FEELTHINKING LIKE A LAWYER: THE ROLE OF EMOTION IN LEGAL REASONING AND DECISION-MAKING

Kristen Konrad Tiscione[*]

The law has had an uneasy relationship with emotion, and we are trained to think that the best decisions are those made based on reason alone. The primacy of reason can be traced at least as far back as Plato, who believed that emotion interferes with reason and diverts us from truth. This Article begins by exploring our ancient mistrust of emotion, particularly in the law, and more recent theories in cognitive psychology and behavioral neuroscience positing that reason and emotion work together in all forms of decision-making to help us make better decisions. Because "thinking like a lawyer" may more aptly be described as "feelthinking like a lawyer," this Article then identifies several points in the legal reasoning process where the influence of emotion may be most significant and noticeably "felt." It concludes that because feelthinking occurs on behalf of clients within specific ethical constraints, understanding the role of emotion in legal decision-making is useful both to the practitioner and the professor of law.

Anyone who values truth should stop worshipping reason.
—Jonathan Haidt[1]

TABLE OF CONTENTS

* Professor of Law, Legal Practice, at Georgetown University Law Center and current President of the Legal Writing Institute, a nonprofit organization devoted to improving legal communication and building the legal writing discipline in legal education. I wish to thank our wonderful Wake Forest colleagues for hosting the February 2019 symposium on *Cognitive Emotion and the Law*: Christine Coughlin, Professor of Legal Writing; Harold Anthony Lloyd, Professor of Law; and Symposium Editors Jojo Fina and Tim Day. And a special thanks to my colleague and friend, Mitt Regan, for his continued support of my scholarship.

1. JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 104 (2012).

I. INTRODUCTION

In the law, as in life, we are conditioned to value reason over emotion.[2] "*Look before you leap.*" "*Think before you speak.*" "*Sleep on it.*" From the outset, we are taught to give emotion time to subside and let reason take over. Reason solves problems and orders society. It clarifies thinking and helps us make better decisions. In contrast, emotion overwhelms us and can disrupt society. Emotion causes us to act impulsively. Reason is strong, masculine, disciplined, and preferable. Emotion is the opposite: weak, feminine, wild, and undesirable. Or is it?

The purpose of this Article is to explore the positive role that emotion plays in legal reasoning, particularly from the practitioner's

2. *See, e.g.*, ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN xi (1994) (recounting how he "had been advised early in life that sound decisions came from a cool head, that emotions and reason did not mix any more than oil and water").

point of view.[3] The law has had an uneasy relationship with emotion,[4] but scholars across several disciplines are increasingly interested in the intersection between the two.[5] In Part II, this Article examines the ancient origins of our mistrust of emotion, particularly in legal argument, and the perceived dichotomy between reason and emotion. Parts III and IV explore recent theories in cognitive psychology and behavioral neuroscience that demonstrate the extent to which this dichotomy is false. Reason and emotion work together in all forms of decision-making to help us make better decisions. In other words, we nearly always feel when we think, and for this, we should be grateful.

We have long believed that emotion has only a negative effect on decisions involving fairness and justice.[6] As Professor Lloyd suggests, law schools' decision to teach law as a science using the Socratic and case methods likely contributed to the eschewal of emotion in law.[7] Yet my goal is not to detail the failings of formalism or teaching law as a science.[8] Nor is it to demonstrate how emotion motivates legal

3. Although my focus is on the reasoning process as it relates to practicing lawyers, much of this discussion applies to judges and legal scholars as well.

4. *See, e.g.*, Terry A. Maroney, *Judicial Emotion as Vice or Virtue: Perspectives Both Ancient and New*, *in* ARISTOTLE ON EMOTIONS IN LAW AND POLITICS 11, 13 (Liesbeth Huppes-Cluysenaer & Nuno M.M.S. Coelho eds., 2018) (noting the "widespread and caricatured view of emotion that permeates Western legal theory—a view that reason and emotion are separable and exist in an oppositional relationship to one another"); Harold Anthony Lloyd, *Cognitive Emotion and the Law*, 41 LAW & PSYCHOL. REV. 53, 55 (2016) (noting the common belief that "emotion or other affective experience should play little or no role in legal or other 'pure' reasoning"); Todd E. Pettys, *The Emotional Juror*, 76 FORDHAM L. REV. 1609, 1609 (2007) (noting the belief that "emotions undercut rational decision making is widely shared today, particularly within the American legal community"); Adam G. Todd, *An Exaggerated Demise: The Endurance of Formalism in Legal Rhetoric in the Face of Neuroscience*, 23 LEGAL WRITING: J. LEGAL WRITING INST. 84, 127 (2019) (arguing that "lawyers must be fully fluent in formalist *logos* rhetoric" but aware of the power of subconscious *pathos* as well).

5. *See, e.g.*, Susan Bandes, *Introduction* to THE PASSIONS OF LAW 1, 1–15 (Susan A. Bandes ed., 1999); Liesbeth Huppes-Cluysenaer, *The Debate About Emotion in Law and Politics*, *in* ARISTOTLE ON EMOTIONS IN LAW AND POLITICS, *supra* note 4, at 3 (referring to the "explosion of emotion research in which emotions are no longer seen in opposition to reason"),; Maroney, *supra* note 4, at 12–13 (detailing the growth of law and emotion scholarship since the mid-1980s in the sciences, humanities, and law); Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1978 (2001) (proposing a consumer choice model for analyzing the role of emotion in law).

6. *See, e.g.*, Stefano Fuselli, Logoi enuloi. *Aristotle's Contribution to the Contemporary Debate on Emotions and Decision-Making*, *in* ARISTOTLE ON EMOTIONS IN LAW AND POLITICS, *supra* note 4, at 91, 92 (noting the traditional view that "emotions influence or even cloud the sharpness of critical reasoning"); Maroney, *supra* note 4, at 13 (describing the view that "law ought to admit only of reason and, therefore, that part of the work of law is to heavily police its boundaries so as to exclude and neuter emotion").

7. Lloyd, *supra* note 4, at 55–56.

8. For a fuller discussion of the limitations of these methods, introduced to Harvard in the late nineteenth century by Christopher C. Langdell, see Linda H.

rules[9] or persuades in advocacy.[10] The extent to which legal rules incorporate or seek to influence emotion, individual choice, and moral values is related but still outside the scope of this Article.[11] My goal is to demonstrate that emotion is a necessary and desirable part of "thinking like a lawyer."

Part V identifies several critical decision points in the legal reasoning process where the influence of emotion on decision-making may be most significant and noticeably "felt." Put another way, I examine those places where the stitch between reason and emotion is less tight and thus more obvious. There being no one word in the English language to describe feeling and thinking at the same time, I refer to it here as *feelthinking*. Part VI discusses the implications of feelthinking for the practicing bar and the legal academy. Acknowledging the role that emotion plays at each step of the process can help us expose both its advantages and disadvantages.[12] In a profession where feelthinking occurs on behalf of clients within ethical constraints, understanding the role of emotion is essential.

Edwards, *The Trouble with Categories: What Theory Can Teach Us About the Doctrine-Skills Divide*, 64 J. LEGAL EDUC. 181, 191–94 (2014); Harold Anthony Lloyd, *Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice, and the Humanities*, 49 WAKE FOREST L. REV. 1213, 1213–16 (2014).

9. *See, e.g.*, MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW 6–8 (2010) (exploring sodomy laws as the expression of disgust); Melissa H. Weresh, *Two Sides of the Coin–Exploring Dyadic Emotions in Immigration and Alienage Jurisprudence*, 54 WAKE FOREST L. REV. 1197, 1219–31 (2019) (arguing that notions of membership and personhood in immigration law are rooted in disgust and trust, respectively).

10. Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1393–96 (2013) (discussing the appropriate role of emotion in constitutional legal argument); Todd, *supra* note 4, at 127 (describing the "powerful role of non-rational influences in judicial decision making").

11. *See, e.g.*, Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585, 586–87 (2004) (attributing the persistence of capital punishment in part to media focus on sympathy, fear, anger, and a desire for retribution); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1395–97 (1997) (arguing for the provocation defense (i.e., crimes of passion) only in circumstances where provocation is based on acts punishable under the law). For a detailed taxonomy on the forms of law and emotion scholarship, see Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119, 121–22 (2006); Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1526–36 (2007) (detailing the ways in which morality pervades the law).

12. *See, e.g.*, Lloyd, *supra* note 4, at 96–98 (detailing the advantages in law of understanding the relationship between reason and emotion).

II. THE PRIMACY OF REASON

A. Reason as the Sole Path to Truth and Justice

The primacy of reason in law can be traced at least as far back as Plato (c. 427–347 BCE). Plato valued truth—knowledge and understanding of first principles—above all else.[13] Plato believed that only dialectic, a reasoned exchange of ideas between philosophers, leads to truth,[14] and his dialogues take that form. Emotion, on the other hand, diverts us from the truth.[15] He often spoke of emotion in two contexts relevant here: the use of emotional appeals in rhetoric and the intrusion of emotion as a (regrettable) function of being human.[16] Because emotion interferes with reason, its use in law and politics is suspect.[17] Life is a constant struggle between reason (the soul) and emotion (the body).[18]

In Plato's view, rhetoric, which includes legal argument,[19] appeals primarily to emotion and thus produces belief, not truth.[20] Not surprisingly, Plato was particularly critical of the sophists who taught rhetoric for use in courts and political assemblies.[21] His disdain for appeals to emotion appears in the early dialogue *Gorgias* (c. 380 BCE).[22] The main interlocutor, Socrates, learns that Gorgias,

13. *See, e.g.*, PLATO, THE REPUBLIC IX, 580–83 (Benjamin Jowett, trans., Random House 1941) (c. 380 BCE) (explaining that of the three classes of men, the lover of wisdom, of honor, and of gain, the lover of wisdom—the philosopher—lives the most noble and pleasant life as a seeker of true knowledge).

14. *See, e.g.*, Richard Kraut, *Introduction to the Study of Plato*, *in* THE CAMBRIDGE COMPANION TO PLATO 1, 1–3 (Richard Kraut ed., 1999) (explaining that Plato's philosophy is an intellectual method of engaging in adversarial conversation to reveal an organized system of truths, reflecting the influence of his teacher, Socrates).

15. *See infra* notes 22—79 and accompanying text.

16. *See* infra notes 21–83 and accompanying text.

17. *See, e.g.*, *infra* notes 40–46 and accompanying text.

18. *See, e.g.*, *infra* notes 45–51 and accompanying text. The ancient Greeks may have used the word *psuche´*, which translates as soul, to refer to what we now think of as the mind. *See* ANTONIO R. DAMASIO, THE FEELING OF WHAT HAPPENS, BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS 30 (1999).

19. The formal study of rhetoric began in Greece in roughly 450 BCE. The full course of study, available to wealthy young men, took ten to twelve years and progressed from learning the alphabet to interactive classroom exercises to effective public speaking and persuasion in any circumstance, including the law. *See* MICHAEL H. FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE 3 (Routledge 2016) (2005).

20. *See, e.g.*, PLATO, *Gorgias*, *in* THE COLLECTED DIALOGUES 454e (Edith Hamilton & Huntington Cairns eds., 1961).

21. The sophists were teachers of rhetoric who encouraged the use of emotional, flamboyant arguments and personal credibility over logic or legal argument. Both Plato and Aristotle were critical of their methods. *See* FROST, *supra* note 19, at 59; George A. Kennedy, *Introduction* to ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 3, 10–12 (George A. Kennedy trans., 2d ed. 2007).

22. *See* PLATO, *supra* note 20.

a well-respected orator and teacher of rhetoric, is in Athens.[23] Socrates, a vehement critic of rhetoric, wishes to question him about it.[24] Intimating that rhetoric is an art without a subject matter,[25] Socrates presses him for a precise definition.[26] Gorgias responds by defining rhetoric as:

> the power to convince by your words the judges in court, the senators in Council, the people in the Assembly, or in any other gathering of a citizen body. And yet possessed of such power you [the rhetor] will make the doctor, you will make the trainer your slave, and your businessman will prove to be making money, not for himself, but for another, for you who can speak and persuade multitudes.[27]

When Socrates points out that many other arts, such as mathematics, also persuade, Gorgias insists that rhetoric is "[t]he kind of persuasion employed in the law courts and other gatherings, . . . and concerned with right and wrong."[28]

At Socrates' skillful urging, Gorgias concedes that rhetoric is the sort of persuasion that provides belief, not knowledge, about what constitutes justice in a given case.[29] Precisely for this reason, Gorgias explains, rhetoric is the greatest of all arts; a rhetor can persuade even in the absence of knowledge.[30] Gorgias assures Socrates that, as with all arts, "[o]ne should make proper use of rhetoric."[31] However, he adds, "[I]f a man becomes a rhetorician and makes a wrongful use of this faculty and craft, you must not, in my opinion, detest and banish his teacher from the city. For he imparted it for a good use, but the pupil abuses it."[32] When Socrates asks how students ignorant of "right and wrong, the noble and the base, the just and the unjust" acquire that knowledge, Gorgias explains that he teaches it to them.[33] However, having already conceded that a rhetorician may act unjustly, Gorgias' claim that rhetoric is the art that teaches justice is disproved.[34]

Gorgias' student, Polus, then asks Socrates what he thinks of the art of rhetoric.[35] Socrates replies, "To tell you the truth, Polus, [it is]

23. *See id.* at 447c.
24. *See id.*
25. *See id.* at 449d–51c (pointing out that teaching persuasion using words is not exclusive to rhetoric).
26. *Id.* at 451c.
27. *Id.* at 452e.
28. *Id.* at 454b.
29. *Id.* at 454e.
30. *Id.* at 455e–56c.
31. *Id.* at 457b.
32. *Id.* at 457b–c
33. *Id.* at 459d–60a.
34. *Id.* at 460e–61b.
35. *Id.* at 462b.

no art at all";[36] indeed, rhetoric is more of a routine or knack that produces gratification and pleasure.[37] Employing the body and soul metaphor, Socrates explains there are four rational arts: two that attend the body and two the soul.[38] The arts of gymnastics and medicine determine what is best for the body, and the arts of legislative government and justice determine what is best for the soul.[39] There are also four false or irrational arts, of which rhetoric is one.[40] Cookery, for example, is the false art of medicine because it "pretends to know the best foods for the body."[41] Without the guidance of the immortal soul, the body chooses what pleases it most.[42] In Socrates' view, "rhetoric [is] to justice what cookery is to medicine."[43] Rhetoric produces only the appearance of justice, and "having no thought for what is best, *she* regularly uses pleasure as a bait to catch folly and deceives it into believing that *she* is of supreme worth."[44] As with delicious food, rhetoric appeals to emotion and desire, feeding people what they want to hear instead of what is good for them.

The struggle between reason (soul) and emotion (body) appears again in the *Phaedrus* (370 BCE), Plato's second dialogue on rhetoric.[45] As in *Gorgias*, Plato alludes to rhetoric as an appeal to emotion, and Socrates envisions a "true rhetoric" that would produce "scientific practitioners of speech."[46] The format of the dialogue is a series of three speeches on love. The first, delivered by Phaedrus, a friend of Socrates, argues it is better to be seduced by someone who does not love you as opposed to someone who does.[47] Socrates objects to the speech "as a piece of rhetoric" that focuses on form over substance.[48] Socrates then delivers his version of the same argument, reminding Phaedrus of two guiding principles: "One is an innate desire for pleasure, the other an acquired judgment that aims at what

36. *Id.* at 462b–c.
37. *Id.*
38. *Id.* at 464b.
39. *Id.* at 464b–e.
40. Socrates explains that beautification (cosmetics or fashion) is the false art of gymnastics, cookery the false art of medicine, sophistry the false art of government, and rhetoric the false art of justice. *See id.* at 465b–c.
41. *Id.* at 464d.
42. *Id.* at 465d.
43. *Id.* at 465c.
44. *Id.* at 464d (emphasis added).
45. *See* PLATO, *Phaedrus*, *in* THE COLLECTED DIALOGUES, *supra* note 20, at 475.
46. *Id.* at 277c. To achieve competence in speaking, the rhetor has to know the truth of the subject matter about which he speaks, be able to discern the nature of the soul to whom he speaks, and adjust his speech accordingly. *Id.* at 277b.
47. *See id.* at 231a–34c (arguing that a lover loses interest when his "craving ends" and that "a lover commends anything you say or do even when it is amiss, . . . partly because his passion impairs his own judgment").
48. *Id.* at 235a.

is best."[49] Socrates then argues that a lover cannot be trusted because he will seek to gratify his own pleasure as opposed to choose what is best for the beloved.[50] Thus does rhetoric gratify its audience with emotion.[51]

Socrates then fears he has offended the god of love and proceeds to give a second speech making the opposite argument.[52] In Socrates' second speech, he argues that love is a form of divine madness that can lead the soul to an understanding of truth.[53] Socrates likens the soul to a team of winged horses driven by a charioteer.[54] One horse is good and noble; it is a lover of glory with temperance and modesty.[55] The second horse is bad and ignoble; it is hot blooded, consorting with wantonness, and hard to control.[56] The charioteer represents reason; he must struggle to control the good horse, representing rational impulse or emotion, and the bad, representing bodily desire.[57] When the charioteer fails to master the horses, their wings are injured, and the soul falls to earth.[58] According to Socrates, those fallen souls are human beings.[59]

Plato also decried human emotion as an obstacle to acquiring knowledge and being rewarded in the afterlife.[60] He often described the soul as consisting of three parts, only one of which is immortal.[61] The immortal part of the soul resides in our ability to reason and achieve the kind of knowledge known best by the gods.[62] The closer

49. *Id.* at 237d.

50. *Id.* at 239e–41d.

51. For a full and insightful discussion of Plato's views on rhetoric as represented in the *Phaedrus*, *see* RICHARD M. WEAVER, THE ETHICS OF RHETORIC 3–26 (Routledge 2009) (1953). According to Weaver, Phaedrus's first speech lauding the nonlover's lack of interest in the beloved represents Plato's pure reason, which is admittedly not adequate to move an audience. *See id.* at 17–18. The second speech, in which Socrates likens love to exploitation, represents base rhetoric, "which influences us in the direction of what is evil." *Id.* at 11. The third speech, in which Socrates likens love to divine madness, embodies Plato's true rhetoric: "[T]he virtuous rhetorician, who is a lover of truth, has a soul of such movement [like that of the successful charioteer], that its dialectical perceptions are consonant with those of a divine mind. . . . The good soul, consequently, will not urge a perversion of justice as justice." *Id.* at 16–17.

52. PLATO, *supra* note 45, at 242d–e.

53. *Id.* at 245b–c.

54. *Id.* at 246b–53d.

55. *Id.* at 253d.

56. *Id.* at 253d–e.

57. *See id.* at 248a–e (explaining that the charioteer's failure to control his horses—emotion and desire—interferes with his ability to "behold the plain of Truth").

58. *Id.* at 246b–d.

59. *See id.* at 248.

60. *See, e.g.*, *infra* notes 76–80 and accompanying text.

61. *See, e.g.*, PLATO, *Timaeus*, *in* THE COLLECTED DIALOGUES, *supra* note 20, at 69c–d.

62. *See* PLATO, *supra* note 45, at 247c (describing "reason alone, [as] the [immortal] soul's pilot" that steers it toward the heavens where truth resides).

it approaches truth, the closer it comes to the divine.[63] In contrast, Plato described the remaining two parts of the soul as mortal, residing in the body and representing rational impulse and bodily desire.[64] With all its earthly demands, the body is a necessary evil that imprisons the immortal soul, which must control the body through reason.[65]

Timaeus (360 BCE), thought to be one of Plato's later dialogues, tells the story of the creation of the world and explores the struggle between reason and emotion.[66] Timaeus, a fictional philosopher, explains that a divine and rational craftsman transformed chaos into the world, an intelligent living organism that has both a body and soul.[67] Next, the craftsman created all living things to populate the world, beginning with the "lesser" gods.[68] The craftsman created a number of human souls equal to that of the stars and then delegated the creation of human life to the lesser gods.[69] Around these souls, the lesser gods

> fashion[ed] a mortal body, and made it to be the vehicle of the soul, and constructed within the body a soul of another nature which was mortal, subject to terrible and irresistible affections—first of all, pleasure, the greatest incitement to evil; then, pain, which deters from good; also rashness and fear, two foolish counselors, anger hard to be appeased, and hope easily led astray—these they mingled with irrational sense and with all-daring love according to necessary laws, and so framed man.[70]

Inferior to the immortal soul, the mortal soul was placed lower in the body so as to avoid "pollut[ing] the divine any more than was absolutely unavoidable."[71] The first part of the mortal soul, "which is endowed with courage and passion and loves contention, they settled nearer the head, midway between the midriff and the neck."[72] The second part, "which desires meats and drinks and the other things of which it has need by reason of the bodily nature," they settled near

63. *See id.*
64. *See* PLATO, *supra* note 61, at 69c–70b.
65. *See, e.g.*, PLATO, *Phaedo*, *in* THE COLLECTED DIALOGUES, *supra* note 20, at 82d–e. The *Phaedo* takes place in Socrates' prison cell during the last hours of his life and addresses the subject of the immortal soul. Socrates tells those gathered around him, including his student Phaedo, "Every seeker after wisdom, knows that up to the time when philosophy takes it over his soul is a helpless prisoner, chained hand and foot in the body, compelled to view reality not directly but only through its prison bars, and wallowing in utter ignorance." *Id.*
66. *See* PLATO, *supra* note 61, at 69d.
67. *See id.* 31b–36d.
68. *See id.* at 40a–d.
69. *See id.* at 41c–e.
70. *Id.* at 69c–e.
71. *Id.* at 69d.
72. *Id.* at 70a.

the abdomen.[73] The gods knew it was necessary to tie this third soul down "like a wild animal"[74] because it "would not comprehend reason."[75]

As Timaeus explains, souls who "conquer" their emotions live just lives.[76] At their death, they return to their companion star.[77] Those who live unjust lives are destined to be born a second time as a woman,[78] suggesting that emotion is both weak and female. If they fail to live just lives a third time, they are reborn as animals who resemble them "in the evil nature which . . . they acquired."[79]

B. The Collaboration Between Reason and Emotion in Achieving Justice

Like Plato, Aristotle valued reason in the pursuit of knowledge,[80] but he did not share his teacher's same dim view of rhetoric, appeals to emotion, or emotion per se. Aristotle recognized that in real life, certainty of knowledge (truth) is often not possible.[81] In the law, arguments based on philosophical values and methods (rhetoric) can produce valuable (if probable) truth akin to justice.[82] Aristotle was interested in emotion as both a bodily state and a state of mind that influences decisions in real-life situations.[83] Aristotle's *Rhetoric* is the first coherent theory of rhetoric,[84] focusing in large part on emotion as "cognitive phenomena open to reason."[85] In law, appeals to emotion were often necessary to enhance reason, helping judges and juries make fair decisions.[86]

Aristotle described rhetoric as the counterpart to dialectic because "both are concerned with such things as are, to a certain

73. *Id.* at 70e.
74. *Id.*
75. *Id.* at 71a.
76. *Id.* at 42b.
77. *Id.*
78. *Id.* at 42c.
79. *Id.*
80. *See, e.g.*, ARISTOTLE, *Nicomachean Ethics*, VI.2, 1139a–b *in* A NEW ARISTOTLE READER 363 (J. L. Ackrill ed., 1987) (describing truth as the product of the part of the soul that possesses reason, distinguishing it from practical knowledge, which relies on desire as well) [hereinafter ARISTOTLE, *N.E.*]; ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE I.1, 1355a11 (George A. Kennedy, trans., 2d ed. 2006) (distinguishing between truth as the result of dialectic and that which "resembles the true" as the product of rhetoric) [hereinafter RHETORIC].
81. *See* RHETORIC, *supra* note 80, at I.2, 1357a12 (explaining that rhetoric addresses subjects that "admit[] two possibilities; for no one debates things incapable of being different in past or future or present").
82. *See, e.g.*, Kennedy, *supra* note 21, at 15.
83. *See, e.g.*, *infra* notes 198–208 and accompanying text.
84. *See* FROST, *supra* note 19, at 24.
85. W.W. FORTENBAUGH, ARISTOTLE ON EMOTION 26 (2d ed. 2002).
86. *See, e.g.*, FROST *supra* note 19, at 57 (noting that appeals to emotion affect the decisions of judges and juries).

extent, within the knowledge of all people and belong to no separately defined science."[87] He defined rhetoric as having the ability "to see the available means of persuasion in each case"[88] and consisting of three types of speech, distinguished by the nature of the audience: deliberative (political), judicial (legal), and demonstrative (ceremonial).[89] Like *Gorgias's* namesake,[90] he thought that the goal of rhetoric is justice[91] and that the art of rhetoric lies in the invention, arrangement, style, and delivery of artistic appeals to *logos* (reason), *pathos* (emotion), and *ethos* (credibility).[92]

In Book II, Aristotle examines fourteen emotions, often in pairs.[93] He considers their cause, the state of mind of those who experience them, and those to whom we direct each type of emotion.[94] For example, he defines anger as "desire, accompanied by distress, for apparent retaliation because of an apparent slight that was directed, without justification, against oneself or those near to one."[95] By defining anger as the result of *thinking* one has been slighted, Aristotle recognized that emotion has a cognitive component.[96] Put another way, "emotions contain and rely on evaluative thoughts."[97] Because emotion can be the product of thought, it is open to reason or persuasion: "The emotions [pathe´]," Aristotle said, "are those things through which, by undergoing change, people come to differ in their judgments and which are accompanied by pain and pleasure."[98] If a jury (mistakenly) perceives a slight against another and seeks to retaliate (i.e., experiences anger), a skillful rhetor can change the jury's mind about the nature of the slight and the need for punishment (i.e., produce calmness, the opposite of anger).[99]

Where reason alone is insufficient to move an audience,[100] it must "be led to feel emotion [*pathos*] by the speech; for we do not give the same judgment when grieved and rejoicing or when being friendly

87. RHETORIC, *supra* note 80, at I.1, 1354a1. The opening line of the treatise responds directly to Plato's criticism that rhetoric is a discipline without a subject matter. *See supra* note 21 and accompanying text.

88. RHETORIC, *supra* note 80, at I.1, 1355b14.

89. *Id.* at I.3, 1358b3.

90. *See* PLATO, *supra* note 20, at 229.

91. *See* RHETORIC, *supra* note 80, at I.3, 1358b3.

92. *Id.* at I.2, 1355b–56a.

93. *See id.* at II.2–11.

94. *See, e.g.*, *id.* at II.5, 1382a–83b (defining fear as a sort of pain and agitation in *anticipation* of a future evil and confidence as the opposite).

95. *Id.* at II.2, 1378b1.

96. *See* FORTENBAUGH, *supra* note 85, at 12.

97. Maroney, *supra* note 4, at 14 (noting that Martha Nussbaum was the first to recognize Aristotle's cognitive theory of emotion in MARTHA NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS (2001)).

98. RHETORIC, *supra* note 80, at II.1, 1378a8.

99. *See id.* at II.3, 1380a1–4.

100. *Id.* at I.1, 1355a12 (stating that rhetoric is useful because "even if we were to have the most exact knowledge, it would not be very easy for us in speaking to use it to persuade [some audiences]").

and hostile."[101] It is hard for jurors to determine justice fairly because "friendliness and hostility and individual self-interest are often involved, with the result that they are no longer able to see the truth adequately, but their private pleasure or grief casts a shadow on their judgment."[102] Although he encouraged the use of emotion in persuasion, Aristotle criticized the sophists for teaching students "to warp the jury by leading them into anger or envy or pity: that is the same as if someone made a straight-edge ruler crooked before using it."[103]

Aristotle argued that the law should "define everything as exactly as possible and for as little as possible to be left to the judges" but that it is "necessary to leave to the judges the question of whether something has happened or has not happened, will or will not be, is or is not the case; for the lawmaker cannot foresee these things."[104] Aristotle thus argues both for and against the use of emotion in legal argument. Despite this seeming contradiction, at least one scholar has argued that Aristotle thought the proper use of emotion was to inspire juries to "feel[] respect towards the law . . . and, consequently, love towards those who strive to uphold it and hate towards those who try to pervert it."[105]

Unlike Plato, Aristotle thought the body and soul were inseparable, making it impossible to disregard emotion as a fact of life.[106] In *De Anima (On the Soul)* and the *Nichomachean Ethics*, Aristotle explains that the soul has two—as opposed to Plato's three—parts (rational and irrational) that work not in opposition but in collaboration with each other.[107] The rational part acquires knowledge and engages in reason, whereas the irrational part consists of our survival instinct, sense perception, and desire, which includes "wanting, passion, and wishing."[108] These "parts" do not reside in different locations within the body and are indivisible: "[I]f an instrument, e.g. an axe, were a natural body, then its substance would be what it is to be an axe, and this would be its soul; if this

101. *Id.* at I.2, 1356a5.

102. *Id.* at 32; *see also* ARISTOTLE, POLITICS III.16, 1287a36–37 (C.D.C. Reeve ed., 2017) (explaining that "[t]hose who hold political office" ["magistrates" in some translations] are "accustomed to doing many things out of spite or gratitude"); RHETORIC, *supra* note 80, at III.1, 1404a5 (explaining that emotion in rhetoric was often necessary due to "the corruption of the audience").

103. RHETORIC, *supra* note 80, at I.1, 1354a5.

104. *Id.* at I.1, 1354b7–8.

105. Daniel Simão Nascimento, *Rhetoric, Emotions, and the Rule of Law in Aristotle*, *in* ARISTOTLE ON EMOTIONS IN LAW AND *POLITICS supra* note 4, at 401, 415.

106. *See infra* notes 114–15 and accompanying text.

107. *See* ARISTOTLE, *On the Soul*, III.9, 432a–33a, *in* A NEW ARISTOTLE READER, *supra* note 80, at 161; ARISTOTLE, *N.E.*, *supra* note 80, at I.13, 1102b (noting that the "irrational" part of the soul "is in some sense persuaded by reason").

108. *See* ARISTOTLE, *supra* note 107, at III.3, 414b; *id.* at III.9, 432a23–26.

were removed, it would no longer be an axe."[109] So too are reason and emotion inseparable, for in the part of the soul "concerned with reasoning there will be wishing, and in the irrational part wanting and passion."[110] Reason attempts to influence emotion, which sometimes "listens to and obeys it."[111] Emotion thus plays a mediating role, standing between reason and desire in the decision-making process.[112]

Not surprisingly, Aristotle disagreed with Plato on the inherent evil of emotion: "[W]e are neither called good nor bad, nor praised nor blamed, for the simple capacity of feeling the passions."[113] For Aristotle, the goal in life was to achieve happiness, which was equivalent to living a virtuous life, and living a virtuous life required rational control of one's emotions.[114] Aristotle described this process in terms of voluntary action and choice. Choice, he said, is the "deliberate desire of things in our own power; for when we have decided as a result of [reason], we desire in accordance with our [reason]."[115] Ultimately, for the choice to be good, "both the reasoning must be true and the desire right."[116] Some emotions are thus more appropriate than others.[117]

III. THE INSEPARABILITY OF REASON AND EMOTION IN DECISION-MAKING

A. The Connection Between Body and Brain (Including the Mind)

Our twenty-first century understanding of reason and emotion is far different from that of Plato. Although Aristotle did not have the advantage of modern neuroscience, he seems to have gotten it more right than wrong. Setting aside the question of the soul,[118] the body

109. *Id.* at II.1, 412b10–15.
110. *Id.* at III.9, 432b4–6.
111. ARISTOTLE, *N.E.*, *supra* note 80, at I.13, 1102b31–32.
112. *See* Fuselli, *supra* note 6, at 104–07 (describing emotion as providing "the bridge" between appetite and intellect).
113. ARISTOTLE, *N.E.*, *supra* note 80, at II.5, 1106a7–9.
114. Kennedy, *supra* note 21, at 3.
115. ARISTOTLE, *N.E.*, *supra* note 80, at III.3, 1113a11–13.
116. *Id.* at VI.2, 1139a23–24.
117. Aristotle's insights on emotion and the soul (mind) as inseparable from the body fell prey to Descartes in the 1600s. Descartes argued that the mind and body are distinct. *See* RENÉ DESCARTES, A DISCOURSE ON THE METHOD OF CORRECTLY CONDUCTING ONE'S REASON AND SEEKING TRUTH IN THE SCIENCES IV 33 (Ian MacLean trans., Oxford University Press 2006) (1637) ("[T]his 'I', that is to say, the Soul by which I am what I am, is entirely distinct from the body."). Because sensory perception is unreliable, knowledge is a function of reason alone. *See id.* at IV, 39 ("[W]hether we are awake or asleep, we ought never to let ourselves be convinced except on the evidence of our reason."). This mind-body (Cartesian) dualism paved the way for rationalism, which flourished during the Enlightenment.
118. Neuroscientists disagree on the extent to which their discipline addresses the existence of a soul as Plato conceived it. *Compare* Joshua D.

and the brain (including the mind) are literally inseparable.[119] The body consists of bone, muscle, organs, and everything else but the nervous system.[120] The brain is part of and in charge of the nervous system, which includes the spinal cord and all the nerves that run throughout our body.[121] The brain and body are "indissociably integrated" by the nervous system and the bloodstream.[122]

In maintaining the processes of life and adapting to external change, the brain receives signals from the body through the peripheral nervous system (the nerves outside the brain and throughout the body) and sends signals back to the body in return.[123] In conjunction, the brain manufactures or causes the manufacture of chemicals, such as hormones, which are sent through the bloodstream.[124] The brain acts upon the body through both the autonomic nervous system (regulating involuntary bodily functions such as breathing) and the somatic or musculoskeletal nervous system (regulating voluntary muscular movement).[125] The "mind" typically refers to internal responses to sensation from the five senses or other parts of the body, such as feelings of pleasure or pain.[126] As a whole, the "brain-body partnership interacts with the environment as an ensemble, the interaction being of neither the body nor the brain alone."[127]

B. Feelings as the Cognitive Component of Emotion

The various structures of the brain known to be involved in processing complex emotion include the ventromedial prefrontal cortex ("VMPFC"), orbital frontal cortex ("OFC"), anterior cingulate cortex ("ACC"), insula, and amygdala.[128] Some of these structures are also involved in decision-making (including moral decisions),

---

Greene, *Social Neuroscience and the Soul's Last Stand*, *in* SOCIAL NEUROSCIENCE: TOWARD UNDERSTANDING THE UNDERPINNINGS OF THE SOCIAL MIND 263, 271 (Alexander Todorov et al. eds., 2011) (assuming "the operations of the mind are the operations of the brain and not those of an immaterial soul"), *with* Anthony I. Jack, *A Scientific Case for Conceptual Dualism: The Problem of Consciousness and the Opposing Domains Hypothesis*, *in* OXFORD STUDIES IN EXPERIMENTAL PHILOSOPHY: VOLUME ONE 173, 176 (2015) (arguing "mechanistic explanations [of neuroscience] will never enable us to fully understand human experience").

119. *See infra* note 129 and accompanying text.
120. *See, e.g.*, DAMASIO, *supra* note 2, at 86.
121. *See id.*
122. *Id.* at 87.
123. *See id.* at 87–88.
124. *Id.*
125. *Id.*
126. *See id.* at 88–89.
127. *Id.* at 88.
128. *See, e.g.*, *id.* at 131–39; James Woodward, *Emotion Versus Cognition in Moral Decision-Making: A Dubious Dichotomy*, *in* MORAL BRAINS: THE NEUROSCIENCE OF MORALITY 87, 88 (S. Matthew Liao, ed., 2016); Edmund T. Rolls, *The Functions of the Orbitofrontal Cortex*, 55 BRAIN & COGNITION 11, 11–25 (2004).

recognizing our own feelings as well as the feelings of others (empathy), and detecting and monitoring our visceral (those pertaining to the gut) sensations.[129] Neurologist Antonio Damasio's cognitive theory of emotion is helpful in understanding how the brain and body work together in making decisions.

Damasio describes two types of emotion: primary and secondary. Our primary emotions develop early in life, whereas secondary emotions evolve as we grow and gain experience.[130] Primary emotions are universal; they include fear, anger, sadness, happiness, disgust, and surprise.[131] Damasio views them as innate reactions to stimuli such as size, motion, sound, and pain.[132] In the case of fear (e.g., in response to encountering a bear), the amygdala and ACC trigger a body state consistent with fear (i.e., increased heart rate, contraction of the gut, perspiration, etc.).[133] Next comes the feeling of the emotion in the brain—the realization of the link between the stimulus and response—and the response itself (fleeing, perhaps).[134] Feeling the emotion helps us learn how to avoid, think about, and manage similar stimuli the next time around.[135]

Later in life, we acquire secondary emotions.[136] Secondary emotions result from pairing "categories of objects and situations, on the one hand, and primary emotions, on the other."[137] For example, Iago's scheming leads Othello to think that his wife has betrayed him.[138] He becomes angry, but his emotions are more complicated than that. He is also jealous, and his jealousy is caused by "evaluating mentally the situation that cause[d] the emotion."[139] We can even experience primary emotion as secondary.[140] Imagine an encounter with a long-lost friend that makes you feel happy. First come

129. *See, e.g.*, James Woodward & John Allman, *Moral Intuition: Its Neural Substrates and Normative Significance*, 101 J. PHYSIOLOGY (PARIS) 179, 182 (2007).

130. DAMASIO, *supra* note 2, at 131.

131. *Id.* at 149; ANTONIO DAMASIO, SELF COMES TO MIND: CONSTRUCTING THE CONSCIOUS BRAIN 123 (2010).

132. DAMASIO, *supra* note 2, at 131.

133. *Id.*

134. *Id.* at 132; *see also* DAMASIO, *supra* note 131, at 110 ("Once any of these trigger regions [in the brain] is activated, certain consequences ensue[,] . . . certain actions are taken[,] . . . and certain expressions are assumed.").

135. DAMASIO, *supra* note 2, at 133.

136. *See id.* at 134.

137. *Id.*; *see also* DAMASIO, *supra* note 131, at 125–26 (noting that certain "background emotions" can be "prompted by a variety of factual circumstances"); Louis C. Charland, *Reconciling Cognitive and Perceptual Theories of Emotion: A Representational Proposal*, 64 PHIL. SCI. 555, 572–74 (explaining Damasio's secondary emotions).

138. *See* WILLIAM SHAKESPEARE, OTHELLO, THE MOOR OF VENICE act 3, sc. 3.

139. DAMASIO, *supra* note 2, at 130, 133, 149–50.

140. *See id.* at 134–35.

conscious images, some of which are in the form of thoughts.[141] At a nonconscious level, the prefrontal cortex—informed by experience (primary emotion)—then triggers a corresponding body state (such as increased heart rate or a happy facial expression), and we then feel that change in our minds.[142] Secondary emotion thus utilizes and builds on some of the same brain structures used in primary emotion.[143]

We experience emotion in one of two ways: either through a change in body state and a subsequent feeling (a body loop) or the mental simulation of a change in body state and subsequent feeling (an "as if" body loop).[144] The "as if" body loop thus avoids a "slow and energy-consuming process"[145] but likely produces a less intense feeling.[146] Actual and "as-if" feelings can either be conscious or unconscious.[147]

C. Good Decisions Involve and Require Emotional Input

Emotion is an inseparable and desirable part of decision-making.[148] Damasio claims Descartes' error was in thinking that reason could exist in isolation from the body.[149] Decisions require knowledge, potential options, and an understanding of the likely outcomes associated with each option.[150] To make a decision, though, one needs a reasoning process, as well as support processes such as attention, working memory, and emotion.[151] Emotion not only helps us make decisions but also helps us make better ones.

Damasio's theory of decision-making is the somatic marker hypothesis.[152] Somatic markers are the feelings that influence our decisions.[153] They are experienced emotions that identify the outcomes of decisions as good, bad, or somewhere in-between.[154] To

141. *See id.* at 136.

142. *See id.* at 136–38; *see also* DAMASIO, *supra* note 131, at 111–14 (explaining how emotions are triggered and ultimately felt).

143. DAMASIO, *supra* note 2, at 137, fig. 7–2 (explaining that the frontal cortices are involved only in secondary emotion).

144. *Id.* at 155–56; DAMASIO, *supra* note 131, at 101–02.

145. DAMASIO, *supra* note 2, at 155.

146. *Id.* at 156.

147. Antonio R. Damasio, *The Somatic Marker Hypothesis and the Possible Functions of the Prefrontal Cortex*, 351 PHIL. TRANSACTIONS: BIOLOGICAL SCI. 1413, 1415 (1996).

148. *See, e.g.*, *id.* (arguing that emotion facilitates logical reasoning); DAMASIO, *supra* note 2, at 200 (arguing that biological drives, body states, and emotions "may be an indispensable foundation for rationality"); Woodward, *supra* note 128, at 89 (emphasizing that "we should be skeptical of the idea that reason and emotion are sharply distinct and mutually exclusive categories").

149. DAMASIO, *supra* note 2, at 248.

150. *Id.* at 166.

151. *Id.*

152. *See id.* at 173; Damasio, *supra* note 147, at 1414–15.

153. *See, e.g.*, DAMASIO, *supra* note 2, at 174.

154. *Id.* at 173–75; Damasio, *supra* note 147, at 1414–15.

illustrate, he uses the example of having to choose whether to do business with a friend's enemy.[155] The immediate response is to picture many competing images, options, and outcomes, including the potential for new business as well as the risk of losing a friend.[156] Instead of performing a lengthy cost-benefit analysis (a sort of pure reason approach), we use somatic markers to narrow down the range of options.[157] They act as a sort of gut feeling in our minds.[158]

Somatic markers help us make more efficient and accurate decisions.[159] Often, they are sufficient to make a decision; if not, they put us in a better position to engage in a deliberate reasoning process and choose among remaining alternatives.[160] Narrowing the choices is often (but not necessarily) followed by a process of reasoning before making a final decision.[161] Where the feeling is conscious, it can act as a warning (e.g., not to do business with the enemy) or as an incentive (e.g., take the business despite the risk).[162] If unconscious, somatic markers affect our decisions without knowing it, but that does not mean the feeling has not occurred; we simply have not paid attention to it.[163] According to Damasio, somatic markers are influenced by social conventions and ethical rules, as well as past experience.[164]

Although emotion is thought to be most important in making decisions that involve personal and social situations, emotion influences abstract reasoning as well.[165] In nonpersonal decision-making, we might not experience the somatic markers as feelings, but they still "act covertly to highlight, in the form of attentional mechanism, certain components over others, and to control, in effect, the go, stop, and turn signals necessary for some aspects of decision-making and planning in nonpersonal, nonsocial domains."[166] Regardless of the context, there are times when it is too time-consuming or difficult to use reason alone to make good decisions in an efficient manner.

155. DAMASIO, *supra* note 2, at 170.
156. *Id.*
157. *Id.* at 173–74.
158. *Id.* at 173.
159. *See id.*
160. *Id.*
161. *Id.*
162. *Id.* at 174.
163. *Id.* at 184–85.
164. *Id.* at 179.
165. *See id.* at 190 (explaining that since the same mechanisms are involved, it is reasonable to assume that emotion plays a part in all decision-making); Woodward & Allman, *supra* note 129, at 189 (rejecting the idea that personal decisions are rooted in emotion and abstract decisions are more reason based).
166. *See* DAMASIO, *supra* note 2, at 190.

Research indicates that emotion is critical for making successful and socially acceptable decisions.[167] As Haidt describes, patients with damage to the VMPFC and related brain sites often have trouble making decisions: "[T]hey perform disastrously, showing poor judgment, indecisiveness, and what appears to be irrational behavior."[168] In the case of Eliot, a patient who survived a brain tumor, Damasio concluded that although his reasoning ability was intact, his inability to experience emotion "prevented him from assigning different values to different options, and made his decision-making landscape hopelessly flat."[169] He describes the case of another patient who spent an inordinate amount of time in his office trying to choose between two dates for his next appointment.[170] Without the aid of emotion to help him narrow down the options, he was incapable of making a decision.[171] Other studies indicate that psychopathy is linked to people who can reason but lack emotion and empathy.[172]

D. There May Be No Such Thing as Pure Reason

The same parts of the brain that process emotion and aid in decision-making monitor bodily sensations, including those associated with food ingestion and expulsion (literally our gut or our intestinal tube).[173] Giulia Enders, a German internist and gastroenterologist, is skeptical of "the view that the brain is the sole and absolute ruler over the body."[174] In sum, she argues that the gut influences our thoughts and feelings (and by extension, our decisions) more than we think.[175] Our language naturally reflects this interaction: we "swallow disappointment," "digest defeat," and "get

167. *See, e.g.*, DAMASIO, *supra* note 2, at 34–79 (reporting on patients who had damage to their VMPFC and could reason but had little emotion/feeling and ability to make socially acceptable decisions).

168. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 824 (2001) (citing DAMASIO, *supra* note 2).

169. DAMASIO, *supra* note 2, at 51.

170. *Id.* at 193.

171. *Id.* at 194.

172. *See, e.g.*, HERVEY CLECKLEY, THE MASK OF SANITY: AN ATTEMPT TO CLARIFY SOME ISSUES ABOUT THE SO-CALLED PSYCHOPATHIC PERSONALITY (3d ed. 2015); *see also* Haidt, *supra* note 168, at 816 (explaining that Scottish philosopher David Hume argued that "a person in full possession of reason yet lacking moral sentiment would have difficulty choosing any ends or goals to pursue and would look like what we now call a psychopath" (paraphrasing DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS App. 1 (Tom L. Beauchamp ed., Clarendon Press 1998) (1777) [hereinafter MORALS])).

173. *See* GIULIA ENDERS, GUT: THE INSIDE STORY OF OUR BODY'S MOST UNDERRATED ORGAN 126 (Jane Bilinghurst ed., David Shaw trans., Greystone Books 2015) (2014).

174. *Id.* at 124.

175. *See id.* at 125–29.

butterflies in our stomach."[176] As Enders explains, the gut has an extensive nervous system that continually gathers information about how the body is doing and sends that information to the brain.[177] Signals sent to the insular cortex create an overall image of how the body is feeling at any given point in time, including other parts of the brain.[178] The brain and the gut thus play a vital role in the choices we make both physically (e.g., moving from cold to warm) and mentally (e.g., going from sad to happy).[179] She thus concludes it "may be time to expand René Descartes' proposition: 'I feel, then I think, therefore, I am.'"[180] Damasio, too, suggests that we experience a steady state of low-level (background) emotion that contributes to mood,[181] which undoubtedly affects our decisions.

IV. THE ROLE OF EMOTION IN INTUITIVE AND DELIBERATE THINKING

Psychologists and neurologists agree that we think in two basic speeds: fast and slow.[182] Fast thinking is often intuitive, effortless, and efficient.[183] Slow thinking is conscious, deliberate, and time-consuming.[184] Neither is perfect, and, as demonstrated below, both involve emotion.[185] In some cases, fast thinking may be preferable to slow.[186]

A. Intuition as Subconscious Feelings

Damasio defines intuition as somatic markers that "operate covertly, that is, outside consciousness."[187] By definition, intuition is in part a function of feeling.[188] In 2005, Malcolm Gladwell[189] popularized the growing interest in intuition, referring to it as the "adaptive unconscious."[190] Similar to Damasio, Gladwell thinks of

176. *See id.* at 125.
177. *Id.* at 124–25.
178. *Id.* at 140–41.
179. *Id.* at 140.
180. *Id.* at 141; *see also* DAMASIO, *supra* note 2, at 88 (emphasizing that the brain receives signals from the brain as well as the body, indicating that our interaction with the environment is "of neither the body nor the brain alone").
181. *See* DAMASIO, *supra* note 2, at 150.
182. *See infra* notes 220–24 and accompanying text.
183. *See infra* Part IV.A.2.
184. *See infra* Part IV.A.2.
185. *See infra* Parts IV.A.2, IV.B.
186. *See infra* Part IV.A.3.
187. DAMASIO, *supra* note 2, at 187.
188. *See id.* at 187–88 (explaining that intuition consists of feelings outside our consciousness).
189. Malcolm Gladwell is a journalist and author on the implications of research in the social sciences. *See About Malcolm*, MALCOLM GLADWELL, https://www.gladwellbooks.com (last visited Nov. 13, 2019).
190. MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 11 (2005).

intuition as quick judgments based on minimal information.[191] Quick judgments are essential for our survival and "can be every bit as good as decisions made cautiously and deliberately."[192] He describes the case of the Greek *kouros*, a statue the J. Paul Getty Museum acquired in the 1980s mistakenly believing it to be from the sixth century BCE.[193] Although the museum conducted a thorough investigation of the statue's authenticity, it was unable to determine what outside art experts saw in a flash: the statute was a fake.[194] Although the experts could not explain exactly why, they just knew "[i]t didn't look right."[195]

Although quick judgments can be based on expertise, they are fallible. Implicit association and bias tests reveal the extent to which our unconscious attitudes can be "utterly incompatible with our stated conscious values."[196] Gladwell provides several examples of unconscious bias or discrimination, including a study in which white men were offered better prices on new cars than white women, black women, and black men, in that order.[197] Despite the danger of relying on quick judgments that may rest on bias, Gladwell maintains that we can teach ourselves to make better ones.[198] Unconscious discrimination is rooted in first impressions, and we can change those impressions "by changing the experiences that comprise" them.[199] For example, in the case of the car salesmen, "it requires more than a simple commitment to equality. It requires that you change your life so that you are exposed to minorities on a regular basis and become comfortable with them" and avoid being "betrayed by your hesitation and discomfort."[200]

1. Intuition as Trustworthy Expertise

Gladwell's work relied in part on the research of Gary Klein, a psychologist who has been studying how people make decisions under pressure since the 1980s.[201] Klein rejects the traditional view that decision-making is always based on deductive reasoning, the analysis of probabilities, and statistical methods.[202] Klein argues that in

191. *Id.* at 11–12.
192. *Id.* at 14. Where quick judgment is necessary, too much information can cause cognitive overload and paralysis. *See id.* at 143 (explaining that "[s]nap judgments can be made in a snap because they are frugal, and if we want to protect our snap judgments, we have to take steps to protect that frugality").
193. *See id.* at 3–8.
194. *Id.*
195. *Id.* at 5.
196. *Id.* at 85.
197. *Id.* at 92–95.
198. *Id.* at 97.
199. *Id.*
200. *Id.*
201. *See id.*
202. *See* GARY A. KLEIN, SOURCES OF POWER: HOW PEOPLE MAKE DECISIONS 1–3 (1999).

natural settings (i.e., outside the laboratory), experts do not make "quick judgments" by methodically comparing a number of options and then choosing one (i.e., by making a sort of pros and cons list).[203] Instead, they often generate a single solution by quickly and subconsciously matching the situation to a similar, prior experience stored in memory.[204] They then run a mental simulation to see if the chosen option will work; if not, they run other mental simulations until they find an acceptable course of action.[205] A good recent example might be the case of Captain Chesley (Sully) Sullenberger, who successfully landed a US Airways plane in the Hudson River when its engines failed.[206]

Klein calls this process a recognition-primed decision ("RPD") strategy, and his RPD model has been influential in a number of contexts, including the military.[207] One of his first studies involved firefighters.[208] In one case, a fire-department commander and his team were having trouble putting out what they assumed to be a kitchen fire.[209] Suddenly, and without apparent reason, the commander ordered his team to evacuate the building.[210] Within seconds, the floor on which the firefighters had been standing collapsed.[211] The commander reported he did not know why he had ordered everyone out.[212] What Klein realized was that the commander had unconsciously identified the signs that the fire had occurred not in the kitchen but in the basement.[213] Just as the art experts in the case of the Getty *kouros* recognized the lack of patterns or signs of an authentic sixth century BCE statue, the fire commander sensed the lack of patterns or signs of a kitchen fire and adapted his course accordingly.

Klein believes strongly in the intuitive power of experts.[214] According to Klein, the sources of power for making good decisions in

203. *See* Daniel Kahneman & Gary Klein, *Conditions for Intuitive Expertise: A Failure to Disagree*, 64 AM. PSYCHOLOGIST 515, 515–16 (2009). Klein's view of intuition is referred to as naturalistic decision-making. *Id.* at 515.

204. *Id.*

205. *Id.*

206. *2009: Airplane Crash-Lands into Hudson River; All Aboard Reported Safe*, CNN (Aug. 11, 2016, 9:44 AM), https://www.cnn.com/2016/08/11/us/hudson-landing-archive-news-story/index.html.

207. *See* Kahneman & Klein, *supra* note 203, at 516; *see generally* Kevin Mullaney & Mitt Regan, *One Minute in Haditha: Ethics and Non-Conscious Decision-Making*, 18 J. MIL. ETHICS 75 (2019) (proposing a form of moral RPD that informs combat decision-making).

208. *See* KLEIN, *supra* note 202, at 7–14.

209. *Id.* at 32.

210. *Id.*

211. *Id.*

212. *See id.* at 31.

213. *Id.* at 32–33.

214. *See generally id.* at 31–44 (discussing the value of expertise).

real life are often not analytical; they include intuition, mental simulation, metaphor, and storytelling:[215]

> The power of intuition enables us to size up a situation quickly. The power of mental simulation lets us imagine how a course of action might be carried out. The power of metaphor lets us draw on our experience by suggesting parallels between the current situation and something else we have come across. The power of storytelling helps us consolidate our experiences to make them available in the future, either to ourselves or to others.[216]

Because of a growing emphasis within decision-making on artificial intelligence, implicit bias, and evidence-based best practices, [217] Klein urges us to celebrate the human factor in effective decision-making.[218]

2. Intuition as Unreliable Bias and Error

Daniel Kahneman agrees with Klein that memory, not magic, is one source of intuition, but he is skeptical of the extent to which we should rely on it because it is often misled by an oversimplification and bias.[219] What Gladwell calls quick judgments and Klein views as pattern recognition, Kahneman calls fast or System 1 thinking.[220] System 1 thinking is "automatic, involuntary, and almost effortless."[221] The slow and deliberate mental process we engage in thereafter is System 2 thinking.[222] System 2 thinking is "controlled, voluntary, and effortful";[223] it "impose[s] demands on limited attentional resources."[224]

For Kahneman, the problem with intuition (System 1 thinking) is that it is more prone to error than slow thinking and just as easily based on preference as on reason.[225] In support, he demonstrates that our quick, gut reactions are often wrong. As an example, he cites research on responses to the following problem: "A ball and a bat

215. *Id.* at 3.
216. *Id.*
217. *See* Kahneman & Klein, *supra* note 203, at 517–24.
218. KLEIN, *supra* note 202, at 285–88 (explaining why the computer metaphor of thinking is incomplete).
219. *See* Kahneman & Klein, *supra* note 203, at 521. Heuristics in this context refers to our tendency to oversimplify complex situations to help make decisions. Bias in this context may, but does not always, connote animus; it can also refer to being misled by information and how it is presented. *See id.* (explaining that nonskilled intuition can "arise from simplifying heuristics, not from specific experience" and "are prone to systematic biases").
220. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20 (2011); Kahneman & Klein, *supra* note 203, at 519.
221. Kahneman & Klein, *supra* note 203, at 519.
222. KAHNEMAN, *supra* note 220, at 21; Kahneman & Klein, *supra* note 203, at 519.
223. Kahneman & Klein, *supra* note 203, at 519.
224. *Id.*
225. *See* KAHNEMAN, *supra* note 220, at 25; Kahneman & Klein, *supra* note 203, at 521–22.

together cost $1.10. The bat costs a dollar more than the ball. How much does the ball cost?"[226] Most people say the ball costs ten cents, which is wrong; the answer is five cents. As Kahneman explains, "[M]any intelligent people adopt the intuitively compelling response without checking it."[227] Second, our answers to questions are influenced by the framing of the question, which triggers certain memories but not others, leading to errors in judgment. For example, in one study, he found that a subject's estimate of the average price of German cars differed dramatically depending on the "anchoring" information provided up front.[228] Asking whether the average price of German cars is "more or less than $100,000" generates a different (higher) answer than asking whether it is "more or less than $30,000."[229] The first question evokes visions of Mercedes, BMWs, and Audis, whereas the second question evokes images of a Volkswagen Beetle.[230] Third, we often tend to attribute the relevant characteristics of simple problems to difficult ones.[231] When asked the likely GPA of a college student who read fluently at the age of four, we are likely to predict and attribute to her reading performance an impressive GPA, even though the two are not highly correlated.[232]

Although he acknowledges a difference between expert and inexpert intuition, Kahneman assumes that algorithms can outperform even expert judgment.[233] Expert judgment is inconsistent, and experts often suffer from the illusion of validity, an unjustified sense of confidence in their intuition that can override both their training and experience.[234] A true expert, whose judgment is likely better than a nonexpert but still fallible, is a person who operates in a relatively stable environment with regular, valid cues (the repetitive patterns that Klein's experts recognize from memory) and has an adequate opportunity to develop her skills.[235] However, in unstable or dynamic environments, where the variables are often changing and valid or reliable information is unavailable, expert judgment is difficult to acquire. For example, it is likely easier to develop expertise and rely on intuition in the context of fighting fires than predicting fluctuations in the stock market.[236]

226. Kahneman & Klein, *supra* note 203, at 521.

227. *Id.* (explaining that the incidence of error was 50 percent for students at Harvard, MIT, and Princeton).

228. *Id.*

229. *Id.*; *see also* Karen E. Jacowitz & Daniel Kahneman, *Measures of Anchoring in Estimation Tasks*, 21 PERSONALITY AND SOC. PSYCHOL. BULL. 1161, 1162–65 (1995) (explaining the effects of anchoring on estimates).

230. Kahneman & Klein, *supra* note 203, at 521.

231. *See id.* at 521–22; KAHNEMAN, *supra* note 220, at 109–95.

232. Kahneman & Klein, *supra* note 203, at 521–22.

233. *Id.* at 518, 523.

234. *Id.* at 517–18.

235. *Id.* at 520–21; KAHNEMAN, *supra* note 220, at 239–40.

236. Kahneman & Klein, *supra* note 203, at 522; KAHNEMAN, *supra* note 220, at 241–42.

3. Intuition as a Component of Moral Judgment

Because law is infused with morality,[237] moral judgments affect legal reasoning. Jonathan Haidt, a moral psychologist, studies the effect of intuition on moral judgments (evaluations of good and bad).[238] He argues that moral judgments are the result of intuition and emotion, not reason.[239] Haidt found that people often react to moral dilemmas in ways they cannot explain.[240] Specifically, they struggle to articulate reasons why a particular act is either right or wrong.[241] Influenced by philosopher David Hume,[242] Haidt concludes that moral judgments appear in our consciousness as the result of moral intuition.[243] Moral intuition (including moral emotion) is System 1 thinking; it is quick and effortless.[244]

In contrast, moral reasoning is an effortful, System 2 process.[245] Moral reasoning occurs after judgments are made and in an attempt to find (only) arguments that support them.[246] Haidt explains that, "[W]hen faced with a social demand for a verbal justification [for a moral judgment], one becomes a lawyer trying to build a case rather than a judge searching for the truth."[247] Like Klein, Haidt is aware of the power of the metaphor. He describes the process—intuitive judgment followed by *post hoc* reasoning—using two. The first metaphor involves the tail wagging the dog; we would like to believe that moral judgment (the dog) is guided by moral reasoning (a

237. *See, e.g.*, Michael S. Moore, *supra* note 11, at 1527–36. Moore explains that the law requires moral judgment in a variety of contexts, including decisions about what reasonable, equal, or *due* process means; in hard cases, where the law is indeterminate; and in cases where the law alone would produce an unjust result. *Id.*; Colin Prince, *Moral Foundation Theory and the Law*, 33 SEATTLE U. L. REV. 1293, 1304 (2010).

238. *See* HAIDT, *supra* note 1, at 45–47; Haidt, *supra* note 168, at 814–15.

239. *See* Haidt, *supra* note 168, at 814.

240. *See id.*

241. For example, one hypothetical described a brother and sister who decide to make love (using birth control) because they think it will be "interesting and fun." *Id.* Although they enjoy it, they decide not to do it again and keep their lovemaking a secret. Even though no harm to anyone followed this incident, most subjects said they thought that what the siblings did was wrong. *Id.*

242. Hume believed that "people have a built-in moral sense that creates pleasurable feelings of approval toward benevolent acts and corresponding feelings of disapproval toward evil and vice." *Id.* at 815–16. According to Hume, moral knowledge derives from sentiment, not reason. *Id.* at 816 (paraphrasing MORALS, *supra* note 172, at App. I.1). According to Hume, "[w]e speak not strictly and philosophically when we talk of the combat of passion and of reason. Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them." DAVID HUME, A TREATISE OF HUMAN NATURE 415 (L. A. Selby-Bigge ed., 1896) (1739).

243. Haidt, *supra* note 168, at 818.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 814.

rational tail), but the opposite is likely true.[248] Second, he describes a rider and elephant, where the elephant is intuition plus emotion, and the rider is reason.[249] In moral decision-making, the rider serves as the spokesperson for the elephant.[250]

Haidt believes moral intuition originates from *a priori* moral theories built in at birth.[251] They are innate and enculturated, but he does not think they are fixed: "Nature provides a first-draft, which experience then revises. . . . 'Built-in' does not mean unmalleable; it means 'organized in advance of experience.'"[252] Although our moral reasoning rarely changes our own minds, it can change *other* people's minds by triggering in them new intuitions.[253] As Haidt explains, "The main way that we change our minds on moral issues is by interacting with other people."[254] Haidt summarizes, "Rather than following the ancient Greeks in worshipping reason, we should instead look for the roots of human intelligence, rationality, and virtue in what the mind does best: perception, intuition, and other mental operations that are quick, effortless, and generally quite accurate."[255]

Moral philosophers James Woodward and John Allman agree with Haidt that intuition facilitates fast decision-making by evaluating many variables "in parallel" and "compress[ing] them into a single dimension."[256] However, they disagree with Haidt on the innate nature of moral intuition. In their view, intuition can be "heavily influenced by learning and experience."[257] Citing instances where intuition amounts to expertise, such as in the case of Klein's firefighters, they argue that moral and social intuition evolve as we gain experience.[258] Given the speed and flexibility of intuition, in certain complex, multidimensional circumstances, it may even be preferable to slow thinking.[259]

248. *See id.* at 823.
249. *See* HAIDT, *supra* note 1, at 52–53.
250. *Id.* at 54.
251. Haidt, *supra* note 168, at 822.
252. HAIDT, *supra* note 1, at 153 (quoting GARY MARCUS, THE BIRTH OF THE MIND: HOW A TINY NUMBER OF GENES CREATES THE COMPLEXITIES OF HUMAN THOUGHT 34, 40 (2004)).
253. *See* Haidt, *supra* note 168, at 823. Haidt observes that we can trigger new intuitions in our own minds by employing empathy (i.e., putting ourselves in someone else's position). In the rare case, the sheer force of logic can be sufficient to change our own minds. *Id.*; HAIDT, *supra* note 1, at 80.
254. HAIDT, *supra* note 1, at 79; *see also* Haidt, *supra* note 168, at 819 (explaining how the moral judgments of others influence an individual's conception of morality).
255. Haidt, *supra* note 168, at 822.
256. Woodward & Allman, *supra* note 129, at 186.
257. *Id.* at 183.
258. *Id.* at 186–87.
259. *See id.* at 183.

B. Emotion and the Interplay Between Intuitive and Deliberate Thinking

It is a mistake to assume that emotion occurs only in fast thinking. As Haidt has put it, "The head can't even do head stuff without the heart"; "when the master (passions) drops dead, the servant (reasoning) has neither the ability nor the desire to keep the estate running. Everything goes to ruin."[260] As Woodward and Allman explain, fast and slow thinking do not operate independent of each other in a set sequence.[261] It is nearly impossible to separate one process from the other, nor should we try.[262] Thinking fast or slow, we make bad decisions in the absence of emotion.[263] A lack of emotion can make us incapable of making any decision at all.[264] People who attempt to rely on reason alone make worse decisions than those who rely in part on intuition.[265] Thus, all "decision-making requires the integrated deployment of both the automatic and deliberative systems (and cognition and emotion) working together and mutually supporting one another."[266] Emotion contributes "to both intuition and deliberation."[267]

V. WHERE FEELTHINKING OCCURS

As a warm-up exercise to examining the role of emotion in legal reasoning, consider the following hypothetical. It involves a lawyer, Bev, trying to decide whether to accept a new case:

> *Bev has been asked to represent Jack, a California high school student suspended for organizing and appearing in a photograph of nearly fifty male classmates making a Nazi salute. The photo was taken off school grounds before the spring prom, which is funded by parents and students, not the school. The photo was intended as a protest of the school principal's recent decision to discipline classmates for demonstrating on school grounds. The student sent the photo to classmates through Snapchat, a video sharing platform. Sending a photo through Snapchat usually means the photo will disappear unless a recipient takes a screenshot. Jack's parents want to sue the school for violating his rights under the federal Constitution.*[268]

260. HAIDT, *supra* note 1, at 41.
261. Woodward & Allman, *supra* note 129, at 189.
262. *See id.*
263. *See supra* Part IV.A.
264. *See* Woodward & Allman, *supra* note 129, at 183.
265. *Id.* at 190.
266. *Id.* at 189.
267. *Id.* at 186.
268. These facts are based on a real photograph, but the details are fictitious. They formed the basis of an appellate brief problem for several sections of first-year students at Georgetown University Law Center.

> *Bev has been practicing for ten years as a litigator in a small firm (eight lawyers) but has no experience in this particular area of law. She has room in her schedule to take on the new case, and her billing for the year is low. Most of the firm's work is defense oriented, but she could really use the business. Finally, her spouse is Jewish, and she converted to Judaism when they got married. One member of her spouse's family died in the Holocaust.*

This scenario is far from unrealistic. It represents a complex, multidimensional situation demanding a personal and professional choice the lawyer will likely struggle to make. Multiple scenarios of possible options and outcomes likely spring to mind. Images might appear to her in a herky-jerky fashion, including meeting the client and feeling an instant dislike for him based on his behavior, refusing to take the case and avoiding discomfort or tension with her spouse, and feeling uncertain about her ability to handle the case zealously and competently.

As Damasio suggests, Bev is not likely to engage in a detailed cost-benefit analysis with any level of accuracy.[269] Citing Kahneman, Damasio reminds us that we are shockingly bad at using probabilities and statistics to help us make complicated decisions.[270] Moreover, it would "take an inordinately long time" to imagine all the potential gains and losses in taking or not taking the case, and it would be nearly impossible to account for the host of unknowns in the equation.[271] Reason alone would be insufficient to help Bev decide in a reasonable amount of time. This is where emotion enters the picture.

Before engaging in the sort of reasoning hinted at above, Bev will likely think effortlessly and intuitively fast. She might experience a "gut feeling" or two, either literally or vicariously (the "as if" kind), and these feelings could be conscious or unconscious.[272] They would then direct her attention to the bad outcomes associated with certain options and help her immediately eliminate them. Perhaps the gut feeling Bev experiences is akin to fear because the last time she turned down a new case she had an argument with her partners. Perhaps, without realizing, Bev discounts rejecting the case outright because she trusts her abilities as a lawyer and she has had to navigate taking uncomfortable cases with her spouse before, and their marriage is solid. Believing she can wrestle with her own sense of guilt, she quickly decides to take the case and then starts thinking more deliberately about managing the details. Emotion and reason thus work together to help Bev decide quickly with some degree of confidence.

269. *See* DAMASIO, *supra* note 2, at 171.
270. *Id.* at 172.
271. *Id.* at 171–72.
272. *See supra* Part III.C.

As should be apparent, this is the process—emotion-enhancing reason—that likely plays out each time a lawyer makes a difficult decision. This process repeats itself in some form throughout the entire representation, including client interviews, phone calls, negotiations with opposing counsel, depositions, court appearances, and so on. My focus here, though, is on places where feelthinking occurs in the process of researching, analyzing, and arguing the legal issues involved in the case. As with the decisions outlined above, these too are personal and professional. Given that we are often unaware of the extent to which emotion influences our decisions, it is not possible to identify them all. And given the signals sent to the brain from the gut[273] and the influence of background feelings,[274] emotion likely plays a constant role.

A. Legal Research

Legal research is like mining for gold. As lawyers gain experience, they develop faith that eventually they will hit the vein that leads to the motherlode. In law school, students learn a deliberative process, often referred to as the Rombauer Method or some variant thereof,[275] which helps them analyze a factual scenario, identify the legal issues involved, and find the controlling law applicable to the facts. Since Bev is experienced, she has likely internalized much of this analytical process and may simply start digging right away without the need for conscious deliberation.

As Bev begins her research, she quickly determines that punishing high school students for posting photographs through social media falls under First Amendment protections. Speech that is not school-sponsored, lewd, or promoting illegal drug use falls under rules established by the Supreme Court in *Tinker v. Des Moines Independent Community School District*.[276] She soon learns that *Tinker* explicitly applies only to on-campus speech and that the Supreme Court has not ruled on whether schools can punish speech that occurs off campus.[277] As it turns out, the Ninth Circuit has recently held that *Tinker* applies to off-campus speech if the speech has a sufficient nexus to the school.[278] Until this year, the Ninth Circuit had borrowed and applied the tests used by the Fourth Circuit

273. *See supra* Part III.D.

274. *See supra* Part III.D.

275. *See* MARJORIE DICK ROMBAUER, LEGAL PROBLEM SOLVING: ANALYSIS, RESEARCH, AND WRITING (5th ed. 1991) (explaining the Rombauer Method generally); Vicenç Feliú & Helen Frazer, *Embedded Librarians: Teaching Legal Research as a Lawyering Skill*, 61 J. LEGAL EDUC. 540, 548 (2012) (explaining the use of the Rombauer Method in legal education).

276. *See* 393 U.S. 503 (1969); Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1067 (9th Cir. 2013).

277. *See Wynar*, 728 F.3d at 1067.

278. *See* McNeil v. Sherwood School Dist. 88J, 918 F.3d 700, 707 (9th Cir. 2019).

(the "sufficient nexus test") and the Eighth Circuit (the "reasonably foreseeable to reach the school" test).[279] If *Tinker* does apply, a school may restrict speech that "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities" or that collides "with the rights of other students to be secure and to be let alone."[280]

Bev thus has the dual and complicated task of researching whether *Tinker* applies to Jack's speech and, if it does, whether the school had a right to suspend him for it. Depending on her own preference, she may or may not separate these issues as she begins her research. She must decide whether to start with some background reading (secondary sources) or the law itself (in this example, case law). As for the case law, she must decide whether to start with cases from the Supreme Court; Ninth, Fourth, and Eighth Circuits; federal district courts in California; or some combination thereof. The options are endless, but she has likely developed a process that suits her, based on her prior experience.

Bev's choices in response to the challenges posed by this research task are quick, System-1-like. She will not likely spend time charting out all possible approaches. Instead, she is more likely to generate a single solution by quickly and subconsciously matching the situation to a similar, prior experience stored in memory.[281] She then runs a mental simulation to see if the option she has chosen will work. If it does not, she will run other mental simulations until she finds one that does. She may be aware of her process, but it might occur outside her consciousness. As she digs deeper and gains a better understanding of the law, she starts to see (and to feel) how her client's facts fit in. Perhaps she is now ready to begin collecting the most relevant cases—her nuggets of gold—to explain and support her client's legal position.

As she skims, sifts, and sorts cases, she begins to collect them. Perhaps she writes down citations, cuts and pastes text into a document of her own, prints the cases, or stores them in electronic folders. Regardless of the chosen method, she uses her gut feelings, Damasio's somatic markers, to decide whether to keep certain cases and reject others.[282] She is not reading each case slowly and deliberately or making charts or summaries of each one. Not yet, anyway. That will come later when she has narrowed the options to a manageable amount. For now, the thinking must be fast. As most lawyers have experienced, fast thinking in legal research is far from perfect; we have all had the experience of rejecting a case in hopes of finding a better one but then later searching in vain to find it again.

279. *See Wynar*, 728 F.3d at 1068–70.
280. *Id.* at 1070 (quoting *Tinker*, 393 U.S. at 514).
281. *See supra* Part IV.A.1.
282. *See supra* Part III.C.

B. Framing the Client's Story

As Aristotle recognized, lawyers use emotion to put their audience in the right frame of mind—to help them empathize with the clients' situation and make the judge and jury care enough to do something about it.[283] Storytelling, in particular, can capture the audience's interest and imagination, tap into shared experience, and induce empathy. As Klein explains, storytelling helps us make decisions, but its source of power is not reason.[284] We make sense of the external world through patterns, and stories help us organize our internal world: ideas, concepts, objects, and relationships.[285] Jurors, for example, manage the evidence in a complex case by organizing it into a story; they then compare the competing stories the lawyers tell them.[286]

Legal scholars have written extensively about the power of stories as well as how to create and analyze them.[287] Good client stories contain all the elements of fiction: strong characters, conflict, a plot that is plausible and internally consistent, and a satisfying or intriguing resolution.[288] As Robbins et al. instruct, it can be helpful for lawyers to tell their client's story based on archetypal stories that involves heroes, including warriors, creators, caregivers, innocents, explorers, and everymen.[289] Klein argues that stories act like mental simulations in helping us make intuitive decisions.[290]

Assume that Bev has filed suit against Jack's school under 42 U.S.C. § 1983,[291] claiming that his suspension violated his First

283. *See supra* Part II.B.

284. KLEIN, *supra* note 202, at 3.

285. *Id.* at 177.

286. *Id.* at 184.

287. *See, e.g.*, CAMILLE LAMAR CAMPBELL & OLYMPIA R. DUHART, PERSUASIVE LEGAL WRITING: A STORYTELLING APPROACH (2017); Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275 (2011); Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7 (1996); Randy D. Gordon, *Making Meaning: Towards a Narrative Theory of Statutory Interpretation and Judicial Justification*, 12 OHIO ST. BUS. L.J. 1 (2017); J. Christopher Rideout, *A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling*, 10 LEGAL COMM. & RHETORIC: JALWD 67 (2013); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767 (2006); Todd, *supra* note 4.

288. Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459, 466 (2001); Rideout, *supra* note 287, at 74; Robbins, *supra* note 287, at 772; *see also* KLEIN, *supra* note 202, at 177–83 (discussing the power of stories in helping to understand events).

289. *See, e.g.*, RUTH ANNE ROBBINS ET AL., YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING 87–101 (2013); Robbins, *supra* note 287, at 802.

290. *See* KLEIN, *supra* note 202, at 183; *supra* Part III.A.1.

291. *See* 42 U.S.C. § 1983 (2018) (allowing private citizens to sue governmental entities for constitutional violations).

Amendment rights. The school has filed a motion for summary judgment,[292] and Bev is preparing to file the same as a cross-motion. While Bev decides how to use emotional appeals to influence the judge, she uses emotion to help her make those decisions. As she drafts the motion, she needs to make choices about the characters, conflict, and nature of the story. Who is the hero in this story? It is certainly not the school. Is it the student? Or the First Amendment? If the hero is Jack, what kind of hero is he? A warrior for First Amendment rights? An earnest, yet misguided innocent of sorts? An *everystudent*? Bev must also frame the conflict. Is it between the right to free speech and the school administrator's need to carry out its educational mission? Is it between the students in the photo and those classmates likely to be harmed by it? Or is it between her client and the principal?

The answers to these questions will have implications for Bev's legal arguments and overall theory of the case. As Damasio explains, the answers are not likely to rest on reason alone.[293] Bev's thoughts and feelings about the nature of Jack's conduct will also affect her decisions. Was it morally permissible for Jack to organize that photo without making its intent clear? Does it matter if Jack was unaware of the gravity of the symbolism behind the salute? That as a result, he did not appreciate the impact the photo might have on Jewish students or students of color? Can he be thought of as "innocent" in that sense? Regardless of Jack's intent, does the symbolism of the Nazi salute and its resulting harm make his conduct morally reprehensible?

As Haidt explains, moral judgments appear in our consciousness as the result of moral intuition.[294] Moral intuition (including moral emotion) is System 1 thinking; it is quick and effortless.[295] As Haidt has observed, moral intuition is more complicated than just assessing harm to others.[296] His research suggests that moral intuition falls into a number of categories: care/harm, fairness/cheating, loyalty/betrayal, authority/subversion, sanctity/degradation, and liberty/oppression.[297] If Bev's gut tells her that Jack had a fundamental right to protest and distribute that photo, her intuition would likely be most influenced by the liberty/oppression category.[298] If she felt that Jack's actions were insulting per se and likely harmful

292. *See* FED. R. CIV. P. 56.
293. *See supra* Part III.C.
294. *See supra* Part IV.A.3.
295. *See supra* Part IV.A.3.
296. *See supra* Part IV.A.3.
297. *See* HAIDT, *supra* note 1, at 150–216.
298. *See id.* at 212 (characterizing liberty/oppression in this context as caring most about traditional ideas of liberty such as the right to be left alone without governmental intrusion, accompanied by the feeling of resentment).

to a number of students at Jack's school, her intuition would be more influenced by care/harm.[299]

As Haidt explains, moral intuition may be innate in some sense, but it is likely malleable and subject to change.[300] Woodward and Allman believe that moral intuitions evolve.[301] Under either theory, Bev's reaction to Jack's conduct is a function of her age and life experience. It might have been different ten years ago and could be different ten years from now. Assume that Bev's intuition is to believe that Jack's conduct was wrong. As Damasio explains, ethical rules influence feelings too.[302] As Bev begins to frame Jack's story, she will take her obligation to represent Jack zealously, competently, and with candor into account as well.

C. Selecting and Organizing Arguments

Assume Bev frames Jack as a sort of warrior/innocent. Students have First Amendment rights at school, even if they are somewhat limited. Regardless of what Jack did, which was admittedly disturbing, he had a right to do so. This is not a petty conflict between principal and student; this is a significant and recurring conflict between students' fundamental rights and governmental intrusion. Having concluded that the school's actions fall outside what *Tinker* permits, Bev turns to the Ninth Circuit's new test for restricting off-campus speech. In determining whether *Tinker* applies, the Ninth Circuit now considers three factors to find a sufficient nexus to the school: (1) the degree and likelihood of harm or potential harm caused by the speech, (2) whether it was reasonably foreseeable that the speech would reach and impact the school, and (3) the relation between the content and context of the speech and the school.[303]

As Bev examines these factors (and the cases construing them), she must select the cases she will rely on to argue that, on balance, these factors weigh against the applicability of *Tinker*. She will also need to select cases to use in support of her argument that the speech did not cause substantial disruption, substantial disruption was not foreseeable, and the speech did not collide with the rights of others.[304] Which cases help her establish the current rules of law, and which cases are factually similar to Jack's? Which cases will the school rely on?

As for organizing her arguments, she is likely to argue the applicability of *Tinker* first, since that issue is dispositive. Within

299. *See id.* (characterizing care/harm in this context as caring most about the potential suffering and distress of others, accompanied by the feeling of compassion).

300. *See supra* Part IV.A.3.

301. *See supra* Part IV.A.3.

302. *See* DAMASIO, *supra* note 2, at 179.

303. McNeil v. Sherwood Sch. Dist. 88J, 918 F.3d 700, 707 (9th Cir. 2019).

304. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

that first issue, she will need to decide which of her arguments is strongest. Perhaps she decides her strongest argument is based on the third factor—that there was a tenuous relationship between the speech and the school because the photo was taken off campus in advance of an event affiliated with but not sponsored by the school. Conventional wisdom dictates that she make that argument first. She might also conclude that her weakest argument relates to the second factor because the speech clearly reached the school (i.e., the principal found out about it and suspended Jack). What should she do with this one? Argue it last? Will arguing it last leave the court with "a bad taste in its mouth"?

Bev will need to make the same organizational choices when arguing the second issue—that even if *Tinker* applies, Jack's conduct is not punishable in this case. Will she argue disruption first because the court tends to address it first? Does she argue it first because it is her strongest argument? Or should she end strong? There are no rules for these decisions. They are discretionary, idiosyncratic, and context dependent. Bev will select the cases and organize her arguments using a recursive loop of fast and slow thinking that calls on her experience and emotion. They are the stuff of art, not science.

D. Telling the Story of the Law and Analogical Reasoning

Analogical reasoning is a form of storytelling because lawyers compare their client's stories with stories from the governing case law.[305] As Bev selects certain cases for detailed explanation and comparison with respect to each issue, she will rely on some cases to suggest the outcome must be the same under stare decisis. Others she will distinguish as facially similar but not similar enough to dictate the same result. The greatest challenge for Bev is to decide which similarities and differences—the facts and circumstances of the cases and the policies underlying the law—matter and which ones do not. We have no stated rules for making these decisions, which Steven Burton describes as making "judgment[s] of importance."[306] Klein recognizes that in these situations, we may be particularly prone to error, overlooking an important case, selecting a misleading one, or failing to interpret one correctly.[307] Nevertheless, Bev will use emotion-enhanced reason to decide.

Several of the legal rules and factors relevant to the constitutionality of Jack's suspension involve moral judgment, and thus intuition as well. As Moore points out, "[W]hen constitutions . . . require judges to . . . respect each citizen's rights to *free* speech, . . . they require judges [and lawyers] to reach legal

305. *See* Edwards, *supra* note 287, at 23.

306. STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 90 (3d ed. 2007).

307. *See* KLEIN, *supra* note 202, at 197.

conclusions based on moral premises."[308] In Jack's case, several of the legal rules and factors relevant to those rules involve flexible standards, such as "sufficient nexus," "reasonably foreseeable," and "substantial disruption." The meaning of "sufficient," "reasonably," and "substantial" under the totality of circumstances necessarily turns on moral intuition and judgment as well.[309]

E. The Use of Metaphor

Like storytelling, metaphor contributes to emotion-based decision-making.[310] In *Rhetoric*, Aristotle encouraged the use of metaphor as part of the canon of style.[311] He said we take a natural pleasure in learning easily, and since metaphor is a powerful tool for understanding and creating knowledge, it is the most pleasing of the figures of speech.[312] As Klein explains, metaphors affect not only our thinking but our emotions as well:[313] "Metaphor does more than adorn our thinking. It structures our thinking. It conditions our sympathies and emotional reactions. It helps us achieve situation awareness. It governs the evidence we consider salient and the outcomes we elect to pursue."[314] As Frost puts it, metaphors are "repositories of universal wisdom and emotional power."[315] Interestingly, we feel the magic of the metaphor before we think it; and then we are unable to forget it.

As Bev fleshes out her argument, she may quickly or slowly construct an effective metaphor that can incorporate her key legal arguments. Having cast Jack as a warrior/innocent engaged in a struggle to protect free speech rights for high school students, she will need to choose a metaphor that fits her narrative. If she wants to capture by analogy the nature of Jack's conduct, she might call it a "spontaneous and thoughtless prank." If she chooses to focus on the nature of the school's punishment, she might describe it as "parental abuse." And if she focuses on the constitutional violation at risk, it might be the story of David and Goliath. To be effective, the chosen metaphor will need to anticipate the school's counter-metaphors. Just as Bev's moral intuition will influence her framing of Jack's story,[316] it will likely influence her choice of metaphor and other figures of speech.

308. Moore, *supra* note 11, at 1527.
309. *See id.* at 1527–28.
310. KLEIN, *supra* note 202, at 3.
311. RHETORIC, *supra* note 80, at III.2, 1404b6.
312. *See id.* III.10, 1410b2; FROST, *supra* note 19, at 89.
313. KLEIN, *supra* note 202, at 198.
314. *Id.* at 199.
315. FROST, *supra* note 19, at 100.
316. *See supra* Part V.B.

VI. THE IMPLICATIONS OF FEELTHINKING

Given the undeniable role that emotion plays in decision-making, one response might be to think that lawyers should eradicate emotion as much as possible from their decision-making process. However, as Justice Brennan once said, "Sensitivity to one's intuitive and passionate responses, and awareness of the range of human experience" is not only "an inevitable but [also] a desirable part of the judicial process, an aspect more to be nurtured than feared."[317] Justice Brennan recognized that "emotional and intuitive responses to a given set of facts or arguments . . . often speed into our consciousness far ahead of the lumbering syllogisms of reason."[318] Trying to take the "feel" out of feelthinking is both impossible and counter-productive.

Realizing the extent to which emotion influences judgment can be disturbing, but it can also be reassuring. Emotion enhances reason and makes judgment possible. With a better understanding of how and where emotion affects legal reasoning, lawyers can better question the premises, assumptions, and biases that fuel their thinking. They can think more carefully about what informs their decisions at critical moments of advocacy. In turn, as legal educators, we can raise our students' consciousness to the interplay between emotion and reason, training them to understand the influence of emotion and intuition in decision-making as they develop into lawyers.

As Gladwell suggests, we can train ourselves to make better snap judgments.[319] Unconscious discrimination may be outside of our awareness, but that does not mean it is outside of our control.[320] Kahneman warns that there is no way for us to know when our System 1 thinking is unreliable,[321] but we can try to recognize situations where we are likely to enter a "cognitive minefield, slow down, and ask for reinforcement from System 2."[322] To the extent we are unable to recognize situations where our intuition is not to be trusted,[323] we should rely as much as possible on guidance from institutional procedures and regulations[324] (including ethical rules governing law practice[325]). By "encourag[ing] a culture in which people watch out for one another as they approach minefields," we

317. William J. Brennan, Jr., *Reason, Passion, and "the Progress of the Law"*, 10 CARDOZO L. REV. 3, 10 (1988).
318. *Id.* at 9.
319. GLADWELL, *supra* note 190, at 15–16.
320. *Id.* at 96; *see also supra* Part IV.A.
321. KAHNEMAN, *supra* note 220, at 416.
322. *Id.* at 417.
323. *Id.*
324. *Id.* at 417–18.
325. *See, e.g.*, *Model Rules of Professional Conduct*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (last visited Nov. 13, 2019).

can minimize bias and error.[326] Intervention can occur at each critical stage of the decision-making process, including the framing of the legal issues, the collection of supporting law, the framing of the client's story as well as the stories of the case law, and the final arguments.[327]

Elaborating on the problem of importance, Burton acknowledges that analogical reasoning arguably "leave[s] the crucial judgment of importance . . . unconstrained by the law and open to abuse"[328] but argues that judicial bias is kept in check by "allowing and disallowing reasons to count in judicial and other deliberations."[329] While reasons grounded in the law are allowed to count, those "stemming from a judge's [or a lawyer's] personal interests, prejudices, and religious or moral views" are not.[330] Haidt argues that understanding how moral intuition works makes it possible to "get reasoning and intuition working more effectively together."[331]

One way would be "to try to create a culture that fosters a more balanced, reflective, and fair-minded style of judgment" and to ask for input from others on their reasoning.[332]

Understanding how emotion influences reason can also help us understand and empathize with other points of view. As Haidt explains, when a conversation that implicates moral judgment turns hostile, our "elephant" leans away, and our "rider" works to rebut the opposing view.[333] However, if we care for, admire, or want to please the opponent, our "elephant" leans in, and our "rider" tries to find truth in the opposing view.[334] Thus, Haidt concludes, "If you want to change people's minds, you've got to talk to their elephants."[335]

Finally, accepting the role of emotion in legal reasoning can help us play a better "believing game" and practice better law.[336] In the pursuit of best truths, the believing game is Peter Elbow's alternative to the "doubting game," which Socrates and Descartes gave us with their unfailing devotion to reason.[337] As a result, making decisions based on emotion can make us feel unintellectual, irrational, or

326. KAHNEMAN, *supra* note 220, at 418.
327. *See id.*
328. BURTON, *supra* note 306, at 27–28.
329. *Id.* at 90.
330. *Id.*
331. Haidt, *supra* note 168, at 829.
332. *Id.*
333. HAIDT, supra note 1, at 79.
334. *Id.* at 80.
335. *Id.* at 57.
336. *See* PETER ELBOW, *The Doubting Game and The Believing Game—An Analysis of the Intellectual Enterprise*, *in* WRITING WITHOUT TEACHERS 147, 178–79 (2d ed. 1998) (suggesting an alternative process to the "doubting game" that would be metaphorical, flexible, cooperative, and supportive as opposed to rooted solely in reason).
337. *Id.* at 150.

sloppy.[338] However, as Elbow explains, the problem with the doubting game is that it seeks answers by seeking error.[339] Eliminating options by disproving them may leave one option left, but that does not make it the best option. To play the believing game is to embrace nonanalytical methods—intuition and emotion—in the pursuit of the best of many good options. In contrast to the doubting game, the believing game helps us develop openness, empathy, and a willingness to cooperate.[340] And as Damasio teaches us, being open and emotionally available helps us make better decisions.

VII. CONCLUSION

Plato's view of emotion as diverting us from truth has had a profound and negative impact on the law. Aristotle recognized that law is not about discovering truth in a scientific sense but rather about determining probable truths in the service of justice. Rhetoric is thus the legitimate counterpart to dialectic. Aristotle also recognized that emotion is undeniably human and has a cognitive component. If we think we have been slighted, we feel angry. In Damasio's terms, we perceive the slight, undergo a change in body state, and then experience the emotion as a feeling in the brain. Emotions help us make better decisions, allowing us to draw on our expertise and listen to our gut feelings. To feelthink like a lawyer is to engage in a recursive loop of fast and slow thinking. As fast thinkers, we rely on intuition and emotion (including moral emotion) to narrow down the multitude of options that present repeatedly in the process of legal reasoning and decision-making. Some of that fast thinking is intuitive, outside our consciousness. Although intuition can be rooted in bias, it is to be nurtured, not feared. At critical decision points, lawyers can slow down, engage in more effortful, System 2 thinking, or seek the input of colleagues better able to challenge their hidden assumptions. When System 2 thinking is simply too complex or time-consuming, emotion steps in to break the log jam, often yielding better and more accurate results.

338. *Id.* at 151.
339. *Id.* at 148.
340. *Id.* at 178–79.