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## Shifting the Male Gaze of Evidence

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# Shifting the Male Gaze of Evidence

Teneille R. Brown\*

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## INTRODUCTION

The Federal Rules of Evidence are a product of their time. They reflect not only the thinking of the 1970s when they were adopted but also the much older English common law on which many Rules were based.<sup>1</sup> It should therefore come as no surprise that they sometimes embody folk views of decisionmaking that are outdated or simply wrong. There are dozens of ways we could reimagine what the Rules could be if they were based on a more accurate understanding of how jurors and judges actually behave under conditions of uncertainty, stress, social bias, and memory strain.

Rather than focusing on a particular Rule, I will examine an overarching normative goal of evidence: The pursuit of objective rationality. To be clear, it is not rationality *per se* that is troubling. Rather, it is a specific view that treats rationality as dichotomous with emotion.<sup>2</sup> It is this folk view, which is deeply rooted in evidence law and practice, that I place in my crosshairs.

To advance a more nuanced understanding of rationality in evidence, this Article will proceed in three brief parts. In the first Part, I will explain how a particular notion of rationality lies at the heart of modern evidentiary principles, using Rule 403 as one example.<sup>3</sup> In the second Part, I will explain how rationality was conceptually gendered from the start and continues to advance a predominantly white, cisgender-male ideal of decisionmaking that furthers epistemic injustice. In the third Part, I will explain how emotions are neither monolithic nor universally corrupting and can actually *improve* decisions.

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1. Before the Federal Rules of Evidence were adopted, state courts “generally recognized that a trial court could exclude relevant evidence due to the danger that the evidence would unduly arouse the jury’s emotions to prejudice or sympathy.” *See, e.g.*, 12 ROBERT LOWELL MILLER, JR., IND. PRAC. SERIES: IND. EVID. § 403.101 n.2 (4th ed. 2023) (discussing Indiana courts). Rule 403 “refined those common law principles.” *Id.*

2. *See* 2B JOHN H. KLOCK, N.J. PRAC. SERIES: EVID. R. ANN. § AC 403:1 (3d ed. 2023) (discussing Rule 403’s requirement that judges weigh the value of evidence with the likelihood of leading jurors to a prejudicial emotional reaction); Christopher Robertson & Michael Shammas, *The Jury Trial Reinvented*, 9 TEX. A&M L. REV. 109, 140 (2021) (“The Supreme Court has said that ‘[t]he jury system is premised on the idea that rationality and careful regard for the court’s instructions will confine and exclude jurors’ raw emotions.’” (quoting *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009))); Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2003 (2010) (discussing law and emotions’ connection).

3. Rationality is also very much at play in the Rules relating to scientific evidence. *See, e.g.*, Kenneth R. Kreiling, *Scientific Evidence: Toward Providing the Lay Trier with the Comprehensible and Reliable Evidence Necessary to Meet the Goals of the Rules of Evidence*, 32 ARIZ. L. REV. 915, 965 (1990) (“The primary criterion of the neutral scientist is a commitment to objectivity.”).

I take as a point of departure that the Rules should be updated to reflect the modern science of decisionmaking.<sup>4</sup> This is not a consensus view but one I adopt for practical and prescriptive reasons.<sup>5</sup> Regardless of our underlying policy goals, they cannot be achieved if built upon fairytales about how humans think and behave.<sup>6</sup> I hope you will enjoy reimagining what the Rules could and should be if they were written today—with a less gendered and more nuanced perspective that recognizes the epistemic value of emotions.

## I. THE GOAL-OF-RATIONALITY IN THE FEDERAL RULES OF EVIDENCE

### *A. Rationality Prioritizes Reason and Silences Emotion*

Rationality is deeply embedded in both the Rules themselves and the ways they are interpreted. David Leonard stated that rationality “lies at the heart of modern evidentiary principles” because relevance itself is “grounded in rationality.”<sup>7</sup> Of the many reasons we have evidence rules—to streamline trials, foster legitimacy and predictability, and promote due process—encouraging “rational fact-finding” is often at the top of this list.<sup>8</sup>

In contemporary evidence law the hegemonic goal-of-rationality is “often taken for granted”<sup>9</sup> and can be traced “from Bentham through Wigmore to the present day.”<sup>10</sup> It is a “remarkably homogeneous” view that has “dominated legal scholarship for most of the twentieth century.”<sup>11</sup> Because rationality is a “suitcase word,” however, before we

4. See, e.g., Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1055 (2014) (“Cognitive science can illuminate how anger, sympathy, selective empathy and other emotions affect the capital jury’s ability to deliberate fairly on the evidence in its entirety . . .”).

5. See Teneille R. Brown, *The Content of Our Character*, 126 PENN. ST. L. REV. 1, 50 (2021) (“To the extent [the science of jury decisionmaking] is at odds with legal doctrine, the legal doctrine can either be routinely ignored, or it can change . . . so long as the law continues to rely on laypeople to assess blame, it should reconcile itself to the layperson’s view of behavior.”).

6. This is in the tradition of Ronald J. Allen and Brian Leiter’s view laid out exquisitely in *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1503–06 (2001), where they critique the idea that “ought implies can.”

7. David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 2 (1987).

8. See Jack B. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 241–42 (1966) (discussing the goals of evidence law); see also Craig R. Callen, *Foreword: Visions of Rationality in Evidence Law*, 2003 MICH. ST. L. REV. 847 (introducing symposium on rationality in evidence law).

9. Callen, *supra* note 8, at 847.

10. Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1339, 1348 n.26 (1987).

11. Peter Tillers, *Mapping Inferential Domains*, 66 B.U. L. REV. 883, 883 (1986).

can go anywhere with it we must unpack it a little.<sup>12</sup> So, what does rationality mean in evidence law?

People likely disagree on the margins about what rationality means. But the typical view embedded in evidence scholarship defines rationality as drawing generalizations from facts and logical reasoning, as opposed to making decisions based on intuitions or feelings.<sup>13</sup> Rationality thus conceived renders emotion “a signal that an argument is prejudicial or transparently manipulative.”<sup>14</sup> For evidence law, rationality means arguments that flow from the mind, as opposed to the heart.

A particular species of rationalism based on Bayes’ Theorem has become fashionable in many fields, including evidence law.<sup>15</sup> It contends that people, and thus jurors, do and should combine new information in logically consistent ways, repeatedly updating their prior probability assessments.<sup>16</sup> There is little to quibble with this as an aspirational model for jury decisionmaking.<sup>17</sup> The problem is that Bayesian models typically rest on the same notions of rationality that discount the epistemic value of emotions and view them as “illogical.”<sup>18</sup> The anti-

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12. Gregory Wheeler, *Bounded Rationality*, STAN. ENCYC. OF PHIL. ARCHIVE (Nov. 30, 2018), <https://plato.stanford.edu/archives/fall2020/entries/bounded-rationality> [https://perma.cc/GX3A-ZFSP].

13. See, e.g., *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980) (“The prejudicial effect may be created by the tendency of the evidence . . . unfairly to excite emotions against the defendant.”); *United States v. Blunt*, 930 F.3d 119, 126 (3d Cir. 2019) (“These descriptions of threatened and actual violence clearly would tend to elicit an inappropriate emotional response from the jurors, resulting in unfair prejudice.”); *State v. Schurz*, 859 P.2d 156, 162 (Ariz. 1993) (“Unfair prejudice ‘means an undue tendency to suggest decision on an improper basis,’ such as emotion, sympathy or horror.” (quoting FED. R. EVID. advisory committee’s notes)); *United States v. Sarr*, 678 F. Supp. 2d 433 (E.D. Va. 2010) (evaluating potential emotional response before admitting proffered evidence); *Wright v. State*, 19 So. 3d 277, 296 (Fla. 2009).

14. Susan A. Bandes, *Feeling and Thinking Like a Lawyer: Cognition, Emotion, and the Practice and Progress of Law*, 89 FORDHAM L. REV. 2427, 2428 (2021) (citation omitted).

15. Thomas L. Griffiths, Charles Kemp & Joshua B. Tenenbaum, *Bayesian Models of Cognition*, in THE CAMBRIDGE HANDBOOK OF COMPUTATIONAL PSYCHOLOGY 59, 59 (Ron Sun ed., 2008) (Bayesian analysis provides a “formal account of how rational agents should reason in situations of uncertainty”).

16. See Mike Redmayne, *Rationality, Naturalism, and Evidence Law*, 2003 MICH. ST. L. REV. 849, 861–62 (describing the problem with viewing rationality as slavish obedience to rules of Bayesian probability theory).

17. See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1514 (1999) (“The significance of Bayes’ theorem for thinking about the law of evidence is mainly as a reminder that estimating probability is a useful and rational way of dealing with uncertainty.”).

18. See, e.g., Kenneth J. Arrow, *Rationality of Self and Others in an Economic System*, in RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 201, 202 (Robin M. Hogarth & Melvin W. Reder eds., 1987); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1550 (1998) (“The mugs [study] results were obtained in circumstances that were the most favorable to the predictions of

emotion view of rationality is not new or unique to Bayesian analysis, but its persistence even in sophisticated models exposes its stickiness.

This view of emotion as corrupting reason is literally ancient. Western intellectual giants, such as Plato, Thomas Hobbes, René Descartes, and Francis Bacon, wrote about their deep suspicion of emotion.<sup>19</sup> They were suspicious of its potential to corrupt reason and, therefore, progress.<sup>20</sup> Plato argued that reason enabled discovery of “ultimate truth[s]” in contrast to our inferior emotions, which distracted us from them.<sup>21</sup> Immanuel Kant proposed that “what makes any feature of society peculiarly human is the fact that it is based on rationality and freedom, *rather than* on the necessity of feelings and inclinations.”<sup>22</sup> It was Kant’s articulation that shaped Max Weber’s view of rationality, which then went on to influence much of Western economic and social thought.<sup>23</sup> In each of these framings, we see that reason is superior to and pitted against emotion. Presumably, they are fundamentally at odds.

Because the “emotion *versus* reason” trope has been with us for thousands of years, it will be difficult to debunk. But as I will explain below, just as thoughts can be biasing or corrupting, so too can emotions. And just as thoughts are critical for decisionmaking, so too are emotions.<sup>24</sup> Emotions writ large are not corrupting or prejudicial; it depends on how and why they are being used. Even so, it remains a popularly held view that emotions corrupt reason. This view informs the common law, judicial codes of conduct and decorum, and the Federal Rules of Evidence.

### *B. Judges Should Shield Jurors from Emotion: Rule 403*

In many different ways, our legal institutions and rules have presumed emotions to be irrational, indeed *unprofessional*. As one

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the conventional theory. . . . [T]he sort of emotional attachments that can grow over time in the real world were absent.”)

19. THOMAS HOBBS, *LEVIATHAN* 203 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651); Anne Ross-Smith & Martin Kornberger, *Gendered Rationality? A Genealogical Exploration of the Philosophical and Sociological Conceptions of Rationality, Masculinity and Organization*, 11 *GENDER WORK & ORG.* 280, 283–85 (2004) (discussing Plato, Descartes, and Bacon).

20. See, e.g., Ross-Smith & Kornberger, *supra* note 19, at 283–85.

21. *Id.* at 283.

22. *Id.* at 285 (emphasis added).

23. *Id.* There are sixteen “apparently distinguishable” meanings of rationality in Weber’s writings, to give one a sense of just how fine-grained this concept can be. *Id.* at 286.

24. “These assumptions [under Rule 403] are largely untested, and many are contradicted by psychological science that demonstrates how emotions affect decision making.” See Jessica M. Salerno & Hannah J. Phalen, *The Impact of Gruesome Photographs on Mock Jurors’ Emotional Responses and Decision Making in a Civil Case*, 69 *DEPAUL L. REV.* 633, 635 (2020).

scholar put it, learning to “think like a lawyer” is frequently code for marginalizing our emotions.<sup>25</sup> The anti-emotion bias permeates many aspects of our profession. Attorneys should not show emotion in front of colleagues, after difficult negotiations, in meetings, or with clients. Otherwise, we risk looking incompetent and unreasonable.

Perhaps we take our cue from judges, who sit atop our legal pyramid. Judges must remain calm, dispassionate, and impartial as they oversee trials. Otherwise, they can be found in violation of their codes of conduct. This sentiment was echoed by U.S. Supreme Court Chief Justice Roberts when he invoked the “umpire metaphor,” in which “judges leave their emotions behind in finding the best solution.”<sup>26</sup>

Consider what Justice Blackmun wrote in his landmark *Roe v. Wade* opinion: “Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.”<sup>27</sup> Imagine in any other context trying to decide cases about medical autonomy, civil rights, murder, or child abuse completely “free of emotion.” Hopefully, we recognize the extraordinary privilege contained within this stance. In case this is not obvious, I will explain below how such statements foster epistemic injustice. Although reviewing courts are finally recognizing that judges are not “superhuman”<sup>28</sup> or “unfeeling robot[s],”<sup>29</sup> there is still a strong norm against judicial expressions of emotion in court.<sup>30</sup>

In addition to needing to appear impartial, judges must also shield jurors from evidence that may trigger too many emotions *in the jurors*. This is expressed in Rule 403 and its nearly identical state counterparts.<sup>31</sup> The Rule provides judges with discretion to exclude

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25. Bandes, *supra* note 14, at 2428.

26. Patricia Mindus, *When Is Lack of Emotion a Problem for Justice? Four Views on Legal Decision Makers' Emotive Life*, 26 CRITICAL REV. INT'L SOC. & POL. PHIL. 88, 94 (2023).

27. *Roe v. Wade*, 410 U.S. 113, 116 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

28. *Jones v. Luebbbers*, 359 F.3d 1005, 1013 (8th Cir. 2004) (acknowledging judicial bias as an possibility arising from “psychological tendencies and human weaknesses.” (quoting *Dyas v. Lockhart*, 705 F.2d 993, 996–97 (8th Cir. 1983))); *see also* Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. 693, 696 (2014) (describing even the most highly qualified judges as susceptible to influence “by cognitive illusions that can produce systematic errors in judgment.” (quoting Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 778 (2001))).

29. *Keppel v. BaRoss Builders, Inc.*, 509 A.2d 51, 56 (Conn. App. Ct. 1986).

30. *See* Terry A. Maroney & James J. Gross, *The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective*, 6 EMOTION REV. 142, 142, 144 (2014) (“[T]he dispassionate-judge ideal presents a barrier to achieving the flexibility necessary for adaptive judicial emotion regulation.”).

31. FED. R. EVID. 403; *see, e.g.*, Donald A. Dripps, *Relevant but Prejudicial Exculpatory Evidence: Rationality Versus Jury Trial and the Right to Put on a Defense*, 69 S. CAL. L. REV. 1389, 1390 (1996) (discussing Rule 403 and California's equivalent); Michael H. Graham, *Relevance*,



otherwise admissible evidence if it is substantially more prejudicial than probative. Importantly, the text of the Rule itself says nothing about emotion. The Advisory Committee Notes (“ACN”) and related case law make clear, however, that an emotional reaction is often what we mean when we say “prejudice.”

The ACN accompanying Rule 403 state that prejudice means “an undue tendency to suggest decision on an improper basis, *commonly, though not necessarily, an emotional one.*”<sup>32</sup> Thus, emotional evidence is not necessary but is often sufficient for demonstrating prejudice. Further justifications for Rule 403 hammer home the point that emotional evidence is “peripheral, somehow not at all relevant to the case,”<sup>33</sup> and the opposite of intellect<sup>34</sup> and impartiality.<sup>35</sup>

There are thousands of appellate cases that admit or exclude emotional evidence by simply quoting this language from the ACN with scant additional justification and without any real balancing of the probative value against its prejudicial effect.<sup>36</sup> This leaves future parties to guess as to why the evidence was found to be within the trial court’s discretion to exclude as too prejudicial. Unfortunately, the ACN language has become a kind of shorthand for what should be a more thorough legal balancing and analysis of prejudice. Attorneys are given

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*Fed.R.Evid. 401, and the Exclusion of Relevant Evidence, Fed.R.Evid. 403: “Many Prayers Are Heard, Few Are Answered.”* 45 CRIM. L. BULL. 1080, 1089 (2009) (discussing Rule 403).

32. FED. R. EVID. 403 advisory committee’s notes to 1972 proposed rules (emphasis added).

33. Teneille R. Brown, *The Affective Blindness of Evidence Law*, 89 DENV. U. L. REV. 47, 70–71 (2011).

34. *State v. Thompson*, 23 N.E.3d 1096, 1127 (Ohio 2014) (“Unfairly prejudicial evidence usually appeals to the jury’s emotions, rather than to intellect.”).

35. *Commonwealth v. Berry*, 648 N.E.2d 732, 741 (Mass. 1995) (“[T]rial judges must take care to avoid exposing the jury unnecessarily to inflammatory material that might inflame the jurors’ emotions and possibly deprive the defendant of an impartial jury.”); *People v. Auldridge*, 724 P.2d 87, 89 (Colo. App. 1986) (following an evidentiary rule that aligns with Rule 403).

36. For some representative examples of how the ACN language and Rule 403 standards are quoted with little to no balancing of the probative value versus prejudicial effect, see *State v. Pickens*, 876 S.E.2d 633, 640 (N.C. Ct. App. 2022) (where the appellate court merely restates the standard and instruction given to the jury); *State v. Smith*, 888 S.E.2d 706, 721 (N.C. Ct. App. 2023); *Dies v. State*, 649 S.W.3d 273, 286 (Tex. App. 2022) (evidence of child abuse is considered inherently inflammatory without an analysis as to why or to what extent this trumps the established probative value); *United States v. Thirty Nine Thousand Seven Hundred Eighty Five Dollars*, 828 F. Supp. 2d 740, 743 (E.D. Pa. 2011); and *Walker v. Commonwealth*, 887 S.E.2d 544, 552 (Va. 2023). Even when cases are permitted as not triggering too emotional of a response, the justification can be circular and fail to say why the contested evidence might be too prejudicial. See *United States v. Rutland*, 372 F.3d 543, 546 (3d Cir. 2004); *Wilson v. State*, 883 S.E.2d 802, 814 (Ga. 2023); *Imming v. De La Vega*, No. A-1-CA-391165, 2023 WL 1434061, at \*7 (N.M. Ct. App. Feb. 1, 2023); *Garcia v. State*, No. 13-22-00001-CR, 2022 WL 3257538, at \*4 (Tex. App. Aug. 11, 2022).

precious little practical guidance in judicial opinions as to what makes a particular piece of evidence “too emotional” to be permitted.<sup>37</sup>

So as not to paint too simplistic of a picture, it is not the case that emotional arguments and evidence are *always* excluded from trials. Indeed, in *Old Chief v. United States*, a rare Supreme Court case that addressed Rule 403, the Supreme Court reminded lower courts that it is important to allow prosecutors to tell a “colorful story with descriptive richness.”<sup>38</sup> Evidence scholars love this case. And it does speak for an important idea—that memorable stories are often emotional ones.

Despite giving us the tools to permit additional emotional evidence, the opinion in *Old Chief* does not seem to have corrected the misperception that emotional evidence is inherently prejudicial, and it is still frequently excluded on this basis alone. For many reasons, *Old Chief* was an outlier case. For one, appellate courts very rarely find an abuse of discretion for a rule that is *itself discretionary*.<sup>39</sup> Second, the lesson from *Old Chief* seems to be inconsistently applied.

What the case does tell us is that, in theory, judges recognize that “[i]t is neither possible nor desirable to lock emotion out of the courtroom.”<sup>40</sup> Yet, in part because of the shallow reasoning around Rule 403, we seem to have no clear guideposts for when and why emotions run afoul of the goal-of-rationality. This puts judges and attorneys in a precarious situation where—in an attempt to avoid an incidental, emotional response that could lead to a new trial or an appeal—they will often decide not to appeal to evidence that might be quite probative.<sup>41</sup>

Prosecutors and defense counsel are thus taught to use the Goldilocks amount of emotion—that is, they should serve up evidence

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37. See, e.g., *Hart v. State*, 173 S.W.3d 131, 148 (Tex. App. 2005). In this sexual assault case, the victim testified that Defendant had a tattoo on his thighs, but she could not describe its contents. Defendant stipulated to the presence of the tattoos but objected to the jury hearing that they contained graphic representations of a nude woman. He argued this violated Texas’s Rule 403, because it would “sway a jury into resolving the case based on emotion rather than reason.” *Id.* at 149. The reviewing court restated the standard and case law, and then simply said that the trial court’s admitting the graphic contents of the tattoos did not violate Rule 403 because it was “within the zone of reasonable disagreement.” *Id.*

38. 519 U.S. 172, 187 (1997).

39. See *United States v. Harry*, 20 F. Supp. 3d 1196, 1221 (D.N.M. 2014) (“The decision to admit or exclude evidence pursuant to rule 403 is within the trial court’s discretion, and the trial court’s discretion to balance possible unfair prejudice against probative value is broad.”). For a similar sentiment in state court, see *Wilson*, 883 S.E.2d at 813.

40. 7 DANIEL D. BLINKA, WIS. PRAC. SERIES: WIS. EVIDENCE § 403.1 (4th ed. 2023); see also Salerno & Phalen, *supra* note 24, at 634.

41. Bandes & Salerno, *supra* note 4, at 1054.

that is not too hot and not too cold.<sup>42</sup> But just as in the fable, attorneys will often struggle to calibrate. If they do not encourage enough emotion, they will bore the jury.<sup>43</sup> If they encourage too much, they could jeopardize their case.<sup>44</sup> It is a tightrope.

There are too many cases implicating Rule 403 to summarize them all here, but I will recount some representative examples. I hope this gives a sense of just how thin the justifications for excluding emotional evidence can be and how emotional evidence is often presumed to be unfairly prejudicial.

In *Gordon v. United States*, a drug trafficking case, the State's witness testified before the grand jury and implicated the Defendants.<sup>45</sup> However, she changed her story at trial.<sup>46</sup> The Defendants claimed her statements were inconsistent because the police had coerced the witness to testify before the grand jury. To correct that impression, the Prosecution asked the witness why her two accounts differed. She explained that she changed her testimony at trial because she was "scared for [her] life"<sup>47</sup> since she lived "right down the street from [the Defendants]"<sup>48</sup> (who could presumably harm her if they knew she testified in open court). The scared witness then started crying.<sup>49</sup>

The Defendants immediately requested a mistrial. This request was initially denied because the defense had "opened the door" to the testimony by claiming police coercion.<sup>50</sup> On appeal, the court said that "evidence concerning a witness' fear tends to be extremely prejudicial because it appeals to the passions of the jury and may cause the jury to base its decision on something other than the rule of law."<sup>51</sup>

42. E-mail from Chris Shaw, Att'y, to Teneille Brown, Professor of L., Assoc. Dean of Fac. Rsch. & Dev., S.J. Quinney Coll. of L. (Sept. 4, 2022, 14:59 PM MDT) [<https://perma.cc/8RUZ-DQJN>].

43. See Louis A. Jacobs, *Evidence Rule 403 After United States v. Old Chief*, 20 AM. J. TRIAL ADVOC. 563, 578 (1997); John A. Burgess, *Persuasive Cross-Examination*, 59 AM. JURIS. TRIALS 1 (2023); 14 GARY WEISS & CAROL DAN BROWNING, KY. PRAC. SERIES: TRIAL PRAC. § 14:10 (1999).

44. See *Urbin v. State*, 714 So. 2d 411, 419 (Fla. 1998) (prosecutors cautioned against injecting "elements of emotion and fear into the jury's deliberations" (quoting *King v. State*, 623 So. 2d 486, 488–89 (Fla. 1993))), *abrogated on other grounds by* *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020); see also *Commonwealth v. Pak*, No. 09-P-2347, 2011 WL 240515, at \*1 (Mass. App. Ct. Jan. 26, 2011) ("Although a prosecutor may argue 'forcefully for a conviction based on the evidence and on inferences that may reasonably be drawn from the evidence,' a prosecutor should not 'play on . . . the jury's sympathy or emotions . . .'" (first alteration in original) (quoting *Commonwealth v. Kazac*, 505 N.E.2d 514, 516–17, 519 (Mass. 1987))); *United States v. Stone*, No. 12-CR-0072, 2013 WL 6798919, at \*2 (E.D. Cal. Dec. 20, 2013).

45. *Gordon v. United States*, 783 A.2d 575, 583–88 (D.C. 2001).

46. *Id.* at 583.

47. *Id.* (internal quotation marks omitted).

48. *Id.* at 585 (internal quotation marks omitted).

49. *Id.*

50. *Id.* at 586.

51. *Id.*

If we are looking for reasons why the expression of fear is so prejudicial, we will not find it in the opinion. It is not there. This is unfortunate because the witness's fear, if credible, provides unique and independent probative value as to why she might have changed her story at trial. Her fear would be crucial for the jury when evaluating how much weight to give her earlier grand jury testimony. We have no idea why her testimony was overly prejudicial, other than that it may have encouraged the jury to *feel something*.

Consider another case, *United States v. Blunt*, where the jointly tried criminal Defendants were husband and wife.<sup>52</sup> They were both found guilty of wire fraud, identity theft, and money laundering.<sup>53</sup> The Defendants claimed that their trials should have been severed (and they probably should have been). The wife, Renita Blunt, opted not to invoke the spousal privilege and instead testified against her husband.<sup>54</sup> She described how he had threatened violence toward her if she did not comply with his criminal plans. Specifically, Blunt said that her husband threatened that “he was going to kill us” and “bring harm to our family.”<sup>55</sup> She also testified that he was violent and chipped her tooth once when he pushed her.<sup>56</sup>

Rather than allowing this to go to her credible fear of her husband and justification for cooperating with his scheme, the appellate judge instead found that the “descriptions of threatened and actual violence clearly would tend to elicit an inappropriate emotional response from the jurors.”<sup>57</sup> This is the *only* reasoning we get for why the testimony was so emotional that the convictions had to be vacated and remanded for separate trials. There is nothing that explains why evidence that the husband was abusive and threatened his wife would be unfairly prejudicial to him when balanced against its probative value. This sort of hollow, unsatisfying explanation is common in cases where evidence is challenged under Rule 403.

Blunt's testimony of abuse might be emotional, but emotional reactions to partner violence are normal and appropriate. Someone who heard about Blunt's abuse may not be *unfairly* influenced. Instead, they may be hearing important context that, if believed, would offer independent probative value for her position that she felt pressured to be involved in her husband's crimes. Excluding this testimony as too

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52. 930 F.3d 119, 122 (3d Cir. 2019).

53. *Id.* at 126.

54. *Id.*

55. *Id.* (internal quotation marks omitted).

56. *Id.* at 122.

57. *Id.* at 126.

prejudicial on its face reveals how rationality has inappropriately silenced the potential *legal relevance* of emotion.<sup>58</sup>

In this Part, I have explained how the anti-emotion view of rationality has historical foundations dating back to ancient times and the Enlightenment. I have also described how this thinking is carried forward in modern Rule 403 cases, like *Gordon* and *Blunt*. These cases reveal the epistemic shortcomings of treating emotional evidence as per se prejudicial. In the next Part, I elucidate how this anti-emotion view of rationality furthers an antiquated male gaze.

## II. RATIONALITY IS GENDERED

### A. Rationality: Sexist from the Start

The sexist and racist underpinnings of rationality are familiar terrain to feminist philosophers.<sup>59</sup> For decades they have documented how rationality and objectivity “were regularly assumed to be exhibited only or primarily by men and, often too, only by men of ‘higher’ races and classes.”<sup>60</sup> Rationality can therefore be criticized on anti-racist and anti-classist grounds as well.

Due to my expertise and space constraints, however, I will focus on the sexist roots of rationality. These roots rely on outdated gender binaries and simplistic notions of gender. And binaries beget binaries—old-fashioned dualism (mind versus body) relies on and reinforces gender binaries (man versus woman).<sup>61</sup>

The binary at the core of the anti-emotion view of rationality stems from Cartesian dualism. Cartesian dualism holds that the mind belongs to reason and masculinity while the body is emotional, irrational, and feminine.<sup>62</sup> In this dichotomous view, everything “other

58. See Recent Case, *United States v. Dingwall*, 6 F.4th 744 (7th Cir. 2021), 135 HARV. L. REV. 1937, 1937 (2022) (footnotes omitted):

Advocates have made inroads feminizing the reasonableness standards used in sexual harassment and self-defense law. Recently, in *United States v. Dingwall*, the Seventh Circuit ruled that a criminal defendant may introduce evidence of battering and its effects to support a *duress* defense, and it rejected a physical proximity requirement for that defense.

59. See Ross-Smith & Kornberger, *supra* note 19, at 283.

60. Phyllis Rooney, *Rationality and Objectivity in Feminist Philosophy*, in THE ROUTLEDGE COMPANION TO FEMINIST PHILOSOPHY 243, 243 (Ann Garry et al. eds., 2017); see also Herta Nagl-Docekal, *The Feminist Critique of Reason Revisited*, 14 HYPATIA 49 (1999).

61. For a discussion of this binary, see Giandomenica Becchio, *Behavioral Economics, Gender Economics, and Feminist Economics: Friends or Foes?*, 26 J. ECON. METHODOLOGY 259 (2019); Rooney, *supra* note 60, at 244.

62. GENEVIEVE LLOYD, THE MAN OF REASON: ‘MALE’ AND ‘FEMALE’ IN WESTERN PHILOSOPHY 27 (2d ed. 1993).

than rational thinking . . . , including emotions, is fallacious.”<sup>63</sup> What women were traditionally thought to bring to the table—that is, compassion, empathy, and communitarian goals of building relationships and trust—were considered *fallacious and irrational*.<sup>64</sup> This carries forward to the present. It also tracks with the way women are lauded for their “happy ideas, taste and elegance” but not “activities which demand a universal faculty [of reason].”<sup>65</sup> In addition to equating femininity and emotions with irrationality, women who are less overtly emotive are often treated as cold, calculating, and untrustworthy, while men can be unemotional without taking such a hit to their trustworthiness.<sup>66</sup> Because of strict gender norms, women are expected to be more sensitive, caring, and sad but are also expected to suppress our emotional expressions to allow our male partners to experience theirs.<sup>67</sup> Ultimately, we are damned either way.

A recent psychological study “put[] empirical teeth” to the “longstanding claim” that men are considered reasonable and women are considered emotional.<sup>68</sup> Researchers ran several implicit association tests and found robust evidence that words connoting emotion and feeling were more often associated with women and words connoting reason and thinking were much more likely to be associated with men.<sup>69</sup> On average, men held stronger explicitly gendered stereotypes that connect themselves with reason and women with emotion.<sup>70</sup>

Of course, not all women are emotional or keen to be seen that way. Assuming all women must cry or giggle is itself an unfair stereotype that boxes us in and denies us the full range of potential individuality. In addition to dismissing women’s emotions as irrational, the gendered view of emotion leads to unfair and dehumanizing group stereotypes.

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63. Becchio, *supra* note 61, at 259.

64. See Shane A. Gleason, Jennifer J. Jones & Jessica Rae McBean, *The Role of Gender Norms in Judicial Decision-Making at the U.S. Supreme Court: The Case of Male and Female Justices*, 47 AM. POL. RSCH. 447, 494–529 (2019).

65. Rooney, *supra* note 60, at 243 (internal quotation marks omitted) (quotation omitted).

66. Amy J.C. Cuddy, Susan T. Fiske & Peter Glick, *When Professionals Become Mothers, Warmth Doesn’t Cut the Ice*, 60 J. SOC. ISSUES 701, 705, 709–10 (2004).

67. “When the going gets tough in a heterosexual relationship, it often falls to the woman to rein in her own stress response, in order to create space for the man to feel his Feels.” EMILY NAGOSKI, *COME AS YOU ARE: REVISED AND UPDATED* 144 (2021).

68. Olivia Pavco-Giaccia, Martha Fitch Little, Jason Stanley & Yarrow Dunham, *Rationality Is Gendered*, *COLLABRA: PSYCH.* 1, 11 (Nov. 12, 2019), <https://online.ucpress.edu/collabra/article/5/1/54/113043/Rationality-is-Gendered> [<https://perma.cc/HNK8-NHW9>].

69. *Id.* at 1–13.

70. *Id.* at 11.

*B. The Sticky Myth That Women Are More Emotional*

Popular culture in the United States reflects the stereotype that women are more emotional than men, without specifying whether this means emotions are “experienced more frequently, with greater intensity, or simply expressed more readily.”<sup>71</sup> Women do report crying more frequently and more intensely than men.<sup>72</sup> There is also a long-standing, though recently discredited, belief that women experience more negative emotions immediately before menstruating.<sup>73</sup>

Despite considerable individual variation, research does tell us that cisgender women, on average, are *more likely to express a complex suite of emotions*. Women also “score higher on emotional intelligence or empathy tests than men.”<sup>74</sup> But given that our early environments teach us to express emotions differently,<sup>75</sup> it is near impossible to say that any differences in emotional expression stem from nature rather than nurture.<sup>76</sup>

Even so, the way emotions are expressed and interpreted are quite gendered. For example, studies of children find that girls demonstrate more internalizing emotions (e.g., sadness, anxiety, sympathy) than boys. Conversely, boys show more externalizing emotions (e.g., anger, rage) than girls.<sup>77</sup>

In a society that values male dominance and disapproves of submission, one can see how women’s internalizing emotions might be viewed as “bad” while the externalizing emotions of men are treated as an ordinary baseline and perhaps even “good.”<sup>78</sup> Anger in particular is

71. Stephanie A. Shields, Heather J. MacArthur & Kaitlin T. McCormick, *The Gendering of Emotion and the Psychology of Women*, in 1 APA HANDBOOK OF THE PSYCHOLOGY OF WOMEN: HISTORY, THEORY, AND BATTLEFIELDS 189, 194 (Cheryl B. Travis et al. eds., 2018).

72. *Id.* at 195.

73. See, e.g., Mary Brown Parlee, *The Premenstrual Syndrome*, 80 PSYCH. BULL. 454, 454–55 (1973); Shields et al., *supra* note 71, at 195–96.

74. Agneta H. Fischer, Mariska E. Kret & Joost Broekens, *Gender Differences in Emotion Perception and Self-Reported Emotional Intelligence: A Test of the Emotion Sensitivity Hypothesis*, PLOS ONE, Jan. 2018, at 1, 1.

75. Lotte D. van der Pol, Marleen G. Groeneveld, Sheila R. van Berkel, Joyce J. Endendijk, Elizabeth T. Hallers-Haalboom, Marian J. Bakermans-Kranenburg & Judi Mesman, *Fathers’ and Mothers’ Emotion Talk with Their Girls and Boys from Toddlerhood to Preschool Age*, 15 EMOTION 854, 854, 856 (2015) (“[B]oth parents convey stereotypical gender messages during parent-child discussion of emotions.”).

76. See Shields et al., *supra* note 71, at 194.

77. Tara M. Chaplin & Amelia Aldao, *Gender Differences in Emotion Expression in Children: A Meta-Analytic Review*, 139 PSYCH. BULL. 735, 735, 754 (2013).

78. See Christopher K. Marshburn, Kevin J. Cochran, Elinor Flynn & Linda J. Levine, *Workplace Anger Costs Women Irrespective of Race*, FRONTIERS PSYCH., Nov. 2020, at 1, 1, 9–12 (“[W]omen who express anger in the workplace are penalized, whereas men are not, and may even be rewarded.”).

intertwined with gender, status, and power such that men who express anger are perceived as more socially dominant than men who cry.<sup>79</sup> Women, on the other hand, receive significant pushback when they assert themselves through anger. For example, one study found that “male managers whose voice expresses anger when learning about a problem are perceived as more competent than those whose voice expresses sadness or remains neutral, whereas the same is not true for female managers.”<sup>80</sup>

Women are punished when they do not conform to cisgender stereotypes. Because women are expected to smile more than men, when women do show anger, their anger is perceived to be *more enraged* than when the same amount is expressed by men.<sup>81</sup> Importantly, even common gender differences like these are not absolute but moderated by age and environment, “underscoring the importance of contextual factors.”<sup>82</sup>

Psychologists suggest that there are likely no innate gender differences in the experience of anger. Rather, “it seems that gendered power relations reinforce for whom expressing anger is appropriate.”<sup>83</sup> This social norm operates to curb women’s expressions of anger. This might be disadvantageous to women, because anger can be individually adaptive and lead to “more problem-focused coping, a reduction in reported shame, lower cortisol reactivity, and a greater endorsement of confrontational, individualistic action.”<sup>84</sup>

A metareview found that, regarding complex emotions, there was weak evidence that women experienced more guilt and shame and negligible evidence that men experienced more pride.<sup>85</sup> These findings “echo the gender similarities hypothesis which maintains that men and women are similar on most but not all psychological behaviors, traits, and abilities.”<sup>86</sup> While earlier studies found what they were looking for—that is, women were more emotional than men—more recent studies have not found strong evidence for this view. The picture is complicated and depends on the study design and ability to control for cultural factors and gender stereotypes. And of course, due to

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79. Shields et al., *supra* note 71, at 199.

80. Ursula Hess, Reginald B. Adams, Jr. & Robert E. Kleck, *Facial Appearance, Gender, and Emotion Expression*, 4 *EMOTION* 378, 379 (2004).

81. *Id.* at 385.

82. Chaplin & Aldao, *supra* note 77, at 735.

83. Shields et al., *supra* note 71, at 200.

84. *Id.* at 198–99.

85. Nicole M. Else-Quest, Ashley Higgins, Carlie Allison & Lindsay C. Morton, *Gender Differences in Self-Conscious Emotional Experience: A Meta-Analysis*, 138 *PSYCH. BULL.* 947, 964 (2012).

86. *Id.* at 964 (citation omitted).



misogynistic cultural norms, similarities in experience do not translate to similarities in expression.

Robust gender stereotypes that suggest women favor guilt and shame and men are more likely to feel proud do exist—especially in white Americans.<sup>87</sup> And while gender norms—especially for women—have been evolving considerably in recent years,<sup>88</sup> this has done nothing to erase the androcentric view of rationality embedded in legal structures. In the next Section, I will explain how rationality has systematically ignored the voices and reactions of women and, in so doing, has failed to recognize the probative value of emotions.

### *C. Rationality as Epistemic Injustice*

When we train our sights on rationality, we see that its anti-emotion bias was sexist from the start. It is not just that concepts of rationality were developed exclusively by privileged, cisgender, white men. The perspective itself fetishizes aspects of decisionmaking that are stereotypically male, such as being dispassionate and cold. This buttresses the way men have traditionally valued communication, while conveniently silencing the legitimate grief and rage of the marginalized and oppressed.<sup>89</sup> This creates a form of epistemic injustice.<sup>90</sup>

Epistemic injustice can “cut deep”<sup>91</sup> because it “deprives the [speaker] of her status as a rational being—a status that, for her, represents a fundamental part of one’s humanity.”<sup>92</sup> Because epistemic injustice involves a group lording power over another, it is not surprising that its victims are often women and people of color.<sup>93</sup> It occurs whenever power dynamics treat certain ways of speaking and knowing as illegitimate. Examples of this include not believing rape victims because they do not explain their sexual assaults in ways men

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87. *Id.* at 950.

88. Alyssa Croft, Ciara Atkinson & Alexis M. May, *Promoting Gender Equality by Supporting Men’s Emotional Flexibility*, 8 *POL’Y INSIGHTS FROM BEHAV. & BRAIN SCI.* 42, 42 (2021).

89. Becchio, *supra* note 61, at 263 (explaining that the goal-of-rationality fortifies “the masculine stereotype of human psychology, based on the idealization of efficiency and logical strength”).

90. MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* 44 (2007).

91. Alicia García Álvarez, *Redefining the Wrong of Epistemic Injustice: The Knower as a Concrete Other and the Affective Dimension of Cognition*, 29 *INT’L J. PHIL. STUD.* 497, 498 (2021) (quoting FRICKER, *supra* note 90, at 44).

92. *Id.*

93. See Lenora Ledwon, *Melodrama and Law: Feminizing the Juridical Gaze*, 21 *HARV. WOMEN’S L.J.* 141, 143 (1998) (“The modern juridical gaze has a blind spot where women’s harms are concerned, all too often failing to recognize the existence of any compensable injury.”).

find credible.<sup>94</sup> Or, not believing the experience of Black people who have been harassed by the police,<sup>95</sup> because their ways of speaking do not conform to white, androcentric norms. Epistemic injustice occurs any time authority figures (like judges) dismiss the way that women and nonwhite people speak and express themselves (as unfairly prejudicial).

Society first became familiar with the term “the male gaze” in film studies, where it became shorthand for focusing on images that entice straight, privileged men while ignoring the perspectives of everyone else.<sup>96</sup> Fortunately, films have begun centering other perspectives. But in many areas of the law, white, cisgender men are still presumed to be both the main characters and the audience. We see this androcentric perspective everywhere we look, including in the Rules of Evidence and the way judges, attorneys, and witnesses are expected to behave.

To knit this together concretely with the Introduction, because emotions are incorrectly identified with women, people who express emotions are not credible *because women are not credible*. Emotional testimony is presumed prejudicial because it is associated with the impartial and passionate “weaker sex.” We know this is gendered because not all emotions are culturally discouraged—only those typically expressed by women and lower-status groups. For example, when judges (or witnesses) express frustration or anger, it is often allowed.<sup>97</sup>

Dismissing emotional testimony outright is a form of epistemic injustice. It silences marginalized voices and conceals their justified anger, sadness, or fear, despite the potential for these emotions to have

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94. Victims of sexual assault may not report this to the police because they suspect that their response will be “insufficient, unhelpful, or indeed detrimental” because police will use race and gender to claim their “reactions are at odds with the manner in which society frames victimization.” Antony Pemberton & Eva Mulder, *Bringing Injustice Back In: Secondary Victimization as Epistemic Injustice*, CRIMINOLOGY & CRIM. JUST., June 2023, at 1, 9.

95. See Suntosh Rathanam Pillay, *Where Do Black Lives Matter? Coloniality, Police Violence, and Epistemic Injustices During the COVID-19 Pandemic in South Africa and the U.S.*, 12 PSYCH. VIOLENCE 293, 295 (2022) (discussing “testimonial injustice,” where “a person’s ability to be a source of knowledge—by expressing their words, feelings, or experiences is discredited by a hearer due to structural identity prejudice” in the context of the 2020 murders of George Floyd and Collins Khosa, two Black men, by police).

96. Laura Mulvey, *Visual Pleasure and Narrative Cinema*, SCREEN, Autumn 1975, at 6, 11, reprinted in LAURA MULVEY, VISUAL AND OTHER PLEASURES 14, 19 (1989).

97. See, e.g., *United States v. McChesney*, 871 F.3d 801, 807–08 (9th Cir. 2017); *State v. Boyer*, 460 P.3d 569, 591–93 (Utah Ct. App. 2020), cert. denied, 466 P.3d 1075 (Utah 2020); *Francis v. Wieland*, 512 S.W.3d 71, 82–84 (Mo. Ct. App. 2017); *DeMartino v. N.Y. State Dep’t of Lab.*, 167 F. Supp. 3d 342, 352 (E.D.N.Y. 2016), *aff’d in part, dismissed in part on other grounds*, 712 F. App’x 24 (2d Cir. 2017).

tremendous independent probative value.<sup>98</sup> Rather than honoring the witness's subjective experiences, in cases like *Blunt* or *Gordon*<sup>99</sup> we have criticized them for not meeting the male standard of “objectivity” and “rationality.”

Alena Allen was an early critic of how legal norms consistently prioritize the male gaze as reasonable and then label it “objective.”<sup>100</sup> But subjective/objective distinctions should immediately raise questions about which ingroup decides what *is* objective. How can we be certain that “objectivity” is not simply a cover for exerting subjective political control?

There is no innate perspective that is a blank slate, or “objective.” While we are born with the cognitive machinery for reasoning, the decisions we make are based on learned values and stereotypes.<sup>101</sup> Even early psychological theories explained emotional processes in terms of universal phenomena that were considered “natural” and “typical,” when in reality, they merely captured “ideal masculinity (northern European, White, and privileged).”<sup>102</sup> By subversively equating rationality with something that is objective, innate, value neutral, and male, the Rules of Evidence have enabled centuries of patriarchy.<sup>103</sup>

Recognizing the ways so-called objective standards act as cover for entrenching power dynamics connects evidence scholarship with the “law and political economy” movement.<sup>104</sup> There are so many aspects of trial that we take as a given—as objectively rational—that are in fact just typically male. Ultimately, the way that men have been perceived to reason is found not to be biased because men wrote the rules on bias and they left their biases out.<sup>105</sup> Of course, it is far easier to achieve the unemotional ideal required in trial when it is not your people who are being oppressed.

98. See ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 303 (H. Rackham trans., Harvard Univ. Press 2014) (c. 384 B.C.E.) (discussing the culpability of one who injures another based on the emotion that motivated the injury).

99. See *supra* Section I.B.

100. Alena M. Allen, *The Emotional Woman*, 99 N.C. L. Rev. 1027, 1032–33 (2021).

101. Becchio, *supra* note 61, at 262.

102. Shields et al., *supra* note 71, at 190.

103. See *id.*

104. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1823–24 (2020).

105. Judge Guido Calabresi acknowledged that the “ways of looking at what is reasonable and what is not . . . inevitably derive from the point of view of those who dominate law-making in a given society.” GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE PERSPECTIVES ON A PUBLIC LAW PROBLEM 22 (1985).

If the script were flipped, we could imagine a set of rules that treated dispassionate decisionmaking itself as biased because it is not the way that ordinary humans assess responsibility or guilt. Unemotional decisionmaking is something that takes a great deal of effort and, as I will explain below, can even lead to less accurate decisions.

*D. Homo Economicus: The Myth of Objective Rationality*

The law and economics movement took the fictional concept of the rational actor and merged it with neoclassical economics to create *homo economicus*. Scholars glorified this androcentric view of decisionmaking that prioritized unemotional, rational self-interest.<sup>106</sup> For a time, this idea captivated scholars in private law subjects like torts, contracts, and property. But it failed to create a sea change in evidence because the goal-of-rationality was already deeply entrenched.

There are many similarities between *homo economicus* and *homo judicious*. For example, efficient jurors and dispassionate judges should be impartial and decisions should bear “no trace of the knower—knowledge unmarked by prejudice.”<sup>107</sup> Subjective, sympathetic thinking is disfavored because this “is much closer to a feminine approach.”<sup>108</sup> Expressing one’s minority status is equated with impartiality and subjectivity, which is bad. But expressing one’s solidarity with the majority is objective, which is good.

Additionally, both under law and economics principles and in evidence law, decisions are optimal when they are rational, unemotional, selfish, and amoral.<sup>109</sup> Law and economics scholars invoke the rejection of unfair money offers as a sign that players in ultimatum games behave irrationally.<sup>110</sup> But this is only irrational if you ignore the

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106. See, e.g., Jolls et al., *supra* note 18, at 1484–85 (law and economics experiment relating to rationality of human action); see also Paula England, *A Feminist Critique of Rational-Choice Theories: Implications for Sociology*, 20 AM. SOCIO. 14, 22 (1989) (discussing the influence of participants’ selfishness on sociological experiments by economics-focused scholars).

107. Rooney, *supra* note 60, at 244.

108. Becchio, *supra* note 61, at 262.

109. See England, *supra* note 106, at 15 (“The ‘ideal-type’ or rational-choice theory is neoclassical economics. This perspective is creeping into other disciplines . . .”).

110. Takahiro Osumi & Hideki Ohira, *The Positive Side of Psychopathy: Emotional Detachment in Psychopathy and Rational Decision-Making in the Ultimatum Game*, 49 PERSONALITY & INDIVIDUAL DIFFERENCES 451, 452 (2010) (“[A]ctual responders often turn down . . . a rational decision in favor of an irrational rejection . . . . This irrational rejection is considered to be driven by negative emotions such as anger or frustration in response to unfair treatment.”).

social importance of signaling trust and condemning immorality.<sup>111</sup> The disconnect between law and morality partially explains the rejection of emotions in both fields, as well as the reverence for Bayesian theories. But this is deeply unwise, as I will explain in the next Part.

### III. INCORPORATING EMOTION

#### A. *Jurors Are Not Bayesian*

Unfortunately, there are numerous examples of how human choices diverge from Bayesian rationality “in the wild,” even if we might use this theory to fruitfully model optimum decisions in laboratories.<sup>112</sup> Perhaps jurors do and should update their reasoning when presented with new information. But purely Bayesian, rationalist models may *never* be able to accurately describe computations performed by actual human brains.<sup>113</sup> The reasons for this are twofold: (1) our brains have finite resources, and (2) most rationalist models fail to incorporate the powerful and complex role of emotions.<sup>114</sup>

What’s more, when we make decisions that appear irrational in the short run, they might still serve a purpose that is systemically rational. That is, the heuristics we use to make quick decisions, many of which rely on gut feelings, provide reasonable rules of thumb—even if they lead to errors in some instances. Punishing someone who is dishonest or greedy in an ultimatum game might have social utility, even when it means that you are personally being economically punished. This flips the idea of rationality on its head. It suggests that classically irrational behavior may serve a reasonable, legitimate purpose if measured on a different time scale or with higher-order social goals. Thus, we cannot isolate an individual witness or juror decision and say that it is irrational, as it might be perfectly rational given the values, emotions, and long-term goals of the group.

111. See Jason E. Plaks, Jeffrey S. Robinson & Rachel Forbes, *Anger and Sadness as Moral Signals*, 13 SOC. PSYCH. & PERSONALITY SCI. 362, 368–69 (2022).

112. See HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION* (4th ed. 1997); Craig R.M. McKenzie, Susanna M. Lee & Karen K. Chen, *When Negative Evidence Increases Confidence: Change in Belief After Hearing Two Sides of a Dispute*, J. BEHAV. DECISION MAKING, Jan. 2002, at 1, 15 (conducting experiment that examines “how people process biased information,” and noting that other studies have “concluded that people adjust insufficiently for bias”); see also Jolls et al., *supra* note 18, at 1477–78 (1998).

113. See Thomas F. Icard, *Bayes, Bounds, and Rational Analysis*, 85 PHIL. SCI. 79, 80 (2018) (“[T]he calculations required by most Bayesian models are intractable and thus could not describe computations performed by a resource-limited brain.”).

114. See HERBERT A. SIMON, *REASON IN HUMAN AFFAIRS* 29 (1983).

*B. Rationality Ignores the Value of Emotions*

Emotions are a critical part of decisionmaking.<sup>115</sup> A metareview of research on emotions and human behavior found that “[e]motions powerfully, predictably, and pervasively influence decision making.”<sup>116</sup> And their role is not exclusively corrupting. Emotions, defined broadly, help us focus our attention on things we care about and pull us away from things we do not.<sup>117</sup> In this way, they guide memory formation and learning. Indeed, “choice itself is indicative of an affective response because it signals an evaluation of preference, motivation, or subjective value assigned to the choice options.”<sup>118</sup> That is, *all* choices stem from our emotions, whether we realize it or not.<sup>119</sup> There is likely no such thing as an emotion-free decision. There may only be decisions that are less obviously affected by intense and conscious emotions.<sup>120</sup>

Studies of people with brain injuries reveal that emotional inputs are *necessary* for optimal decisions. Compelling scientific evidence for this comes from patients with lesions in the ventromedial prefrontal cortex (“vmPFC”), a key brain region for integrating so-called “emotional” and “cognition” processes.<sup>121</sup> Impairments to the vmPFC reduce both the “patients’ ability to feel emotion” and “the optimality of their decisions.”<sup>122</sup> Lesions in other brain areas critical for emotion also lead patients to fail to properly attend, perceive, evaluate, and make decisions.<sup>123</sup> For example, people who have damage in the frontotemporal lobe from dementia behave immorally because they cannot draw from appropriate emotional inputs.<sup>124</sup> The Western

115. Qiwei Yang, Shiqin Zhou, Ruolei Gu & Yan Wu, *How Do Different Kinds of Incidental Emotions Influence Risk Decision Making?*, BIOLOGICAL PSYCH., July 2020, at 1, 8 (finding results “in line with previous findings that unconscious emotions elicited by subliminal stimulus affect value judgments and risk behavior”).

116. Jennifer S. Lerner, Ye Li, Piercarlo Valdesolo & Karim S. Kassam, *Emotion and Decision Making*, 66 ANN. REV. PSYCH. 799, 802 (2015).

117. David Pizarro, *Nothing More Than Feelings? The Role of Emotions in Moral Judgment*, 30 J. THEORY SOC. BEHAV. 355, 358 (2000).

118. Elizabeth A. Phelps, Karolina M. Lempert & Peter Sokol-Hessner, *Emotion and Decision Making: Multiple Modulatory Neural Circuits*, 37 ANN. REV. NEUROSCIENCE 263, 267 (2014).

119. See Caroline J. Charpentier, Jan-Emmanuel De Neve, Xinyi Li, Jonathan P. Roiser & Tali Sharot, *Models of Affective Decision Making: How Do Feelings Predict Choice?*, 27 PSYCH. SCI. 763, 772 (2016) (“We demonstrated that feelings drive the decisions people make.”).

120. Lerner et al., *supra* note 116, at 803.

121. *Id.* at 802.

122. *Id.*

123. *Id.*

124. Stefanie Roberts, Julie D. Henry & Pascal Molenberghs, *Immoral Behaviour Following Brain Damage: A Review*, 13 J. NEUROPSYCHOLOGY 564, 564 (2019); see Mario F. Mendez, *Behavioral Variant Frontotemporal Dementia and Social and Criminal Transgressions*, J. NEUROPSYCHOLOGY & CLINICAL NEUROSCIENCES 328, 333 (2022) (“Persons with [behavioral variant frontotemporal dementia] show defective moral reasoning and may engage in immoral

philosophers got it wrong—in some cases, *not* being able to experience emotion leads to irrational and immoral decisions.

Emotional inputs are critical for socializing and making healthy moral judgments.<sup>125</sup> This may be why machine learning systems that include computational models of emotion improve human-computer interactions.<sup>126</sup> In the real world, when an actor hurts someone to save others (making a utilitarian decision, like in the familiar “trolley problems”), we need to see the actor express sadness, or we will infer negative things about their character. This is not obviously a bias. Emotions confer important moral content.

The role of emotions in moral judgments has obvious implications for listening to witness testimony at trial. Refusing to permit emotional testimony may perversely lead jurors to attribute moral blame to the speaker if the lack of affect is abnormal. Indeed, efforts to remove emotion from decisionmaking in morally laden trials can be counterproductive, as suppressing emotional content and processes might inadvertently lead to *worse* evaluative decisions or unfair inferences.

### C. *The False Dichotomy Between Emotion and Reason*

It is conventional, but wrong, to discuss rational decisions as being made with the head and emotional decisions as being made by the heart. The head and the heart are integrated metaphorically and literally. So-called cognitive processes like attention, perception, evaluation, and preparatory motor action critically depend on emotional inputs.<sup>127</sup> Researchers now state unequivocally that “[e]motion is commonly associated with logical decision making, perception, human interaction, and to a certain extent, human intelligence itself.”<sup>128</sup>

Even so, we continue to see the false and sticky dichotomy between emotion and reason in simplistic frameworks that present thinking as “fast” or “slow,” or as instinctive and emotional versus more

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acts . . .”); Eleonora Ceccaldi, Rossana Damiano, Cristina Battaglini, Valentina Galetto & Marina Zettin, *An Emotional Agent for Moral Impairment Rehabilitation in TBI Patients*, FRONTIERS PSYCH., June 2020, at 1, 10 (“When facing a moral personal dilemma, [traumatic brain injury] participants differ from controls whilst they don’t seem to differ when the dilemma elicits no emotion.”).

125. Plaks et al., *supra* note 111, at 362.

126. Enrique Osuna, Luis-Felipe Rodríguez, J. Octavio Gutierrez-Garcia & Luis A. Castro, *Development of Computational Models of Emotions: A Software Engineering Perspective*, COGNITIVE SYS. RSCH., May 2020, at 1, 14–16.

127. Phelps et al., *supra* note 118, at 265.

128. Nazmi Sofian Suhaimi, James Mountstephens & Jason Teo, *EEG-Based Emotion Recognition: A State-of-the-Art Review of Current Trends and Opportunities*, COMPUTATIONAL INTEL. & NEUROSCIENCE, 2020, at 1, 1–2.

deliberate and rational.<sup>129</sup> While these heuristics are handy and parsimonious, they are increasingly being debunked.<sup>130</sup> Psychologists and neuroscientists are providing concrete evidence that the two systems underlying emotional and cognitive processes are functionally interconnected. Rather than stemming from two discrete systems, they together reflect a distributed network that interacts in different and complementary ways, depending on the type of emotion and decision.<sup>131</sup>

#### *D. Emotions Are Not Monolithic*

While we can refer to emotions as one thing, they are actually concepts that map onto many very different experiences and mental processes. Emotions can vary widely in intensity, quality, valence, and effect.<sup>132</sup> Thus, there is not “one way” that an emotion influences decisions because there is not “one thing” that constitutes an emotion.<sup>133</sup>

Most research has focused on valence (whether the emotion is positive or negative). But this is just one of many emotional dimensions. Arousal,<sup>134</sup> intensity, duration,<sup>135</sup> and situational context<sup>136</sup> are other dimensions of emotions that matter a great deal too. Emotions of the same negative valence (such as anger, disgust, and sadness) impact our

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129. Phelps et al., *supra* note 118, at 265.

130. *See id.* at 281 (“[W]e argue that the repeated reference to dual systems of emotion and reason in research on decision making potentially limits scientific advances by discouraging investigations that capture the detailed and nuanced relationships between unique aspects of affect and choices.”).

131. *See id.* at 278 (“The limited research to date on the integration of emotion into value computation is starting to yield a network of regions . . . .”); Chiara Ferrari, Viola Oldrati, Marcello Gallucci, Tomaso Vecchi & Zaira Cattaneo, *The Role of the Cerebellum in Explicit and Incidental Processing of Facial Emotional Expressions: A Study with Transcranial Magnetic Stimulation*, 169 *NEUROIMAGE* 256, 256 (2018) (“[T]he cerebellum might represent an important node of the ‘limbic’ network, underlying not only emotion regulation but also emotion perception and recognition.”); Claudius Gros, *Cognition and Emotion: Perspectives of a Closing Gap*, 2 *COGNITIVE COMPUTATION* 78, 82 (2010) (“Cognition and emotions are deeply intertwined, and it is clear that cognitive processing influences the emotional control via direct feedback loops.” (footnotes omitted)).

132. Phelps et al., *supra* note 118, at 273.

133. *See* Oriol FeldmanHall, Paul Glimcher, Augustus L. Baker & Elizabeth A. Phelps, *Emotion and Decision-Making Under Uncertainty: Physiological Arousal Predicts Increased Gambling During Ambiguity but Not Risk*, 145 *J. EXPERIMENTAL PSYCH.* 1255, 1256 (2016) (“[S]cientists have established that emotion—a discrete response to external or internal events resulting in a range of reactions including subjective feelings and bodily responses—plays a role in the representation of value.” (citations omitted)).

134. *See* Karen Niven & Eleanor Miles, *Affect Arousal*, in *ENCYCLOPEDIA OF BEHAVIORAL MEDICINE* 63, 64 (Marc D. Gellman ed., 2020) (“Arousal also influences cognitive processing in ways that may be adaptive for survival.”).

135. Emil Persson, Erkin Asutay, William Hagman, Daniel Västfjäll & Gustav Tinghög, *Affective Response Predicts Risky Choice for Fast, but Not Slow, Decisions*, 11 *J. NEUROSCIENCE PSYCH. & ECON.* 213, 215 (2018) (“The response time manipulation had a strong effect on the extent to which subjects’ emotional arousal could predict their risky choices.”).

136. FeldmanHall et al., *supra* note 133, at 1261.



thinking very differently.<sup>137</sup> Even the same emotion—excitement—affects risk-taking differently depending on whether we are pressed for time or have breathing space to deliberate. Emotions do not work in linear and predictable ways.<sup>138</sup>

Anger, for example, can be useful in redirecting immediate threats. But it also can induce self-involved, “biased, risky, and retaliatory thinking.”<sup>139</sup> Because anger stems from a need for control, it leads to more certainty and confidence in our decisions, and more blame for others. Jurors who are angry are likely to view negative events as “predictably caused by, and under the control of” others.<sup>140</sup> This suggests that “if jurors are made to feel angry and disgusted, it might motivate them to seek out information that justifies blaming and punishing a defendant and ignore other information that contradicts that motivation.”<sup>141</sup> In this case, we might want to caution against evidence that triggers too much anger.

But anger impacts people differently. For people who are not generally angry, inducing anger can slow their performance on a cognitive task. At the same time, individuals who are prone to anger may be *assisted* by subliminal anger primes.<sup>142</sup> The way we respond to emotional evidence will depend not just on the context and emotion but on our individual personality traits. Anger makes some people freeze and some people mobilize.

Now, let us consider fear. Acute fear has been shown to assist in threatening situations, by heightening our awareness, perception, visual sensitivity, and attention.<sup>143</sup> Fear does not always corrupt reason. It can help us avoid falling off a cliff or being bitten by a snake. But fear also leads to less confidence, less certainty in moral decisionmaking, and less of a sense of personal control. In some situations, this can produce a “perception of negative events as

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137. Lerner et al., *supra* note 116, at 804.

138. See, e.g., Mario Wenzel, Thomas Kubiak & Tamlin S. Conner, *Positive Affect and Self-Control: Attention to Self-Control Demands Mediates the Influence of Positive Affect on Consecutive Self-Control*, 28 COGNITION & EMOTION 747, 747–54 (2014) (discussing how performance of study participants changed depending on whether they experienced positive or neutral emotional responses while engaging in the studied activity).

139. Vykinta Kligyte, Shane Connelly, Chase Thiel & Lynn Devenport, *The Influence of Anger, Fear, and Emotion Regulation on Ethical Decision Making*, 26 HUM. PERFORMANCE 297, 299 (2013).

140. Lerner et al., *supra* note 116, at 807.

141. Salerno & Phalen, *supra* note 24, at 639.

142. Sarah N. Garfinkel et al., *Anger in Brain and Body: The Neural and Physiological Perturbation of Decision-Making by Emotion*, 11 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 150, 150–56 (2016).

143. Petra Vetter, Stephanie Badde, Elizabeth A. Phelps & Marisa Carrasco, *Emotional Faces Guide the Eyes in the Absence of Awareness*, ELIFE, Feb. 8, 2019, at 1, 1–10.

unpredictable and situationally determined.”<sup>144</sup> Unlike anger, fear may lead us to *discount* individual blame.

But even this is too simplistic. If the actor is not in our social ingroup (e.g., we are white and the defendant is Black), having participants view fearful images has been shown to reduce our empathy toward these outgroup actors and *increase* their blame.<sup>145</sup> Thus, the same emotion of fear operates differently depending on whether we identify with the person whose actions are being evaluated. This has implications for jurors viewing crime-scene photos but itself does not answer the question of whether these photos are unfairly prejudicial.

Generally speaking, positive emotions have been found to improve encoding for background information by broadening implicit memory performance.<sup>146</sup> However, positive moods increased visual scanning of scenes, made participants’ visual attention less reliable, and broadened their attentional focus.<sup>147</sup> That is, the positive mood led them to process information breezily and superficially. But here too, this effect is not universal. If people are expected to shift tasks from one that is mood congruent to one that is not mood congruent, being in a positive mood can *reduce* performance on the second (sadness-inducing) task.

There are not many studies that apply these nuanced views of emotional processes to mock jurors, but a couple have done just this. In one such study, when the mock jurors were induced to feel sad, this emotional shift decreased their visual scanning of the scene, increased the reliability of their visual attention, and narrowed their attentional focus.<sup>148</sup> Participants who were induced to be sad in a separate study on interrogation tasks were less likely to judge the suspect as guilty and selected less hostile interrogation tactics.<sup>149</sup> They were also “more likely to use an analytic (rather than a heuristic) processing style.”<sup>150</sup> Thus, in some cases, sadness might trigger the kind of processing that the Rules of Evidence try to encourage.

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144. Lerner et al., *supra* note 116, at 807.

145. Matt T. Richins, Manuela Barreto, Anke Karl & Natalia Lawrence, *Incidental Fear Reduces Empathy for an Out-Group’s Pain*, 21 *EMOTION* 536, 536–44 (2021).

146. Renée K. Biss & Lynn Hasher, *Delighted and Distracted: Positive Affect Increases Priming for Irrelevant Information*, 11 *EMOTION* 1474, 1474–1478 (2011).

147. Catherine Esnard & Nicolas Vibert, *Jurors’ Emotional State, Attentional Focus, and Judicial Judgment in a Criminal Court*, 33 *J. COGNITIVE PSYCH.* 439, 447 (2021).

148. *Id.* at 443, 447.

149. Deshawn Sambrano, Jaume Masip & Iris Blandón-Gitlin, *How Emotions Affect Judgement and Decision Making in an Interrogation Scenario*, 26 *LEGAL & CRIMINOLOGICAL PSYCH.* 62, 62 (2021).

150. *Id.*

This tip-of-the-iceberg summary of the incredible complexity of emotions hopefully drives home the point that their impact is far from predictable, monolithic, or easy to control. Emotions straddle a broad range of feelings and experiences, which can operate in very different ways depending on the perceiver, the thing perceived, personality traits, the task at hand, and context. Just like thoughts, emotions can help us focus and also can distract us.

### *E. Suppressing Emotion Is Cognitively Costly*

Social stereotypes tell us that men suppress emotions more than women.<sup>151</sup> While this, too, depends on context, there is some empirical evidence that this is the case.<sup>152</sup> If motivated, however, adult men and women alike are generally “quite successful at inhibiting overt signs of emotion-expressive behavior.”<sup>153</sup> This can be socially advantageous if we occasionally want to save face and protect others’ feelings.<sup>154</sup> Men and women appear equally *capable* of suppressing emotions that bubble up, but due to social pressures, men might feel they are expected to suppress more emotion than women.

Masking emotions does not mean we do not experience them.<sup>155</sup> Indeed, suppressing emotions takes a great deal of effort. This may be why suppressing emotions is associated with “lesser well-being, more symptoms of psychopathology, and lesser relationship satisfaction.”<sup>156</sup> Negative long-term health effects suggest caution when encouraging judges to routinely suppress their emotions.

Suppressing emotion activates the sympathetic nervous system (the “fight-or-flight” response). This in turn can make it harder for us to attend to new information and form new memories.<sup>157</sup> To underscore this incredibly important point, the explicit emotional suppression that judges and juries are expected to perform probably *impairs their ability*

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151. See Ayan Cai, Yixue Lou, Quanshan Long & Jiajin Yuan, *The Sex Differences in Regulating Unpleasant Emotion by Expressive Suppression: Extraversion Matters*, FRONTIERS PSYCH., July 7, 2016, at 1.

152. See, e.g., *id.*

153. Jane M. Richards & James J. Gross, *Composure at Any Cost? The Cognitive Consequences of Emotion Suppression*, 25 PERSONALITY & SOC. PSYCH. BULL. 1033, 1033 (1999).

154. See *id.* at 1041. For background discussion on the neurological impact of emotional suppression, see generally Yuta Katsumi & Sanda Dolcos, *Suppress to Feel and Remember Less: Neural Correlates of Explicit and Implicit Emotional Suppression on Perception and Memory*, NEUROPSYCHOLOGIA, 2020, at 1.

155. Richards & Gross, *supra* note 153, at 1033.

156. Kateri McRae & James J. Gross, *Emotion Regulation*, 20 EMOTION 1, 3 (2020).

157. *Id.*

to remember evidence.<sup>158</sup> There are big downsides to striving for emotional control.

Rather than expecting judges, attorneys, witnesses, and juries to mask their emotions, we might instead encourage cognitive reappraisals. Reappraisals involve reinterpreting or reevaluating the situation in light of the situation or our goals.<sup>159</sup> An example might be reminding yourself that a witness who has said something really insulting (which made you angry) is likely under a great deal of stress, so you should not take it personally.

Compared to suppressing emotions, reappraisal strategies are “often associated with adaptive outcomes such as greater physical health, . . . more positive social outcomes, [and] greater psychological well-being.”<sup>160</sup> While psychologists often champion the benefits to well-being when reappraisals are selected over suppression, the ability to reappraise emotional experiences in the moment is also cognitively costly.<sup>161</sup> Research suggests that men are more likely to suppress emotions than reappraise the situation.<sup>162</sup>

### *F. Emotions Are Critical for Moral Judgments*

As we saw above, both *homo economicus* and *homo judicious* are expected to wall off their emotions from their reasoning. But in addition to taking a cognitive toll, excluding emotion from decisionmaking elides the importance of morality for legal judgments.<sup>163</sup> Judges and juries that are devoid of emotion may be “numb[ed]” to their ethical intuitions, which can lead to injustice.<sup>164</sup> While emotions may lead to unfair results if we are primed to feel rage or blame, they are also necessary for helping us assess social and moral value.<sup>165</sup> Complex emotions such as envy, jealousy, guilt, shame, embarrassment, and pride are moral emotions that “facilitate our social interactions and relationships by

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158. See Katsumi & Dolcos, *supra* note 154, at 1–2.

159. McRae & Gross, *supra* note 156, at 3.

160. *Id.* (citations omitted).

161. See Maroney & Gross, *supra* note 30, at 142–51.

162. Daisy A. Burr, Tracy d’Arbeloff, Maxwell L. Elliott, Annchen R. Knodt, Bartholomew D. Brigidi & Ahmad R. Hariri, *Functional Connectivity Predicts the Dispositional Use of Expressive Suppression but Not Cognitive Reappraisal*, *BRAIN & BEHAV.*, July 2019, at 1, 2.

163. Joshua D. Greene, R. Brian Sommerville, Leigh E. Nystrom, John M. Darley & Jonathan D. Cohen, *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 *SCIENCE* 2105, 2105–07 (2001).

164. Bandes, *supra* note 14, at 2429 (2021).

165. Mindus, *supra* note 26, at 100; see also Gerben A. van Kleef & Stéphane Côté, *The Social Effects of Emotions*, 73 *ANN. REV. PSYCH.* 629, 630–31 (2022) (discussing how emotions can alter behaviors).

motivating us to adhere to social norms and personal standards.”<sup>166</sup> Excluding them from court means excluding important social signaling that might not be possible to convey in other ways.

The role of empathy in judicial decisionmaking has likewise been maligned because it has come to signal feminine bias.<sup>167</sup> But this reveals our own ignorance of how critical empathy is for the kinds of judgments jurors and judges must make.<sup>168</sup> Empathy is much broader than simply “feeling sad for others.” It encompasses the ability to interpret other people’s thoughts and emotions and to put ourselves in their shoes (“cognitive empathy”). People who are low in empathy will find it almost impossible to assess the credibility of witnesses (is this person lying?) and their motivations (did they have the intent to kill?). Without empathy, the core functions of both jurors and judges will be significantly compromised.<sup>169</sup> Thus, we do not mean what we say when we advocate for unemotional decisionmaking. If emotions are not to be relied upon, juries and judges could be replaced by perfectly Bayesian, psychopathic robots. Of course, psychopaths *are* abundantly rational.<sup>170</sup> However, this rationality does not come from concern for the common good or intellectual competence but from being cold and emotionally aloof.

#### CONCLUSION

In this Symposium Article, I provide a two-part critique of evidence law’s obsession with the anti-emotion view of rationality. First, whether intentional or not, the pursuit of unemotional rationality has silenced the voices of the marginalized and the oppressed. The concept of rationality itself is gendered and rests on a false dichotomy between emotion and reason, where emotion is feminine and inferior and reason is male and idolized. This slavish pursuit of rationality both in evidence rules and practice has furthered the “male gaze” of evidence

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166. Else-Quest et al., *supra* note 85, at 948.

167. See, e.g., Kathryn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 OHIO N.U. L. REV. 263, 266–67 (2010) (discussing controversy that arose during Justice Sotomayor’s confirmation hearing as related to the fact that she “valued empathy”).

168. Pizarro, *supra* note 117, at 362.

169. For a discussion of the importance of mental state on judgment, see Fiery Cushman, *Deconstructing Intent to Reconstruct Morality*, 6 CURRENT OP. PSYCH. 103, 103 (2015); Melanie Killen, Kelly Lynn Mulvey, Cameron Richardson, Noah Jampol & Amanda Woodward, *The Accidental Transgressor: Morally-Relevant Theory of Mind*, 119 COGNITION 197, 211 (2011); and Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCH. BULL. 556, 564 (2000).

170. Justin Balash & Diana M. Falkenbach, *The Ends Justify the Meanness: An Investigation of Psychopathic Traits and Utilitarian Moral Endorsement*, 127 PERSONALITY & INDIVIDUAL DIFFERENCES 127, 127 (2018).

law and scholarship. By perpetuating these practices, we commit epistemic injustice.

Second, emotions are not monolithic. While emotions can sometimes lead us astray, they can also reveal the motivations behind actions and provide important social context. That is, emotions can communicate independent probative value. Efforts to suppress emotions in the courtroom are likely unsuccessful and cognitively taxing. But what is even more concerning is that the silencing of emotion robs judges and juries of their moral compass. Surely this is not the ideal to which we aspire.

While judicial codes of conduct may need to be revised, the text of Rule 403 itself does not need to be altered to shift the male gaze of the Rules. Rather, the change must come from judges and evidence scholars themselves. We need to stop assuming that emotion is presumptively unfairly prejudicial—when expressed in court or encouraged by evidence. Because this is a common interpretation of Rule 403, it will be a tough habit to break.

It would be helpful if the oft-cited ACN accompanying Rule 403 were revised to remove the language indicating that emotions are a common basis for unfair prejudice. But short of that, judges need to more carefully apply the Rule *as it is written*. When excluding evidence based on Rule 403, judges must do more work to explain *why* an emotion is too misleading, inflammatory, or distracting. They must also justify why the moral force and independent probative value of the emotional evidence are substantially outweighed by its presumably unfair effects. This should all occur simultaneously with honest reflection on the sexist and racist norms that have favored cold and unemotional legal decisionmaking for far too long.