock juror studies reveal that, even when all mock jurors hear the same exact evidence, jurors who see gruesome photographs of a murder victim are more likely to vote guilty (Bright & Goodman-Delahunty, 2004, 2006; Douglas et al., 1997) compared to mock jurors who do not see the photographs. For example, Bright and Goodman-Delahunty (2006) presented mock jurors with a lengthy trial transcript describing a case against a man on trial for murdering his wife. Half of the mock jurors heard either non-gruesome or gruesome verbal descriptions, and in addition the jurors viewed either no photographs, non-gruesome photographs, or gruesome photographs. The mock jurors then reported their verdicts and how angry and disgusted they felt before and after reading the case materials. The verbal descriptions had no effect on verdicts, but the visual stimuli did: Mock jurors who saw the gruesome photographs were more likely to vote guilty and rated the prosecution’s evidence as more sufficient than did jurors who saw non-gruesome or no photographs. Furthermore, these effects were driven by the mock jurors’ reported anger toward the defendant; that is, viewing the photographs caused the jurors to become angry toward the defendant, and in turn, this anger led them to vote guilty more often and to believe that the prosecution evidence was sufficient. This suggests an emotion-driven explanation as opposed to an argument that gruesome photographs were merely providing unique information. An emotion-driven explanation is also supported by studies demonstrating that jurors who view color photographs are more biased toward punitive sentencing than jurors who viewed the same photographs in black and white (Oliver & Griffitt, 1976; Whalen & Blanchard, 1982). To claim that the color photographs serve a probative (i.e., informational) function for the jurors, one would have to argue that the more punitive judgments resulted because the color photographs contained unique information not evident in the black and white versions. A more compelling explanation is that the color photographs elicited more emotion in the mock jurors, which lead to more punitive judgments.



A second type of emotionally disturbing prosecution evidence that might elicit negative emotion in jurors is victim impact statements. In the sentencing phase of a capital trial prosecutors can have the victim’s family members testify about the impact of the victim’s death. Supporters of victim impact statements believe that these statements provide information about the extent of harm committed by a defendant (i.e., serve a probative value). In *Booth v. Maryland* (1987) and *South Carolina v. Gathers* (1989), the Supreme Court banned victim impact statements from death penalty trials, finding them informationally irrelevant and biasing of jurors against the

defendant, thereby contributing to arbitrary death penalty sentences and violating the 8th amendment that forbids cruel and unusual punishment. But in *Payne v. Tennessee* (1991), the Supreme Court reversed itself, and in a recent case, the Court even allowed the admission of “video tributes” to the victim, including pictures of the victim from childhood set to soft music and narrated by the victim’s mother (*Kelly v. California*, 2008) – surely an appeal to jurors’ emotions. The majority in *Payne* opined that victim impact statements are relevant to the sentencing phase of a trial because they speak to the level of harm resulting from a crime and that any violation of the defendant’s rights “were harmless beyond a reasonable doubt” (*Payne v. Tennessee*, 1991). Thus, the court is assuming that the effect of victim impact statements is probative (i.e., providing information regarding harm) and not prejudicial (i.e., “harmless”).

The Court’s assumptions have been tested in a growing number of laboratory and field studies. Several laboratory studies have found that mock jurors who are exposed to victim impact statements (versus no statements) are more punitive toward the defendant in terms of sentencing in death penalty cases (ForsterLee et al., 2004; Luginbuhl & Burkhead, 1995; McGowen & Myers, 2004; Myers & Arbuthnot, 1999; Myers, Goodwin, Latter, Winstanley, 2004) and ratings of crime severity (Greene, Koehring, & Quiat, 1998). One study with real cases echoed these results: Among actual trials in one Midwest U.S. county, defendants in trials that included (versus did not include) victim impact statements were more likely to be incarcerated than put on probation (Erez and Tontodonato; 1990). One study, however, failed to find that victim impact statements had an effect on sentencing outcomes (Davis & Smith, 1994).

Field studies, however, have found little or no effect of victim impact statements on sentencing decisions (Erez & Roeger, 1995; Erez & Rogers, 1999; Henley, Davis, & Smith, 1994). Although these studies are more realistic than laboratory simulations, our ability to generalize the results to American juries is limited because they assessed decisions made by legal professionals (e.g., judges) and involved much less serious cases than the experimental studies (which might elicit less emotion) (for a review see Salerno & Bottoms, 2009). Jurors and judges might differ greatly in the extent to which their punitiveness is affected by victim impact statements. For example, compared to potential jurors, judges are likely to hear victims’ stories that induce sadness, anger, and disgust on a regular basis and may, especially over time, become less emotionally affected by them.

Defense evidence. Defense attorneys also appeal to jurors, perhaps by attempting to elicit sympathy and empathy in jurors in hopes of making the jurors more lenient toward their clients. Haegerich and Bottoms (2000), for example, found that mock jurors who heard a defense attorney urging empathy for the defendant during opening and closing statements were less likely than jurors who did not hear this empathy induction to find a defendant guilty. Thus, appeals to jurors’ empathy appear to affect their verdicts. Defense attorneys might also elicit negative emotions in jurors. Perhaps the best example of defense attorneys presenting emotionally disturbing evidence we can offer is the defense presenting disturbing details of a defendants’ history of child abuse as mitigating evidence in an attempt to steer jurors away from the death penalty. Such evidence is often aimed at stirring jurors’ emotions and certainly has the potential to be as emotionally charged as gruesome crime scene photographs or victim impact statements presented by the prosecution. The research investigating this phenomenon reveals, however, that the effect of emotional mitigating evidence is not always what one might expect. For example, research finds that mitigating evidence that is emotionally-disturbing (e.g., a history of child abuse) sometimes causes mock jurors to be more punitive, which has been labeled as the “backfire effect” (e.g., Barnett, Brodsky, Price, 2007; Brodsky, Adams, Tupling, 2007). Stevenson, Bottoms, and Diamond (2010) coded mock jurors’ comments about a defendant’s history of abuse during deliberations and found that jurors were more likely to either ignore the defendant’s history of child abuse or even to use this factor as an aggravator, than they were to use this evidence in the intended mitigating manner. They found jurors were more likely to discuss a defendant’s history of child abuse to mean that his behavior was controllable and stable more than uncontrollable and

unstable, respectively. This, of course, is not likely the reaction the attorney would have expected. The researchers speculated that that the emotional evidence probably made jurors' more angry, but toward the defendant, which made them more punitive – even though the evidence was originally intended to make them sympathetic and thus less punitive toward the defendant. This is an example of how trying to manipulate jurors' emotions might have unintended effects – effects that can be explained by social psychological and neuroscience research about emotion and decision-making. This research can explain the effects of appeals to jurors' emotions that attorneys might not predict based on their own intuition about how jurors' emotions operate.

Social Psychological Explanations

Heightened juror emotion might have unintended consequences in the courtroom because of how emotion affects how deeply jurors process evidence. People can process information (such as testimony in court) through either a deliberative and effortful route or a quicker more efficient route (for review of dual-process models, see Evans, 2008). Emotion depletes attention and ability to process information deeply (Wilder & Simon, 1996). Anger in particular results in shallower processing, because anger makes people feel more confident in their own judgments (Lerner & Tiedens, 2006). When people are less able or motivated to process information deeply, they rely on heuristics or “cognitive shortcuts,” such as stereotypes. For example, Bodenhausen, Sheppard, and Kramer (1994) found that after reading the same case evidence, people induced to be angry perceived a Hispanic person as more guilty of assault than a non-Hispanic person, but people who were induced to be in a sad or neutral mood perceived the Hispanic and non-Hispanic persons as equally guilty. The authors concluded that angry participants relied on the race stereotype because their anger was making them process the case information less deeply. A more recent study clarified, however, that angry people have the capacity to process deeply because they only rely on stereotypes when they think the stereotype is relevant (Moons & Mackie, 2007). This research suggests one unintended consequence of making jurors more angry: it might increase their reliance on stereotypes when deciding on a verdict.

Another unintended effect of emotion is that it can cause jurors to process other trial evidence in a biased way. In other words, making jurors angry might not just make them more likely to vote guilty, but it might change how they process and interpret other evidence. Strong negative emotion can bias the information-processing and decision-making processes in many different ways. For example, negative emotion can cause jurors to look for information and interpret evidence to be consistent with blaming a target (Alicke, 2000). This means jurors who are angry at a

defendant might be more likely to seek out information that backs up that emotion and to interpret other information to be consistent with their anger. Emotion can also change our judgments in a more direct way. People consult their emotions to decide how they feel about something (Forgas, 1995; Schwartz & Clore, 2003). For example, when jurors are deciding whether they trust a defendant, they might ask themselves how they are feeling. If they are angry they might interpret that to mean that they do not trust the defendant – even if the anger came from something unrelated, such as being in a bad mood. So, for attorneys, this means that jurors might consult their anger (caused by seeing a photograph of a child victim) as information that they do not trust the defendant, independent from an assessment of evidence indicating guilt. Finally, emotion can lead to visceral reactions that are merely justified by deeper cognitive reasoning that happens *afterward* (Haidt, 2001). For example, seeing a gruesome photo might make us angry, which we

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later justify by coming up with reasons to believe the defendant did it. In a particularly relevant metaphor, Haidt (2001) likens people more to lawyers defending a case than to judges or scientists seeking truth. If true, this would suggest that emotion might bypass rational, deliberative processing entirely and directly result in more punitive judgments. This theory would predict that the reason victim impact statements make jurors react more punitively is because they induce immediate visceral response that jurors later justify with evidence that fits their emotional reaction, not because they gain unique information from the statement.

Feigenson and Park (2006) applied these theories to legal decision-making specifically. They proposed that emotion can affect legal judgments indirectly through providing information, but also directly in ways that are independent from any information the emotion might provide. For example, jurors' negative emotions caused by emotional evidence would make them more likely to process evidence that is negative, thus focusing their attention more on the evidence that is consistent with their anger toward the defendant. So, if jurors are extremely angry after hearing a victim impact statement, they might be more likely to pay attention to negative information (e.g., an officer testifying that the crime was particularly heinous) than positive information (e.g., a defendant's mother testifying to the positive aspects of his character). This might explain why mock jurors who viewed gruesome photographs rated the prosecution's evidence as more sufficient than did jurors who did not view the photographs (Bright & Goodman-Delahunty, 2006). Because the two groups heard exactly the same case evidence, this suggests that the jurors who saw the photographs focused more on the negative anger-congruent evidence (e.g., traumatic details of the crime, negative information about the defendant, etc.) than did other jurors.

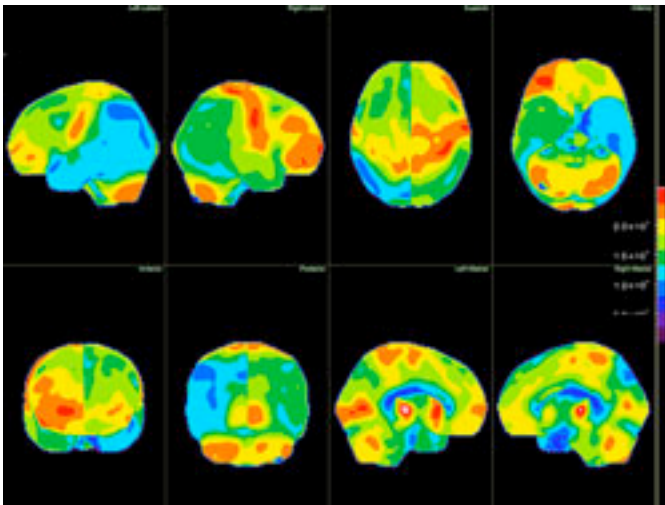
Neuroscience Explanations

In addition to social psychological research, neuroscience research can tell us about the impact of emotional evidence on jurors' emotions and subsequent judgments. We can learn a lot about the effect of emotion on information processing from neuro-imaging studies that use functional magnetic resonance imaging (fMRI). fMRI is a technique used to measure blood flow to areas of the brain during activities. By measuring where blood flows during different tasks, researchers can show the level of brain activity on an image of the brain associated with the tasks. For example, if people are speaking they might have more blood flow to the areas of the brain associated with language, areas that would be shown as "lighting up" on the fMRI image. By examining these images and considering the amount of blood flow to a given area, researchers can correlate brain activation in particular areas with whatever cognitive activity is being performed by a subject. Studies using fMRI to investigate emotion can provide insight into how brain activity differs when people make decisions that involve more (compared to less) emotional stimuli. A study investigating emotion might, for example, compare how brain activity differs between people who experience the emotional stimuli (e.g., view angry faces, disturbing photographs, etc.) to people who do not experience the emotional stimuli.

Although neuroscience and law is a growing field, we are aware of only one study that investigates brain activity while making legal guilt and punishment decisions (Buckholtz, Asplund, Dux, Zald, Gore, Jones & Marois, 2008). This study found that a set of brain areas linked to social and emotional processing are associated with deciding punishment for 50 hypothetical legal cases. This study has found preliminary support for the contention that emotion is at least somewhat involved in legal decision-making. This study did not, however, investigate whether increased levels of emotion affect legal decision-making.

A number of non-legal, but relevant, fMRI studies have compared the effect of more versus less emotional decisions on brain activity. For example, researchers have compared brain activation differences when people consider moral dilemmas that involve a personal element (and therefore believed to elicit more emotional engagement) versus a non-personal element (Greene, Nystrom, Engell, Darley, & Cohen, 2004;

Greene, Sommerville, Nystrom, Darley, & Cohen, 2001; Greene & Haidt, 2002). For example, Greene and colleagues (2001) asked participants to decide a classic “moral dilemma” in which they must decide between letting a trolley full of people run off a cliff versus sacrificing only one man’s life to stop the trolley (thus saving the people on board). In the impersonal (i.e., less emotional) condition, participants were told they had to pull a lever to switch the trolley to a second track and away from the cliff, killing a man standing on that second track. In the personal (i.e., more emotional) condition, participants were told they had to push a man onto the track in front of the trolley to stop it. Participants contemplating the more personal moral violation had increased activity in brain areas associated with emotion and, of even more interest, decreased brain activity in areas associated with cognitive processes such as working memory. Greene and colleagues (2004) found that these two different activation patterns were what drove their decisions in the moral dilemma. In other words, people who had to make a more (versus less) emotional decision had greater activity in the brain area associated with emotion and less activity in the brain area associated with cognition, which led the two groups to make different moral decisions. In another study, participants judged whether the action depicted in a scenario was wrong (similar to jurors’ task in a trial) and whether they would have acted the same way. Judgments about the morality of inflicting intentional harm resulted in greater activation in emotional areas of the brain and lesser activation in cognitive areas, compared to judgments about unintentional harm (Borg, Hynes, Van horn, Grafton, & Sinnott-Armstrong, 2006). If we assume that reading about intentional harm would make people more angry than unintentional harm, this would also suggest that more (versus less) emotional judgments lead to more emotion and less cognition activity. So, if we apply this to our issue of emotional evidence in court, this (along with the social psychological theories described above) might suggest that jurors whose verdict decisions are more emotional due to disturbing evidence might be driven more by their emotions and process the evidence less deeply, compared to jurors who have a less emotionally charged decision-making process.



Other neuroimaging studies have compared people with higher versus lower emotion in ways more like the circumstances encountered by jurors considering harm suffered by victims in court cases. One study found that people who read sentences about bodily harm (which participants rated as higher in emotionality) made quicker judgments and showed less activation in a brain area associated with autobiographical episodic memory and deciding intentions of others, compared to people who read sentences that did not include bodily harm (Heekeren, Wartenburger, Schmidt, Prehn, Schwintowski, & Villringer, 2005). The researchers concluded that viewing bodily harm limits one’s ability to take the emotional context into account when judging another person’s actions. Although reading sentences

about harm does not exactly mimic viewing gruesome photographs, if people are less able to take context into account when they have seen more emotional stimuli, this might explain why people who see autopsy photographs might be less open to mitigating evidence (i.e., the context in which the crime was committed).

What does this mean for attorneys?

Next, we will discuss what the practical applications of these theories might be for attorneys. Typically, psychologists avoid going “beyond their data,” to predict behavior. The research we have reviewed relies on what people tend to do on average and does not necessarily apply to any individual juror. So, rather than try to predict how jurors will react to attorneys’ attempts to “toy” with their emotions, we consider

possible unintended effects that attorneys might not expect. Earlier we described an example of an unexpected effect of emotional evidence: the backfire effect in which mitigating evidence about a defendant's history of child abuse was more often ignored or used as an aggravator, as opposed to as a mitigator, as the defense intended (Stevenson et al., 2010). Theories about emotion that predict jurors' heightened negative emotions might change how they process other information might explain this unexpected effect. For example, jurors' anger toward the defendant (which might have already been elicited during the guilt phase of the trial) could cause jurors to pay more attention to evidence that fits with their anger. This might explain why many jurors ignored the defendant's history of child abuse during deliberation – because it was not congruent with their anger toward the defendant. These theories also predict that angry jurors might interpret ambiguous information to be consistent with their emotion or to justify their immediate visceral response. This could explain why some jurors use a history of child abuse as an aggravator – their anger toward the defendant led them to reason that the abuse left the defendant permanently “damaged” and unable to be rehabilitated. Thus, jurors' negative emotions might bias their processing and interpretation of evidence to produce effects attorneys might not have expected based on their intuition about how emotional evidence will influence jurors.

Thus, defense attorneys might want to pay particular attention to how the evidence they present could be filtered through anger jurors might already feel toward the defendant. Perhaps addressing these alternative interpretations of the evidence up front might ameliorate the collateral effects of jurors' emotions on how they interpret evidence. In other words, perhaps participants in Stevenson et al.'s (2010) study might not have interpreted the history of child abuse as meaning the defendant was “damaged goods” if the defense attorney had presented expert testimony combating that claim. Calling attention to the potential impact of jurors' emotions might also cause jurors to correct for this influence. In fact, emotions affect judgments most strongly when the emotion is unnoticed. For example, Schwarz and Clore (2003) found that anger is more likely to affect judgments after it dissipates into irritation, because its origin is less clear and thus less likely to be corrected. Similarly, by the time jurors render a verdict, the emotional influence on their judgments might be outside of their awareness. This might make jurors less likely to realize their emotions are running high due to disturbing evidence and thus less likely to correct for this effect.

Defense attorneys, however, are not the only ones who should be cautious about the unintended effects of toying with jurors' emotions. Prosecutors should also exercise caution and be aware of collateral effects of jurors' negative emotions. Angry jurors, for example, might process the case evidence less thoroughly, which might make them more likely to miss or make mistakes about evidence in general – including prosecution evidence. Jurors misinterpreting or forgetting evidence can be just as detrimental to the prosecution's case as to the defense's case. For example, if the prosecution's case hinges on complex expert testimony that might be difficult for jurors to follow, making jurors angry might limit their ability to process the expert testimony, ultimately weakening the case overall. Further, making jurors angry might lead to increased stereotyping, which could be detrimental to the prosecution if the plaintiff or one of the prosecution's witnesses belongs to a stereotyped group.

Attorneys should note that not all jurors will react strongly to emotional evidence, even the most gruesome photograph or the most compelling victim impact statements. Some jurors, for example, might have more experience with disturbing information (perhaps through medical or emergency rescue, playing graphic video games or watching graphic forensic television programming such as *CSI: Crime Scene Investigators*), which one could speculate might cause these people to react differently than others. Jurors also might be more or less naturally affected by emotional information. Researchers have identified personality variables, such as Need for Affect (Maio & Esses, 2001) and Disgust Sensitivity (Haidt, McCauley, & Rozin, 1994), which are considered individual differences in susceptibility to emotional information. These

individual differences are assessed with questionnaires that may be incorporated in *voir dire* to determine how much a given juror might be influenced by emotional evidence.

Although we believe that the constellation of evidence we have presented is quite relevant in understanding how emotional evidence might impact jurors' decisions, there are certainly a number of reasons to be cautious about generalizing from some of the studies we reviewed to the actual legal arena. First, the social cognition and neuroscience studies we reviewed were not conceived of for generalization to the context of legal decision-making specifically and still need to be tested further in the legal context. Second, none of the models we have discussed take into account the potential influence of the jury deliberation process. Studies that do not include the jury deliberation component might misrepresent what final post-deliberation verdicts would be in a real jury context (Diamond, 1997; Salerno & Diamond, in press). Finally, it is important to note that these studies are based on how people are affected on average – thus these results cannot predict how any one given juror will react.

Conclusion

The purpose of our paper is not to predict how jurors will react emotionally, but instead to argue against the ability to do so with accuracy. Our purpose is to caution attorneys about the complexity of emotion and decision-making and to caution against assuming the effects of their attempts to toy with jurors' emotions. Inducing juror emotion, such as anger, can affect not only jurors' verdicts, but also how deeply they process and how they interpret trial evidence. This can lead to many unintended effects, such as biasing processing and interpretation of evidence in emotion-consistent ways, increased errors, decreased ability to understand complex testimony, increased reliance on stereotyping, and perhaps many others that have not yet been identified.

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Endnote

¹ Portions of this article are adapted from Salerno, J. M., & Bottoms, B. L. (2009) Emotional evidence and jurors' judgments: The promise of neuroscience for informing psychology and law. *Behavioral Sciences and the Law: Special Issue: The Neuroscience of Decision Making and Law*, 27, 273-296.

We asked three experienced trial consultants to offer their reactions to Salerno and Bottoms article on the impact of disturbing emotional evidence on jurors' verdicts. On the following pages, John McCabe, Dennis Elias and Richard Waites offer their perspectives.

Response to Unintended Consequences from John McCabe

John G. McCabe, (john.mccabe@earthlink.net) Doctoral Candidate, is Chair of the ASTC's Research Committee. John is currently consulting while he completes his doctoral work at Claremont Graduate University and studies means of correcting juror bias that is caused by negative emotional reactions.

We are all familiar with the concept of people being *blinded by emotion*. The blinding emotion could be rage, or jealousy, or envy, etc. We have probably all heard someone say something akin to, "He was so upset that he wasn't thinking straight." And, of course, there is, or at least was, the *in flagrante delicto* defense: killing the interloper is justifiable if a man catches another man in bed with his wife. That emotions can overwhelm reason is not controversial.

A more radical idea, proposed by Antonio Damasio in his 1994 book *Descartes' Error*, is that emotions set not only the upper limit of reasoning, but also reasoning's lower limit. That is, without input from our emotions we would be unable to reason as social beings. Here Damasio is not referring to systematic, abstract, syllogistic reasoning (i.e., All men are mortal. Socrates is a man. Therefore, Socrates is mortal). Rather, he is referring to social reasoning (e.g., being able to judge whether a given action will lead to an increased or decreased likelihood of achieving one's social goals).



In the 1986 book *Law's Empire*, Ronald Dworkin argues that the rightful purpose of the justice system is to "secure a morally defensible outcome" (p. 165). By and large, this is what I believe jurors are attempting to do, but they cannot do it without taking into consideration their own emotional reactions. A cold cost-benefit analysis may be an artificial substitute for determining if an outcome is *morally defensible*, but I tend to think that the gauge is more in one's gut than one's head. Besides, a systematic cost-benefit analysis is likely to be unwittingly influenced by emotional information. Thus, if we are to understand the juridical decision-making process, it is critically important to understand the role that emotional reactions play in that process.

When I read Salerno and Bottoms' article, these two great books by Damasio and Dworkin were brought to mind. Salerno and Bottoms are correct; despite the legal myths, emotions permeate jury decision-making. Rule 403's *substantially outweighed* language sets a high bar for exclusion. The law favors jurors seeing more rather than less, despite the potential biasing impact. Rule 403 concerns only *unfair* prejudice. I appreciate Salerno and Bottoms' contribution regarding evidence and testimony that is likely to elicit emotions that in turn can lead to increased punitiveness or leniency. Their explanations, both social psychological and neuro-cognitive, were presented well. Moreover, as someone who studies these issues, I thank them for presenting information about the impact specific emotions have on jurors' level of cognitive effort as well as the potential unintended pitfalls of attorneys trying to induce particular feelings in jurors. A colleague recently sat on a jury in which a last-minute appeal to emotion backfired; he says, like watching a train wreck, everyone cringed, but you just could not look away. It is always important to anticipate, understand, and manage jurors' emotional responses.

Clearly, though, more research is necessary. For instance, for logistical reasons, we psychologists tend to test the effects of emotions in relatively short timeframes, a couple of hours or a day, whereas a trial may last days, weeks, or even months. There is a natural ebb and flow to both emotional reactions and the motivation and ability necessary to critically evaluate evidence and testimony. As a result, an angry emotional response on one day may or may not hamper thoughtful consideration of evidence the next day or even later that same day. Although extremely valuable, effects demonstrated in laboratory experiments may not map onto jurors' naturalistic experiences very well. As we move forward, a greater understanding of the modulation of the effects of juror's emotional reactions is necessary. This is to say nothing of source effects like perceived sincerity, factors affecting emotional dynamics in a trial, etc.

Still, emotional responses of decision-makers have not gotten their due in the history of law and rhetoric. Appeals to emotion, or *pathos*, are relegated in the minds of many to third place behind *logos*, logical argument, and *ethos*, the speaker's character. Yet, the more we learn, the more we see emotion's prominent and sometimes insidious role in decision-making. Notable is one of the articles cited by Salerno and Bottoms, Douglas et al. (1997), in which participants were more punitive when exposed to graphic photographic evidence relative to those not shown any photos. This was despite the photos' lack of any information diagnostic of the defendant's guilt. More importantly, though, the participants whose decisions were affected by exposure to the graphic photos were unaware that the photos had impacted their judgments. Unless brought to consciousness, emotion biases without the biased even noticing.

This article by Salerno and Bottoms speaks to a larger issue as well, law as a reflection of the Western notion that rationality is separate from (and superior to) emotionality. This is what Damasio refers to as *Descartes' error*, conceiving of the mind as separate and distinct from the body, especially the viscera, the gut where emotion is felt. An interesting consequence of this bifurcation, according to Damasio, is that because the body and mind are thought of as distinct, Western medicine tends to treat the body, the disease, without sufficient consideration given to the mind, the patient. The popularity of holistic medicine, which was just beginning to flourish in the early 1990s when Damasio wrote his book, is evidence of people's need to feel that their doctor understands not just their disease but also how that disease is affecting their whole self. Medicine has only recently embraced some of the ideas of a holistic approach with very encouraging results. Preliminary evidence shows more favorable outcomes when both body and mind are treated. However, an impediment to progress in this area is likely the medical establishment, particularly as substantiated by medical schools. Traditional approaches have momentum on their side.

Another likely problem is that the skill set necessary to become a great orthopedic surgeon, for instance, is probably not the same as the skill set necessary to relate to and connect with patients on an emotional level. In this age of medical specialization, demanding a great surgeon have extraordinary technical skills and great bedside manner may be asking too much. And, having to choose, most of us would prefer the heartless but skillful surgeon. Of course, the only thing worse than a doctor with a bad bedside manner is one that unknowingly fails to connect with his or her patients. In the same way, an attorney may hone their argumentative skills as much as an expert surgeon hones surgical skills, but the training may not emphasize what is necessary to relate to a jury, the *box-side manner*.

Response to Salerno & Bottoms from Dennis C. Elias

Dennis C. Elias, Ph.D. is Senior Litigation Consultant with the firm, [Litigation Strategies, Inc.](#), Phoenix, AZ and Member of the Executive Committee, ASTC Board of Directors.

Two things grabbed me immediately when I read Salerno & Bottoms contribution: 1) “Unintended Consequences”, and 2) “Toying with Jurors’ Emotions”. The former bespeaks the unpredictability of juror response to novel, emotionally-charged evidence and the latter, the notion that the trial advocate has the capacity to target, evoke and harness emotion that will enhance his or her chances of persuading to a verdict.

Unintended consequences can be limited but not completely controlled by adequate preparation and pretrial research.

The case is about what the jury says it’s about. It’s well known (and often painfully proven) that what you, the trial advocate, think is important and impactful in your case narrative or fact pattern, doesn’t necessarily carry the freight with your jurors. Advocates marry their theory of the case and through the passion of advocacy, become embedded in belief that their valuing and emotional response to a certain fact, piece of evidence or narrative thread, is the norm. How could anyone feel differently? Any trial advocate can tell war stories about the surprise, horror and desolation of a deliberation and verdict that result in the total refutation of such idiosyncratic and misplaced certainty. What you think and feel about the case probably has too much biasing baggage for you to accurately predict the judgment and emotions of an average jury member.

Jurors compose melodramas from the facts, features and characters involved in the events leading to conflict and trial. They create character profiles of the players in order to help them explain the motives and choices of each actor. Once they have composed the narrative, often filled with counterfactual in-filling, they unconsciously and consciously are guided by how they feel and the emotions emerging from the story path.

It’s probably a good idea to stop imagining that a particular piece of evidence that has an emotionally evocative component is going to reliably evoke the same emotion, the same intensity of emotion and the same effect of that emotion on the valuing/decision process of any one or group of jurors. The idiosyncrasies of individual life experience, values, attitudes, perspectives, etc., alone suggests that it is foolhardy to predict the impact of a particular piece of evidence ex cathedra from your navel.

Regardless, the savvy trial advocate can discover the quality and range of emotional perspective taken on any particular case material by testing it fairly in front of mock jurors within the context of a summary presentation of the case in chief. Presenting the material in question in context is essential, as that is the best approximation of how the actual triers of fact are going to experience the narrative. Nota bene: Allow several panels of mock jurors to inform you of their characteristic or consensus emotional involvement and reaction to evocative evidence or testimony. One panel can simply be affected by too many outlier variables to be reliable.

Once you’ve got a consensus and consistent feel for the way actual people embrace and embody the emotional elements into their case narrative and judgment, it’s time to shape your trial presentation in such a manner that invites jurors to recognize how your case theory and facts are congruent with what they expect and what they feel organically.

You can lead a horse to water, but you can't make him drink. You cannot reliably make jurors feel one way or the other. The notion of stimulus and response when it comes to eliciting emotion from jurors is simplistic, misguided and pretty much an invitation to chaos. I recall one product liability roof crush case where the plaintiff produced a photo of the bloody wreckage of the driver's side interior of an SUV that had rolled over and crushed the driver. The vehicle was righted and the photo was taken from directly behind the driver's seat. The attorney was convinced that this photo explicitly showed the roof collapse and the unnecessary and horrific crushing of its occupant. This was his slam dunk.



When presented to four separate focus group panels, something disturbing developed. In each panel, someone in the panel would notice a crack in the dash board clearly visible in the photo. The crack was misperceived in all four panels as a marijuana cigarette. The case turned from product liability to a reckless and stoned driver who lost control of his vehicle. Had he not been stoned, the accident would not have happened. The jurors, rather than being angered by the totality of the collapse of the roof, were now disgusted with the fact that this unworthy character's family were trying to profit from his death.

Yes, the autopsy drug screen showed he was negative for all and any recreational or prescription substances, but the strength of their misperception of the photo prevailed... as did the persisting unanticipated emotion of disgust and angry blame. This slam dunk became a fatal gut shot.

The emotional components of your fact pattern and case narrative cannot be induced, they must be invited. Gross effort to provoke, prod or perpetrate a specific emotion and the contextual meaning of that emotion is prone to failure. For one reason, the context of trial is such that jurors know they are subject to arguments, evidence and spin that is designed to persuade them to one rendering of the facts or another. They are savvy to most persuasion enterprises and will often become resentful of what they see as ham handed and/or slick efforts to push them one way or the other.

In another product liability case, the plaintiff put up horrifying pictures of burn victims of a LP gas flash explosion. The visceral reaction of the entire large panel could be heard in gasps and seen with locked gaze, audible gasps and sub vocalizations, "Oh my dear God!" Later in the presentation video excerpts from the videotaped depositions of these same folks, taken some two years after the explosion, were played. The room was hushed and not a sign of reaction could be seen.

During deliberation, mock jurors nearly unanimously went ballistic and were offended by the Burn Unit pictures. The photos were seen as a gross effort to emotionally manipulate the jurors to find for the plaintiff. Clearly, as proven by the deposition video, these folks were not permanently or seriously injured. The unintended consequence for the plaintiff was that the jurors punished the 'manipulation' by severely reducing the damages. While the actual horror of the acute phase of the burns and the agonizing treatment was accurately demonstrated in the pictures, this acute phase pain, suffering, anxiety, horror and the nature of the injuries during this phase were relegated to offensive "spin". You cannot toy with jurors' emotions. You mustn't tease the bear.

Discovering how jurors react to emotionally charged evidence prior to trial allows you to craft, sequence, and contextualize your evidence. In the above LP gas explosion case, the plaintiff subsequently created a sequential montage of photos showing the arc of the treatment and improvement emphasizing the unique hardships of each recovery and rehabilitation ordeal. By placing the ED and Burn Unit pictures within the context, it allowed the jurors to experience both the shock and agony of the original injury, but also

empathize with the ordeal of recovery as well as the miracle of how well they recovered. Context and sequence dissolved the sense of being manipulated by shock and awe and resolved subsequent mock jurors' anger and resentment. This process made sense to the jurors as they now had participated in the course of injury through recovery and the outcome was emotionally congruent and satisfying, yet they retained an acute awareness of what a long, painful ordeal it had been.

Emotions, both simple and complex, are the common stuff of all storytelling. The melodrama produced by the individual jurors fits within their life experiences and expectancies. They meet the parties and compose profiles to describe their character, motives and choices. As the conflict occurs, they are thrust into perspective-taking that invites basic emotions of anger, anxiety, sadness, empathy and disgust. These emotions and the relative intensity of each emotion can and does shape the evaluative process, often short-circuiting a purely rational thread.

You cannot evoke push-button emotions. You must present the narrative and evidence to jurors and allow them to tell you what the story is, what the conflict is, what the right thing to do about it is... and the emotions they have about that process are the palette you take away to shape and nuance your case presentation. You cannot make them feel. You must learn to invite their feelings to aid in your burden of persuasion.

On Being Reasonably Emotional by Richard Waites

Dr. Richard Waites is a board certified trial attorney and social psychologist. He is a senior trial consultant with [The Advocates](#), a trial consulting firm with offices in 17 major U.S. cities.

The article written by Bottoms and Salerno is helpful in raising awareness of trial attorneys and trial consultants about the complexities involved in trying to manipulate the emotional reactions of jurors in trial. Although some of the ideas the authors provide to us are helpful, others are too simplistic and raise more questions than they answer.

One of the stated objectives of the present article and the authors' previous work is to warn trial attorneys about the possibility of unintended effects upon "jurors' thinking processes" of presenting evidence that might elicit strong emotions of jurors. (Salerno & Bottoms, 2009). In reaching this objective, the authors provide several clear examples of how evidence that might invoke a strong emotional reaction from some jurors offered for one purpose, might instead invoke a different emotional reaction or effect than was intended. However, the authors have scant advice to a trial attorney about how to deal with the trial strategy questions involved.

Disturbing Trends in Juror Research

One of the strengths of the article is its restatement of the conflicting and disturbing trends that have developed between those who narrowly focus on the study of juror decision making and those who study the general psychology of decision making in the resolution of moral dilemmas. The authors here restate and refer to other juror research that discusses "emotion" or "emotional evidence" as if the emotional experience of a person is a definable segment of one's decision making processes that can be rationally understood and excised by a trial judge or trial attorneys in the course of a trial. (Salerno & Bottoms, 2009; Feigenson & Park, 2006). In Feigenson & Park, the authors refer to "legal decision makers' abilities to correct for any affective influences they perceive to be undesirable".

Couched in these terms, how are non-psychologists, including most trial attorneys, supposed to understand the real role that the emotional experience of a judge, juror, or arbitrator plays in resolving moral dilemmas presented in trial? How can a trial attorney develop a successful trial strategy while believing that he or she can pick and choose which emotional reactions can be manipulated within jurors or whether emotional reactions should be somehow prevented altogether?

Another of the article's strengths is the authors' position that despite the rhetoric about attempts to manipulate and regulate jurors' emotional or affective responses, the role of emotion in juror decision making is not well understood. The authors state that their purpose is not to predict how jurors will react emotionally, but instead to argue against the ability to make such predictions with accuracy.

In the final analysis, one might argue that an exhaustive study of how to manipulate the role of emotion in courtroom decision making comes at the expense of studying the larger picture of how jurors and other legal decision makers do their job.

Moral Decision Making

How people, including jurors, resolve the moral dilemmas presented to them has proven to be a rich field of study for those of us who work in the courtroom. Over the past 30 years, the revelations that have come from intense study of how people resolve moral dilemmas have changed the landscape of what is important for us to know in our work in the courtroom and in arbitration.

We have now evolved from the premise that the key to resolving moral dilemmas (including those in the courtroom) lies in rational thought (See Kohlberg, 1963). The role of rational reasoning has come increasingly into question as investigators have documented a number of limits to the reasoning process. Researchers have determined, for example, that individuals will rely upon cognitive shortcuts (e.g. stereotypes) when their cognitive capacities are insufficient for the task at hand (Kahneman & Frederick, 2002). Other researchers have demonstrated that some judgments and decisions appear to sidestep conscious deliberation entirely (e.g., Greenwald & Banaji, 1995; Dijksterhuis, 2004). Other investigators have discovered other fundamental limits on purely rational decision making.

As a result of the mounting awareness of the limits of rational reasoning, there has been a resurgence of interest in the impact of emotions on decisions (e.g., Lowenstein et al., 2001). Some investigators now theorize that emotions are the primary motivators for moral judgment and behavior, that moral judgments evolve from sudden, emotion-laden moral perceptions, and that the rational accounts given by decision makers often amount to little more than post-facto rationalizations (e.g., Haidt, 2001).

The importance of this evolution in thought to practice in the courtroom is immediate and profound for several reasons. First, we now believe that the whole story and meaning of the evidence and the arguments to jurors takes priority over the incremental parts of a presentation (i.e., the sum effect of the argument is greater than the total of its parts). Second, different individual jurors will perceive the case differently depending upon their own personal influences. Therefore, the most powerful and persuasive courtroom arguments will appeal to



individual jurors who experience the case in different ways. Finally, we are no longer limited to studying the effects of incremental items of evidence or argument. We can study the combined effect of a prospective argument as a whole organic unit and our freedom to be creative and imaginative is enhanced.

The research work of Joshua Greene at Princeton in the course of studying how people resolve a moral dilemma is helpful as an example of one way to study how judges, jurors, and arbitrators form stories and meaning from potential evidence and arguments in a case. Greene's work often employs the use of the tools available in the practice of neuroscience (Greene, et al., 2001).

In one of his experiments, he asked research participants how they would resolve a difficult situation. For example, he presented a video where the participants watched five people in a trolley rolling down a railway track towards the edge of a cliff. The participants were given the choice of throwing a lever to divert the trolley, although doing so would result in another person being killed who was standing on the track on which the trolley would be diverted. If they made the choice to pull the lever, one person would be sacrificed to save the other five.

During the study, Greene and the other researchers used functional MRI scans to watch for brain activity. The scans showed that the images' moral content, or lack of it, influenced easily identifiable distribution of brain activity—but with substantial overlap between two categories. In essence, moral and emotional responses were distinguishable, but not entirely separable.

Greene's work and findings are helpful in understanding how evidence and arguments in the courtroom or in arbitration will evoke a complex reaction and experience from the decision makers including elements of emotion and logical reasoning that cannot be separated. So the real objective of developing a successful trial presentation for a trial attorney must be to create a trial presentation that appeals to both the emotions and the logical reasoning of the individual decision makers in a way that gives them a satisfying experience.

Conclusion

It is true that the introduction or withholding of evidence or arguments that might invoke an emotional response might lead to unintended consequences. However, practitioners in the courtroom do have a great many tools to help them experiment with the alternatives and discover new and powerful ways to tell the story for a client and create positive meaning in the case in the quest for a favorable decision. Some suggestions for consideration are included below.

Recommendations

1. **Tell an appealing story.** If it is true that many factors (i.e., logic, emotion, heuristics, and others) are elements in a juror's decision making process, then perhaps Aristotle was correct when he stated that every good story or persuasive argument must appeal in three ways; to one's logic, to one's emotions, and to one's beliefs about character. Therefore the most important part of trial strategy in most instances is the story and meaning of the case from the viewpoint of the judge, jury, or arbitration panel.
2. **Address all of the audiences in your jury.** Courtroom and jury decision making is all about making moral judgments and resolving moral dilemmas. Varying degrees and types of emotion and logic can be expected. The belief or assumption that courtroom decision making is the same as rational

decision making is a fallacy. In the courtroom, we must accept the premise that different jurors will experience varying degrees and types of both emotion and logic in resolving our case. Eliminating jurors in jury selection who we believe will not give our client a fair hearing because they are naturally very emotional in their processing of information or are not very emotional is a good initial strategy. But, we must assume that we will have a mix of people on the jury. If that is true, we must help them deal with the emotional or lack of emotional content of the evidence and arguments in intelligent ways that are more likely to respect the varied emotional and rational personalities of a mixed group of people. Simply put, we might present information to different people in different ways. For the more emotional members of the jury, we help them to resolve or experience their emotions, whichever is best for our client. For the more rational members of the jury, we help them to see the logic of the evidence and our superior arguments. Varied presentations do not have to be conflicting.

3. **Test your approach in advance.** As with all important decisions that trial lawyers must make about their trial strategy, some advance research and testing can be helpful. This research can be conducted informally or using social science research methods, such as focus groups or mock jury trials, but should use the feedback of disinterested people who have many of the same background characteristics of the likely jurors.

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March 2010's Favorite Thing!!!

Every issue we tuck in a 'Favorite Thing' from an ASTC member. A favorite thing is something freely available on the internet, useful for litigators, and generally speaking, quite cool. This month's favorite thing comes from Ted Brooks.

Ted Brooks is a Trial Presentation Consultant and President of Litigation-Tech LLC, and publishes the [Court and Trial Technology Blog](#).



The WayBack Machine <http://www.archive.org/> (part of The Internet Archive, which is a digital library of Internet sites and other cultural artifacts in digital form) is a very valuable resource for viewing the chronological evolution of nearly every web site currently (or formerly) in existence. The WayBack Machine (does anyone besides me remember [Mr. Peabody](#)) is updated approximately once a month, and also indicates when changes were made to the site.

4.

Editor's Note

Welcome to our March 2010 issue of [The Jury Expert](#)! Once again, we have diverse and provocative offerings for you. Whether you flip first to our article on apology, choose to travel to East Texas, or ponder the impact of emotional evidence, see just how informative and persuasive visual communication can be, think about the goals of witness preparation, sweat through the surprising heat of attitudes toward atheists, consider the use of 606(b) in jury impeachment, or travel back in time with our March 2010 Favorite Thing, you are bound to have an experience that teaches you a thing or two and that means you have more interesting conversations with colleagues.

We are continuing to try new topics and formats of articles as we press forward with *The Jury Expert*. Let us know what you think (what should we do more of, what should we do less of, and what should we keep the same?) by sending me an email (click on my name below).

Tell us what you want to read. Tell us what you want to learn. Tell us what you are curious about (related to litigation advocacy). We will try to accommodate your questions, curiosities and desire for new topic areas.

You'll also see a bit of a new layout on our front webpage. We are looking for advertisers to help support costs of creating this publication and other activities of our publisher (the [American Society of Trial Consultants](#)). Read. Consider. Question. Comment on our website!

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