
Evolution of the Trial Advocate: From Quintilian to Quanta in the Contemporary Courtroom

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I. INTRODUCTION

There I stood in the well of the packed courtroom. Cameras focused on me, the culmination of a career in court, weeks of preparation, editing, and practice—it was the moment that an oral advocate trains for. I knew the substance of my argument, and I had detailed facts to offer, but how would I deliver it with impact? In the face of such density and pressure, how does one convince a diverse group of people, who know that you are trying to persuade them, to move together in one direction? It might have been easier if I had more information about each of them, about their biases, their tendencies, their lives, their feelings. But I had very little. At this moment, when I had an audience and observers waiting expectantly, how would I tell a persuasive story that would save the life of the trial?

So I began my Donahue Lecture at Suffolk University Law School. I aimed to emphasize the importance of advocacy at trial. I told its story. I showed it with multimedia. I interacted and got audience feedback. I pulled heartstrings and imparted knowledge. I did not try to be exhaustive, but I had a point: to make the case that we need to update trial advocacy. I argued why it is critical that lawyers, students, and professors—as well as judges, legislators, and corporate clients—each celebrate the importance of the trial. It is not a zero-sum game. The craft deserves excellence, and those who excel command a premium. I further argued that trial advocacy has fundamentally changed because of developments in science, technology, and the changes in the practice of law itself. What we know about how people process information and how to connect with them has evolved. Trial advocacy must evolve in light of these developments. Finally, I shared some thoughts on what actually works to change minds in a courtroom, an appreciation that each piece of information can generate belief in a fact or a feeling, a prominent role of emotional intelligence, and framing information in ways that are consistent with our themes. Through adaptation, the advocates of this century should

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thrive and not just survive.

A. *Improving Advocacy's Importance Can Save the Trial*

This is a story born of crisis. Although the volume of litigation has increased, jury trials in America are endangered.¹ The reasons are many, but none are more important than outcome predictability and litigants' budgeting of risks.² In an age where the sheer volume of cases has increased, there are several pragmatic incentives for litigants and courts to keep the wheels of justice moving efficiently, if not transparently.³ Ultimately, while society may be no less interested in justice, simple economic theory alone can threaten the existence of trials as we know them.⁴ Trials cost money and increase risks in an age when society seeks to find ways to mitigate these risks.

B. *The Legal Landscape Has Changed*

While litigation increases and the number of trials decreases, the volume of lawyers in America is greater than it has ever been.⁵ The focus of legal

1. See Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), http://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html?_r=0 [https://perma.cc/KYH8-VU8C] (outlining significant decline of jury trials in America). See generally ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* (2009) (discussing causes of declining number of American jury trials).

2. See Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1419 (2002) (observing American jury trial decrease and increase in use of jury trial alternatives). Recognized explanations for the decrease in trials include: a joining of American and global procedures by which judges define the issues themselves, develop the record, and then resolve the case; Alternative Dispute Resolution (ADR) and other tools have displaced traditional trial procedure; other legal decision-making procedures strengthen other branches of government at the expense of the judiciary; fundamental changes in legal system character toward becoming a more "informal and flexible economic and political instrument"; the widespread notion that ADR is a more evolved means of dispute resolution; an aversion to trials due to the high economic costs involved; the belief that jury trials are risky leading to higher settlement rates; cultural shift in courts and among judges resulting in a decrease in fidelity to precedent and an increase in pragmatism; the notable democratization of juries, which has reduced their overall predictability; a decrease in available trial court resources; and the tremendous growth and general success of plea bargaining fueled by the surge of mandatory minimums and sentencing guidelines. See BURNS, *supra* note 1, at 88-101 (setting out various explanations for decrease in trial numbers).

3. See *Jacob v. City of New York*, 315 U.S. 752, 752-53 (1942) (expounding on fundamental right to jury trial). As the Supreme Court has said, courts should "jealously" defend jury trials, and recognize the emotional component of American loyalty to them, which arguably transcends their practicality. See *id.* at 753.

4. See Terry R. Means, *What's So Great About a Trial Anyway? A Reply to Judge Higginbotham's Eldon B. Mahon Lecture of October 27, 2004*, 12 TEX. WESLEYAN L. REV. 513, 521 (2006) (arguing market factors lead to natural decline of trials). One way to mitigate the economic impact of going to trial and suffering an expensive judgment is to invest in a concerted trial insurance system by which insurers may diversify some of that risk. The prospect and structure of such a system is more appropriate for a separate forum, but models such as the Terrorism Risk Insurance Act could be instructive in creating economic incentives for underwriters, including creation of insurer consortiums that could be potentially funded by small shares of plaintiffs' judgments.

5. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal*

education has largely been on substantive areas of law and less on the art of trial advocacy, with very few students getting practical, stand-up advocacy experience before they leave law school. In short, there are fewer lawyers with meaningful trial experience, and it is harder for lawyers to gain that experience upon graduating law school due to the current lack of trials.⁶ The trial lawyer has become a vanishing species.⁷ It is also harder to get trial experience regardless of your education. There is very little mentoring, and lawyers have to be more aggressive to get trials, often facing risks surrounding their professional ethics, finances, and future career opportunities.

But numbers alone do not tell the story—society changes over time, affecting courtroom presentation and the utility of law. This Article asserts that at trial, the lawyer can make the difference and that their persuasiveness can transcend the hand they have been dealt. When I first became a trial lawyer, I experimented with various styles in order to connect with the jury. I tried to present through different personas—I even tried different accents.⁸ I remember one case in which I intentionally dropped every “r” and elongated every vowel, so that I might appeal to a rural Massachusetts jury. I didn’t.

I lost trial after trial during that time. I learned a few things, though, including that ad hoc social science cannot become a trial strategy, and that using any voice (figurative or not) other than your own is dangerous. Since then, I observed others at trial and studied what worked for them. Finding my own contemporary voice, rather than the old one that I thought they wanted to

and State Courts, 1 J. EMPIRICAL LEGAL STUD. 459, 460-76 (2004), <http://epstein.wustl.edu/research/courses.judpol.Galanter.pdf> [<https://perma.cc/H26U-7EYC>] (illustrating empirically trial decline in state and federal courts); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 569 (2012) (emphasizing how pretrial discovery under Federal Rules reduces need for complete trial); *ABA National Lawyer Population Survey: Historical Trend in Total National Lawyer Population 1878-2016*, A.B.A., http://www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2016.authcheckdam.pdf (last visited Dec. 1, 2016) [<https://perma.cc/74PH-KR5N>] (showing lawyer population has grown approximately one to two percent per year for past two decades).

6. See MARK MOTIVANS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2010—STATISTICAL TABLES 17, tbl. 4.2 (2013), <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf> [<https://perma.cc/KM9M-S7SB>] (highlighting lack of case filings). In 2010, only 2.3% of convictions in criminal cases were a result of jury trials, and if you include bench trials, this number is only 2.6%. See *id.*; see also Higginbotham, *supra* note 2, at 1409 (illustrating trend away from trials between 1991 and 2000). According to Galanter’s research, even in state courts, where 98% of trials occur, jury trials have decreased from 1.8% in 1976 to just 0.6% of dispositions in 2002. See Galanter, *supra* note 5, at 507.

7. I should acknowledge that most Americans likely may not perceive the decrease in trials and the devaluation of trial lawyers either as a crisis, or even a bad thing. In terms of national policy and culture, there are reasons on both sides. I simply point out that the valuation of trial lawyers requires an appreciation of the value in trials themselves. If trials continue to occur, then it is in the individual trial advocate’s interest to have a leg up in terms of training, skill, and strategy—at least until the rest of the field catches up.

8. See Tanya Chartrand & John A. Bargh, *The Chameleon Effect: The Perception—Behavior Link and Social Interaction*, 76 J. PERSONALITY AND SOC. PSYCHOL. 893, 897 (1999), https://faculty.fuqua.duke.edu/~t1c10/bio/TLC_articles/1999/Chartrand_Bargh_1999.pdf [<https://perma.cc/3GT5-VZGD>] (explaining subconscious tendency to mimic postures, mannerisms, and expressions could indicate degree of dispositional empathy).

hear, was the first step in my personal evolution as a trial lawyer. I could not persuade anyone effectively until then.

1. Technology

Technology has fundamentally changed the practice of law. More justice, but less trial action, has come from such influential innovations as word processing, database management, and online legal research. Additionally, complex innovations such as litigation software, DNA analysis, and computer forensic work, often make cases less likely to go to trial.

Technology has also shifted how people consume information in an information age, and by extension, how they expect to consume information from trial advocates. Not long ago, the Internet did not factor into how average jurors learned anything; now, the Internet and social media are perhaps the primary ways most jurors gain knowledge. The information access channels are different from a generation ago, in kind, depth, and voice. They may even involve different parts of the brain.⁹

We now consume media from whatever source we wish rather than a homogenized network or newspaper. We are frequently overloaded with information, so we dig only as deeply as we wish to dig, we usually only look where we want to, and we no longer need to remember information we can search for when we want to. We now view multiple sources of media, choosing those sources that most suit our own preferences and prejudices from the marketplace of articles and opinions. Increasingly, the accuracy of this information is becoming less important.¹⁰ We also increasingly socialize our reactions to information and seek feedback from our social networks in real-time. This also makes it more likely that jurors, like the rest of society, are apt to become more entrenched in extreme beliefs they find virtually.

9. See Betsy Sparrow et al., *Google Effects on Memory: Cognitive Consequences of Having Information at Our Fingertips*, 333 *SCI.* 776, 776-78 (2011), <http://www.cpdee.ufmg.br/~fcampelo/files/disciplinas/EEE933/2013-1/Referencias/Sparrow2011%20-%20Google%20Effects%20on%20Memory.pdf> [<https://perma.cc/2QP4-THJD>] (highlighting two experiments based on constant access to information). The Internet is shaping jurors' learning much as it shapes the general public's. In so doing, it increases jurors' reliance on external sources for memory and analysis, and enables a short attention span with expectations of interactivity and self-selecting where to gather information. Mindful of this reliance, judges are increasingly admonishing jurors to avoid searching on the Internet during trials along with their tradition of admonishing avoiding media. Therefore, by the time they get into deliberations, jurors are more likely to rely on their fellow jurors, the attorneys' framing of issues, and the judge's instructions in order to recall the evidence that is relevant to their decision making. This is also why jurors will likely remember emotional evidence longer throughout trial and deliberations.

10. See Nick Wingfield et al., *Google and Facebook Take Aim at Fake News Sites*, *N.Y. TIMES* (Nov. 14, 2016), http://www.nytimes.com/2016/11/15/technology/google-will-ban-websites-that-host-fake-news-from-using-its-ad-service.html?_r=1 [<https://perma.cc/BQ4N-2ZTU>] (discussing fake news and presidential election).

2. *Changing Expectations of Consumption*

All the while, popular media sets expectations about what should happen in a courtroom with respect to lawyers and evidence, a phenomenon sometimes called the “law and order” or “CSI effect.” Similarly, technology has made an unfathomably voluminous amount of information available to trial lawyers, such that adequately winnowing down such huge data has become harder to do, not to mention more time-consuming and expensive. Distilling a massive investigation or case into digestible pieces for a judge or jury to consume easily is a challenge. In this context, mining datasets for meaningful conclusions is becoming a precious skill, which itself increasingly relies on artificial intelligence and algorithmic pattern recognition.

Ironically, while technology has improved, there has been a dumbing down of technical understanding in society, especially of scientific concepts. Some trial lawyers routinely try to simplify their cases so that a child in grade school would understand them. These smaller, more digestible pieces of content have become a form of expression unto themselves. As described below, these quanta of information, logical and emotional, develop individuals’ opinions about issues. Another unique aspect of social media is that it offers constant feedback, which creates new social pressures and identity issues related to expressive conduct.

3. *Multivariate Diversity*

American juries are no longer largely homogenous groups. Due to the diversity of lawyers, judges, and jurors, the challenge of finding a common morality and life experience is much more difficult in the modern day, and the results are less predictable. This is not the jury pool that Clarence Darrow might have had.¹¹ Jurors process information based on their widely varied perspectives. Consequently, the trial lawyer’s narrative has to be that much more universal.

Those cases that do go to trial are intensely watched in the information age. While in some jurisdictions there are cameras in the courtroom, for the most part, pundits and media spin the events taking place in the courtroom to the Internet and beyond. My last trial was live-tweeted by an army of reporters. Another trial was blogged about so much that I can review which ties I wore simply by reading the archives.

11. See T.A. Frail, *Everything You Didn’t Know About Clarence Darrow*, SMITHSONIAN (June 10, 2011), <http://www.smithsonianmag.com/history/everything-you-didnt-know-about-clarence-darrow-14990899/> [<https://perma.cc/VE55-6NHT>] (discussing history of Clarence Darrow).

4. *Economics*

Success in such a public forum might enhance a career, but the risk of failure can be devastating. The Internet does not forget. More fundamentally, trials are incredibly expensive, and it is increasingly difficult for corporate clients to accurately assess the odds and risks associated with their litigation-related investment. Therefore, trial lawyers, as well as their clients, have long-term economic reasons, for parochial and public relations purposes, for being more selective about which cases that they posture toward trial.

5. *Impersonality*

Judges and juries have grown accustomed to consuming information through video, sound bites, images, and self-directed web browsing, rather than the detached arms-length process of trial presentation.¹² Jurors expect to see well-curated multimedia presentations, and are less prepared to connect with the people in the courtroom. The time may be near when jurors can navigate evidence for themselves, at their own pace and convenience using hand-held technology from their juror chair. Although this may make it harder for a trial advocate to create a human connection, the potential persuasive benefits are well worth the effort. A human connection transcends the simple logic of a legal problem and allows the individual to be affected and moved.

6. *Brain Science*

Modern science has developed new insights into how the emotional centers of the brain are critical to persuasion. Contrary to conventional wisdom suggesting that logic and emotion are separate brain systems, they now appear to be connected to cognition via integrated neuronal networks that often compete for dominance in the interpretation of information.¹³ Even anatomically, we now know that the pleasure center of the brain, the amygdala, is linked to the prefrontal cortex, which is associated with necessary cognitive

12. See *United States v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992) (emphasizing benefit of juror trial involvement when conditions controlled correctly); *Commonwealth v. Urena*, 632 N.E.2d 1200, 1206 (Mass. 1994) (commenting on concerns regarding allowing jurors to question witnesses). In both *United States v. Sutton* and *Commonwealth v. Urena*, the courts noted the high risks involved in juror participation, and urged practitioners to use the tactic sparingly. See *Sutton*, 979 F.2d at 1005; *Urena*, 632 N.E.2d at 1206. The Massachusetts Model Jury Instruction includes an instruction for such cases. See Massachusetts Model Jury Instruction for Use in the District Court (2009), 1.180 (outlining proper procedure for jury and witness).

13. See Jaak Panksepp, *A Proper Distinction Between Affective and Cognitive Process Is for Neuroscientific Progress*, in *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS* 225 (Paul Ekman & Richard J. Davidson eds., 1994) (noting intense interrelatedness between cognitive and emotional processes); see also Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 858 (1987) (emphasizing importance of coexistent reasoning and emotional response during legal deliberation).

activities to juror functioning, including choice, prediction, planning and controlling emotion.¹⁴ The orbitofrontal cortex is associated with sensory integration and decision making, as well as the anterior cingulate cortex, which is involved in attention, motivation, and error detection.¹⁵ Emotion powerfully affects what someone “believes,” particularly when emotions are aroused, leading to narrowing attention and a focus on the experience.¹⁶

Some posit that emotions more often bridge divides in cognitive belief rather than widen them.¹⁷ Studies show that people with a higher need for affect, which is defined as the “motivation to approach or avoid emotion-inducing situations,” are more easily persuaded with emotional information than those with a low need for affect.¹⁸ On the other hand, those with a low need for affect tend to avoid highly emotional situations, and are more readily persuaded with unemotional information.¹⁹ Some say that we cannot think without emotions.²⁰ As I argue below, in light of these huge developments in neuroscience, emotion is essential in contemporary courtroom advocacy.

7. *Trials Increasingly Have Broader Implications*

Today’s courts and jurors face different fears and concerns than those a generation ago. Transnational crime, terrorism, computer and intellectual

14. See generally Adam K. Anderson, *Feeling Emotional: The Amygdala Links Emotional Perception and Experience*, 2 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 71 (2007), <http://scan.oxfordjournals.org/content/2/2/71.full> [<https://perma.cc/WP7C-7DNQ>] (discussing recent research on amygdala function and emotional experience).

15. See generally Michela Gallagher & Andrea A. Chiba, *The Amygdala and Emotion*, 6 CURRENT OPINION IN NEUROBIOLOGY 221 (1996), <https://www.ncbi.nlm.nih.gov/pubmed/8725964> [<https://perma.cc/WJG4-FK43>] (exploring recent studies on amygdala and emotion connection).

16. See, e.g., Gregory R. Maio & Victoria M. Esses, *The Need for Affect: Individual Differences in the Motivation to Approach or Avoid Emotions*, 69 J. PERSONALITY 583, 609 (2001), <https://www.ncbi.nlm.nih.gov/pubmed/11497031> [<https://perma.cc/J46W-C9QL>] (adding additional elements to emotional-cognitive research); Jonathan R. Zadra & Gerald L. Clore, *Emotion and Perception: The Role of Affective Information*, 2 WILEY INTERDISC. REV. COGNITIVE SCI. 676, 676 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3203022/> (exploring how emotions affect visual perception); Mara Mather & Matthew Sutherland, *The Selective Effects of Emotional Arousal on Memory*, AM. PSYCHOL. ASS’N (Feb. 2012), <http://www.apa.org/science/about/psa/2012/02/emotional-arousal.aspx> (highlighting emotional arousal affects information intake process).

17. See MICHAEL MCGUIRE, BELIEVING: THE NEUROSCIENCE OF FANTASIES, FEARS, AND CONVICTIONS 110 (2013) (describing how emotion widens or narrows when cultural beliefs divide).

18. See Maio & Esses, *supra* note 16, at 583 (describing subset of people with higher cognitive-emotional association levels).

19. See Geoffrey Haddock et al., *Should Persuasion Be Affective or Cognitive? The Moderating Effects of Need for Affect and Need for Cognition*, 34 PERSONALITY SOC. PSYCHOL. BULL. 769, 771, 777 (2008), <http://psych.cf.ac.uk/home2/maio/Haddock%20et%20al%20PSPB%202008.pdf> [<https://perma.cc/5LXD-3MGP>] (furthering research on need for affect in drawing connection between need for affect and cognitive functioning).

20. See Christine C. Kelton, *Clients Want Results, Lawyers Need Emotional Intelligence*, 63 CLEV. ST. L. REV. 459, 493 (2015) (concluding integration of emotion and cognition necessary for effective advocacy).

property cases, and multinational corporate conflicts are now regular controversies that barely existed thirty years ago. The impact of these issues transcends the parties involved, and can be catnip for the media. People want to navigate these emotional waters together, not alone. At the same time, travel and interactivity in the world has increased; borders are more porous and cultures more readily understandable and interactive. It is a fundamentally different audience than that faced in the last century, and the advocate must adapt.

C. How the Advocate Can Add Value

Not only is the legal profession feeling the implications of this legal climate change, but society in general feels the impact as well. The perception of the American trial lawyer is etched into the fabric of society—in popular culture as well as in the ethos of the founding fathers. Lawyers are the purveyors of due process and a litigant's last champion against injustice.²¹ The trial lawyer can alter the playing field even after the facts and law are settled, and thus brings the hope of victory to every litigant. They give those clients in between a chance to make their case. Regardless of the merits of a case, a client's fate can change dramatically purely on account of the skill and cunning of his advocate.

The skills, strategies, and law of advocacy have not changed much in recent decades. In the economic calculus of litigation, the predictability of avoiding trial has discounted the advocate's role in the outcome of cases. Like so many industries, adjusters and in-house counsels find means and averages to estimate likelihoods of outcomes measured against the cost of services with little regard for how the skill of the trial lawyer alters those odds. Often, it is safer not to play in the market at all.

There are no useful quantitative performance metrics for trial lawyers. Metrics, such as those used in other professions would allow filtering out of situational talent in a way not deciphered simply through a review of how a lawyer generally handled a case—traditionally congruent with liability and the amount of a judgment.²² Creating metrics for trial lawyers will increase their

21. See *Adams' Argument in Defense*, MASS. HIST. SOC'Y, <https://www.masshist.org/publications/apde2/view?id=ADMS-05-03-02-0001-0004-0016> (last visited Dec. 1, 2016) [<http://perma.cc/CY3U-P5CV>] (illustrating American lawyer's dedication to justice and truth above popular approval). "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence . . ." *Id.* This rhetoric is an example of Adams's gift for making persuasion seem like a simple recitation of evidence.

22. As an example of an attempt to quantify value, meaningful statistics are being collected to give executives, like former Boston Red Sox general manager Theo Epstein, more tools for analysis to identify potentially undervalued talent for his teams. Bill James coined Sabermetrics, a statistical and situational analysis of nontraditional baseball player performance statistics. This analysis improved efficiencies and extracted increased value from overlooked professional baseball players. See *A Guide to Sabermetric Research*, SOC'Y FOR AM. BASEBALL RES., <http://sabr.org/sabermetrics> (last visited Nov. 12, 2016) [<https://perma.cc/8HAH-WW8D>] (describing formation of Sabermetrics). In the law, this has been used in

perceived value to clients, and thereby help protect the institution of the trial. In creating such metrics, a significant measure of a trial lawyer's value should be pegged to his persuasiveness at trial.²³

One of the reasons for the perceived fungibility of trial advocates is that the job has not changed much. Candidates' training and experiences are often similar, and there are not many opportunities to gain experience. Typically, competent lawyers research the law, present the facts consistent with their client's version of events, and hope fate is on their side. This is where the skilled trial advocate can alter the playing field. For example, in closing a trial involving the bounds of free speech, my expert adversary quoted Thomas Paine to evoke the principles of freedom that fit his theory of the case. There is something of a call and response at a trial—every assertion gives an opportunity to concede, to stop traction of an idea, or even to shift the momentum away from it.

Although there was a risk in adopting or challenging counsel's reference, I chose to promptly remind the jury that Paine wrote the book "Common Sense," which was their most vital asset in judging liability—something that played directly into my narrative and cut through my adversary's distraction tactic. By changing the calculus through intelligent risk-taking and creating unforeseen risks for the opponent, the trial advocate increases his own value and increases the costs to the adversary. This is precisely the type of economic incentive that adds strategic value to clients, and through basic economics, can save the American trial.²⁴

relation to the statistical analysis of cases, strategies, and outcomes, but not of the lawyers themselves. In many professions, the value of services is intended to be proportional to the skill and scarcity of that professional, but this is not so in the law. In the law, that is all done by shorthand. There is seldom any attempt to quantify that which is ephemeral, and the result is that the business proposition for a skilled trial advocate cannot be shown in terms that the business people hiring trial advocates might appreciate. The value proposition needs to be changed from how much value does a trial lawyer add to how much value does *this* trial lawyer add. Using these tools, Epstein ended the championship droughts in Boston and Chicago.

23. One option is to create a statistical measure similar to the baseball metric known as Value Over Replacement Player (VORP), or Wins Above Replacement (WAR)—where the productivity of a baseball player is compared to the hypothetical average player who would have replaced him. See Amanda Rykoff, *Inside the Stats that Created 'Moneyball,'* ESPN (Feb. 16, 2012), <http://www.espn.com/espnw/news-commentary/article/7577771/stats-created-moneyball> [<https://perma.cc/7HKC-R4DV>] (highlighting various tools used in gathering baseball statistics). A Value Over Replacement Advocate (VORA) formula can provide the following: weight to the diversity of cases someone had tried, the number of trial days litigated, the number of witnesses examined on direct and cross, the number of arguments given, motions made and won, motions opposed and won, and judgments. Other factors could include if someone is a plaintiff or a defendant in multi-party litigation. Like in any scientific analysis, the first step should begin with measuring these types of statistics for attorneys.

24. See Towers Watson, U.S. Tort Cost Trends: 2011 Update 3 (2012), <http://www.casact.org/library/studynotes/Towers-Watson-Tort-Cost-Trends.pdf> [<https://perma.cc/L9EW-VBM8>] (reviewing costs associated with tort cases). According to the leading actuarial analysis of U.S. tort costs and associated lawyers' fees, as of 2010, the annual expenditures on tort cases was approximately \$264 billion dollars. *Id.* Although only a gross calculation, given the prevailing estimate of nineteen percent of that sum spent purely on plaintiffs' attorney fees, that means that plaintiffs' trial attorneys received approximately \$50 billion dollars.

Quality trial advocacy either persuades or perishes. We live in an age where automation and predictability are diminishing the importance of human perspective. This Article proposes that trial advocacy can evolve to better fit the contemporary audience. Trial advocates will be no more successful than artificial intelligence machines at persuading others if they fail to evolve to changes in a diverse and shrinking world. Trial advocates will struggle if they fail to adapt to rapidly evolving developments in cognitive and social sciences, or if they fail to frame narratives that appeal to multiple intelligences.²⁵ An automated algorithm that applies factual predicates (whether conflicting or not) to a legal or regulatory structure and arrives at a disposition, is arguably not far off if there is an interest in developing it. This may be the alternative dispute resolution of the future, a sort of Google justice.

Individual lawyers who adapt to these changes will benefit, but fundamental changes in trials will require an institutional will to save them.²⁶ This requires challenging the orthodoxy of our 250-year-old jurisprudence and reliance on the business of legal education. Trial advocates must sound the call, even before the trial courts and legislatures have altered their rules to accommodate the evolution. If we do not embrace change and help define what the litigation practice of the next generation will look like, then the economy will form it rather than our social and moral order.

In comparison, trends in neuroscience research seem to point to a simple conclusion: advocates' persuasiveness correlates to their ability to move an audience through more than just a presentation of the facts.²⁷ The advocate must weave in a moral thread that, when properly framed and tied together, will help the audience arrive at a common conviction. To evolve, the advocate must recognize what is primal about human persuasion and adapt it to the digital age.

II. ADVOCATES MUST BE ABLE TO PERSUADE

Trial advocacy, like few other persuasive pursuits, makes clear that its purpose is to persuade the court to adopt the lawyer's perspective. Trial court persuasion is an overt practice. Therefore, most accept that a lawyer's job is to persuade and not merely present—it is arguably the most ethical type of

See id.

25. *See* HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* xi (3d ed. 2011) (discussing “set of criteria” for intelligence). “Multiple intelligences” was a phrase coined by Howard Gardner to describe the various forms of mental capacity. *See id.*

26. Some scholars, such as Koehlert-Page, are pushing back against the trend of stripping emotional content from trial presentation, and are teaching the importance of storytelling in law school. *See* Cathren Koehlert-Page, *Tell Us a Story but Don't Make It a Good One: Embracing the Tension Regarding Emotional Stories and the Federal Rule of Evidence 403*, 84 *MISS. L.J.* 351, 385-90 (2015) (arguing judicial opinions reflect nuanced understanding of emotional reasoning).

27. *See id.* at 359-60 (emphasizing importance of storytelling in trial advocacy).

persuasion within our society.²⁸ Consequently, it should come with little moral objection for an attorney to use rhetorical, procedural, and scientific tools to attempt to convince someone of a fact.

Many perceive a lawyer's attempts to persuade as trickery that makes jurors and witnesses do and say things that they do not mean. This notion has led contemporary courts to consistently limit how litigants may try their cases. Injecting emotional intelligence within a procedural framework, will enfranchise all the parties involved in a trial. We should not let process prevent justice; injecting emotional intelligence will enfranchise not just the lawyers, but all parties involved in a trial.

A. *Persuasion Requires an Advocate to Change Feelings*

To persuade, a lawyer must ultimately lead someone to make a choice about their client. In the law, we expect and encourage jurors and judges to employ their common sense and life experiences to interpret evidence. We adopt the incongruent legal fiction that they abandon their perceptions about a case until they see all the evidence and the law is explained to them. We should all recognize a person's innate decision making is often driven by biases both conscious and unconscious. Even judges are prone to allowing their own biases and beliefs to bridge legal and experiential divides.²⁹ Because of these prejudices, persuasion often involves changing one's mind. Consequently, the most persuasive narratives are those that make the most sense out of events that people are the least experienced with.

Psychologists who have studied the process of changing minds find that people are frequently influenced by the messaging of information.³⁰ When some are asked to report their pre-persuasion perception, it is common that they cannot accept that they believed otherwise.³¹ Anyone who is married understands that the most effective persuasion is not acknowledged as

28. See generally ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (rev. ed. 1993) (discussing concept of ethical persuasion); B.F. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1971) (expounding methods of persuasion and their causes and degrees of effectiveness).

29. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225 (2009) (finding racial bias impacts trial judges); Terry Carter, *Implicit Bias Is a Challenge Even for Judges*, A.B.A. J. (Aug. 5, 2016), http://www.abajournal.com/news/article/implicit_bias_is_a_challenge_even_for_judges [<http://perma.cc/DL42-R3P4>] (describing Judicial Division on bias).

30. See HOWARD GARDNER, *CHANGING MINDS: THE ART AND SCIENCE OF CHANGING OUR OWN AND OTHER PEOPLE'S MINDS* 14 (2004) [hereinafter GARDNER, *CHANGING MINDS*] (contending rhetoric key tool for changing someone else's mind). I refer to "messaging" here as framing the import of a piece of information based on the context and the sequencing of the information. For example, by saying "I refilled the glass to the half-way point" I imply much more about the fact that the glass is now half-full than if I said, "I refilled the glass." In this way, I can imply that the glass had been empty and that I took the active step to restore its level, in addition to communicating what may be the key fact of how full it is. The quantum of information then becomes less of a data point and more of a vehicle to tell a story.

31. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 202 (2011) (describing human reaction to cognitive dissonance created by outside persuasion).

persuasion at all; to the contrary, it is leading the other person to think their current belief is what they believed all along.

Fundamentally, this means that there is an outcome bias in society, and there are liability consequences for professionals who may follow procedure, but achieve negative outcomes. This phenomenon also colors what happens in a courtroom. Judges are more likely to rely on a standard procedure that will not risk reversal, thinking that uniformity creates an equal playing field. But the reality is that every litigant is situated differently with respect to both facts and legal frameworks, and there must be room for parties to persuade with the best narrative that the evidence supports.

This procedural bias has been stripping emotion from the courtroom. Emotion itself lacks a clear definition, but for these purposes, it's a feeling that is not a product of purely logical reasoning.³² There is a social component to emotion that is a shared, unarticulated understanding, which I wrap into this definition to convey that emotional and socially significant nonrational factors affect persuasion.³³ The gut feeling of an emotion is an inseparable component of emotional intelligence and the brain's shorthand for processing complex information by leveraging pre-existing neural pathways.³⁴ Emotions are perceived as dangerous in a courtroom in that they allow for the possibility that something other than the judicially determined facts will influence the outcome. However, barring emotions from the dialogue leaves open the possibility that judges and juries are *not* accurately considering the facts.

Our system of justice prides itself on its cool, sterile reflection of facts to arrive at a sober judgment.³⁵ Aristotle, who recognized the power of courtroom emotion, said emotional argument, *Pathos*, corrupts.³⁶ Christian and Kantian traditions perpetuated this orthodoxy, albeit for perhaps more high-minded reasons.³⁷ During the Enlightenment, when the modern Anglo-American judicial system began forming, scholars gave much weight to the science of proof as a principle of courtroom procedure.³⁸ Some recent literature suggests

32. See Carol Sanger, *Role and Reality of Emotions in Law*, 8 WM. & MARY J. WOMEN & L. 107, 108-09 (2001) (exploring increasing consideration of emotion in current jurisprudence).

33. See *id.* (considering trial advocates emotionless).

34. See Luiz Pessoa, *Emergent Processes in Cognitive-Emotional Interactions*, 12 DIALOGUES CLINICAL NEUROSCIENCE 433, 440, 444 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3117594/> (describing possible effects of neural pathway sharing).

35. See Mark Spottswood, *Emotional Fact-Finding*, 63 U. KAN. L. REV. 41, 47 (2014) (noting widely held, emotionless trial advocate sentiment).

36. See Aristotle, *Politics*, PERSEUS, <http://www.perseus.tufts.edu> (follow the perma.cc URL to access) (last visited Dec. 1, 2016) [<https://perma.cc/Z9LJ-GBR3>] (discussing Aristotle's take on *pathos* related to persuasion).

37. See Spottswood, *supra* note 35, at 47-48 (commenting on Kantian aversion toward emotion regarding moral decision making).

38. See WILLIAM TWINING, *THEORIES OF EVIDENCE: BENTHAM & WIGMORE* 156-57 (1985) (explaining Wigmore's emphasis on scientific proof); John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1245-46 (2006) (describing evolution of evidentiary rules favoring reason over emotion).

that emotional arguments may result in poorer or less-efficient decision making.³⁹ But modern psychological and cognitive science also supports the opposite proposition—that emotions may stimulate attention and render someone more able to exercise cognitive and social-emotional judgment.⁴⁰

By eliminating emotional content from the trial advocate's toolkit, the advocate is at risk of obsolescence. Emotions, communicated or felt, are what make stories interesting, and are essential to changing the judge and jury's viewpoints.⁴¹ With the loss of emotions comes the loss of the human element on the jury and the bench.

Moreover, attempting to exclude emotional and intuitive influence from trials is a fool's errand, and wrong as both a moral and scientific matter. Emotional and intuitive influences fundamentally affect human endeavors, even when they are not congruent or related to the task at hand. This includes incidental emotions, such as what is going on in a juror's life or environment that may affect their decision making.⁴² Emotions trigger attention and allow deeper, more meaningful understanding.⁴³ Emotions and intuition are not the same as prejudice and bias, but the risk that these overlapping concepts might bleed into the thought-processing dynamic has led the legal world to shun them.⁴⁴ But this is an overreaction that may have caused more harm than good.

39. See Michel Tuan Pham, *Emotion and Rationality: A Critical Review and Interpretation of Empirical Evidence*, 11 REV. GEN. PSYCHOL. 155, 157 (2007), <http://www.columbia.edu/~tdp4/RGP2007.pdf> [<https://perma.cc/VLY8-FJAG>] (listing effects of emotional states on rationality and reasoning). Studies demonstrate that while under intense emotional states, it takes longer to verify the validity of logical inferences, alternatives are scanned in a more haphazard fashion, and persuasive arguments are processed less thoroughly. See *id.*; Mike Oaksford et al., *Mood, Reasoning, and Central Executive Process*, 22 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 476, 481 (1996), <http://psycnet.apa.org/index.cfm?fa=buy.optionToBuy&id=1996-02947-015> (discussing results of experiments showing negative effects of highly affective mood on participants' logical reasoning).

40. See Antoine Bechara et al., *Emotion, Decision Making and the Orbitofrontal Cortex*, 10 CEREBRAL CORTEX 295, 295 (2000), http://synapse.princeton.edu/~sam/Bechara_Damasio.pdf [<https://perma.cc/QS3J-Z3HX>] (reviewing different components of cortex); Myeong-Gu Seo & Lisa Feldman Barrett, *Being Emotional During Decision Making—Good or Bad? An Empirical Investigation*, 50 ACAD. MGMT. J. 923, 923 (2007), <http://www.affective-science.org/pubs/2007/seobarrett2007.pdf> [<https://perma.cc/ZW7S-S52G>] (reviewing “link between affective experience and decision-making performance”).

41. See MCGUIRE, *supra* note 17, at 109-10 (discussing emotional effects on cultural belief); Spottswood, *supra* note 35, at 65-66 (describing process of rationally valuing our emotional responses).

42. See Simone Schnall et al., *Disgust As Embodied Moral Judgment*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 1096, 1097-1108 (2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2562923/> (detailing effect of unpleasant and morally repugnant smells, environments, and past experiences on juror decision making); see also Spottswood, *supra* note 35, at 70-72 (describing juror studies involving emotional stimuli irrelevant to case and their subsequent effects on juries).

43. See Spottswood, *supra* note 35, at 64-65 (explaining link between emotions and physical responses).

44. See Richard A. Katula, *Emotion in the Courtroom: Quintilian's Judge—Then and Now*, in QUINTILIAN AND THE LAW: THE ART OF PERSUASION IN LAW AND POLITICS 145-155 (Olga Tellegen-Couperus ed., 2003). Professor Richard Katula did an interesting study related to the art of emotional appeal. See *id.* at 151-52. He interviewed a number of judges about the impact of emotional factors on their decision making. *Id.* Katula's judges almost universally felt that emotions and reason occupy separate faculties of the mind. *Id.* at 151. Ninety-five percent of them rejected any utility in considering emotions in decision making, and

B. Bias Negatively Affects Persuasion and Should Be Filtered Out as Much as Possible

In an effort to toss out the bathwater that is bias, courts have been excluding the emotion baby. Lawyers are asked to be stoic and unemotional to emphasize that reason is the only avenue to a just result. But what this approach fails to recognize is that reason is composed of many different elements.⁴⁵ A person's state of mind, for example, is a fact that can only be deduced through a subjective logic.

Marketing, cognitive practice, and biopsychosocial practice have all shown that intuition and emotion are inseparable aspects of rational human decision making. For example, emotional details, such as remorse and victim impact are regularly admitted in court because the law recognizes that they bear on a rational result. However, this type of evidence usually does not reach the jury, who might be overwhelmed by such evidence. This practice appears to some as being patronizing to juries, yet this sentiment may merely conceal a bigger danger. Whether they will admit it or not, judges are equally products of their emotional and experiential selves, full of bias and prejudice.⁴⁶

Chief Justice Marshall, sitting as a circuit judge during jury selection of Aaron Burr's treason trial, set the standard for selecting an impartial jury, choosing to frame impartiality as the condition when a person is persuadable, and rejecting "strong and deep" preconceived impressions that will resist the force of the testimony.⁴⁷ Marshall articulated the legal fiction that we employ today: We ask sitting jurors to apply all of their life experience to what they see in the courtroom in our quest to have people persuaded only by what they see there, after we filter out those jurors we believe to be too uncompromising. A judge's biases are even more invidious—there is little, if any, recourse because there is rarely appellate review available.

Marshall ultimately recognized that jurors would have biases, but he was more worried about a jury that could not be persuaded, recognizing the imperfection of such an exercise. Implicit in his acknowledgment of the vagaries of bias was the empowering of trial advocates to hone their craft. Acknowledging that one's strength and depth of belief is tied to intransigence is

explained various ways in which they actively sought to suppress emotions. *Id.* at 151-52. However, when faced with cases where the facts were more-or-less equivalent, about fifty percent said they used emotions as a guide to decide the case, but overwhelmingly they emphasized that emotions would not outweigh the facts in a case, or at least hoped that they would not. *See id.* at 152. A few judges acknowledged that they judged witnesses differently based on their impression, attractiveness or sympathetic role, and that they often made credibility assessments based on emotional factors. *See id.*

45. *See generally* KAHNEMAN, *supra* note 31 (illustrating expansiveness of concept of reason).

46. *See* Spottswood, *supra* note 35, at 101 (noting judges susceptible to emotion-affected decision making); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1251-52 (2005) (concluding judges cannot avoid influence of evidence they exclude).

47. *See* United States v. Burr, 25 F.Cas. 49, 51 (C.C.D. Va. 1807) (expounding on ideal juror).

important. Not only should we be eliminating as much intransigence before a trial as possible, but we should also acknowledge that it is precisely the emotional argument that can penetrate intransigence at trial.

Skilled trial lawyers routinely try to appeal to the emotions of the jurors.⁴⁸ They empathize, they communicate in terms a jury can relate to, they play to prejudices, and they present their clients in a light that echoes their own posturing. It is not unheard of for litigants to conduct research on the judge as well, to understand where her biases lie. Trial attorneys have often invited jury consultants to the jury selection table. Market research shows that such tactics work, and they are tried based on the possibility that they might.⁴⁹

III. HOW TRIAL PERSUASION HAS EVOLVED

A. *Quintilian and the Science of Persuasion*

Strategies that are actually effective in court to change minds are largely reflected in what has worked to persuade people throughout history. I do not mean to jettison what we have learned as students of human history. What works in today's courts are often simple modifications of what the Roman rhetorician Quintilian proposed almost two thousand years ago.⁵⁰ The typical law professor may study Aristotle and the importance of logic, but I encourage the trial lawyer to study Quintilian, who artfully expounded on using emotion in a Roman tribunal.⁵¹ Quintilian wrote a compendium called *Institutes of Oratory* in the first century.⁵² He was a widely-regarded philosopher and lawyer, arguing before the courts of several Roman emperors. Most importantly, he was one of the most influential rhetoricians of his age, and continued to be a great influence on those who followed largely because of his school and *Institutes of Oratory*.⁵³

Quintilian was a student of persuasion. He recognized that to persuade people in a fact-neutral setting, a lawyer must exercise the art of emotional appeal. Per Professor Richard Katula, who brought new-found attention to

48. See Means, *supra* note 4, at 518 (explaining human fallibility causes “randomness and unpredictability of our dispute-resolution system”).

49. See Audrey Cleary, *Scientific Jury Selection: History, Practice, and Controversy*, 28 CONCEPT (2005), <https://concept.journals.villanova.edu/article/viewFile/255/219> [<https://perma.cc/F2GL-48JN>] (reviewing principles in jury selection).

50. See Sandler et al., *Trial Practice: Classical Rhetoric and the Modern Trial Lawyer*, AM. B. (Sept. 2010), http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/solo_lawyer_trial_rhetoric_persuasion_argument_artistotle_demosthenes_cicero_quintilian.html [<https://perma.cc/6DUA-WMLU>] (highlighting Quintilian's notable stance in early trial-tactic education).

51. See Richard A. Katula, *Quintilian on the Art of Emotional Appeal*, 22 RHETORIC REV. 5, 7-14 (2003), https://www.jstor.org/stable/3093050?seq=1#page_scan_tab_contents (noting Quintilian's contributions in study of emotional appeal).

52. *Id.* at 5.

53. See *id.* (internal citations omitted) (detailing Quintilian's historic importance).

Quintilian in the twentieth century, Quintilian proposed six rules for the orator in successfully utilizing emotional appeal: know the emotions (that is, have emotional intelligence); imagine and feel the emotion yourself; describe the scene as the client experienced it to make the jury see it as it occurred; take care to not awaken “emotions which either do not naturally arise from the case or are stronger than the case would suggest”; mimic the client’s emotion because synchronizing creates a unified display to the jury, and; speak in the voice of the client, not your own voice.⁵⁴ These suggestions may appear to be tips on how a lawyer can manipulate the image of his client to cater to a jury’s predilections in an unethical way. But Quintilian reasoned that juries sit in order to be persuaded, so these practices do not violate ethical obligations, and in fact, they further justice and the greater good.

B. Contemporary Law Eschews What Works

Although Quintilian lived two thousand years ago, not much has changed about what works to persuade, but what has changed is our appreciation of these factors. Our courts are not designed to permit a lawyer to implement Quintilian’s teachings openly. Instead, the rules constrain lawyers who are skilled in the arts of empathy and narrative, lest they manipulatively control the thoughts of an unsuspecting judge or jury.⁵⁵

Some judges recognize the inherent emotion in trial lawyering, and trust juries to focus on what is important without much restriction. Judges have a self-interest in making the jury system work, and in the end, they are often legal pragmatists.⁵⁶ Others, out of expedience, tradition, or both, simply ignore the gamesmanship of a modern trial and rest on the fiction that logic is the only tool that belongs in the courtroom.

A more mature course would be to acknowledge the multiple intelligences at work in a courtroom, and to create uniform rules that embrace these multiple intelligences.⁵⁷ The world is not a sanitized petri dish—and the popular media and imagery of the past century have altered the pure “logic-only” system that

54. See *id.* at 9-11 (setting out Katula’s condensed Quintilian trial oration tips).

55. See Jeremy A. Blumenthal, *A Moody View of the Law: Looking Back and Looking Ahead at Law and the Emotions*, in EMOTION AND THE LAW: PSYCHOLOGICAL PERSPECTIVES 185, 187 (Brian H. Bornstein & Richard L. Wiener eds., 2010) (discussing emotional intelligence studies and effects on legal landscape); Neal Feigenson, *Emotional Influences on Judgments of Legal Blame: How They Happen, Whether They Should, and What to Do About It*, in EMOTION AND THE LAW: PSYCHOLOGICAL PERSPECTIVES 45, 89 (Brian H. Bornstein & Richard L. Wiener eds., 2010) (discussing emotions in judgment); Toni M. Massaro, *Show (Some) Emotions*, in THE PASSIONS OF LAW 80, 104 (Susan A. Bandes ed., 1999) (arguing for more research into effects of emotion within legal system).

56. See RICHARD A. POSNER, HOW JUDGES THINK 230 (2008) (explaining most judges follow pragmatic approach to legal analysis).

57. See GARDNER, CHANGING MINDS, *supra* note 30, at 29-31 (evaluating individuals’ diverse information processing capabilities and coining term “intelligences” to describe problem-solving abilities).

our jurisprudential forefathers may have envisioned.⁵⁸ It is time to liberate fact finders and encourage more use of emotional faculties.⁵⁹

C. Empowering Human Feelings and Intuition May Render Better Justice

Not everyone agrees with the attempted banishment of emotion and intuition in the courtroom. While there are pitfalls, what we understand about human nature, the way fact finders consume, witnesses present, and advocates frame information, are all wrapped up in an imprecise mélange of reason, emotion, and other neurophysiological phenomena.⁶⁰ Artificially limiting facts from consideration because they might evoke powerful emotional responses unjustly distorts reality. The gamesmanship at trial around what emotionally-charged information the opposite party will introduce is usually where the battle lines are drawn. For this reason, many trial lawyers spend significant time trying to limit the other party from using their arsenal through technical limitations of the law. This is not a secret, as neuroscientific evidence has become increasingly prevalent in U.S. courtrooms in recent years.⁶¹ Others have recently written about the important developments in cognitive science that have shown how emotional fact finding is critical to how many people process information in order to assess the truth.⁶²

Conversely, there is little doubt that some emotional evidence, especially when irrelevant to the necessary fact finding mission, can be unfairly prejudicial, and must be regulated. Federal Rule of Evidence 403 and its state analogs are the primary vehicles for judicial regulation of unfairly prejudicial evidence.⁶³ While the rule does not explicitly mention emotional content, our jurisprudence has come to read emotional appeals as one of the most common reasons for such prejudice.⁶⁴ In fact, while emotional content could yield prejudice, the scientific evidence is ambiguous as to what type of emotional information, if any, can diminish logic.⁶⁵ Applying such a theory to a specific

58. See *United States v. Mehanna*, 735 F.3d 32, 64 (2013) (holding evidence of emotionally-charged, terrorism-related materials admissible).

59. The actual mechanics for regulating emotion may not be served by over-specific evidence rules, but rather rules that encourage a broader acceptance of emotions generally.

60. See generally DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* (1995) (discussing effects of emotional intelligence in decision making).

61. See Nita A. Farahany, *Neuroscience and Behavioral Genetics in US Criminal Law: An Empirical Analysis*, 2 J.L. & BIOSCIENCES 486, 486-87 (2016), (introducing empirical study on neuroscience use within criminal justice system). Professor Farahany drew from 1,585 judicial opinions citing to neuroscientific evidence between 2005 and 2012. See *id.* at 486.

62. See *supra* note 55 (citing multiple authorities on subject).

63. See FED. R. EVID. 403 (dealing with exclusion of relevant evidence due to prejudice, waste of time, or confusion).

64. See *United States v. Gamble*, 290 F. App'x 592, 595 (4th Cir. 2008) (highlighting how “risk of arousing the emotions” factors into 403 analysis).

65. See Nadine Jung et al., *How Emotions Affect Logical Reasoning: Evidence from Experiments with Mood-Manipulated Participants, Spider Phobics, and People with Exam Anxiety*, 5 FRONTIERS IN PSYCHOL., 2-

case would be even more difficult to measure.

A judge's 403-balancing test is an intuitive exercise that is not rooted in science, but rather, is based on the judge's subjective experiences and biases.⁶⁶ Judges typically have only two options to deal with such evidence, either allow it or exclude it.⁶⁷ Accordingly, when the court disallows these evidentiary tools, they often strip the attorney's arguments of emotional and intuitive content. Due to the rapid dynamic of a trial, the trial judge has broad discretion in these evidence-related decisions, which are incredibly influential on the way advocates can try their cases.⁶⁸

Rule 403 becomes the shorthand with which judges restrict the introduction of evidence that will yield overwhelming prejudicial force, either by admitting something into evidence or by empowering devastating arguments. This procedure highlights that the trial practice is not always something rooted in the law or the facts, but rather, the intuitive exercise of knowing the judge and knowing people. In practice, some judges say that evidence is prejudicial simply because they think that one party does not need it to prove their case. A judge's power in this area often discourages advocacy in an attempt to protect a verdict from appeal.⁶⁹ What matters is a judge's pragmatic sense of whether evidence is cumulative, unique, game-changing, completely one-sided, or emotionally overwhelming. None of these qualities unequivocally portend unfair prejudice.

Nevertheless, from local to international tribunals, courts limit powerful and relevant evidence because of the possible public perception that consideration of the fairly prejudicial evidence resulted in imbalanced justice. A few more sophisticated judges have tailored more nuanced remedies that compensate for emotional impact, but still permit the advocate to make his persuasive points.⁷⁰

Unfortunately, figuring out where the lines should be drawn is not easy when the cases defining the bounds are so atypical. Ironically, most judges know the lines when they feel them. Appellate courts seldom intrude on a trial judge's balancing decisions because, as a logical matter, they recognize

3 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4050437/> [<https://perma.cc/7F58-NXRJ>] (surveying current research on mood-reasoning connection, finding varied results).

66. See FED. R. EVID. 403 (addressing prejudicial evidence).

67. See *Old Chief v. United States*, 519 U.S. 172, 191-92 (1997) (holding unfairly prejudicial evidence should be excluded regardless of relevance).

68. See *United States v. Mehanna*, 735 F.3d 32, 63 (1st Cir. 2013) (affirming trial judge's major role of evidentiary gatekeeper). "In the last analysis, the lack of a scientifically accurate measuring device [to regulate unfair prejudice through Rule 403] reinforces both the importance of the trial judge's role and the wisdom of affording substantial deference to his balancing decision." *Id.*

69. Evidentiary decisions of the trial court are usually held to a deferential standard on appeal. However, the more exclusionary decisions a judge makes, the more likely that an appellate court reviewing the cold, stark record may question an evidentiary ruling. If a party attempts to introduce marginally probative evidence that furthers an important component of their theory of the case, there is a greater chance of appellate scrutiny of the exclusion or admission of evidence that would have helped make or break a party's case.

70. See *Mehanna*, 735 F.3d at 63 (tailoring presentation of evidence to minimize inflammation of jury).

appellate courts are not in a position to do their own balancing.⁷¹ Unlike cases such as *Old Chief v. United States*,⁷² in which the Supreme Court clarified that a party cannot introduce pieces of relevant evidence that are too prejudicial as a matter of law, the battle at trial usually lies in how far each side can push the storyline with evidence and arguments that may require Rule 403 analysis.⁷³ In many cases, the emotional component is inextricably intertwined with the story, making judges' important gatekeeping roles extremely difficult because they may not know the storyline themselves.⁷⁴

United States jurisprudence disfavors emotional appeals for several historical, but not altogether intentional, reasons. There are the idealistic philosophical discussions of justice in classics such as Bentham and Rawls, who viewed emotions primarily as distractions and not as economical or rational forces.⁷⁵ There is also a historical and misogynistic effort by many male judges to proclaim that they are better equipped to decide justice because unlike women, who are unduly influenced by emotion, these masculine judges can disregard it.⁷⁶ But, there are practical, power-based reasons as well. The puritanism of prohibiting appeals to jurors' emotional intelligence is in many ways a legal fiction designed by judges to avoid losing power in legal proceedings; in other words, appeals to emotions pose a threat to judges' Solomonic ability to divine answers where others cannot.⁷⁷

Judges sustain the prestige of their profession through "professional mystification," bolstering the appearance of their own skill, wisdom, and disinterest in the outcome of proceedings.⁷⁸ The reality is that judges are served by politics, intuition, and emotion just as much as other audiences. In

71. See *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008) (remarking on trial court's advantage in assessing admissibility under Rule 403); see also *Old Chief*, 519 U.S. at 180-81 (noting Rule 403 required Court to preclude introduction of prior convictions when stipulated by parties). The Court emphasized the importance of the stipulation here, and clarified that "'unfair prejudice' . . . means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Old Chief*, 519 U.S. at 180 (quoting Advisory Committee's Notes of Rule 403).

72. 519 U.S. 172 (1997).

73. Compare *id.* at 191-92, with *Mehanna*, 735 F.3d at 59 (emphasizing difference between limiting evidence entirely and formulating appropriate way to present inflammatory evidence).

74. See Monica K. Miller et al., *How Emotion Affects the Trial Process*, 92 JUDICATURE 56, 57 (2008) (discussing admissible emotionally inflammatory testimony during Oklahoma City Bombing trial, which constituted critical evidence).

75. See generally MARTHA C. NUSSBAUM, *POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE* (2013) (arguing sympathy and emotion essential in American judicial structure, disagreeing with earlier rational models).

76. See Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L. J. 127, 129-30 (1996) (describing masculine-feminine dualism of Enlightenment epistemology); Leubsdorf, *supra* note 38, at 1245 (suggesting law prefers so-called masculine traits like reason over feminine traits in Enlightenment epistemology).

77. See POSNER, *supra* note 56, at 3 (articulating judges maintain autonomy in their decision making by creating "opacity" in deliberation process).

78. See *id.* (naming unique tool of judges for protecting their positional prestige).

fact, this may not be a problem—intuition by people who are good at their jobs is generally a good thing.⁷⁹ Judges favor their own intuitions, as illogical as they may be, but are quick to dismiss such intuition of others in court.⁸⁰

What many judges ultimately want is for *no one* to be swayed by emotions. Judges arguably use their emotions to make decisions on the bench.⁸¹ Perhaps, the risks of in-court emotional content via evidence are typically more relevant to the case at hand than extrajudicial emotional content. The extrajudicial influence of emotions is arbitrary, whereas those that are used by a trial advocate in a courtroom are fairly presented, subject to rebuttal, and congruent to the case. Despite this, judges routinely exclude emotion from the courtroom. The state of the psychosocial research suggests that emotions do not merely alter how we want to interpret facts in a case, they also change our perceptions of the facts and our openness to acceptance of the facts at all.⁸²

A political reality of the judicial development is that by removing emotional manipulation, individual lawyers are less able to impact judicial proceedings. A judge may prefer this routine because of a seemingly lower level of risk of appeal.⁸³ But in practice, some bold trial attorneys continue to find their way out of the shackles. Through choice of diction, sequence of evidence, theme, tone, non-verbal cues, allusion, and other rhetorical and procedural tools, many lawyers successfully inject emotional content into the evidence and argument, despite stifling evidentiary rules.

Speaking more freely and persuasively to a jury that is accustomed to absorbing emotional content with more than just reason will allow lawyers to be more effective in court, and may result in more accurate justice. To the extent that there is a deliberate calculus to neuter the advocate, it is from a view of justice as a more concrete, one-dimensional problem, rather than as the legacy of nuanced, individualized cases. Arming opposing advocates with emotional tools would empower both lawyers in the court and jurors in deliberations to persuade others.

Merely framing a problem has a profound impact on how a person goes about resolving it, even if the logic should be identical. Take the classic example of deciding whether a glass is half empty or half full.⁸⁴ Studies have

79. See GERD GIGERENZER, GUT FEELINGS: THE INTELLIGENCE OF THE UNCONSCIOUS 32-36 (2007) (describing study showing experienced ball players performed better when responding to first instinct).

80. See *id.* at 15 (internal citation omitted) (indicating they “don’t trust the police officer’s hunches, because they are not [the judge’s] hunches”).

81. See Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1250-64 (2012) (discussing “righteous judicial anger”). Judicial variability in perception of emotional import is as diverse as the bench itself. See *id.* at 1254-56.

82. See Spottswood, *supra* note 35, at 54 (remarking emotions can affect human perception of facts).

83. An evidentiary ruling or procedure that could result in unfairly prejudicial evidence being admitted poses a greater risk to the integrity of a case than if the regular procedure is used. Judges often try to reduce this risk by ensuring that no emotion-invoking evidence is introduced.

84. See Craig R. M. McKenzie & Jonathan D. Nelson, *What a Speaker’s Choice of Frame Reveals:*

shown that audiences comprehend additional information from otherwise logically equivalent scenarios based on the context, the implicit expectations, and a sub-textual language that many understand but is not easily articulable.⁸⁵ If a glass was previously empty, people will tend to say it is now half full, and vice versa. Conversely, if a speaker said that a glass was half empty, the audience infers that it had been full.⁸⁶ In this way, we can see that language of intuition can affect decision-making outcomes without anyone noticing. This can also be called messaging or framing of information.

Science shows that human minds are not built to work with the rules of probability, yet that is precisely what we ask courts to do.⁸⁷ Humans must figure out their own computation tools to navigate the challenge. Furthermore, they can make reasonable guesses, rules of thumbs, gut instincts, and intuitive conclusions. Science also establishes that emotional cognition creates biological and physiological changes in the brain, and by extension, impacts how we process information itself.⁸⁸

A few years ago, I tried a series of cases involving genocide in Africa. I fretted that an American jury would be unable to empathize with the African victim-witnesses, because they had so little in common, and some of them did not even communicate in the linear narratives that English speakers use in almost all types of communication. However, over the course of three trials, I found that empathy is a universal trait. A person can relate to any other person, as long as they are given an opportunity to do so and not given a persuasive reason not to. I learned this lesson the hard way when, in the first of the three trials, I called one of the genocide's perpetrators to the stand in light of the fact that he had identified the defendant as one of his commanders. I asked him how many people he had killed, and he said that he stopped counting after one hundred. He described his strategy on how to kill, and then explained how, in limited time, he was able to become so prolific.

The jury heard from many witnesses about how horrific the genocide was. But I had presented a most unsympathetic mass-murderer, and he detracted from the power of all of the African witnesses who preceded him. I gave the jury, and the court, a reason to hate the man, and by extension, to question their empathy for the victims in the case. It was a step too far—a lesson I learned

Reference Points, Frame Selection, and Framing Effects, 10 PSYCHONOMIC BULL. & REV. 596, 596, 598-99 (2003), <http://jonathandnelson.com/papers/2003speakersChoice.pdf> [<https://perma.cc/7VQZ-VAHX>] (noting impact of reference point, including through water glass illustration).

85. See *id.* at 596 (articulating effects of reference points on framing content).

86. See *id.* at 598-99.

87. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1125 (1974) (considering chance self-correcting process). See generally Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61 (2002) (discussing "probability neglect").

88. See JEROME KAGAN, WHAT IS EMOTION?: HISTORY, MEASURES, AND MEANINGS 77 (2007) (noting interplay between emotion and physical reaction).

after the jury hung. When we retried the case, the genocidaire did not make the trip.

D. Quantum Theory of Advocacy: Information Can Be Fact and Feeling

Physics may be the most rational of human pursuits. According to quantum theory in physics, the reality of a physical phenomenon is often dependent on the perception of a conscientious observer. For example, a quantic particle has wave-particle duality, which means a phenomenon can be perceived as a wave or a particle, depending on the circumstances.⁸⁹ The entire understanding of a system may be dependent on the label associated with one small part of that system, which is often determined by the observer's perspective and his basic tools for perceiving it at a certain period. Now understood to be the core of physical science, quantum theory remains an extremely tough concept to grapple with—even Albert Einstein noted its “spooky” nature.⁹⁰

In some ways, it humbles the scientist to recognize that there are things that he cannot yet understand or explain, but still knows are necessary to perceiving reality. Connecting emotionally and intuitively with an audience carries some of these same defining attributes. Advocacy often involves using information in multiple ways in order to find the truth.⁹¹ Sometimes information is a fact, and that information can generate a feeling, depending on the conscientious observer. An advocate can manipulate the significance of these quanta of information by triggering different neural pathways in the juror's mind.⁹²

When it emerged, quantum theory was revolutionary. Thousands of years of physics orthodoxy had been up-ended by the concept of how energy and matter relate to one another; sometimes a wave is a particle, and sometimes a particle

89. See Zeeya Merali, *Quantum Physics: What Is Really Real?: A Wave of Experiments Is Probing the Root of Quantum Weirdness*, 521 NATURE 278, 280 (2015), http://www.nature.com/polopoly_fs/1.17585!/menu/main/topColumns/topLeftColumn/pdf/521278a.pdf [https://perma.cc/22MP-HAVA] (summarizing duality concept within quantum physics).

90. See John Markoff, *Sorry, Einstein. Quantum Study Suggests 'Spooky Action' Is Real*, N.Y. TIMES (Oct. 21, 2015), http://www.nytimes.com/2015/10/22/science/quantum-theory-experiment-said-to-prove-spooky-interactions.html?_r=0 [https://perma.cc/9JK8-8CRB] (describing Einstein's unhappiness with uncertainty inherent in quantum theory).

91. See David M. Harrison, *Complementarity and the Copenhagen Interpretation of Quantum Mechanics*, UPSCALE (Mar. 27, 2006), <http://www.upscale.utoronto.ca/GeneralInterest/Harrison/Complementarity/CompCopen.html> [https://perma.cc/R945-KPTW]. Albert Einstein may have said it best:

It seems as though we must use sometimes the one theory and sometimes the other, while at times we may use either. We are faced with a new kind of difficulty. We have two contradictory pictures of reality; separately neither of them fully explains the phenomena of light [or truth], but together they do.

Id.

92. See MCGUIRE, *supra* note 17, at 109 (mentioning studies showing brain areas responsible for cognition and emotion). These brain areas are connected via integrated neuronal networks and that they often “compete for dominance” in the interpretation of information.” See *id.*

is a wave. What I call the “Quantum Theory of Advocacy” can be used to favorably change a juror or observer’s decision by cultivating themes that resonate with facts and feelings to shape belief. Facts that pack more emotional punch than their soberer and logic-leaning counterparts, when strung together, can fundamentally alter the view of the conscientious observer. Sometimes this is a risky gambit to try to create an epiphany in the observer. Sometimes it is a steady process of stripping away preconceived notions until the observer questions one of their fundamental beliefs, and sometimes it simply involves a presentation of evidence that generates a feeling that is more persuasive than its pure cognitive weight. When the facts do not change, quantum theory can be helpful to craft a narrative that reframes the issue.

When I practiced in The Hague, a panel of judges from various countries made up my jury. None of the insecurities that attended to my early career were in play; I was not concerned about connecting with the audience. Here, the real advocacy challenge was how to move the bench to find the most junior of multiple defendants in a joint-criminal enterprise culpable under international law. Based on my experience, international judges, particularly those from a continental tradition, are arguably more emotion-averse than U.S. judges.

The jury of judges included the most challenging conscientious observers. I had to create a belief and conviction with a cold record in which there was relatively less evidence against this defendant compared to the others. I turned to the Quantum Theory of Advocacy, distilling the facts that create the emotional response to help frame the story that I wanted them to believe.⁹³ This defendant was a police official who did nothing to relieve the suffering of prisoners in his custody, while he also obstructed international efforts to provide relief. By selectively highlighting his exploitation of prisoners for a political motive, I painted the defendant as a tyrant. I further described how the defendant took orders from the other megalomaniacal defendants who envisioned leveraging the human life of their prisoners to create a new country. I selected episodes that demonstrated the character of the defendant I framed, as well as the suffering of the victims that was consistent with the narrative. By using these facts in storytelling that portrayed the relationship between the victims and the defendant, I could make the tools of cognition emotionally evocative.

The case became about how the victims felt and what they believed the

93. When framing a case for trial, after identifying the themes and narratives of a case, I make a list of the key quanta of information that will empower my narrative and those that will detract from it. For each quantum of information, I make a column that lists how it can help my narrative, and what I have to do to for the jury to interpret the evidence in that way. I then make a column that lists how it can hurt my narrative—and potentially help my adversary’s—and what I have to do to prevent that interpretation. A final column lists the other quanta, which can help buttress this piece of information and increase the credibility of my desired interpretation, with an eye toward deputizing the other jurors to be the advocates for my narrative.

defendant was thinking at the time. This provided the judges with a glimpse into what the defendant did, and why he did it. The defendant's narrative, where he attempted to place the crimes in a different context, could not compete with this impression, largely because the facts that I highlighted were not in serious dispute. Editing a narrative so that it does not confuse the message with dissonant facts can fill the voids created in our brain's messaging systems.⁹⁴ In circumstantial cases, tying together circumstantial evidence with a narrative that makes sense of how and why those facts occurred is critically important.

IV. WHAT WORKS IN THE MODERN TRIAL

As the trial advocate has faded, multi-national marketing campaigns, media outlets, large organizations, and political groups have all created a demand for mass-appeal persuasion techniques. This requires social scientists and economists' perspectives on how to persuade others.⁹⁵ To some, persuasion is a science that begins with jury selection and moves to theme-building, to polling, to focus groups, and finally to a verdict. To others, persuasion is no more than what my friend Patty describes as just knowing people.

Below are the touchstones of persuasiveness that I keep going back to during my trials.⁹⁶ This is a craft, a distillation of science, experience and art. They are not so different from Quintilian's, and they include what it takes to get to know people.

A. Appeal to Emotional Intelligence

This is intended to be an observational guide and introduction to a deeper and more nuanced appreciation for how neuroscience can impact the legal world. The perfect algorithm that can determine human behavior remains elusive, but one thing is clear: emotional intelligence is an essential component of courtroom understanding, and the advocate who neglects emotion does so at his or her own peril. Emotional intelligence is a primal trait, and advocates should try to create feelings that support their reasoning.⁹⁷ It is this kind of

94. See generally Susan E. Haviland & Herbert H. Clark, *What's New? Acquiring New Information As a Process in Comprehension*, 13 J. VERBAL LEARNING AND VERBAL BEHAVIOR 512 (1974), <http://web.stanford.edu/~clark/1970s/Haviland> (follow the perma.cc URL to access) [<https://perma.cc/D99H-REH7>] (outlining how humans understand language). Many studies have shown that the brain fills in gaps of information, often through bridging inferences between new information and what they already know. See *id.* at 518.

95. See NEIL J. KRESSEL & DORIT F. KRESSEL, STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING 14 (2002) (describing rise of jury consulting companies stemmed from market research arena).

96. For an excellent overview of trial advocacy resources, I recommend Professor Stanchi's article that contains a bibliography of dozens of resources. See generally Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. ASS'N LEGAL WRITING DIRECTORS 75 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434739 [<https://perma.cc/P98E-FPMK>] (discussing use of persuasion by lawyers).

97. See MCGUIRE, *supra* note 17, at 139 (describing Chimpanzees "as a model for this early emotion-

intelligence that is least at risk of becoming artificial.

To prepare a jury to understand an argument and subsequently articulate it during deliberations, you must prepare them to absorb an intensely emotional and cognitive experience. You must also maintain the appropriate emotional tone throughout the trial. This means setting a tone upon your first interactions with the audience that is sympathetic to your cause. If your tone is one of indignation, you should carry that sentiment throughout; if it is one of profound misery, then this tone should be carried throughout. By accurately gauging the mood of your audience, your story, and your own projection, a trial advocate can set the stage for imparting information that will be absorbed and acted upon.

B. Narrative and Narration

Storytelling is not a panacea, but it can do what no other rhetorical tools can, as it weaves together emotion and logic within one narrative.⁹⁸ Without a basic framework to put facts together, the audience provides its own significance to everything, which is much less predictable than allowing an advocate to create that framework for them.⁹⁹ But we must modify storytelling in a courtroom. How one tells the story is just as important as the story's substance—sequencing, unfolding, drama, character, voice, language, and the rule of three, all matter at trial.¹⁰⁰ Information has to be released in tight but controlled packets that satisfy the components of good storytelling in a way that appeals to a diverse audience.¹⁰¹ The rules of the game require easy-to-consume pieces that make sense and further the story—all while being more believable than the competing stories.¹⁰² Use of visual learning, along with dynamic multimedia and experiential tools, allows for the narrative to sink in and reinforce the story—ideally jurors will bond with each other over their understanding of the story.¹⁰³ You want to make the trial an experience that few jurors will ever forget.

cognition asymmetry”).

98. See Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 286, 303-04 (2013) (explaining the way narratives “color” how jurors assess evidence).

99. See Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 523-25 (1991) (noting jurors must create storyline for themselves in most trials).

100. See generally Phillip H. Miller, *Storytelling: A Technique for Juror Persuasion*, 26 AM. J. TRIAL ADVOC. 489 (2003) (discussing traditional trial structure and inductive information processing).

101. See KRESSEL & KRESSEL, *supra* note 95, at 150 (highlighting importance of narrative for juror comprehension and decision making).

102. See BURNS, *supra* note 1, at 77 (emphasizing power of narrative for recreating past settings and events).

103. See Jansen Voss, *The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom*, 29 L. & PSYCHOL. REV. 301, 315 (2005) (reiterating importance of storytelling in courtroom).

Scientific support for the importance of narrative at trial can be found in the Elaborative Likelihood Model (ELM) as relates to persuasion.¹⁰⁴ The ELM acknowledges a duality in the decision making process between a central route toward attitude change and a peripheral route. When a person is completely engaged in forming an opinion or judgment, with total focus and no distraction, they are persuaded by the merits of the facts they hear. When a person is less engaged in forming an opinion, persuasion often occurs through their peripheral route, where criteria other than facts and information persuade them.¹⁰⁵

Because fact finders are typically willing and able to process information to shape their understanding and attitudes towards ideas, the central route of attitudinal change is likely to succeed.¹⁰⁶ That is to say, positive impressions of a party's legal position are likely to positively sway a jury as they critically examine and process the facts. The corollary to this psychological phenomenon is that high-end focused and central route processing often yield more firmly entrenched ideation and attitudinal shift.¹⁰⁷ Similarly, low-end passive processing, or processing in which a person does not understand what the messaging is precisely, still allows for persuasion, but it is not as persuasive as the more mindful route. When someone is looking for answers, they will likely find them one way or the other, and a story where the messaging is clear is a prime vehicle for tying together loose ends and laying out the answers that you want a judge or jury to find.

The main tools of story telling are language and themes. The language used should be vivid and purposeful—every image should have a meaning that builds your narrative. The story should be structured so that key themes are clear, memorable, and juxtaposed with images that you want to have associated with that particular theme. Trial themes are recurrent ideas, usually rooted in a core moral value that can help further the trial storyline. Sometimes lawyers can root a storyline in a turn of a phrase, or repetition of a piece of evidence or quotation. I find pausing helps allow a theme to set in.

There are more themes than stories, and all the themes need not be tied up. Some of the themes can be imagery, sounds, or other memes, but what matters is that the themes make sense. Metaphors and analogies are useful to convey the meaning of relationships or ideas that are too dense for the jury to easily absorb. A rule of thumb I use is imagining my mother as the juror. Chances are mom will relate better to a folktale or a reference in popular culture than a

104. See Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, 19 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 123, 125 (1986), <http://www.psy.ohio-state.edu/petty/documents/1986ADVANCESsPettyCacioppo.pdf> [<https://perma.cc/EDH7-YLZ7>] (explaining authors' model testing "communication-induced attitude change").

105. See *id.* (outlining "two routes to persuasion").

106. See *id.* at 125-26 (explaining information-processing pathway toward attitude shift).

107. See *id.* at 127.

scientific concept.

C. *Credibility and Likeability*

Authority in a courtroom comes with credibility. As a trial lawyer, proper execution requires experience. When you present reliable and relevant evidence, you enhance your own credibility. With proper self-orientation, a trial advocate advertises that the case is not about him, but rather, is about his client. In his own voice, his goal is to personify the client. A seasoned, talented advocate uses seemingly objective facts and tones to convey what is otherwise a side of the story that appears undeniable. When you exhibit proper emotional intelligence, knowing yourself, the impression of your actions, and the emotional climate in the courtroom, you enhance your credibility. Above all, to be the most credible advocate in the courtroom, you have to know your case better than anyone. If you master the details, everyone will see it. You have to present your case without overreaching or exaggerating. You must also present only high-quality evidence.

Likeability stems from the traditional components of credibility because people tend to like others who are credible more than con artists; however, likeability and credibility are not the same. In fact, many studies have shown that juries side with the litigant who is more likeable.¹⁰⁸ Unfortunately, likeability may be correlated to characteristics like attractiveness, attire, and how similar to the jurors a lawyer is.¹⁰⁹ Perhaps more than any of the cerebral advice I am giving, you should try to be prepared, nonrepulsive, and respectful of everyone's time. But there is such a thing as trying to balance too many variables; some studies have even shown that your success may be correlated to factors such as where you stand when you are in court.¹¹⁰

One of the key components of credibility is respecting your audience. To establish credibility, the audience must also understand your goal of providing them with the information they need to evaluate. In addition to building your audience's trust in you, you must answer audience questions without challenging their ability to understand your explanations. This is harder than it seems because the law of the courtroom aims to keep information very simple. But keeping information simple does not mean that you have to diminish the

108. See generally Laurie R. Kuslansky, *Like It or Not: Likability Counts for Credibility in the Courtroom*, A2L CONSULTING (Jan. 4, 2014), <http://www.a2lc.com/blog/bid/69509/Like-It-or-Not-Likeability-Counts-for-Credibility-in-the-Courtroom> [<https://perma.cc/3KNJ-AS8L>] (describing how likeable lawyers appear more credible to jurors).

109. See generally Maureen A. Howard, *Beyond a Reasonable Doubt: One Size Does Not Fit All When it Comes to Courtroom Attire for Women*, 45 GONZ. L. REV. 209 (2010) (highlighting importance of physical appearance in court).

110. See Jeffrey S. Wolfe, *The Effect of Location in the Courtroom on Jury Perception of Lawyer Performance*, 21 PEPP. L. REV. 731, 775 (1994) (concluding "lawyer's location in the courtroom affects jury perception of his or her performance").

life experiences or the common sense of a jury or a judge. You can break complex issues down into digestible pieces, and if they still cannot understand your messages, you can use analogy and popular metaphors to allow jurors another way to grasp the concepts. An expert witness can also help make such a point. Hammering a point that is obvious underestimates an audience, and often backfires as being perceived as a desperate, or a single-note strategy. Providing a judge or the jury with the information that they really want to see is the most important aspect of building credibility, for it shows that you have good judgment and that you understand what evidence they need to see versus what is a distraction.¹¹¹

A corollary to the analogy of imagining your mother as your juror is that all trial advocates should take care not to act petty. Impeaching your opponent on things that matter is more important than impeaching them on things that do not. Lawyers build their credibility in front of a jury throughout the case, from jury selection through closing argument. You cannot act inconsistently during that time. You have to respond to concerns that you know the audience will have with your case, and be prepared when your opponent attempts to exploit these concerns. Preemption is useful for important points, but not every point. While you emphasize the strength and probative nature of your evidence, you can always make the other narrative seem distant, speculative, and unbelievable. If the opposing narrator is also incredible, do not follow suit by attacking them. Finally, do not lie.

V. VIRAL PERSUASION: MAKE AN ARGUMENT THAT JURORS CAN AND WILL MAKE THEMSELVES WHEN YOU ARE NOT THERE

A. *Make the Case About Details*

Trials are exercises in immersing fact finders in the details of the case.¹¹² The best way to persuade is to influence the individual juror's experience with the interpretation of the evidence.¹¹³ Details are the most valuable tool in a trial advocate's toolkit. They allow the lawyer to frame the narrative as an "intense encounter with the evidence."¹¹⁴ When doing so, an advocate should never lose sight of the fact that effective communicators make complex concepts appear

111. When I was a state prosecutor, on the first day of a drug trafficking trial in the Massachusetts Superior Court, I drove to the courthouse with my mother, who fortuitously had jury duty that day. Although she was in the jury pool, unfortunately, I was unable to test this proposition first hand when she was selected to sit on the civil case scheduled that day. When the case was over, she told me that when the jury was deliberating, they all believed that one of the drivers' blood alcohol content was over the legal limit, but none of the jurors understood that being over the limit was evidence of the driver's negligence in an automobile accident.

112. See BURNS, *supra* note 1, at 9, 33 (describing juror's evidentiary experience and discussing level of "detailed factual development that the trial provides").

113. See *id.* at 32 (asserting "stories are told when there has been a deviation from a traditional pattern").

114. See *id.* at 9 (discussing importance of evidence to outcome).

simple. The trial lawyer's challenging task is to identify the case's important facts, analyze them, and then use those facts within their narrative that also detracts from the other side's story. When done successfully, the jury itself adopts your perception of the case.

Leveraging other advocates in the deliberation room reinforces your narrative and themes, and you can only do that by giving jurors the necessary details. It is also another manifestation of quantum theory at trial—turning each factual particle into a wave. A fact that resonates on an emotional level, and furthers a narrative by filling a void of cognition through an inference, becomes the fuel that transforms a juror into your advocate. One way to experience this is to identify commonalities and unify shared experiences amongst the audience. Vocal sympathizers on the jury will likely use the cognitive and emotional information you have provided to persuade others during deliberations. Ironically, the best advocate may be the one who trains the juror on how to persuade the others on the jury.

B. Appeal to a Moral Core

Moral values are necessarily implicated in trial decision making. Persuasion does not occur from a presentation of facts alone; it often requires a level of moral judgment reserved for firm convictions. There are lines to keep in mind when arguing morality—for instance, appealing to the collective conscience of a community rather than following the law clearly crosses these moral lines.¹¹⁵ But within this, there is plenty of room to highlight themes and to tell a story in which common morality compels a result that is consistent with your client's interest. It is important here to prevail upon such unifying morality that there can be no room for dissent with the value proposition. By way of example, the notion of justice is arguably universal, but it is subjective in nature. Presenting a story where a decision for the opponent yields a universal injustice makes a compelling moral case for your side that transcends smaller-scale prejudices.

C. Frame the Choices to Be Made Consistently with Your Narrative

Advocates must distill into simple terms the way that an audience can act on what they just heard. In this way, the trial becomes interactive. There was a problem, it was dramatic, and there was a solution. Simplicity should be the touchstone, and empowering the jury should be the goal.

One of the reasons for staying on message is that you want the judge or jury to get on the “yes train” to your argument. By establishing powerful facts about issues that form the bedrock of your narrative, you can then focus on the contentious issues with a newly-created track record of reliability and

115. See *United States v. Avilés-Colón*, 536 F.3d 1, 24 (1st Cir. 2008) (arguing prosecutor swayed jury with emotional statements).

decisional momentum. If the opposing counsel attempts to frame a different issue, you should reframe it and explain that your framing makes more sense in light of the bedrock issues of which the jury has already been convinced. Once the momentum of your storyline gets rolling, your credibility will be enhanced, and jurors will have a hard time dismissing your argument, even if it has a weak spot or two.

D. Attorneys Are Directors in This Drama: Use Visuals and Multimedia

There are two major components of evidence: the witnesses and the exhibits. The more dynamic each piece of evidence, the more memorable it will be. Fact finders need to see, hear, touch, and feel the evidence, and they must connect with and relate to the witnesses. The trial advocate's goal used to be how can I make the audience listen to me, yet our current technology poses a more important question—how do I make the evidence come alive?

For exhibits, the message is simple—make them understandable, make them attractive, and make them further your narrative. It took me a long time to realize that I do not have to introduce every piece of evidence I could find that could be helpful to my case. I only have to introduce those that I want to use. If an exhibit does not meet all three elements, I will question whether to use it at all. When I say “use” a piece of evidence, that means that the evidence is part of my narrative, and the theme around that piece of evidence is reinforced through the questioning of witnesses, argument, and through the evidence that relates to it. Each exhibit should be scrutinized to determine what more it adds, emotionally or rationally, to your narrative.

When it comes to the information age, glitzy is not always better, but it is expected. Technology has changed how people expect to see information, especially information distilled from massive quantities of data. Visuals have become the mainstay of popular learning, and visuals that accentuate your point without distracting from it are worth the effort. This is harder than it sounds. All too often, lawyers who read articles like this one think that putting up the latest technology or fanciful image is going to convince a jury. They forget that the presentation is merely a means to communicate the information, and if the visual does not adequately convey the substance, then it is a waste of time. Moreover, if the substance does not compel your narrative, then the visual becomes a distraction and impeaches your credibility. Good visuals are those that an audience will want to look at and understand, and ideally, they will see why you showed it to them. When a visual replaces the need to call more witnesses or dwell on more complicated exhibits, then that efficiency also makes you more credible.

The courtroom must be an experience for it to be internalized—it is not just a lecture course or a PowerPoint slideshow. Trial presentation must be greater than simply a recitation of data—using sight, sound, touch and feelings, an

advocate is able to make an experience out of something that might otherwise be mere rhetoric. Visuals must make something clear that would simply be rhetoric otherwise. A rule of thumb I use is that if my mother cannot understand the visual within a few seconds, then it is too busy. If it takes too long to process and figure out what a visual is trying to communicate, then it is more likely that the visual will confuse the jury, or worse, they will misunderstand what you are trying to convey.

VI. PROPOSED SYSTEMIC CHANGES

A. *Suggested Changes to Rules*

The Bar and the Judiciary must think innovatively to preserve the power of trials, especially if there is any intent to influence the economics working against trials. Here, I offer some ideas that may begin the discussion, for which I leave the analysis of viability for a later time.

- Federal Rule of Evidence 403: Make clear that it is not intended to limit emotional content, but rather that it is a tool to regulate unfair prejudice and thereby encourage remedies short of exclusion of evidence. This may be accomplished by modifying the committee notes, through judicial conferences, and perhaps Rule 403 itself.
- Federal Rule of Evidence 611: Encourage highlighting of impactful evidence through the mode and order of examining witnesses and presenting evidence. This may be accomplished by modifying the committee notes to diminish the risk of argumentativeness, through judicial conferences, and perhaps Rule 611 itself to maximize the coherence of evidence.
- Create a rule that encourages frequent prophylactic instructions around the time of introduction of any evidence that is at risk of creating unfair prejudice so that the fact finder is ethically persuaded, if at all.
- Establish robust standard jury questionnaires, request rudimentary psychosocial polling of potential jurors, and conduct more attorney-led jury voir dire.
- Permit regulated jury interactivity with each other, with the evidence and the parties during the trial. This could include increased use of technology that will allow jurors to understand the exhibits and testimony at their own pace.
- Increase judicial training on implicit biases, best practices to manage emotional trials, and the pros and cons of the biopsychosocial impact of emotional and intuitive information on decision making.
- Increase the use of intermediary judicial officers to review potentially influential evidence that may be excluded by a Rule 403-type ruling.

- Create commercially viable trial insurances to mitigate the risks associated with the trial.

B. Suggested Changes for Advocates

In addition to the training, practice, and talent that made yesterday's advocates effective, below I distill some of what I have learned can make them more effective today.

- Break your narrative into themes that apply to a common moral core.
- Make evidence come alive and use more multi-media.¹¹⁶
- Do not rely on rhetoric.
- Edit incessantly—try to find the essence of what you need and only dwell on certain points if it is advantageous. Given the increasing amounts of data that need to be distilled, this process has to occur in all stages of a case.
- Use more experts and social science through litigation consultants and expert witnesses to understand how to best synthesize an unfamiliar subject for the jury. The state of the art is not always within your experience.
- Frame each issue in light of emotional and cognitive intelligence.
- Avail opportunities for viral persuasion—empower arguments that will allow others to advocate your position.
- Take intelligent risks.
- Create comparable statistical measurements for trial lawyers—such as the number of issues adopted by the court that were framed by an advocate, or a report on an attorney's brevity proportional to positive rulings or results.
- Teach more trial advocacy, provide more practice courses, and require some basic continuing legal education.
- Require mentorship for all trial advocates. Pay your experiences forward.

VII. CONCLUSION

The evolution of the trial advocate means adapting to the time, manner, and means necessary for human persuasion. It also means personal growth. The trial advocate must adapt himself, by appreciating who he is and to speak in his own voice. In a day when the trial is becoming increasingly algorithmic, the human connection can create the greatest value for rendering justice. It is that

116. See Jessica M. Salerno & Bette L. Bottoms, *Unintended Consequences of Toying with Jurors' Emotions: The Impact of Disturbing Emotional Evidence on Jurors' Verdicts*, JURY EXPERT (Mar. 1, 2010), <http://www.thejuryexpert.com/2010/03/unintended-consequences-of-toying-with-jurors-emotions-the-impact-of-disturbing-emotional-evidence-on-jurors-verdicts/> [https://perma.cc/LXP2-86Z2] (highlighting impact of frequent use of emotions in trials through various media).

aspect that we should evolve to embrace.

During my Donahue lecture, for a few minutes, I narrated an infamous crime in slow motion, and asked for audience reaction in any terms that they chose. Undoubtedly the audience knew the basics, but had not seen me describe what happened in court. The first three observations of the audience, who knew only what they had seen in the media about the case, were as follows: “tell me something I haven’t heard before,” “chilling,” and “makes me angry.” Each of these observations is precisely what our system of trial ostensibly tries to avoid—pretrial expectations and dispositions, emotional reactions, and the closing of one’s mind. Then, in the next few minutes, I played a video of the crime as it occurred, which they also had not seen, narrating with an almost identical script, albeit synchronized to the video, and asked for audience reaction. This time, I received the same reaction of anger, but the audience also described something that I did not: the perpetrator’s affect. Finally, for a few minutes I again played the video of the crime, although this time starting a few moments earlier to increase anticipation. This time, I again showed the audience the crime that had been committed. On this third occasion, I explained more about who had committed the crime, how they had committed it, and why they committed it. I explained why they were nonchalant, and I provided details about how they had coordinated with each other. The reaction to the third showing was surprising. This time the audience did not use words to describe an emotional reaction—instead, they said that the crime was calculated, coordinated, self-directed, and the audience felt connected to the victims.

This exercise, probably not so different from a focus group that trial consultants conduct for other trial lawyers routinely, was grossly imperfect. But for present purposes, the more details that were offered that advanced my trial narrative, the more I answered the questions that I knew they wanted answers to, which enhanced their cognition. The more I was able to bring to life through multiple intelligences and means of communication, the more the Donahue audience focused on the legally relevant points that I was trying to convey.

Advocacy is an art and a craft. Both must be practiced and cultivated to evolve. In fewer and fewer courtrooms around the country, advocates fight the good fight for their clients who have no reasonable alternative than testing the unpredictable waters of trial. Amidst that uncertainty and stress, at the end of a controversy, the trial advocate alone, through his skill and preparation, can skew the odds back to his client’s favor. The outcomes of the cases in those courtrooms may in fact be correlated with the quality of the stories that the advocates share, as well as the resonance of the moral of those stories. It is important to recognize that potential can yield incredible, untapped value for clients and lawyers, and ultimately could change the economics that have endangered the jury trial. The craft of advocacy must evolve to achieve that

vision, and its craftsmen and craftswomen should lead the way.