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## **The Emotional Components of Moral Outrage and Their Effect on Mock Juror Verdicts**

by Liana Peter-Hagene, Alexander C. Jay, and  
Jessica M. Salerno

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***Don't miss our the consultant responses from [Jill Holmquist](#) and [Jason Barnes](#) at the end of the article.***

When we ask jurors to judge a defendant for his or her crime, we are often also asking them to evaluate a moral transgression. Committing a murder, for example, violates not only a law, but also society's deep-seated sense of moral right and wrong. The cold, cognitive realization that a *law* has been broken is therefore accompanied by an emotional reaction to the *moral* violation, often conceptualized as "moral outrage." Therefore, jurors' verdict decisions might be influenced not only by careful consideration of evidence, testimony, and reasonable guilt standards (i.e., assessments of legal guilt), but also by jurors' more intuitive, emotional responses to the defendant's moral transgression (i.e., moral outrage). But what is moral outrage, exactly? We know intuitively that moral outrage has a strong emotional component, but what emotions are involved? Does the extent to which jurors feel morally

outraged by a criminal act predict the likelihood of their reaching a particular *guilt* verdict? And if so, does this mean that guilt verdicts are susceptible to the potential prejudicial effects of moral outrage and its emotional components? We will draw upon social psychological research and our own research findings ([Salerno & Peter Hagene, 2013](#)) to discuss the implications of the emotional side of moral outrage for jury decision making in service of informing attorneys' and judges' decisions about the potentially prejudicial effect of emotionally evocative evidence. More specifically, we will discuss how the combination of jurors' anger and disgust produces moral outrage, which in turn can make jurors more likely to vote guilty. Finally, we will discuss the legal implications of these findings for the use of evidence that can arouse both anger and disgust in jurors.

## Moral Outrage and Legal Decisions

Given that laws were codified to reflect societal views of what behavior is right and wrong, broken laws often reflect behaviors that society finds immoral. Thus, illegal behavior is often behavior that would be considered immoral by the majority of jurors. Unlike judgments of fact, which can be largely dispassionate and cold, moral judgments have a strong emotional component (Darley & Pittman, 2003; Haidt, 2003; Rozin, Lowery, Imada, & Haidt, 1999). Therefore, psychological research about how people react to moral transgressions emotionally might provide insight into how jurors' emotional reactions to a crime might affect their verdict decisions.

Research in moral psychology has demonstrated that when people witness moral transgressions, they react with moral outrage. Moral outrage has been defined as a constellation of cognitive (e.g., attributions of blame), behavioral (e.g., desire to punish), and emotional (e.g., anger) responses to perceived wrongdoing (Fiske & Tetlock, 1997; Skitka, Bauman, Mullen, 2004; Tetlock, Kristel, Elson, Green, & Lerner, 2000). Moral outrage is a very important concept that legal professionals should be aware of, given that it predicts many legally relevant behaviors, such seeking retribution for perpetrators and compensation for victims (Carlsmith, Darley, & Robinson, 2002; Lotz, Okimoto, Schlosser, & Fetchenhauer, 2011; Tetlock et al., 2000). Generally speaking, the more moral outrage legal decision makers experience, the more they will punish the offender. Many consider moral outrage to be our way of assessing the amount of harm committed (Carlsmith et al., 2002), in order to exact the proportionate (i.e., correct) level of retribution. In other words, the more moral outrage we feel, the more harm we perceive had been done, and the more punishment is necessary to counter the harm and restore the balance of justice.

In our own research, we have found several legal contexts in which moral outrage is a powerful force in punishment decisions. When judging juvenile sexual offense cases, people who read about a more severe offense (i.e., a rape case) compared to a less severe offense case (i.e., sexual harassment) experienced more moral outrage toward the offender, which in turn made them support more punitive sex offender registration policies (Salerno, Najdowski, Stevenson, et al., 2010). We have also found that *reducing* moral outrage can make jurors *less* supportive

of harsh punishment. More specifically, when politically conservative jurors read about a “gay panic” defense (in which a murder defendant claimed the victim provoked him by making a gay sexual advance) they experienced less moral outrage, relative to when they read a similar provocation defense that did not include the gay advance. As a result of this reduced moral outrage they were more likely to downgrade their sentence from murder to manslaughter (Salerno, Najdowski, Bottoms, et al., in press). In other words, when a murder victim violated conservative jurors’ traditional sexual values by making a gay advance on the defendant (i.e., a perceived moral transgression), the jurors were less morally outraged at the defendant for killing the victim, which in turn led them to be more lenient. Thus, it is clear that moral outrage increases the likelihood of punitive decisions. These findings inspired us to investigate what the emotional components of moral outrage are and how they might influence jurors’ *verdict* decisions—despite the legal system’s ideal that guilt judgments be driven by rational thought, rather than emotion (Bandes, 1999).

## **The Emotional Components of Moral Outrage: A Unique Combination of Anger and Disgust**

What emotions are we feeling when we are “morally outraged” by others’ actions? An intuitive response is to characterize moral outrage as anger. It is, after all, called moral “outrage.” Thus, it is no surprise that moral outrage researchers have focused on anger—in fact, some researchers even question the existence of “moral outrage,” considering it to be indistinguishable from anger (Batson et al., 2007; O’Mara et al., 2011). Some researchers even measure moral outrage by merely asking people how angry they are about a moral transgression (e.g., Batson et al., 2007, 2009; Laham et al., 2010; O’Mara et al., 2011; Skitka, 2002; Tetlock et al., 2000).

We hypothesized—along with others (Jensen & Petersen, 2011; Mullen & Skitka, 2006)—that the conceptualization of moral outrage as merely anger might miss another important emotional component: moral disgust. Anger is only one of several moral emotions that people experience when witnessing a moral transgression, other moral emotions experienced include disgust and contempt (Darley & Pittman, 2003; Haidt, 2003; Rozin, Lowery, Imada, & Haidt, 1999). Experiencing disgust can make people judge moral transgressions more severely (see Russell & Giner-Sorolla, 2011)—even when the disgust is elicited by something unrelated to the transgression. For example, when people were exposed to a disgusting smell they rendered more punitive judgments for a moral transgressor—even though the smell was completely unrelated to the case they were judging—relative to when they were not exposed to the disgusting smell (Schnall, Haidt, Clore, & Jordan, 2008). In fact, people react to moral violations with disgust more consistently than with anger (Hutcherson & Gross, 2011). Given the prominent role of disgust in moral judgments, we tested whether moral outrage might be a combination of both anger *and* disgust, rather than merely a moral form of anger.

## **Present Research**

**The emotional components of moral outrage.** Our first goal was to test our hypotheses that

(a) disgust, along with anger, is a necessary component of moral outrage, and (b) anger and disgust do not arouse moral outrage independently of each other, but rather it is the unique *combination* of anger and disgust that predicts how much moral outrage is experienced. We tested this theory in two very different types of scenarios that were likely to arouse moral outrage: a rape case and a civil case against the Westboro Baptist Church for picketing the funeral of a dead soldier with signs reading “God loves dead soldiers.” We found that the combination of our participants’ anger and disgust predicted how much moral outrage they felt toward the offender in both cases, confirming that disgust is also a central part of moral outrage in addition to anger. Critically, we also found that the effect of one emotion on moral outrage depended on the other. For example, when people felt angrier, they felt more moral outrage—but only if they were also experiencing at least moderate disgust. That is, even though people often think that anger and moral outrage are the same thing, people’s anger was completely unrelated to moral outrage if the person was not experiencing disgust along with anger. This was also the case for disgust: when people felt more disgusted, they felt more moral outrage—but only if they were also experiencing at least moderate levels of anger. In other words, we could not predict how morally outraged someone would be from how angry they were, without also knowing how disgusted they were.

The results of this study confirm that moral outrage is not just anger: Disgust and anger are both emotional components of moral outrage, and are intimately linked in their ability to predict people’s moral outrage in response to a moral transgression. Next, we tested whether these emotional components of moral outrage increased jurors’ confidence in a guilty verdict in a case that included emotionally disturbing trial evidence.

**The emotional components of moral outrage and verdicts.** The second study was designed to test whether we would find the same results in the context of a mock trial scenario, and determine whether there were downstream consequences to experiencing anger, disgust, and moral outrage on jurors’ verdicts. Participants viewed evidence and trial summary from a murder case. The evidence presentation including gruesome post-mortem photographs that we expected would rouse jurors’ anger and disgust. Next, they read pattern jury instructions for murder, and chose a verdict. They also reported how disgusted and angry they felt in response to the victim’s injuries, and how morally outraged they were by the defendant.

We found, consistent with our first study, that the combination of jurors’ anger and disgust predicted their moral outrage. Specifically, we again found that the angrier people were, the more moral outrage they felt—but this relationship existed only when they were also feeling at least moderate disgust. In this second study, however, we found that participants’ disgust was an even more consistent predictor of moral outrage than was anger: The more disgusted the participants were, the more moral outrage they experienced—this relationship existed regardless of how much anger they felt; even when they were feeling *no* anger.

Importantly, experiencing moral outrage made jurors more confident in a guilty verdict. The combination of jurors’ anger and disgust started a chain reaction, such that these emotions increased moral outrage, which in turn, made them more confident in a guilty verdict. Again, the effect of one emotion depended on the other. Specifically, even though all of the participants saw the same trial evidence, we found that the angrier they felt, the more moral outrage they

experienced, which in turn made them more confident the defendant committed the crime—but this pattern existed only when they were also experiencing at least moderate disgust.

We again found that disgust was an even more consistent predictor than was anger: The more disgusted the jurors felt, the more moral outrage they experienced, which in turn made them more confident the defendant was guilty—this pattern existed regardless of how angry they were (even if they were experiencing *no* anger). This finding was consistent with other researchers' findings that disgust might increase punitive tendencies to a greater degree than does anger (Russell & Giner-Sorolla, 2011).

To be clear, all participants saw the same evidence, but their emotional reactions led them to different levels of confidence in a guilty verdict. This study suggests that increasing one emotion (e.g., anger) increases jurors' reliance on the other emotion (e.g., their disgust-based "gut" reactions) in deciding on verdict. In short, the combination of anger and disgust that jurors experienced determined how much moral outrage they felt, which in turn determined how certain they were of the defendant's guilt.

## Legal Implications

Several concerns about rousing jurors' anger and disgust in the courtroom have been raised, including (a) the potential that these emotions might prejudice jurors against the defendant and (b) that these emotions might be a detriment to jurors' ability to carefully process information and to make thoughtful, reasoned judgments. According to the Federal Rules of Evidence, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." (Federal Rules of Evidence, 2006). The advisory notes to this rule explain that unfair prejudice "means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." Thus, judges often have to decide whether the probative value of gruesome photographs of murder victims, for example, outweigh their prejudicial effect. Our results join an existing body of research to inform judges' decisions about whether emotionally disturbing evidence should be admissible in court. Equating "emotional" and "prejudicial" can sometimes be problematic in this context (Bandes & Salerno, in press) and, as experimental psychologists, it is not our place to judge what evidence is probative and what evidence should be considered prejudicial in court. What our research findings *can* do is address the two concerns about emotionally evocative evidence by providing information about how jurors' emotions affect their judgments to help judges make more informed admissibility decisions.

Relevant to the first concern that these emotions might prejudice jurors against the defendant directly, prior research has demonstrated that gruesome photographs of murder victims (versus verbal descriptions) made mock jurors more angry, which in turn made them more likely to vote guilty (Bright & Goodman-Delahunty, 2006). Even viewing color (versus black and white) crime scene photographs made mock jurors more punitive (Oliver & Griffitt, 1976; Whalen & Blanchard, 1982)—an effect difficult to explain through probative value and likely explained better through the prejudicial effects of anger and disgust. In our study, the mock jurors all saw the same evidence—but it was the extent to which they reacted to the gruesome photographs with

anger and disgust that increased their moral outrage and, in turn, their confidence in a guilt verdict. Thus, different jurors will judge the same case differently depending on their emotional reaction. This suggests that jurors with heightened disgust sensitivity (Jones & Fitness, 2008), for example, might make more punitive judgments.

Our results also provide information regarding the second main concern with anger and disgust-eliciting evidence. In addition to increasing jurors' punitive tendencies directly, these emotions can change their decision making processes as well, by encouraging superficial information processing and reliance on intuition and stereotype. We found that rousing one emotion (e.g., anger) made jurors rely more on their "gut reactions" (i.e., disgust) when deciding on a verdict. Thus, one type of emotional response to disturbing evidence can lead them to rely more on other intuitive, emotional responses. Evidence that elicits both anger and disgust might lead to jurors relying more on quick, less effortful, and more intuitive judgments. Other social psychological research provides further support and explanations for this phenomenon. When people feel angry and/or disgusted they tend to feel more certain that their decisions are correct (Smith & Ellsworth, 1985; Tiedens & Linton, 2001; Russell & Giner-Sorolla, 2011). This heightened certainty can make people less motivated to process information carefully and to consider alternative decisions (Tiedens & Linton, 2001), less responsive to additional information (Russell & Giner-Sorolla, 2011), and can also increase their reliance on non-relevant, prejudicial factors such as racial stereotypes (Bodenhausen, Sheppard, & Kramer, 1994).

Given these [unintended consequences of rousing jurors' emotions](#) (Salerno & Bottoms, 2010), lawyers and judges need to carefully consider the effect of jurors' emotions on not only their ultimate verdicts, but the decision making process through which they arrive at these verdicts. More specifically, judges should be informed about these effects when weighing the probative versus prejudicial effect of emotionally disturbing evidence. Further, our findings also inform judges that they need to be particularly wary of evidence that might elicit disgust, given that it was a more consistent predictor of moral outrage and verdict confidence than was anger.

Defense attorneys should be wary of gruesome evidence presented by the prosecution (or any evidence that might elicit anger and disgust toward their client) as it might unduly bias the jury against their clients. Further, prosecutors should tread cautiously in the presentation of emotionally evocative evidence, which may be excluded on the basis of legal prejudice. Prosecutors should also be aware of the ways in which the effects of emotions on jurors' judgments are not always straightforward. That is, although generally anger and disgust make people more punitive, they also increase people's certainty in their own beliefs or biases (Smith & Ellsworth, 1985; Lerner & Tiedens, 2006). Thus, in more ambiguous trials or in trials where the defendant is also a sympathetic figure, prosecutors' efforts to elicit anger and disgust (via photographic evidence or otherwise) might backfire and make jurors more confident in an acquittal if that is the way in which they were leaning. In conclusion, lawyers and judges need to be aware of the effects of anger, disgust, and moral outrage on jurors' judgments in order to make more informed decisions about emotionally disturbing evidence in court.

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[Alexander Jay, BA](#) is a Graduate Student at Arizona State University in Glendale, AZ. His professional interests are in the areas of social psychology and legal decision making. Mr. Jay's research is primarily focused on jury decision making, contemporary racism, and the impact of defendant characteristics on jurors' judgments and has given several presentations at national conferences related to Psychology and Law.

[Jessica Salerno, PhD](#) is an Assistant Professor at Arizona State University in Glendale, AZ. Her professional interests are in the areas of jury decision making; emotion & law; and prejudice & the legal system. Dr. Salerno has received competitive grants and awards in recognition of her work, and has published her work in academic journal articles and books chapters. You can review Dr. Salerno's research and contact information on her webpage at <http://psychlawlab.weebly.com/>.

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#### Endnote

<sup>1</sup> Portions of this article are adapted from Salerno, J. M., & Peter-Hagene, L. C. (2013). The interactive effects of anger and disgust on moral outrage and jurors' verdicts. *Psychological Science*, 24, 2069-2078.

#### References

- Bandes, S. A. (1999). *Passions of law*. New York, NY: New York University Press.
- Bandes, S. A., & Salerno, J. M. (in press). Emotion, proof and prejudice: The cognitive science of gruesome photos and victim impact statements. *Arizona State Law Review*.
- Batson, C. D., Chao, M.C., & Givens, J. M. (2009). Pursuing moral outrage: Anger at torture. *Journal of Experimental Social Psychology*, 45, 155-160.
- Batson, C. D., Kennedy, C. L., Nord, L., Stocks, E. L., Fleming, D. A., Marzette, C. M.,
- Lishner, D. A., Hayes, R. E., Kolchinsky, L. M., & Zerger, T. (2007). Anger at unfairness: Is it moral outrage? *European Journal of Social Psychology*, 37, 1272-1285.
- Bodenhausen, G. V., Sheppard, L. A., & Kramer, G. P., (1994). Negative affect and social judgment: The differential impact of anger and sadness. *European Journal of Social Psychology*, 24, 45-62.



Bright, D., & Goodman-Delahunty, J. (2006). Gruesome evidence and emotion: Anger, blame, and jury decision-making. *Law and Human Behavior, Special Issue: Emotion in legal judgment and decision making*, 30, 183-202.

Carlsmith, K. M., Darley, J. M., & Robinson, P. H. (2002). Why do we punish?

Deterrence and just deserts as motives for punishment. *Journal of Personality and Social Psychology*, 83, 284-299.

Darley, J. M., & Pittman, T. S. (2003). The psychology of compensatory and retributive justice. *Personality and Social Psychology Review*, 7, 324-336.

Federal Rules of Evidence (2006). Retrieved March 27, 2014 from <http://www.supremecourt.gov/orders/courtorders/frev06p.pdf>.

Feigenson, N., & Park, J. (2006). Emotions and attributions of legal responsibility and blame: A research review. *Law and Human Behavior, Special Issue: Emotion in legal judgment and decision making*, 30, 143-161.

Fiske, A. P., & Tetlock, P. E. (1997). Taboo trade-offs: Reactions to transactions that transgress the spheres of justice. *Political Psychology*, 18, 255-297.

Haidt, J. (2003). The moral emotions. *Handbook of Affective Sciences*, 852-870.

Hutcherson, C. A., & Gross, J. J. (2011). The moral emotions: A social-functionalist account of anger, disgust, and contempt. *Journal of Personality and Social Psychology*, 100, 719-737.

Jensen, N. H., & Petersen, M. B. (2011). To defer or to stand up? How offender formidability affects third party moral outrage. *Evolutionary Psychology*, 9, 118-136.

Laham, S. M., Chopra, S., Lalljee, M., & Parkinson, B. (2010). Emotional and behavioral reactions to moral transgressions: Cross-cultural and individual variations in India and Britain. *International Journal of Psychology*, 45, 64-71.

Lerner, J. S., & Tiedens, L. Z. (2006). Portrait of the angry decision maker: How appraisal tendencies shape anger's influence on cognition. *Journal of Behavioral Decision Making*, 19, 115-137.

Lotz, S., Okimoto, T. G., Schlosser, T., & Fetchenhauer, D. (2011). Punitive versus compensatory reactions to injustice: Emotional antecedents to third-party interventions. *Journal of Experimental Social Psychology*, 47, 477-480.

Mullen, E., & Skitka, L. J. (2006). Exploring the psychological underpinnings of the moral mandate effect: Motivated reasoning, group differentiation, or anger? *Journal of Personality and Social Psychology*, 90, 629-643.

- Oliver, E., & Griffitt, W. (1976). Emotional arousal and 'objective' judgment. *Bulletin of the Psychonomic Society*, 8, 399-400.
- O'Mara, E. M., Jackson, L. E., Batson, C. D., Gaertner, L. (2011). Will the real moral outrage stand up? Distinguishing among emotional reactions to a moral violation. *European Journal of Social Psychology*, 41, 173-179.
- Rozin, P., Lowery, L., Imada, S., & Haidt, J. (1999). The CAD triad hypothesis: A mapping between three moral emotions (contempt, anger, disgust) and three moral codes (community, autonomy, divinity). *Journal of Personality and Social Psychology*, 76, 574–586.
- Russell, P. S., & Giner-Sorolla, R. (2011). Moral anger is more flexible than moral disgust. *Social Psychological and Personality Science*, 2, 360-364.
- Salerno, J. M., & Bottoms, B. L. (2009). Emotional evidence and jurors' judgments: The promise of neuroscience for informing psychology and law. *Behavioral Sciences and the Law: Special Issue: The Neuroscience of Decision Making and Law*, 27, 273-296.
- Salerno, J. M., & Bottoms, B. L. (2010). Unintended consequences of toying with jurors' emotions: The impact of disturbing emotional evidence on jurors' verdicts. *The Jury Expert*, 22, 16-25.
- Salerno, J. M., Najdowski, C. J., Bottoms, B. L., Harrington, E., Kemner, G., & Dave, R. (in press). Excusing murder? Conservative jurors' acceptance of the "gay panic" defense. *Psychology, Public Policy, & Law*.
- Salerno, J. M., Najdowski, C. J., Stevenson, M. C., Wiley, T. R. A., Bottoms, B. L., Vaca Jr., R., Pimentel, P. S. (2010). Psychological mechanisms underlying support for juvenile sex offender registry laws: Prototypes, moral outrage, and perceived threat. *Behavioral Sciences and the Law*, 28, 58-83.
- Schnall, S., Haidt, J., Clore, G. L., & Jordan, A. H. (2008). Disgust as embodied moral judgment. *Personality and Social Psychology Bulletin*, 34, 1096 – 1109.
- Skitka, L. J., Bauman, C. J., & Mullen, E. (2004). Political tolerance and coming to psychological closure following the September 11, 2001, terrorist attacks: An integrative approach. *Personality and Social Psychology Bulletin*, 30, 743-756.
- Skitka, L. J. (2002). Do the means always justify the ends, or do the ends sometimes justify the means? A value protection model of justice reasoning. *Personality and Social Psychology Bulletin*, 28, 588-597.
- Smith, C. A., & Ellsworth, P. C. (1985). Patterns of cognitive appraisal in emotion. *Journal of Personality and Social Psychology*, 48, 813-838.

Tetlock, P. E., Kristel, O. V., Elson, S. B., Green, M. C., & Lerner, J. S. (2000). The psychology of the unthinkable: Taboo trade-offs, forbidden base rates, and heretical counterfactuals. *Journal of Personality and Social Psychology*, 78, 853-870.

Tiedens, L. Z., & Linton, S. (2001). Judgment under emotional uncertainty: The effects of specific emotions on information processing. *Journal of Personality and Social Psychology*, 81, 973-988.

Whalen, D. H., & Blanchard, F. A. (1982). Effects of photographic evidence on mock juror judgment. *Journal of Applied Social Psychology*, 12, 30-41.

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## Jill Holmquist responds:

***Jill Holmquist is a trial consultant and President of Forensic Anthropology, Inc. ("FAI") where she works with Dr. Martin Q. Peterson, one of the pioneers in trial consulting. She is also an attorney licensed in California and Nebraska. FAI provides trial consulting services nationally for plaintiff and defense counsel in cases that range from personal injury suits to complex business transactions and patent infringement suits.***

Authors Liana Peter-Hagene, Alexander C. Jay and Jessica M. Salerno present their important findings that the emotions of anger and disgust combine to affect the degree of moral outrage people feel regarding case facts, as well as the degree of certainty they feel regarding their verdicts. They also discuss the more consistent role of disgust in affecting moral outrage and verdict certainty, at least in a murder case involving gruesome photographs. Their research raises both theoretical and practical questions.

In theory, legal decision-making should be free of emotion. It's a tradition passed down from the time of Plato and Aristotle, who saw reason as superior to emotion.<sup>[1]</sup> From this intellectual history, we developed jury instructions that require jurors to only consider the evidence and warn against basing decisions on the basis of passion, prejudice or sympathy.<sup>[2]</sup>

While prejudice should play no role<sup>[3]</sup>, is it reasonable to expect jurors to decide cases solely on the basis of evidence without emotion, particularly when emotion seems to be fundamental to morality?

Aristotle taught that pathos, *i.e.*, emotion, was a crucial component of persuasive speech.<sup>[4]</sup> In spite of admonitions to lawyers that they ought not appeal to emotion and the admonition to jurors to avoid passion, prejudice or sympathy, lawyers have long used emotional pitches to persuade jurors.

Even courts have recognized that "relevant evidence is inherently prejudicial."<sup>[5]</sup> This recognition implicitly underlies the qualification of "unfair" prejudice in evidence rules dealing with the probative value of evidence being outweighed by (unfair) prejudice, as in Federal Rules of Evidence, Rule 403, which the authors cite.<sup>[6]</sup> We recognize that evidence has both logical and emotional power, so we ask judges to temper the effects of that evidence when the prejudicial value outweighs its probative value. However, as the authors point out, the comment to Rule 403 indicates it is the emotional component that judges are concerned with.

The authors seem to agree that this concern is justified. They indicate their results can help "inform judges' decisions about whether emotionally disturbing evidence should be admissible in court." Certainly the fact that disgust reactions to gruesome photographs help solidify certainty about verdicts or that color crime scene photographs have the effect of making juror decisions more punitive causes some concern. But does it mean we should only use black and white photographs or we should bar especially gory photographs from the jury? The balancing test of Rule 403 gives judges discretion but rarely do they make these decisions affirmatively

when the photographs have some probative value.

The other concern they raise is the more general one that “emotions might be a detriment to jurors’ ability to carefully process information and to make thoughtful, reasoned judgments.” Jonathan Haidt’s research supports that caution. According to his research, “moral judgments are initially the product of non-conscious automatic intuitive processing” and that “conscious reasoning then takes place and is typically occupied by the task of justifying whatever intuitions that happen to be presented to the consciousness in a biased, non-truth seeking way.”<sup>[7]</sup>

But, if this is how human reasoning actually works, I think it begs the larger question of whether we ought to acknowledge the actual and perhaps legitimate role emotion plays in juror decision-making.

From a practical standpoint, the authors suggest tactics that attorneys might want to use, regardless of whether emotions “should” play a role in decision-making.

Obviously, a prosecutor will generally want to use graphic photographs to provoke disgust and anger in a murder case. A similar strategy might work for a personal injury attorney whose client has suffered catastrophic injuries for which there is graphic visual evidence. Conversely, defense attorneys in low impact car collisions want jurors to see the relative lack of damage to vehicles in order to cast doubt on the extent of a plaintiff’s alleged injuries.

Attorneys in criminal and civil cases involving gruesome injuries may want to select jurors who have “heightened disgust sensitivity”, although as the authors note, disgust reactions might backfire under certain circumstances.

It’s important to note that the authors’ results differed from the scenario testing to the mock trial testing. In the first two scenarios, anger and disgust were interdependent. In the mock trial, disgust operated independently of anger. Perhaps it had to do with photographic evidence, which was apparently not used in the scenarios. Or maybe the distinction between the results relates to the topics being discussed: rape and Westboro Baptist protesters in the scenarios versus murder in the mock trial. Murder would likely be considered a much greater moral transgression than would carrying signs that demean the deaths of soldiers.

Clearly, attorneys want to elicit moral outrage in jurors, regardless of what type of case is involved or what side they are on. But it raises a chicken and egg problem: which comes first, the violation of a moral imperative or the feelings of disgust (or disgust and anger), which then trigger a moral outrage?

Can attorneys create moral outrage with strategic moral framing of issues or gory photographs? Or must there be some fundamental violation of morality in order for that framing or photographic evidence to be most effective? And what other moral emotions motivate jurors to render particular verdicts or award damages? I hope the authors will pursue these questions.

## Notes

[1] Jonathan Haidt (2003) “The moral emotions”, in R. J. Davidson, K. R. Scherer, & H. H. Goldsmith (Eds.), *Handbook of affective sciences*, 852-870.

[2] For example, Hawai'i Civil Jury Instructions, Instruction 2.5, states: “It is your duty and obligation as jurors to decide this case on the evidence presented in court and upon the law given to you. You must perform your duty and obligation without favoritism, passion, or sympathy for any party in the case, and without prejudice against any of the parties.” California Criminal Jury Instructions § 200 provide the following form: “Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes, but is not limited to, bias for or against the witnesses, attorneys, defendant[s] or alleged victim[s], based on disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, age, [or] socioeconomic status (./,) [or \_\_\_\_\_ *insert any other impermissible basis for bias as appropriate*].” In contrast, in Nebraska, one of the preliminary instructions to the jury is simply “Do not allow sympathy or prejudice to influence you.” NJI2d Civ. 1.00.

[3] I refer here to the pernicious type of prejudice, such as racial prejudice.

[4] Aristotle, *Rhetoric*, Book 1, Part 1.

[5] See, e.g., *U.S. v. McRae* (5th Cir. 1979) 593 F.2d 700, 707 and *U.S. v. Merrill* (11th Cir. 2008) 513 F.3d 1293, 1301.

[6] Fed.R.Evid., Rule 403 states in full: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Most, if not all, states have similar rules.

[7] Jonathan Haidt, *Bias and Reasoning: Haidt's Theory of Moral Judgment* (retrieved 4/22/14 from [http://www.smatthewliao.com/wp-content/uploads/2010/10/liao\\_bias\\_and\\_reasoning.pdf](http://www.smatthewliao.com/wp-content/uploads/2010/10/liao_bias_and_reasoning.pdf)) I note that the intuitive processing of emotions is not limited to disgust, which the authors refer to as a “gut” reaction. I think anger is equally a “gut” reaction.

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### Jason Barnes responds:

***Jason Barnes, a.k.a. “The Graphics Guy” is a graphic designer and trial consultant based in Dallas, Texas. He has been practicing visual advocacy since 1990 and has worked in venues across the country. He specializes in intellectual property and complex business litigation cases. You can read more about Mr. Barnes and how he can help you tell better stories in the courtroom at his webpage and on his blog, [www.igetlit.com](http://www.igetlit.com).***

Recognizing that feelings of disgust can trigger prejudicial emotional responses in jurors is only the first step. We must then determine whether we will harness this powerful effect or resist it.

Our position on that question, perhaps not surprisingly, is largely driven by which side of the courtroom in which we are seated. Prosecutors or plaintiffs will likely wish to harness the emotional response that disgust provokes. Defendants, on the other hand, will likely wish to oppose the introduction of evidence that holds such power over the human mind.

I prefer to take a practical view and present several images for consideration. We can first assess the original image for its visceral effect. Then, we can assess the same image as processed in ways that attempt to moderate this influence.

Example 1: The authors note that images containing gore as shown in the Image 1 below have the power to disgust and can lead to emotional bias in what should be objective deliberations. Suppose that the prosecutor in a criminal trial wished to use the image to establish the position of the body (head towards the open cabinet) or presence of the WD-40 spray can. This photo would certainly do that, but the Defendant could object and propose that the second version, Image 2, rendered in black and white be used instead.



In Image 2, the body position or spray can is still clearly visible to the viewer but the lack of gore substantially changes the overall impression of the image. One may argue that the evidentiary value is preserved but the prejudicial elements are removed or minimized.





Example 2: Suppose in another case the following image of a murder victim, Image 3, was shown to the jury. But maybe the prosecutor wanted to show it to each eye-witness for the stated purpose of identifying the victim. The defense could object and suggest that the prosecutor use Image 4 in its place.



In Image 4, the cropped, black and white image of the victim's face is easily identifiable without inclusion of the prejudicial blood and without repeating the image of the victim splayed across the floor.



Example 3: Consider the following video depicted in Image 5 (here in the form of an animated gif but the principle will be the same for any video) in which we see a scene taken from the popular HBO program, *House of Cards*. We see, repeatedly, security camera footage of a young woman as she falls in front of and is run over by a subway train. Even though it is in black and white, and maybe because of the sterility of that mode, it is particularly ghastly. The image of the actual impact of the train upon the body is incredibly powerful. The repetitive looping only magnifies the effect.



However, if we take the motion out of the equation and present the still frame of Image 6, the moment just before impact, the prejudicial, disgust-inducing effect is controlled to a remarkable degree.



Though image processing can be a powerful tool, like any tool, it can be misused. I would never recommend the complete removal of blood from an image. To remove all the blood would be misleading and could result in a loss of credibility for the attorney and/or client responsible. However, judicious, thoughtful and deliberate use of these techniques can help attorneys meet the challenges of imagery that holds the power to disgust.