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# MANAGING FEAR-BASED DEROGATION IN MURDER TRIALS

*John Rafael Perez*<sup>†</sup>

## INTRODUCTION

Federal Rule of Evidence 403 (“Rule 403”) governs all evidentiary decisions, and yet its foundational nature often leaves it unsatisfactorily questioned and criticized. Rule 403 states, in relevant part, that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice.”<sup>1</sup> This relatively simple statement speaks volumes about the deeply held values of the American adversarial system. Indeed, the need for undue prejudice to *substantially outweigh* probative value reveals a preference for admitting evidence even if that evidence may pose an unfair threat to a criminal defendant. This tendency is defensible because over-exclusion of evidence could certainly prevent parties from telling their full stories in court. For our system to deliver justice, however, we must properly decide when the threat of prejudice is too great such that admissibility must yield to greater values and ideals.

According to Yale Law School Professor Stephen Carter, the idea of unfair prejudice is incredibly unclear and understudied.<sup>2</sup> Despite the concept’s proliferation in judicial opinions, briefs, and academic articles, very few lawyers and scholars have sought to comprehensively define the term and clearly delineate its boundaries. For this reason, it is incredibly important to turn to the field of psychology, which closely studies human attitudes, behaviors, and cognitions under controlled conditions, for insights into the nature of “prejudice.”<sup>3</sup> Indeed, psychological studies have informed

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1. FED. R. EVID. 403.

2. Stephen L. Carter, William Nelson Cromwell Professor of Law, Yale Law School, Evidence Class on Rule 403 (Jan. 2015). Indeed, this deficiency taps into a broader problem—that legal systems are seldom structured to account for predictable human frailties, even when there are dire consequences to allowing such frailties to contaminate legal decision-making. *See, e.g.*, J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137, 138 (1990) (“The Supreme Court, however, has not welcomed empirical research on jury behavior when deciding evidence and trial procedure cases. Instead, the Justices seem to react to it with distrust and suspicion. They continue to approve legal rules based on intuitive assumptions about human behavior that research by psychologists has shown to be erroneous.”).

3. *See, e.g.*, June Louin Tapp & Felice J. Levine, *Epilogue for Psychology and the Law*, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 364 (June Louin Tapp & Felice J. Levine eds., 1977).

our understanding of human behavior for decades but have surprisingly been excluded from mainstream legal discourse.<sup>4</sup>

This Article focuses on an important subset of psychological research to answer a controversial question: To what extent should we admit gruesome visual evidence, such as photographs of corpses, in murder trials? There is good reason to focus on this question. In murder trials, the very life and liberty of the defendants standing trial are at stake. Wrongful convictions born out of impermissible influences on juror decision-making deprive defendants of these constitutional guarantees while also eroding the legitimacy of the American justice system.

This Article proceeds in five parts. In Part I, I discuss the prevailing Rule 403 approach to considering gruesome visual evidence in both federal and state courts. Because the American judicial system heavily favors admitting evidence over excluding it for prejudice, gruesome visual evidence has become, for the most part, a mainstay in murder trials. Part II critically analyzes narrative integrity, the only viable rationale for the probative value of gruesome visual evidence in murder trials. By picking apart the Supreme Court's arguments in *Old Chief v. United States*, I illustrate that this rationale is unpersuasive. Furthermore, I argue that gruesome visual evidence's probative value, at least in the context of murder trials, is relatively low. In Part III, I discuss how the countervailing prejudice to the defendant caused by gruesome visual evidence far outweighs the evidence's nominal probative value. By focusing on the robust psychological literature on Terror Management Theory, I argue that the effects of gruesome visual evidence are the very definition of unfairly prejudicial. Part IV then outlines two potential solutions that can be accomplished either by the amendment of relevant evidentiary codes or judicial reinterpretation of admissibility standards: (1) categorical exclusions of gruesome visual evidence and (2) shifting to a presumption of prejudice in the Rule 403 balancing test. I justify these solutions' viability with reference to both current practice in state and federal courts as well as more forward-looking normative arguments about desirable law and policy. Finally, Part V responds to a host of counterarguments to this proposal. In the course of addressing these counterarguments, I discuss the fallibility of human actors, the inadequacy of existing ad hoc solutions, the importance of rule modifications in instituting broad policy changes, and the extent to which this proposal can be harmonized with the prosecutor's role and the adversarial system more broadly. I conclude on a hopeful note—that our growing knowledge of human cognition situates us well to align our legal rules with our greater ideals.

## I. THE PROBATIVE PRESUMPTION AND ADVERSARIAL STORYTELLING

The very language of Rule 403 expresses a preference for admissibility over exclusion. Not only does the rule require that prejudice *substantially* outweigh probative value to justify exclusion, but it even makes it discretionary to exclude *substantially* prejudicial evidence at all.<sup>5</sup> Because all fifty states have adopted the language

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4. See, e.g., Tanford, *supra* note 2, at 138. Furthermore, psychology is only growing in its importance, given its relevance to many of our most controversial and divisive contemporary legal and policy issues. See, e.g., Roseanna Sommers, Note, *Will Putting Cameras on Police Reduce Polarization?*, 125 YALE L.J. 1304 (2016).

5. FED. R. EVID. 403 (explaining that “[t]he court *may* exclude relevant evidence,” arguably making the

of the Federal Rules of Evidence,<sup>6</sup> it is no surprise that courts across jurisdictions share this same inclination, particularly when faced with requests to introduce gruesome visual photographs into evidence. To name just one example out of hundreds,<sup>7</sup> in *State v. Hollis*,<sup>8</sup> the Kansas Supreme Court determined that photographs of shooting victims and snapshots of naked corpses stabbed multiple times were admissible.<sup>9</sup> Despite the grisly nature of these photographs, the court articulated the principle that such photographs were “not inadmissible because they [were] shocking or gruesome [as long as] they [were] relevant to material matters at issue.”<sup>10</sup>

### A. *Stretching Admissibility Too Far*

The most troubling aspect of the tendency to admit gruesome visual evidence is how far courts have gone in relaxing the standard, almost eliminating the practical force of Rule 403 altogether, at least for photographs of corpses. To name just one example, in *In re Air Crash Disaster near New Orleans*, the Fifth Circuit found no error in the admission of photographs of victims charred by fire in a plane crash.<sup>11</sup>

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exclusion of substantially prejudicial evidence completely optional (emphasis added)).

6. See MO. CONST. art. I, § 18(c); ALA. R. EVID. 403; ALASKA R. EVID. 403; ARIZ. R. EVID. 403; ARK. R. EVID. 403; CAL. EVID. CODE § 352; COLO. R. EVID. 403; CONN. CODE EVID. § 4034-3; DEL. R. EVID. 403; FLA. STAT. § 90.403; GA. CODE ANN. § 24-4-403; HAW. REV. STAT. § 626-403; IDAHO R. EVID. 403; ILL. R. EVID. 403; IND. R. EVID. 403; IOWA R. EVID. 5.403; KAN. STAT. ANN. § 60-445; KY. R. EVID. 403; LA. CODE EVID. ANN. art. 403; ME. R. EVID. 403; MD. R. EVID. 5-403; MASS. GUIDE EVID. art. IV, § 403; MICH. R. EVID. 403; MINN. R. EVID. 403; MISS. R. EVID. 403; MONT. CODE ANN. § 26-10-403; NEB. REV. STAT. § 27-403; NEV. REV. STAT. § 48.035; N.H. R. EVID. 403; N.J. R. EVID. 403; N.M. R. ANN. § 11-403; N.C. GEN. STAT. § 8C-1-403; N.D. R. EVID. 403; OHIO R. EVID. 403; OKLA. STAT. tit. 12, § 2403; OR. REV. STAT. § 40.160; PA. R. EVID. 403; R.I. R. EVID. 403; S.C. R. EVID. 403; S.D. CODIFIED LAWS § 19-19-403; TENN. R. EVID. 403; TEX. R. EVID. 403; UTAH R. EVID. 403; VT. R. EVID. 403; VA. R. EVID. 2:403; WASH. R. EVID. 403; W. VA. R. EVID. 403; WIS. STAT. § 904.03; WYO. R. EVID. 403; *Johnson v. United States*, 683 A.2d 1087, 1090 (D.C. 1996) (“We will follow the policy set forth in Federal Rule of Evidence 403 . . . .”); *People v. Scarola*, 525 N.E.2d 728, 732 (N.Y. 1988) (“[R]elevant evidence . . . may still be excluded . . . if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side . . . .”); see also GUAM R. EVID. 403; FORT BELKNAP TRIBAL CODE tit. VI, § 4; *Commonwealth of the Northern Mariana Islands v. Saimon*, 3 N. Mar. I. 365, 375-376 (1992); UNIF. R. EVID. 403.

7. See, e.g., *United States v. Brady*, 595 F.2d 359, 361-62 (6th Cir. 1979); *Licklitter v. Chandler*, No. 5:08-CV-313-JMH/REW, 2011 U.S. Dist. LEXIS 117024, at \*51 (E.D. Ky. Sept. 14, 2011); *People v. Degorski*, 998 N.E.2d 637, 657 (Ill. App. Ct. 2013); *People v. Mills*, 537 N.W.2d 909, 917-19 (Mich. 1995); *Elliot v. Kesler*, 799 S.W.2d 97, 104 (Mo. Ct. App. 1990); *State v. Fisher*, No. 65562, 1994 Ohio App. LEXIS 2601, at \*3-\*8 (June 16, 1994); *Henderson v. State*, No. 01-05-00499-CR, 2006 Tex. App. LEXIS 5644, at \*10-\*11 (June 29, 2006); 29A AM. JUR. 2D *Evidence* § 979 (2014); 1 ART OF ADVOCACY - DEMONSTRATIVE EVIDENCE § 10.06(4)(b) (2014) (explaining that exclusion of evidence for its gruesome nature is “unlikely” because “the rule requiring the exclusion of a gruesome injury photograph, if its prejudicial effect outweighs its probative value, is vague and conclusory”); 1 FEDERAL RULES OF EVIDENCE MANUAL § 403.03 (2014) (compiling cases wherein the probative value of gruesome visual evidence outweighed the potential for prejudice); M.C. Dransfield, Annotation, *Admissibility of Photograph of Corpse in Prosecution for Homicide or Civil Action for Causing Death*, 73 A.L.R.2d 769 (2014) (compiling cases from all federal and state courts wherein gruesome photographs were admitted into evidence); Danny R. Veilleux, Annotation, *Admissibility in Homicide Prosecution of Allegedly Gruesome or Inflammatory Visual Recording of Crime Scene*, 37 A.L.R.5th 515 (2014) (compiling cases from all federal and state courts wherein gruesome visual recordings were admitted). For a general account of the evolution of gruesome visual evidence jurisprudence and the presumption of admissibility, see MARIANA VALVERDE, LAW AND ORDER: IMAGES, MEANINGS, MYTHS 153-62 (2006).

8. 731 P.2d 260 (Kan. 1987).

9. *Id.* at 270.

10. *Id.*

11. 767 F.2d 1151 (5th Cir. 1985).

The Fifth Circuit explained that even when “the testimony of the witnesses describing the discovery and condition of the bodies was not contradicted, and therefore there was *little need* to introduce the photographs,” the “photographs were not so gruesome that their prejudicial potential absolutely required their exclusion.”<sup>12</sup> Many state appellate courts have taken a similarly liberal approach on review.<sup>13</sup> For example, according to the Maryland Court of Appeals, “[a]lthough [gruesome visual photographs] may be more graphic than other available evidence, like autopsy reports, [courts] have seldom found an abuse of a trial judge’s discretion in admitting them in evidence.”<sup>14</sup>

Putting aside the policy debate around the normative desirability of liberal admissibility standards, there is the legal issue of whether courts are properly interpreting Rule 403’s standard for probative evidence or confusing it with the similar but distinct Rule 401 relevance standard.<sup>15</sup> At this point, it is important to distinguish the two. Federal Rule of Evidence 401 defines relevant evidence as having “any tendency to make a fact more or less probable than it would be without the evidence” when “the fact is of consequence in determining the action.”<sup>16</sup> As is apparent from the general language of the rule, the relevance threshold is very low. The determination of probative value, on the other hand, is more discerning. According to the United States Supreme Court, the analysis of probative value should look beyond the individual piece of evidence in question and examine all available substitutes.<sup>17</sup> *Relevant* evidence can still be excluded if its *probative* value, in light of the entire evidentiary record and all existing alternatives, is outweighed by the risk of unfair prejudice.

In determining what the probative value, as opposed to mere relevance, of gruesome visual evidence is, it helps to examine case law from different jurisdictions. Courts have generally justified the probative value of gruesome visual evidence through a number of familiar rationales. In *State v. Gerlaugh*,<sup>18</sup> for example, the Arizona Supreme Court found no error in the admission of photographs of a murder victim’s body into evidence. The court explained that “[p]hotographs can be admitted to aid in identifying the victim, to illustrate how the crime was committed, to aid the jury in understanding testimony, and to show the location of mortal wounds.”<sup>19</sup> In addition to these stated reasons, courts have also justified gruesome visual evidence as a way to refute an argument of self-defense<sup>20</sup> or show the victim’s body positioning.<sup>21</sup>

The issue with many of these rationales, however, is that they still seem to fall

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12. *Id.* at 1154 (emphasis added).

13. *See, e.g.,* *Hunt v. State*, 540 A.2d 1125, 1130 (Md. 1988).

14. *Id.*

15. Indeed, judicial opinions arguably reveal a conflation of these two standards. *See, e.g.,* *State v. Hollis*, 731 P.2d 260, 270 (Kan. 1987).

16. FED. R. EVID. 401.

17. *Old Chief v. United States*, 519 U.S. 172, 182-83 (1997).

18. 654 P.2d 800 (Ariz. 1982).

19. *Id.* at 805.

20. *See, e.g.,* *People v. Becker*, 2 N.W.2d 503 (Mich. 1942); *Waters v. Commonwealth*, 124 S.W.2d 97 (Ky. 1939); *Commonwealth v. Peronace*, 195 A. 57 (Pa. 1937).

21. *See, e.g.,* *Robinson v. United States*, 63 F.2d 147 (D.C. 1933); *People v. Jersky*, 36 N.E.2d 347 (Ill. 1941); *People v. Smith*, 104 P.2d 510 (Cal. 1940); *State v. Lantzer*, 99 P.2d 73 (Wyo. 1940); *State v. Hamilton*, 102 S.W.2d 642 (Mo. 1937).

back on the relevance standard when they should be using the probative standard. Indeed, courts acknowledge that while gruesome visual evidence may be relevant to showing the location of a wound, for example, it is only one of numerous ways to establish this fact in the record. In Pennsylvania, to determine a gruesome photograph's probative value, the court must inquire into its "essential evidentiary value."<sup>22</sup> Similarly, in Georgia, admission of a post-autopsy photograph "requires that the photograph be . . . necessary to establish a material fact . . . that could only become apparent because of the autopsy."<sup>23</sup> Many other jurisdictions have articulated similar understandings of probative value that emphasize the idea of necessity rather than mere relevance.<sup>24</sup>

Considering this emphasis on necessity, the aforementioned rationales for admitting gruesome visual evidence simply do not carry the day. Indeed, more often than not, the stated purposes for introducing gruesome visual evidence can be fulfilled through other means such as witness or expert testimony. There is, however, an important purpose for gruesome visual evidence that cannot simply be substituted through other means: *narrative integrity*. The United States Supreme Court discussed this rationale, in depth, for the first time in the landmark case *Old Chief v. United States*.<sup>25</sup>

### B. Narrative Integrity and the Story of *Old Chief*

In *Old Chief*, a defendant was accused of violating a statute that prohibited the possession of a firearm by anyone with a prior felony conviction.<sup>26</sup> He offered to stipulate to his prior conviction, and argued that his offer rendered evidence of the name and nature of his prior offense—assault causing serious bodily injury—inadmissible because its probative value was substantially outweighed by its prejudicial effect.<sup>27</sup> The Supreme Court agreed with the defendant,<sup>28</sup> but not without first laying out the value of narrative integrity. Specifically, Justice Souter wrote that "the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary

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22. *Commonwealth v. Liddick*, 370 A.2d 729, 730 (Pa. 1977) (emphasis added).

23. *McCullough v. State*, 341 S.E.2d 706, 706 (Ga. 1986) (emphasis added) (internal quotation marks omitted).

24. See, e.g., *State v. Harper*, No. E2014-01077-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 885, at \*50 (Nov. 3, 2015) ("As a general rule, where medical testimony adequately describes the degree or extent of an injury, gruesome and graphic photographs should not be admitted. Photographic evidence may be excluded when it does not add anything to the testimonial description of the injuries. Autopsy photographs often fall into this category. . . . If the defendant offers to stipulate to the facts shown in the photograph or the defendant does not dispute the testimony that the photographs illustrate, the more likely the prejudicial effect will substantially outweigh the photographs' probative value" (citations omitted) (internal quotation marks omitted)); see also *Berry v. State*, 718 S.W.2d 447, 451-452 (Ark. 1986) (citing cases with similar reasoning); *State v. Collins*, 727 S.E.2d 751, 758 (S.C. Ct. App. 2012) ("[T]he extent to which an autopsy photograph corroborates other evidence or testimony increases its probative value. However, the probative value from a photograph's tendency to corroborate will vary depending on the facts of an individual case."); discussion *infra* Part IV.B (analyzing, in depth, Utah's well-developed jurisprudence on essential evidentiary value).

25. 519 U.S. 172 (1997).

26. *Id.* at 174.

27. *Id.* at 175-76.

28. Some courts have interpreted this ruling as applying only in "narrow circumstances." See, e.g., *Daniels v. United States*, 738 A.2d 240, 252 (D.C. 1999).

force of the case as the Government chooses to present it.”<sup>29</sup>

The Supreme Court laid out a dual purpose for the value of narrative integrity. First, the Court claimed that the “persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them.”<sup>30</sup> Specifically, “making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness.”<sup>31</sup> Second, and according to the Court, more importantly, “there lies the need for evidence in all its particularity to satisfy the jurors’ expectations about what proper proof should be.”<sup>32</sup> “If [jurors’] expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party.”<sup>33</sup> “If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, ‘never mind what’s behind the door,’ and jurors may well wonder what they are being kept from knowing.”<sup>34</sup>

The following two sections will work in tandem to address the viability of this theory of narrative integrity based on both prongs of the Rule 403 analysis. Part II will address the probative prong by critically analyzing the Supreme Court’s assertions about concrete evidence and jury gap-filling capacities. In Part II, I hope to demonstrate that the probative value of gruesome visual evidence, examined through the very rationales laid out by the Supreme Court in *Old Chief*, is relatively low. Part III will then address the prejudicial prong by discussing contemporary psychological literature on the damaging cognitive impact of exposure to gruesome visual evidence. Through this discussion, I hope to illustrate, through an incredibly robust empirical literature, that the prejudicial effect of such evidence is far too great a burden to permit.

The subsequent analysis is specific to the narrow situation wherein one side attempts to introduce gruesome visual evidence in murder trials when other alternatives are readily available. I do not seek to attack narrative integrity wholesale, and I acknowledge that narrative integrity may remain a crucial aspect of our adversarial system in a number of cases. In the following sections, however, I argue that the value of narrative integrity is minimal in this particular evidentiary circumstance and is far outweighed by the unfair prejudice to the criminal defendant (and, perhaps, the threat to our justice system’s legitimacy).

## II. HOLES IN THE NARRATIVE AND REEVALUATING THE “PROBATIVE”

### A. *Unfounded Fears of Jury Backlash*

It is unclear how the Court reached its conclusion that jurors “may penalize the

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29. *Old Chief*, 519 U.S. at 186-87.

30. *Id.* at 187.

31. *Id.*

32. *Id.* at 188.

33. *Id.* (alteration in original) (quoting Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CALIF. L. REV. 1011, 1019 (1978)).

34. *Id.* at 189.

party who disappoints them by drawing a negative inference against that party.”<sup>35</sup> Contemporary psychological literature on coherence-based reasoning has demonstrated that human beings have impeccable cognitive gap-filling capacities.<sup>36</sup> If the prosecutor omits a photograph of the victim’s corpse, but is able to construct a coherent narrative of guilt in all other respects, jurors should have no problem drawing inferences of that defendant’s guilt based on the entire evidentiary record.<sup>37</sup> Psychological research suggests that this is a far more likely outcome than jurors “penalizing” one party.

The well-documented confirmation bias phenomenon also casts doubt on the Court’s concerns. The gist of this human tendency is that even the smallest types of suggestions or persuasions as to a specific theory of a case may push individuals to search for, select, and interpret information in a manner that confirms rather than refutes the theory.<sup>38</sup> Multiple studies have demonstrated this effect in the criminal justice setting.<sup>39</sup> For example, Steve Charman and colleagues found that participants reported higher similarity between a suspect and a facial composite when they were simply told that the particular suspect was guilty.<sup>40</sup> Additionally, Nick Lange, and colleagues found that participants who were verbally led to believe that a speaker was suspected of a crime perceived more incriminating statements in recordings of that speaker’s speech.<sup>41</sup>

It is staggering how little it takes to influence jurors’ attitudes, behaviors, and cognitions. In a provocative set of studies at New York University, John Bargh illustrated how participants primed with words related to rudeness interrupted the experimenter with more speed and frequency than those primed with words related to politeness.<sup>42</sup> In a second study, he demonstrated how participants primed with words related to old age actually walked more slowly down the hall.<sup>43</sup> Finally, and frighteningly, he also demonstrated that participants primed with African-American faces exhibited more hostility towards an experimenter’s request.<sup>44</sup> The experimenters found such effects despite the faces being subliminally flashed for only thirteen to

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35. *Id.* at 188.

36. *See, e.g.*, Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision-Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) [hereinafter Pennington & Hastie, *The Story Model*]; Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. OF PERSONALITY & SOC. PSYCHOL. 242 (1986).

37. *See, e.g.*, Pennington & Hastie, *The Story Model*, *supra* note 36, at 523-29.

38. *See, e.g.*, Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2098 (1979); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998) (reviewing evidence of the confirmation bias in a variety of contexts).

39. For an extended discussion of this bias in the forensic investigation setting, see John Rafael Peña Perez, Comment, *Confronting the Forensic Confirmation Bias*, 33 YALE L. & POL’Y REV. 457 (2015).

40. Steve D. Charman et al., *Exploring the Diagnostic Utility of Facial Composites: Beliefs of Guilt Can Bias Perceived Similarity Between Composite and Suspect*, 15 J. EXPERIMENTAL PSYCHOL.: APPLIED 76, 76 (2009).

41. Nick D. Lange et al., *Contextual Biases in the Interpretation of Auditory Evidence*, 35 LAW & HUM. BEHAV. 178, 178 (2011).

42. John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 231, 234-36 (1996).

43. *Id.* at 237-38.

44. *Id.* at 239.



twenty-six milliseconds.<sup>45</sup> If even unconscious primes can be tactically employed to influence jurors, it seems unlikely that excluding an arguably duplicative piece of evidence would substantially burden the party attempting to introduce it. Instead, if something is missing in the narrative or if pieces are presented out of order, jurors are likely to fill in the gaps based on the strength of the available evidence and the plausibility of each side's constructed narratives. If that is not enough to convince detractors, studies even go as far as to suggest that more subtle types of suggestion, rather than overt attempts at persuasion, can actually be more effective in pushing a jury to decide issues in one's favor.<sup>46</sup> This finding flies in the face of the Court's fear that disallowing gruesome visual evidence, an overt tool of persuasion, would put one party at a categorical disadvantage.

One may argue that, because the prosecution has the higher burden of proof in criminal cases, they should not be deprived of a powerful tool of persuasion. In addressing this argument, it is worth considering that jurors bring their own expectations and preconceived notions with them into trials, and these schemas can be incredibly resistant to change in a way that benefits the prosecution.<sup>47</sup> The manner in which the legal system is portrayed in popular media, in particular, may have an impact on jurors' susceptibility to persuasions of guilt. For example, there are countless movies and television series that feed into society's expectations that the criminal justice system is always able to correctly determine the identity of an accused murderer.<sup>48</sup> Of course we know that, in reality, this type of closure is not always guaranteed, given the general obstacles to complete information in both the investigation and trial phases. Still, if jurors anticipate, based on their media-induced expectations, that the perpetrator of a murder will always be identified and punished, they may come in with a tendency to deliver verdicts that fit within the narrative of guilt to which they have become accustomed.<sup>49</sup> In other words, a finding of "not guilty" becomes much less psychologically satisfying because it doesn't comport with jurors' ideas of how the justice system is supposed to function. The danger of this preference for guilty verdicts is only heightened by the psychological literature showing that "blaming is often *intuitive* and *automatic*, driven by a natural impulsive desire to express and defend social values and expectations."<sup>50</sup> Perhaps instead of framing the discourse as one that highlights a miniscule loss to the prosecutor, we should

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45. *Id.*

46. See, e.g., Jack W. Brehm & John Sensenig, *Social Influence as a Function of Attempted and Implied Usurpation of Choice*, 4 J. PERSONALITY & SOC. PSYCHOL. 703, 703 (1966).

47. Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857, 868-69 (1991) [hereinafter Smith, *Prototypes*]; see also Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 LAW & HUM. BEHAV. 507 (1993); Vicki L. Smith & Christina A. Studebaker, *What Do You Expect?: The Influence of People's Prior Knowledge of Crime Categories*, 20 LAW & HUM. BEHAV. 517 (1996).

48. See e.g., LEGALLY BLONDE (Type A Films 2001); *Suits* (Universal Cable Productions); *The Good Wife* (CBS Productions). Even when movies or television episodes do not depict the perpetrator being found guilty at trial, they often, at the very least, reveal the true identity of the perpetrator to the viewers, providing them with some sense of closure. See, e.g., *How to Get Away with Murder* (ABC Studios).

49. See, e.g., Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 729 (2010) ("'Cultural cognition' refers to the tendency of individuals to conform their perceptions of legally consequential facts to their defining group commitments.").

50. Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 257 (2012) (emphasis added).

acknowledge how the prosecutor already starts out with a significant advantage<sup>51</sup> because of juror schemas that favor closure, attribution, and blame.

It is also worth noting how selectively we tend to place our mistrust of the jury's innate abilities. To mistrust a jury with the task of making inferences despite gaps in their knowledge while trusting them to separate any emotions they experience as a result of exposure to gruesome visual evidence from the independent weight of the evidence seems inherently contradictory. We entrust juries to make decisions with incomplete information *all the time*, in almost every single trial. On the other hand, contemporary court practices such as judicial admonitions, voir dire, banning propensity evidence, and excluding hearsay all seem to point to an acknowledgement of the imperfection of human perception and cognition, and the unavoidable emotional effects some types of evidence may have on a lay juror. At the very least, we should turn to the psychological literature in making difficult policy decisions based on jurors' *actual* capabilities and vulnerabilities.

### *B. Reconsidering the Value of Tangible Things*

The Court's other rationale that "making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness"<sup>52</sup> is arguably inapplicable in the context of murder trials. First, with regards to the establishment of a crime's formal definition, the crucial factor for murder is *intent*. Pictures of corpses do very little to satisfy the formal definition of the offense, which has to do with the mental state of the offender and not the status of the victim. Indeed, the fact that someone died in a murder trial is a given. Jurors don't need, and are not likely to ask for, a photograph of the dead body to confirm that. In the few instances wherein the picture of the corpse may give insights into the mental state of an offender, such as when wounds evince a deliberate use of force or premeditation, such information can easily be imparted to the jury in other ways, such as testimony, diagrams, charts, figures, or cropped or altered photographs.

The argument about a colorful narrative with rich descriptions is well taken. In an adversarial system, each side must be able to present a persuasive story on behalf of their client. Still, we must be wary of defining our system by its willingness to promote adversarial storytelling rather than the extent to which it safeguards the values of due process. A prosecutor's role as an advocate for the government is important, but it must be harmonized with every lawyer's ethical duty to uphold the primary purposes of our system—fairness and justice. First, it is important to reiterate that most anything presented through a picture of a corpse can be presented through other means. No information even has to be lost by gruesome visual evidence's ex-

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51. And this does not even touch on the significant resource disparities between prosecutors and defense lawyers. See, e.g., C. Ronald Huff, *Wrongful Convictions in the United States*, in *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* 64 (C. Ronald Huff & Martin Killias eds., 2008) ("The adversarial system relies on the skill and resources of the prosecution and the defense, and nearly always in criminal cases, the prosecution enjoys considerably more resources than does the defense. These resource advantages include human resources (investigators, staff, etc.) and budgetary resources.").

52. *Old Chief v. United States*, 519 U.S. 172, 187 (1997).

clusion, and so perhaps the concerns about descriptive richness are overblown. Second, when the value of a colorful narrative is stacked up against the value of our system's integrity, it will be difficult to find a lawyer who values the former over the latter. The following section of this Article engages in this complex value-based analysis by discussing, in-depth, why our system's integrity is endangered by the admission of gruesome visual evidence and, consequently, why a relatively minor constraint on descriptive richness is entirely justified. Moreover, Part V will respond to counterarguments about whether limiting the extent to which we admit gruesome visual evidence endangers either the prosecutor's role or the adversarial system more generally.

### III. STARING DEATH IN THE FACE AND EXPOSING UNFAIR PREJUDICE

Psychologists Jeff Greenberg, Tom Pyszczynski, and Sheldon Solomon first introduced Terror Management Theory in 1986.<sup>53</sup> The theory is premised on the human capacity for self-reflective thought, which creates a unique awareness of the inevitability of death.<sup>54</sup> Reminders of human mortality, especially the presentation of gruesome visual evidence in court, may leave people "paralyzed with terror."<sup>55</sup> In fact, hundreds of studies have utilized even less potent manipulations than gruesome photographs to elicit this psychological fear.<sup>56</sup> The main way in which people cope with this existential anxiety is to cling to "cultural worldviews" that imbue one's existence with "meaning, order, predictability, and permanence by means of stable cognitive frameworks or narratives."<sup>57</sup> Such worldviews include a broad range of cultural, historical, religious, or political beliefs about how the world should function.<sup>58</sup> These beliefs provide a "prescription for leading a good, meaningful life" as well as "some hope of [symbolic] immortality."<sup>59</sup> In short, justifying these protective and comforting beliefs is how human beings manage their terror.

#### *A. Fear-Based Derogation of the "Other"*

The natural consequence of people's reliance on cultural worldviews to buffer death-anxiety is the derogation of those who do not share these same views.<sup>60</sup> This

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53. Jeff Greenberg et al., *The Causes and Consequences of a Need for Self-Esteem: A Terror Management Theory*, in PUBLIC SELF AND PRIVATE SELF 189 (Roy F. Baumeister ed., 1986); see also THOMAS A. PYSZCZYNSKI ET AL., IN THE WAKE OF 9/11: THE PSYCHOLOGY OF TERROR (2003).

54. Greenberg et al., *supra* note 53, at 196.

55. *Id.*

56. See, e.g., Brian L. Burke et al., *Two Decades of Terror Management Theory: A Meta-Analysis of Mortality Salience Research*, 14 PERSONALITY & SOC. PSYCHOL. REV. 155 (2010).

57. Mark J. Landau et al., *A Function of Form: Terror Management and Structuring the Social World*, 87 J. PERSONALITY & SOC. PSYCHOL. 190, 192 (2004); see also Jeff Greenberg et al., *Proximal and Distal Defenses in Response to Reminders of One's Mortality: Evidence of a Temporal Sequence*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 91, 91-93 (2000) ("[D]eath-related thought . . . triggers symbolic cultural worldview defense.").

58. See, e.g., Jeff Greenberg et al., *Evidence of a Terror Management Function of Cultural Icons: The Effects of Mortality Salience on the Inappropriate Use of Cherished Cultural Symbols*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1211 (1995).

59. Greenberg et al., *supra* note 54, at 196.

60. See *id.* at 199-200 ("We suggest that the pervasive tendency of in-group members to display negative attitudes, beliefs, and behaviors toward outgroup members is an attempt to defuse the threat to one's own beliefs

effect persists because dissenting individuals pose a threat to the stability, self-esteem, and symbolic immortality created by cultural worldviews.<sup>61</sup> Studies have operationalized this derogation in two ways: (1) participants' attitudes towards individuals who criticize their worldviews explicitly and (2) participants' attitudes towards individuals who are merely from a different social group.<sup>62</sup>

Studies show that mortality salience<sup>63</sup> causes people to manifest increased negative attitudes towards those who directly criticize their worldviews. For example, one study showed that reminding American participants of their mortality resulted in negative reactions towards a hypothetical interviewee with an unfavorable view of the United States.<sup>64</sup> Another study took terror management into the real world by analyzing actual romantic partners.<sup>65</sup> The study found that mortality salience reduced feelings of commitment in couples that were asked to ponder the differences in their worldviews.<sup>66</sup>

Furthermore, studies show that mortality salience causes people to manifest increased negative attitudes towards those who merely belong to a different social, political, or religious group. In particular, studies have shown how, under mortality salience, Christians react more negatively to Jews as opposed to other Christians,<sup>67</sup>

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implied by the existence of the outgroup.”).

61. Derogation is not the only documented effect of terror management. Indeed, when reminded of their death, people are more likely to rely on heuristic cues in analyzing the persuasiveness of specific arguments rather than on deep, deliberate assessments of the merits of such arguments. *See, e.g.,* Sheldon Solomon et al., *The Effects of Mortality Salience on Personally-Relevant Persuasive Appeals*, 23 *SOC. BEHAV. & PERSONALITY* 177, 177 (1995) (demonstrating that participants relied on expert status rather than argument strength when they were aware of their own mortality); *see also* Diane M. Mackie & Leila T. Worth, *Processing of Persuasive In-Group Messages*, 58 *J. PERSONALITY & SOC. PSYCHOL.* 812, 812 (1990) (demonstrating a similar effect for ingroup status). One explanatory theory for this effect is that coping with thoughts of death produces “self-regulatory fatigue.” Matthew T. Gailliot et al., *Self-Regulatory Processes Defend Against the Threat of Death: Effects of Self-Control on Thoughts and Fear of Dying*, 91 *J. PERSONALITY & SOC. PSYCHOL.* 49, 49, 59 (2006). In other words, because participants use so much of their cognitive resources defending against death thoughts, they have minimal resources left over to engage in deliberate processing and overcoming cognitive heuristics, stereotypes, and shortcuts. *Id.* It is easy to see how this effect works hand in hand with the derogation of others. It is extremely difficult to critically assess one's stereotypes and biases against those who challenge one's worldviews when one's cognitive processes have already been depleted. In this way, the heuristic processing effect and the derogation effect are inextricably linked.

62. Ya Hui Michelle See & Richard E. Petty, *Effects of Mortality Salience on Evaluation of Ingroup and Outgroup Sources: The Impact of Pro- Versus Counterattitudinal Positions*, 32 *PERSONALITY & SOC. PSYCHOL. BULL.* 405, 406 (2006); *see also* Bernice L. Z. Khoo & Ya Hui Michelle, *Mortality Salience and Evaluations of In-Group Versus Out-Group Critics: The Role of Criticism Legitimacy and Perceived Threat*, 44 *EUR. J. SOC. PSYCHOL.* 242 (2014).

63. “Mortality salience” refers to an induced state wherein participants are made aware of their mortality and the fact that they will someday die. This differs from terror management, which pertains to the subsequent subconscious processes that participants use to cope with the resulting anxiety.

64. Jeff Greenberg et al., *Evidence for Terror Management Theory II: The Effects of Mortality Salience on Reactions to Those Who Threaten or Bolster the Cultural Worldview*, 58 *J. PERSONALITY & SOC. PSYCHOL.* 308, 315-17 (1990).

65. Amy Strachman & Jeff Schimel, *Terror Management and Close Relationships: Evidence that Mortality Salience Reduces Commitment Among Partners With Different Worldviews*, 23 *J. SOC. & PERS. RELATIONSHIPS* 965 (2006).

66. *Id.* at 973.

67. Greenberg et al., *supra* note 64, at 309-13.

Italians react more negatively to Germans as opposed to other Italians,<sup>68</sup> and Americans donate less to international as opposed to domestic charities.<sup>69</sup> Participants in these studies exhibited negative attitudes and behaviors towards an outgroup member even without actual evidence that the outgroup member actually disagreed with the participants' worldviews. In short, the "mere existence of others" served to threaten participants' faith in their cultural worldviews.<sup>70</sup>

The terror management is one of a limited number of phenomena that have been directly studied in the courtroom setting. Studies have shown that reminders of mortality that arise during the course of a trial can have a demonstrable impact on the attitudes, behaviors, and most importantly, verdicts of legal decision-makers. Aaron Rosenblatt's seminal study of judicial decision-making is illustrative.<sup>71</sup> In the study, judges had to decide on an appropriate bond in the hypothetical case of an arrested prostitute.<sup>72</sup> Judges who wrote out their thoughts on their own death prior to the bond assessment set a more punitive average bond of \$455.<sup>73</sup> Judges in the control condition, on the other hand, set an average bond of only \$50.<sup>74</sup> Rosenblatt also managed to replicate this effect with ordinary individuals instead of judges,<sup>75</sup> generalizing the findings to jury decision-making as well. Rosenblatt determined that this punitive effect<sup>76</sup> was a likely result of the prostitute's violation of participants' worldviews concerning conventional morality.<sup>77</sup>

Another study by Lori Nelson investigated how terror management affects the

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68. Emanuele Castano et al., *I Belong, Therefore, I Exist: Ingroup Identification, Ingroup Entitativity, and Ingroup Bias*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 135 (2002).

69. Eva Jonas et al., *The Scrooge Effect: Evidence that Mortality Salience Increases Prosocial Attitudes and Behavior*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1342 (2002).

70. Greenberg et al., *supra* note 64, at 310.

71. Abram Rosenblatt et al., *Evidence for Terror Management Theory: I. The Effects of Mortality Salience on Reactions to Those Who Violate or Uphold Cultural Values*, 57 J. PERSONALITY & SOC. PSYCHOL. 681 (1989).

72. *Id.* at 682.

73. *Id.*

74. *Id.*

75. *Id.* at 683-84.

76. Psychologists have also discovered a leniency effect following terror management in a narrow set of circumstances. Specifically, Joel Lieberman flipped Aaron Rosenblatt's seminal paradigm by placing the emphasis on the *victim* of the crime rather than the *perpetrator*. Joel D. Lieberman et al., *Vicarious Annihilation: The Effect of Mortality Salience on Perceptions of Hate Crimes*, 25 LAW & HUM. BEHAV. 547 (2001). Specifically, Lieberman analyzed hate crimes by varying the distinctiveness of the victim. *Id.* at 556-57. When a hate crime was described in abstract terms with no specific victim mentioned, participants were more punitive towards perpetrators of hate crimes. *Id.* at 561. Conversely, when the victim was described as gay, threatening specific participants' worldviews, participants were actually more lenient in their treatment of the perpetrators. *Id.* at 556-57, 559, 561. This Note acknowledges the existence of the leniency effect but focuses primarily on the punitive effect for three important reasons. First, the punitive effect is more robust, prevalent, and well documented. *See, e.g., supra* notes 60-70 and accompanying text; sources cited *infra* note 83. Second, in murder trials, the victim is no longer around, and so the likelihood that participants will anchor their decisions on the victim's characteristics are reduced. Third, the punitive effect is arguably the most systemically problematic manifestation of terror management because of its potential to increase the rate of false convictions, sending innocent individuals to lifetimes in prison or even death.

77. Rosenblatt et al., *supra* note 71, at 684-86. For further discussion of the punitive effects of mortality salience, see Jamie Arndt et al., *Terror Management in the Courtroom: Exploring the Effects of Mortality Salience on Legal Decision Making*, 11 PSYCHOL., PUB. POL'Y & L. 407, 413-22 (2005); and Donald P. Judges, *Scared to Death: Capital Punishment as Authoritarian Terror Management*, 33 U.C. DAVIS L. REV. 155, 163, 167-69 (1999).

apportionment of blame in adversarial situations.<sup>78</sup> Nelson asked American participants to decide a hypothetical lawsuit between an injured driver and either an American or Japanese automobile manufacturing company.<sup>79</sup> Participants that, prior to the assessment, were exposed to a gruesome video involving burned corpses, blood, caskets, and graveyards, exhibited a nationalistic bias in their assessments of guilt.<sup>80</sup> Specifically, participants under mortality salience were much more likely to blame the driver rather than an *American* automobile company.<sup>81</sup> This same bias was not present when the automobile company was Japanese.<sup>82</sup>

For those who still have reservations about the robustness of the literature on Terror Management Theory, it is helpful to look not just at the hundreds of empirical terror management studies worldwide,<sup>83</sup> but also at the theory's theoretical overlap with core psychological phenomena that have explained inequality and inter-group conflict for decades. Examples include scapegoating,<sup>84</sup> the outgroup homogeneity

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78. Lori J. Nelson et al., *General and Personal Mortality Salience and Nationalistic Bias*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 884 (1997).

79. *Id.* at 886.

80. *Id.* at 886-89.

81. *Id.* at 887-89.

82. *Id.*

83. For additional studies that support the general predictions of Terror Management Theory, see Jamie Arndt et al., *Subliminal Exposure to Death-Related Stimuli Increases Defense of the Cultural Worldview*, 8 PSYCHOL. SCI. 379 (1997); Orit Taubman Ben-Ari et al., *Does a Threat Appeal Moderate Reckless Driving? A Terror Management Theory Perspective*, 32 ACCIDENT ANALYSIS AND PREVENTION 1 (2000); Burke et al., *supra* note 56; Alison Cook et al., *Firing Back at the Backfire Effect: The Influence of Mortality Salience and Nullification Beliefs on Reactions to Inadmissible Evidence*, 28 LAW & HUM. BEHAV. 289 (2004); Michael K. Coolsen & Lori J. Nelson, *Desiring and Avoiding Close Romantic Attachment in Response to Mortality Salience*, 44 OMEGA: J. DEATH & DYING 257 (2002); Victor Florian & Shlomo Kravetz, *Fear of Personal Death: Attribution, Structure, and Relation to Religious Belief*, 44 J. PERSONALITY & SOC. PSYCHOL. 600 (1983); Ying-Yi Hong et al., *The History of War Strengthens Ethnic Identification*, 2 J. PSYCHOL. CHINESE SOCIETIES 77 (2001); Eva Jonas et al., *Currencies as Cultural Symbols – An Existential Psychological Perspective on Reactions of Germans Toward the Euro*, 26 J. ECON. PSYCHOL. 129 (2004); Mark J. Landau, *Deliver Us from Evil: The Effects of Mortality Salience and Reminders of 9/11 on Support for President George W. Bush*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1136 (2004); Ara Norenzayan & Ian G. Hansen, *Belief in Supernatural Agents in the Face of Death*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 174 (2006); Tova Rosenbloom, *Sensation Seeking and Risk Taking in Mortality Salience*, 35 PERSONALITY & INDIVIDUAL DIFFERENCES 1809 (2003); Kumagai Tomohiro & Ohbuchi Ken-Ichi, *The Effect of Mortality Salience and Collaborative Experience on Aggression of “Third-Party Victims,”* 62 TOHOKU PSYCHOLOGICA FOLIA 109 (2003); Kees van den Bos, *Uncertainty Management: The Influence of Uncertainty Salience on Reactions to Perceived Procedural Fairness*, 80 J. PERSONALITY & SOC. PSYCHOL. 931 (2001); and Kees van den Bos & Joost Miedema, *Towards Understanding Why Fairness Matters: The Influence of Mortality Salience on Reactions to Procedural Fairness*, 79 J. PERSONALITY & SOC. PSYCHOL. 355 (2000). *But see* Jeffrey J. Rachlinski et al., *The Role of the Judge in the Twenty-First Century: Inside the Bankruptcy Judge’s Mind*, 86 B.U. L. REV. 1227, 1253-57 (2006) (failing to replicate previous terror management findings, but arguably because the mortality salience manipulation, having participants hear about a gravedigger, was simply not a potent enough manipulation).

84. *See, e.g.*, Neel Burton, *The Psychology of Scapegoating: Scapegoating Is as Ancient as It Is Deeply Rooted*, PSYCHOL. TODAY (Dec. 21, 2013), <http://www.psychologytoday.com/blog/hide-and-see/201312/the-psychology-scapegoating>; *see also* Carl Iver Hovland & Robert R. Sears, *Minor Studies of Aggression: VI. Correlation of Lynchings with Economic Indices*, 9 J. PSYCHOL.: INTERDISC. & APPLIED 301 (1940); Edwin Poppe, *Effects of Changes in GNP and Perceived Group Characteristics on National and Ethnic Stereotypes in Central and Eastern Europe*, 31 J. APPLIED. SOC. PSYCHOL. 1689 (2001). For an account of how scapegoating manifests itself more specifically in the terror management context, see Jeffrey L. Kirchmeier, *Our Existential Death Penalty: Judges, Jurors, and Terror Management*, 32 LAW & PSYCHOL. REV. 55, 64-75 (2008). (“If my belief system protects me from the dread of death, your belief system threatens my protection. In response, to save my protection, I must destroy yours.”).

effect,<sup>85</sup> social distancing,<sup>86</sup> and dehumanization.<sup>87</sup> In short, it is no longer productive to doubt that these cognitive pitfalls do exist and exert a considerable impact on decision-makers. Instead, we should make the acknowledgment of these human shortcomings a major factor in crafting important legal and policy decisions.

### B. The “Other” in the Courtroom

Terror Management Theory is highly relevant to the Rule 403 analysis because it presents two potential routes for impermissible prejudice to infect the trial. First, jurors reminded of their death may act more punitively towards those from visible, discernible minority groups. Second, jurors reminded of their death may act more punitively towards a criminal defendant solely because the defendant has been accused of murder, a worldview-destabilizing criminal offense. I will discuss both routes in turn.

There is a robust psychological literature on how the group membership and ideologies of the accused can trigger increased punitive behavior in decision-makers under mortality salience. Jurors reminded of their death may treat the accused in an excessively punitive way based on factors such as race,<sup>88</sup> religion,<sup>89</sup> political views,<sup>90</sup> gender,<sup>91</sup> sexuality,<sup>92</sup> national origin,<sup>93</sup> or explicitly expressed opinions on deeply held beliefs.<sup>94</sup> Furthermore, psychologists have found that derogation processes are most potent and robust when there has been a time lag between the presentation of a

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85. See, e.g., SCOTT PLOUS, UNDERSTANDING PREJUDICE AND DISCRIMINATION 10 (2003); see also AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY 9 (“Markets concentrate enormous wealth in the hands of an ‘outsider’ minority, fomenting ethnic envy and hatred among often chronically poor majorities.”). For literary perspectives on the long-standing and embedded tendency to “other” members of an out-group, see, for example, GLORIA ANZALDÚA, BORDERLANDS / LA FRONTERA: THE NEW MESTIZA 100-01 (2d ed. 1999).

86. See, e.g., Phillip Atiba Goff et al., *The Space Between Us: Stereotype Threat and Distance in Interracial Contexts*, 94 J. PERSONALITY & SOC. PSYCHOL. 91 (2008); Juan Manuel Falomir-Pichastor & Gabriel Mugny, “I’m Not Gay. . . . I’m a Real Man!”: *Heterosexual Men’s Gender Self-Esteem and Sexual Prejudice*, 35 PERSONALITY & SOC. PSYCHOL. BULL. 1233 (2009); Janet K. Swim et al., *Avoiding Stigma by Association: Subtle Prejudice Against Lesbians in the Form of Social Distancing*, 21 BASIC AND APPLIED SOC. PSYCHOL. 61 (1999).

87. See, e.g., DAVID LIVINGSTONE SMITH, LESS THAN HUMAN: WHY WE Demean, ENSLAVE, AND EXTERMINATE OTHERS (2012); PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL 297-323 (2008).

88. See, e.g., Jeff Schimel et al., *Stereotypes and Terror Management: Evidence that Mortality Salience Enhances Stereotypic Thinking and Preferences*, 77 J. PERSONALITY & SOC. PSYCHOL. 905, 912-16 (1999).

89. Greenberg et al., *supra* note 64, at 309-13.

90. See, e.g., Holly A. McGregor et al., *Terror Management and Aggression: Evidence that Mortality Salience Motivates Aggression Against Worldview-Threatening Others*, 74 J. PERSONALITY & SOC. PSYCHOL. 590 (1998) (demonstrating that participants allocate a particularly large portion of hot sauce for those who threaten their political beliefs); see also Armand Chatard, *Loss Shapes Political Views? Terror Management, Political Ideology, and Death of Close Others*, 32 BASIC & APPLIED SOC. PSYCHOL. 2 (2010); Lea Winerman, *The Politics of Mortality: Some Psychologists Say that Americans’ Fears of Death Could Have Given President Bush the Edge in the 2004 Election*, AM. PSYCHOL. ASS’N (Jan. 2005), <http://www.apa.org/monitor/jan05/mortality.aspx>.

91. See, e.g., Jamie L. Goldenberg et al., *Gender-Typical Responses to Sexual and Emotional Infidelity as a Function of Mortality Salience Induced Self-Esteem Striving*, 29 J. PERSONALITY & SOC. PSYCHOL. 1585 (2003); Schimel et al., *supra* note 88, at 910-12, 916-18.

92. See, e.g., Schimel et al., *supra* note 88, at 918-21.

93. See, e.g., *supra* notes 68-69, 78-82 and accompanying text.

94. See, e.g., *supra* notes 64-66 and accompanying text.

mortality reminder and the final decision.<sup>95</sup> This is concerning because trials are often drawn out ordeals with extended periods between the presentation of gruesome visual evidence and the call for a verdict. If the goal of the court system is to reach objective determinations of guilt based primarily on evidence and factual findings, this heightened potential for derogation is highly problematic.

Concerns about juror impartiality under mortality salience are exacerbated by the racial and socio-economic inequalities inherent in the American justice system. Individuals accused of crimes often fit the mold of “outsiders” because they are racial minorities,<sup>96</sup> are of lower income status<sup>97</sup> and educational attainment,<sup>98</sup> are mentally disabled,<sup>99</sup> or come from generally tumultuous backgrounds.<sup>100</sup> Conversely, individuals who tend to serve on juries are likely white<sup>101</sup> and of the requisite economic and social status to spend considerable time in jury service, a privilege that less affluent individuals may not possess.<sup>102</sup> These group membership differences between jurors and those accused create an optimal environment for derogation by amplifying the salience of the outsider.

Skeptics may argue that the diversity of a jury should neutralize these effects. Indeed, twelve randomly selected individuals are likely to belong to different social groups and possess different ideologies. As such, the discordance between the group membership or ideologies of a single juror and the accused should, theoretically, not significantly affect the outcome of the trial. Unfortunately, despite psychological research showing that jury diversity decreases errors in decision-making,<sup>103</sup> the system

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95. Jeff Greenberg et al., *Role of Consciousness and Accessibility of Death-Related Thoughts in Mortality Salience Effects*, 67 J. PERSONALITY & SOC. PSYCHOL. 627, 627 (1994); see also Greenberg et al., *supra* note 57, at 91-93.

96. See Alexia Cooper & Erica L. Smith, *Homicide Trends in the United States, 1980-2008 Annual Rates for 2009 and 2010*, BUREAU JUST. STAT. (Nov. 2011), <http://www.bjs.gov/content/pub/pdf/htus8008.pdf>.

97. See, e.g., Peter Blanck et al., *The Appearance of Justice: Judges' Verbal & Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89, 139-42 (1985); Melissa S. Kearney & Benjamin H. Harris, *The Unequal Burden of Crime and Incarceration on America's Poor*, BROOKINGS INST. (Apr. 28, 2014), <https://www.brookings.edu/blog/up-front/2014/04/28/the-unequal-burden-of-crime-and-incarceration-on-americas-poor>.

98. See, e.g., Karen Heimer, *Socioeconomic Status, Subcultural Definitions, and Violent Delinquency*, 75 SOC. FORCES 799 (1997); *Violence and Socioeconomic Status*, AM. PSYCHOL. ASS'N, <http://www.apa.org/pi/ses/resources/publications/factsheet-violence.pdf> (last visited Apr. 1, 2016).

99. See, e.g., Michael Kroll, *Buckle of Death Belt: The Death Penalty in Microcosm*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/chattahoochee-judicial-district-buckle-death-belt-death-penalty-microcosm> (last visited Apr. 1, 2016).

100. See, e.g., Claire A. Ogilvie et al., *Attachment & Violent Offending: A Meta-Analysis*, 19 AGGRESSION AND VIOLENT BEHAV. 322 (2014); Patrick Renn, *The Link Between Childhood Trauma and Later Violent Offending: The Application of Attachment Theory in a Probation Setting*, 4 ATTACHMENT & HUM. DEV. 294 (2002).

101. See, e.g., Karen R. Humes et al., *Overview of Race and Hispanic Origin: 2010*, U.S. CENSUS BUREAU, U.S. DEP'T OF COM. 4 (Mar. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

102. John Fulmer, *Jury Diversity Bill Now Law*, DAILY REC. (June 22, 2010), <http://nydailyrecord.com/blog/2010/06/22/jury-diversity-bill-now-law> (“Minorities often are faced with jury-service problems that most white, middle-class or affluent people don’t have . . . including a more transient population, language barriers and being poorly paid for time spent in court. Poor and lower-class workers may have trouble obtaining child care, or their employers are reluctant to lose them for the duration of a lengthy trial . . . Many poor people are transient . . . and the truth is many poor people are minorities.” (internal quotation marks omitted)).

103. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006).



has lagged behind in adapting to this new information.<sup>104</sup> Furthermore, even generously setting aside systemic problems with jury diversity in the United States, as well as the reality of racialized and stereotype-driven uses of peremptory challenges and jury selection techniques,<sup>105</sup> this argument is undermined by another source of terror-induced derogation. Specifically, the accused is extremely disadvantaged not just because he or she is likely a member of a discernible outgroup, but because he or she is now associated with murder—a crime so heinous that it is systemically threatening to the worldviews of practically all individuals.

A helpful framework for understanding this source of prejudice is the System Justification Theory.<sup>106</sup> This theory “posits a general human tendency to support and defend the social status quo,” which causes people to behave defensively when they “perceive a threat to the legitimacy of a system to which they are attached.”<sup>107</sup> Decades of social science research have supported this proposition.<sup>108</sup> Furthermore, an individual may defend a system even when the system conflicts with that individual’s ideological motives.<sup>109</sup> Because of this bias for the system, “[t]hreats to the social order can also increase people’s desire for revenge against the perpetrators of those threats . . . in an effort to defend and protect the social order.”<sup>110</sup> Social scientists have uncovered pertinent manifestations of this behavior that are relevant to the courtroom context. For example, in a study by Derek Rucker, participants treated hypothetical criminals more punitively when the crime committed was highly threatening to the social system.<sup>111</sup> Similarly, Cheryl Kaiser used system justification motives to elicit strong desires for revenge against the perpetrators of the 9/11 attacks.<sup>112</sup>

Murder will no doubt instigate similar vengeful responses from jurors because of the immense threat the crime poses to the social order. When criminal defendants are accused of murder, they are tagged with an incredibly destabilizing label. Because jurors under mortality salience need to cling to their worldviews, and worldviews are commonly defined through the groups and concepts that individuals align themselves with, the last thing jurors would want would be to associate themselves with someone who has been accused of such a terrifying crime. As such, jurors may attempt to unconsciously punish and distance themselves from the defendant. In other words, the mere premise that a defendant could have committed murder may be enough to put that defendant in a distinct group of “others.”

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104. See *supra* notes 101-102 and accompanying text.

105. See, e.g., Petition for Writ of Certiorari, *Foster v. Chatman* (2016), <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/04/2015.01.30-Foster-Cert-Petition.pdf>; see also *Batson v. Kentucky*, 476 U.S. 79 (1986); Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1 (1988).

106. John T. Jost & Mahzarin R. Banaji, *The Role of Stereotyping in System Justification and the Production of False Consciousness*, 33 BRIT. J. SOC. PSYCHOL. 881 (1994).

107. Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CALIF. L. REV. 1119, 1123 (2006).

108. See, e.g., John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881 (2004).

109. Blasi & Jost, *supra* note 109, at 1129.

110. *Id.* at 1139.

111. Derek D. Rucker et al., *On the Assignment of Punishment: The Impact of General-Societal Threat and the Moderating Role of Severity*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 673 (2004).

112. Cheryl R. Kaiser et al., *A Prospective Investigation of the Relationship Between Just-World Beliefs and the Desire for Revenge After September 11, 2001*, 15 PSYCHOL. SCI. 503 (2004).

In sum, the literature suggests that those accused of murder are prime targets for terror-induced derogation because of either tangible, discernible group membership or simply because the crime with which they are associated is deeply threatening to the social order. This is a tremendous problem if our justice system seeks to decide cases on the merits rather than aggravated passions. Before discussing potential solutions, however, it is important to address a few clarifying points.

### C. *The Power of Visual Evidence*

An important point to address is why we should focus primarily on visual evidence and not other types of potentially gruesome material such as written or auditory evidence. The short answer is simply that, in murder trials, it is practically impossible to inoculate the jury from every reminder of death. At some tipping point, broad exclusions will begin to eat away at any avenue the prosecution may have at carrying out its role in the justice system. As such, we should strive to restrict only the most prejudicial types of gruesome evidence while allowing prosecutors some leeway to substitute unduly prejudicial evidence with less extreme alternatives.

Visual evidence presents the clearest danger of unfair prejudice. As Judge Posner put it:

Physical exhibits . . . are a very powerful form of evidence, in some cases too powerful, as we learn in *Julius Caesar* from Antony's masterful demagogic use of Caesar's blood-stained toga and slashed body to arouse the Roman mob. After hearing a welter of confusing and contradictory testimony, perhaps of a technical nature . . . or being led through a maze of inscrutable documentation . . . the jury is invited to resolve its doubts on the basis of a simple, tangible, visible, everyday object of reassuring familiarity. "Seeing is believing," as the misleading old saw goes.<sup>113</sup>

The psychological literature seems to back up Judge Posner's intuitions. Indeed, in a 2006 study, David Bright and Jane Goodman-Delahunty presented participants with either verbal or photographic evidence that was either gruesome or non-gruesome.<sup>114</sup> They found that participants presented with the gruesome photographs experienced more negative emotions, particularly anger.<sup>115</sup> This anger, in turn, moderated a significant increase in conviction rates when compared to participants not presented with such photographs.<sup>116</sup> Bright and Goodman-Delahunty explained that negative emotions increase the amount of blame an individual ascribes to a particular offender.<sup>117</sup> The individual experiencing the negative emotions may relax his or her interpretation of conviction standards, exaggerate negative evidence, or search for information in a manner that confirms guilt.<sup>118</sup> These reactions are well supported in the existing literature.<sup>119</sup>

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113. *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1231 (7th Cir. 1996) (citations omitted).

114. David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 *LAW & HUM. BEHAV.* 183, 190 (2006).

115. *Id.* at 192-95.

116. *Id.* at 195-96.

117. *Id.* at 187-88.

118. *Id.* at 188-89.

119. See, e.g., Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 *S. CAL. INTERDISC. L.J.* 237 (2010); Benjamin V. Madison III, Note, *Seeing Can Be Deceiving: Photographic Evidence in a Visual Age – How Much Weight Does It*

To the extent that visual cues produce the strongest negative emotions, it is unsurprising that they lead to an increased willingness to convict based on the negative emotions rather than the strength of evidence presented. Indeed, anger has been associated with increased attribution of blame, even for accidents.<sup>120</sup> Additionally, angry people experience impaired cognitive processing and are more likely to rely on stereotypes and heuristics to make quick attributions of fault.<sup>121</sup> Furthermore, individuals feeling either disgust or fear may make more defensive attributions of fault due to the anxiety that the fate of the victim will befall them as well.<sup>122</sup> Returning to Terror Management Theory, it is worrying to imagine how much worse the derogation effects would be with both emotionally-driven impulses and terror management processes affecting jurors' cognitive capacities.

#### D. *The Focus on Murder Trials*

There is a strong argument that, given the robustness of the psychological literature, the exclusion of gruesome visual evidence should apply to all cases, including civil cases. In this Article, I have not gone this far for a few reasons. First, the use of gruesome visual evidence in murder trials is the most pressing problem because the defendant's life and liberty are on the line. Since murder carries the harshest punishments our system deals out, it is vital that we turn our attention to reforming murder trials first. Second, it may be practically difficult to instigate an expansive policy change in one fell swoop without facing crippling resistance. Progress, at least in the law, is generally made incrementally. Third, it is unclear whether non-death-related gruesome images in civil trials, such as photographs of severed body parts in tort cases, produce similar terror management effects. While it is highly probable from a theoretical perspective, future scholarship should seek to extend the current Article based on progress in both the legal and empirical literature.

To conclude, an exceedingly robust psychological literature points to a reality we can no longer deny. We simply cannot continue to admit gruesome visual evidence as freely as we do without sacrificing our commitments to fair and impartial trials. Cases should be decided on the weight of each side's evidence rather than the extent to which each side is able to arouse negative emotions and employ cognitive distractions. The following section argues for two potential solutions.

### IV. TURNING THE TIDES AND SHIFTING THE BURDENS

As Parts II and III have demonstrated, our current approach to gruesome visual evidence, which values admission over exclusion, is deficient. It does not account for

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*Deserve?*, 25 WM. & MARY L. REV. 705, 724 (1984).

120. Jennifer S. Lerner et al., *Sober Second Thoughts: The Effect of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 563 (1998); see also JAMES R. AVERILL, *ANGER AND AGGRESSION: AN ESSAY ON EMOTION* (1982).

121. See, e.g., Galen V. Bodenhausen, *Emotions, Arousal, and Stereotypic Judgments: A Heuristic Model of Affect and Stereotyping*, in DAVID L. HAMILTON & DIANE M. MACKIE, *AFFECT, COGNITION AND STEREOTYPING: INTERACTIVE PROCESSES IN GROUP PERCEPTION* 13 (1993).

122. Bright & Goodman-Delahunty, *supra* note 116, at 188.

the well-documented effects such evidence may have on jurors' emotional and cognitive states.<sup>123</sup> There are two viable options for correcting this problem. Both options can be accomplished in two ways—either through the amendment of the jurisdiction's rules of evidence or a corresponding judicial interpretation of Rule 403 (or a state equivalent) that augments the standard for the admissibility of gruesome visual evidence in murder trials.

### A. *Categorical Exclusions*

An easy fix for the problems caused by gruesome visual evidence is to simply exclude such evidence from the courtroom altogether, at least in murder trials. While categorical exclusion may seem like a radical proposition,<sup>124</sup> it is actually a relatively familiar concept in our existing evidentiary frameworks. For example, the Federal Rules of Evidence contain such exclusions. Rule 409 prohibits the admission of “[e]vidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from injury.”<sup>125</sup> Similarly, Rule 610 prohibits the admission of “evidence of a witness’s religious beliefs or opinions . . . to attack or support the witness’ credibility.”<sup>126</sup> Moreover, general rules of privilege have almost sacred significance in our justice system. In fact, just recently, a federal district court judge ruled that the sanctity and certainty of attorney-client privilege takes precedence over something as crucial as another defendant’s right to assert an advice of counsel defense.<sup>127</sup>

Rule drafters and judges can also soften a categorical exclusion by providing a limited number of discrete exceptions. This approach permeates many of the Federal Rules of Evidences as well. Indeed, the following are generally prohibited except in limited circumstances: propensity or character evidence,<sup>128</sup> remedial measures,<sup>129</sup> compromise offers and negotiations,<sup>130</sup> plea discussions that do not result in a guilty

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123. Previous scholarship on this issue has proposed that we work within the current evidentiary system. See, e.g., Stanley L. Morris, *The Admissibility of Photographs of the Corpse in Homicide Cases*, 7 WM. & MARY L. REV. 137 (1966). I argue that the current system is untenable and must be modified to truly deliver justice.

124. For a piece that expresses, through its tone, the general hesitance with which calls for categorical exclusions are met, see Rory K. Little, *Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Cases*, 37 SW. L. REV. 965 (2008) (“Moreover, this is an essay, not a tenure piece, and its brief discussion surely does not answer, or even address, every possible aspect of the idea. But let’s see how serious we really are about totally eliminating (rather than just reducing) wrongful convictions, by imagining a total ban on their known evidentiary sources—indeed, a ban that is immediately judicially enforceable—when the death penalty is at issue.”); *id.* at 984 (“Of course, as the Supreme Court once said of the Treason clauses, an idea with a superficial appearance of clarity and simplicity can nevertheless be packed with controversy and difficulty. Perhaps that is the case here but the seriousness of the question suggests that the idea should at least be fairly considered.” (internal quotation marks omitted)).

125. FED. R. EVID. 409.

126. FED. R. EVID. 610.

127. *United States v. Wells Fargo Bank, N.A.*, 132 F. Supp. 3d 558 (S.D.N.Y. 2015).

128. FED. R. EVID. 404.

129. FED. R. EVID. 407.

130. FED. R. EVID. 408.

plea,<sup>131</sup> liability insurance,<sup>132</sup> and, most famously, hearsay.<sup>133</sup> These exclusions are commonly made on the basis of public policy decisions. For example, we exclude remedial measures because of the “social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.”<sup>134</sup> We also exclude compromise offers and negotiations because of the “public policy favoring the compromise and settlement of disputes.”<sup>135</sup> Moreover, we exclude plea discussions that do not result in guilty pleas because “[e]ffective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises.”<sup>136</sup> As such, “free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.”<sup>137</sup> If the public policies of safety, peace, and even efficient administration necessitate exclusion of evidence, then certainly the public policies of justice and due process for criminal defendants should as well. Furthermore, it is worth noting that many of the policy rationales laid out by the Federal Rules of Evidence are based mostly on the intuitions of individual drafters or judges, while the dangers of gruesome visual evidence are empirically backed by hundreds of psychological studies.

A categorical exclusion provides numerous benefits beyond shielding juror impartiality. A hard and fast rule promotes efficiency in the trial context that often requires hundreds of evidentiary decisions in a single day. This lightens the cognitive load on judges and allows them to conserve their mental resources for the more nuanced and complex issues that come up.<sup>138</sup> Categorical rules also create standardization in case outcomes both within and across jurisdictions because different judges, with varying perspectives on the Rule 403 analysis, are all obliged to come out the same way on certain issues. This fosters predictability and the increased likelihood of equal treatment for all defendants under the law. This need for standardization is becoming even more important given emerging evidence that various situational factors, even those as seemingly innocuous as the number of hours since a judge has eaten, can significantly affect how punitively judges rule.<sup>139</sup>

One important counterargument to address is whether exclusions rob judges of flexibility in what is usually a complex trial setting. First, as already discussed, any categorical exclusion can be softened through the use of exceptions. Even if not every gruesome visual photograph will create undue prejudice that outweighs its probative value, evidentiary codes can account for this minority of cases while still maintaining a default exclusionary rule. For example, we could carve out a specific exception for

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131. FED. R. EVID. 410.

132. FED. R. EVID. 411.

133. FED. R. EVID. 801-07.

134. FED. R. EVID. 407 cmt.

135. FED. R. EVID. 408 cmt.

136. FED. R. EVID. 410 cmt.

137. *Id.*

138. See, e.g., Gailliot et al., *supra* note 61, at 59; Francesca Gino et al., *Unable to Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 191, 191 (2011); Martin S. Hagger et al., *Ego Depletion and the Strength Model of Self-Control: A Meta-Analysis*, 136 PSYCHOL. BULL. 495, 495 (2010).

139. See, e.g., Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, PROC. NAT'L ACAD. SCI. U.S. (2011), <http://www.pnas.org/content/108/17/6889.full.pdf>.

photographs where the defendant on trial happens to also be in the photograph with the victim's corpse, establishing a very strong link between that specific defendant and the murder. Second, as already discussed, just because we give judges the potential for flexibility does not mean they will necessarily be able to use it, due to the limits of human cognitive capacities.<sup>140</sup> Freeing up judges' mental resources on "easier" issues backed extensively by psychological literature can actually improve how judges tackle more nuanced and complex issues, enhancing the trial process on balance. Third, a little less flexibility is sometimes normatively desirable when appropriate. If enough empirical studies support a need for a relatively more rigid rule, it may be wise to seriously consider that position.

### *B. A Presumption of Prejudice*

A second solution to the issues posed by gruesome visual evidence is to flip the presumption of the Rule 403 analysis in the context of murder trials. In other words, instead of requiring unfair prejudice to substantially outweigh the evidence's probative value, we could require that the probative value substantially outweigh the unfair prejudice instead. Variants of this approach seem to have been successfully adopted into some jurisdictions' evidentiary jurisprudence.<sup>141</sup> The clearest example is the state of Utah, which has developed extensive case law on the issue. It is instructive to review this history in order to tease out the legal and policy rationales that have entrenched themselves in Utah evidentiary practice.

The Supreme Court of Utah first verbalized its legal standard for gruesome visual evidence in *State v. Garcia*.<sup>142</sup> In *Garcia*, a jury convicted the criminal defendants of second-degree murder after seeing five color photographs of the victim's bloody corpse and the surrounding crime scene.<sup>143</sup> In reviewing the lower court's decision to admit the photographs, the court explained that it was crucial to determine whether the danger of undue prejudice substantially outweighed "the photographs' essential evidentiary value."<sup>144</sup> The court further explained that "essential evidentiary value in the context of potentially prejudicial photographs of the victim's body" would "generally be inappropriate where the only relevant evidence they convey can be put before the jury readily and accurately by *other means not accompanied by the potential prejudice*."<sup>145</sup>

Just three years later, the court faced a similar issue in *State v. Cloud*.<sup>146</sup> In *Cloud*, a jury convicted a criminal defendant for the murder of his fiancée after seeing photographs of the victim's bloody corpse and close-ups of the stab wounds.<sup>147</sup> In determining whether the district court erred in admitting such evidence, the Utah Supreme Court looked to past case law to determine whether the district court could have substituted the gruesome visual evidence for a less prejudicial type of evidence.

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140. See, e.g., sources cited *supra* note 140.

141. See sources cited *supra* notes 22-24 and accompanying text.

142. 663 P.2d 60 (Utah 1983).

143. *Id.* at 62-63.

144. *Id.* at 64.

145. *Id.* (emphasis added).

146. 722 P.2d 750 (Utah 1986).

147. *Id.* at 751-52.

The court first discussed the 1968 case *State v. Poe*, where at issue were the “admitted autopsy photographs of a homicide victim’s dissected brain cavity[,] to illustrate the path of the fatal bullets.”<sup>148</sup> There, the court found reversible error in the decision to admit the photographs because all the relevant information that could have been gleaned from the photographs had already been introduced by the lay and medical testimony.<sup>149</sup> Similarly, the court recounted the 1979 case *State v. Wells* where the court reasoned that photographs of a homicide victim were “superfluous” because the uncontested testimony of the medical examiner had already established the facts that the photographs were allegedly introduced to establish.<sup>150</sup> As such, the photographs had “no evidentiary value except the hoped-for emotional impact on the jury.”<sup>151</sup>

Following the reasoning in *Poe* and *Wells* and the general standard laid out in *Garcia*, the Utah Supreme Court found error in the admission of the autopsy photographs. While the State argued that the photographs illustrated “the brutality of the attack,” the court noted that there were multiple viable alternatives to the photograph including the examiner’s testimony, the police officers’ testimony, and a visual chart, all of which discussed the location and position of the body as well as the extent of the wounds.<sup>152</sup> The Utah Supreme Court then concluded that there was no probative value to the photographs and reversed the conviction.<sup>153</sup>

Two years later, in *State v. Lafferty*, the Utah Supreme Court took the strongest stance it had taken on the issue when it considered the admissibility of two gruesome photographs of the corpses of a woman and a child.<sup>154</sup> The Utah Supreme Court stated, in relevant part:

Although the rule’s language seems to require a simple balancing of probative value and potential for unfair prejudice, our past decisions have recognized that *inherent* in certain categories of relevant evidence is an unusually strong propensity to unfairly prejudice, inflame, or mislead a jury. Evidence in these categories is uniquely subject to being used to distort the deliberative process and improperly skew the outcome. Consequently, when evidence falling within such a category is offered, we have required a showing of *unusual probative value* before it is admissible under rule 403. In the absence of such a showing, the probative value of such evidence is presumed to be “substantially outweighed by the danger of unfair prejudice.”<sup>155</sup>

The court went a step further, however, in categorizing gruesome photographic evidence as inherently prejudicial material:

[G]ruesome photographs will often be excluded because the required showing of unusual probativeness cannot be made. This is because there is no legitimate need for the gruesome photographs of a homicide victim’s corpse that prosecutors usually seek to introduce. An important consideration in assessing the probative value of a photograph is whether the facts shown by the photograph can be established by other

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148. *Id.* at 752 (citing *State v. Poe*, 441 P.2d 512, 515 (Utah 1968)).

149. *Id.* at 752.

150. *Id.* at 753.

151. *Id.* (quoting *State v. Wells*, 603 P.2d 810, 813 (Utah 1979)) (internal quotation marks omitted).

152. *Id.* at 753-54.

153. *Id.* at 754-56.

154. 749 P.2d 1239, 1256 (Utah 1988)

155. *Id.* at 1256 (emphasis added).

means.<sup>156</sup>

The Utah Supreme Court then ruled that the lower court had erred by admitting the photographs.<sup>157</sup> Indeed, the nature of the wounds and the positioning of the body, the reasons given by the prosecution for the photographs' relevance, had already been established by the testimony of the victims, police officers, and medical examiner.<sup>158</sup> The photographs were "merely cumulative" of such testimony.<sup>159</sup>

Following *State v. Lafferty*, Utah courts eventually cemented the case's reasoning by applying the "presumption of prejudice" standard to succeeding cases involving gruesome visual evidence.<sup>160</sup> The current standard, summarized at length in *State v. Bluff*, is helpful in conceptualizing how a presumption of prejudice would be "codified" in practice:

If, however, the photograph meets the legal definition of gruesomeness, it may not be admitted absent a showing of "unusual probative value." The burden is thereby shifted at this stage of the analysis to the State to show that the probative value of such evidence substantially outweighs the risk of unfair prejudice. It is true that shifting the burden to the State runs contrary to the general presumption of admissibility favored by the Rules of Evidence. However, we have determined that this departure from the general rule is both necessary and equitable. The decision to admit a crime scene or autopsy photograph generally must be made early in the proceedings, before its probative value can be easily ascertained. Given that this evidence, by definition, has a tendency to confuse and inflame the jury, we believe it is appropriate for courts to err on the side of caution and exclude unfairly prejudicial evidence unless the State can show good cause for its admission.<sup>161</sup>

The logic used by the Utah Supreme Court is incredibly helpful in countering the prevailing assumption that exclusion of a gruesome photograph affects the completeness of the evidence presented to the jury.<sup>162</sup> Instead, courts can and should scrutinize gruesome evidence more closely as parties can frequently make the same point in ways that are far less prejudicial and threatening to the fairness of the trial. Many of the facts that lawyers seek to establish through gruesome visual evidence, such as body positioning or wound severity, can be established through verbal testimony from victims, witnesses, police officers, and experts. Lawyers can also use diagrams and auditory aides that support their narratives but stop short of attempting to play on the emotions of the jury. Furthermore, with the rise of new technology, lawyers can even digitally reconstruct replicas of crime scene images without contaminating the jury with brutal, bloody images.<sup>163</sup>

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156. *Id.* at 1256-57.

157. *Id.* at 1257.

158. *Id.*

159. *Id.*

160. *See, e.g.*, *State v. Bluff*, 52 P.3d 1210 (Utah 2002); *State v. Vargas*, 20 P.3d 271 (Utah 2001); *State v. Dunn*, 850 P.2d 1201, 1222 (Utah 1993); *State v. Dibello*, 780 P.2d 1221 (Utah 1989).

161. *Bluff*, 52 P.3d at 1224-25.

162. *See e.g.*, *State v. Gerlaugh*, 654 P.2d 800, 805 (Ariz. 1982) (reasoning that gruesome photographic evidence was necessary to "illustrate how the crime was committed, to aid the jury in understanding testimony, and to show the location of mortal wounds" despite the availability of alternatives for establishing such facts).

163. *See, e.g.*, *Alliance Forensics: Digital Forensic Reconstruction Illustration and Animation*, ALLIANCE FORENSICS LABORATORY, INC., [http://www.allianceforensics.com/srv\\_fanim.shtml](http://www.allianceforensics.com/srv_fanim.shtml) (last visited Apr. 1, 2016);



Utah's evidentiary jurisprudence should not be interpreted as a deviation from acceptable evidentiary practice. In fact, Utah's specificity and clarity in describing the reversed presumption aligns with the general standard endorsed by the Supreme Court of the United States. Indeed, the Court has interpreted the very use of the word "probative" in Rule 403 to denote a concept similar to Utah's "essential evidentiary value." Specifically, according to the Court, evidence should not be analyzed as "an island, with estimates of its own probative value and unfairly prejudicial risk the sole reference points in deciding whether the danger substantially outweighs the value and whether the evidence ought to be excluded."<sup>164</sup> This "would leave the party offering evidence with the option to structure a trial in whatever way would produce the maximum unfair prejudice consistent with relevance."<sup>165</sup> Instead, "a reading of the companions to Rule 403, and of the commentaries that went with them to Congress, makes it clear that what counts as the Rule 403 probative value of an item of evidence, as distinct from its Rule 401 relevance, may be calculated by comparing *evidentiary alternatives*."<sup>166</sup> This means "that a judge applying Rule 403 could reasonably apply some discount to the probative value of an item of evidence when faced with less risky alternative proof going to the same point."<sup>167</sup>

What seems like an apparent counterargument is that a judicially initiated reversal of the Rule 403 standard directly contravenes the plain language of Rule 403. This concern is misguided. As already discussed, the Federal Rules of Evidence contain numerous general exclusions.<sup>168</sup> These exclusions all follow the underlying principle behind the Rule 403 analysis in that the drafters simply anticipated that specific types of evidence's prejudicial effect would almost always outweigh their probative value. A reversal of the standard in the narrow situation wherein gruesome visual evidence is introduced in murder trials is no different from any of these general exclusions. Judges are just deciding that, in a majority of cases, these images' cannot make the requisite showing of probative value to warrant admission, in light of the undue prejudice the images could introduce.

Before concluding this section, it is important to note that, compared to a categorical exclusion, a reversal of the standard could be more open to abuse. Specifically, judges could use their remaining discretion to continue to accept rationales such as identifying the location of wounds or showing body positioning as "substantially outweighing" gruesome visual evidence's unfair prejudicial effect. To prevent this, judges would need to create a strong body of case law that clearly catalogues the exceptional circumstances in which gruesome visual evidence should be admitted in the murder trial setting. Judges would also have to stay mindful of decoy rationales that do not comport with the Supreme Court's mandate of carefully considering evidentiary alternatives. That being said, however, we cannot underestimate the power of a statutory or judicial amendment to an existing legal standard. An amendment will very likely produce some sort of behavioral shift in judicial decisions or at least

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*Crime Scene Reconstruction*, NAT'L CENTER FOR AUDIO & VIDEO FORENSICS, <http://www.ncavf.com/articles/Crime-Scene-Reconstruction-articles.html> (last visited Apr. 1, 2016).

164. *Old Chief v. United States*, 519 U.S. 172, 182 (1997).

165. *Id.* at 183.

166. *Id.* at 184 (emphasis added).

167. *Id.* at 183.

168. *See supra* notes 127-135 and accompanying text.

put decision-makers on notice of the dangers of gruesome visual evidence.<sup>169</sup> This development will certainly be an improvement on the status quo and will only grow in influence as it is slowly accepted and adopted.

## V. ADDRESSING RESISTANCE AND REJECTING THE STATUS QUO

Throughout this Article, I have responded to a number of potential counterarguments. In Part I, I clarified that the purpose of this paper is not to attack the value of narrative integrity wholesale, or to recommend that the entire system lean on the side of exclusion. Instead, this Article is focused on a narrow but crucial subset of decisions involving gruesome visual evidence in murder trials. In Part II, I responded to many of the Supreme Court's stated rationales for the importance of narrative integrity and explained why they do not carry the day, at least in murder trials. In Part III, I explained that the emphasis on visual evidence, instead of oral or auditory evidence, is far from arbitrary. In fact, it contributes to a balanced system that gives prosecutors a menu of different options that pose less of an unfair threat to defendants. Finally, in Part IV, I explained why neither a categorical exclusion nor a presumption of prejudice approach is alien to our current system of evidence, contravenes the text of Rule 403, or threatens judicial flexibility. In this final section, I hope to anticipate and put to rest additional counterarguments that have not yet been explicitly addressed in the Article. In addressing these counterarguments, I expose the status quo as simply untenable.

### A. Cognitive Pitfalls of Jurors

When psychological research challenges our conception of the human capacity for neutral judgment, it tends to be uncomfortable. Indeed, we all like to think that we are mentally strong, capable, and intelligent individuals who can be fully trusted, under any circumstances, with important decisions. One problem with this view of human capabilities, however, is that it does not take the *unconscious* nature of terror management into account. Unconscious biases “influence our behavior . . . but we remain oblivious to their influence.”<sup>170</sup> As such, they are notoriously difficult to identify, much less address.

Terror management is far from a maladaptive human quirk. Multiple social scientists have theorized that terror management processes are particularly entrenched because they serve important evolutionary functions.<sup>171</sup> The human “combination of an instinctive drive for self-preservation with a [unique] awareness of the inevitability of death creates the potential for paralyzing terror.”<sup>172</sup> Over the years, societies constructed cultural systems and worldviews to mitigate such threats of death.<sup>173</sup> These worldviews provide “meaning, order, permanence, stability, and the promise

169. See, e.g., discussion *infra* Part V.E.

170. See, e.g., MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE*, at xii (2013); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 *UCLA L. REV.* 1124 (2012).

171. See, e.g., Mark J. Landau, *On the Compatibility of Terror Management Theory and Perspectives on Human Evolution*, 5 *EVOLUTIONARY PSYCHOL.* 476 (2007).

172. Eddie Harmon-Jones et al., *Terror Management Theory and Self-Esteem: Evidence that Increased Self-Esteem Reduces Mortality Salience*, 72 *J. PERSONALITY AND SOC. PSYCHOL.* 24, 24 (1997).

173. Greenberg et al., *supra* note 53, at 198-99.

of literal [or symbolic] immortality to those who live up to the standards of value set by the worldview.”<sup>174</sup> Human beings unconsciously and *automatically* cling to these worldviews to preserve their self-esteem and buffer anxiety in the face of overwhelming threats.<sup>175</sup>

Furthermore, the specific worldviews that people subscribe to, relating to certain ideologies and membership in social groups, can unconsciously cause prejudicial behavior from even the well intentioned. Anthony Greenwald produced the most famous demonstration of this unconscious derogation in their work on the Implicit Association Test.<sup>176</sup> They found that participants who would have explicitly denied that they were prejudiced towards African Americans demonstrated implicit negative responses towards them nevertheless.<sup>177</sup> Commentators have attributed this automaticity to the fact that “connections made often enough in the conscious mind eventually become unconscious.”<sup>178</sup> Unsurprisingly, the cultural atmosphere plays a vital role in the entrenchment of these implicit biases. For example, “[b]y five years of age . . . many children have definite and entrenched stereotypes about blacks, women, and other social groups.”<sup>179</sup> These stereotypes are then further reinforced by “peer pressure, mass media, [and] the actual balance of power in society.”<sup>180</sup> Attempting to overcome these entrenched biases within the truncated framework of a single trial is too difficult a task for any individual juror.

Also worth noting is the difficulty of discerning whether undesirable unconscious processes are ever properly thwarted prior to a juror’s verdict, despite what the juror may claim or believe. People are simply bad at monitoring such unconscious processes precisely because they occur “without awareness or intention.”<sup>181</sup> Additionally, people are incredibly motivated to eschew suggestions that they may be prejudiced. Indeed, in a meta-analysis of over a hundred studies on implicit biases, Anthony Greenwald found “that impression management can undermine validity of self-report measures in socially sensitive domains” such as discussions of race.<sup>182</sup> As such, it is unrealistic to suggest that jurors “fix” their automatic reactions after they’ve been exposed to gruesome visual evidence. They may not know what to fix

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174. Harmon-Jones et al., *supra* note 174, at 24.

175. *Id.* at 24-26.

176. Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1465 (1998). To take the Implicit Association Test online, see PROJECT IMPLICIT, <https://implicit.harvard.edu> (last visited, Apr. 1, 2016).

177. See Greenwald et al., *supra* note 176, at 1473-76.

178. Annie Murphy Paul, *Where Bias Begins: The Truth About Stereotypes*, PSYCHOL. TODAY (May 1, 1998), <https://www.psychologytoday.com/articles/199805/where-bias-begins-the-truth-about-stereotypes>. This automaticity has been studied in more than a hundred published studies. See, e.g., Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 19 (2009).

179. Paul, *supra* note 180.

180. *Id.*; see also Jerry Kang, *Implicit Bias*, NAT’L CENTER FOR STATE COURTS. 3 (Aug. 2009), [http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit\\_3\\_kang.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf) (explaining that implicit biases generally lean “in the direction consistent with the general social hierarchies”).

181. COGNITIVE SOCIAL PSYCHOLOGY: THE PRINCETON SYMPOSIUM ON THE LEGACY AND FUTURE OF SOCIAL COGNITION 360 (Gordon B. Moskowitz ed., 2001); see also Tom Pyszczynski et al., *A Dual-Process Model of Defense Against Conscious and Unconscious Death-Related Thoughts: An Extension of Terror Management Theory*, 106 PSYCHOL. REV. 838 (1999).

182. Greenwald et al., *supra* note 180, at 29.

or how to fix it, and they may be more focused on denying that they could have unconscious prejudice at all.

### B. Cognitive Pitfalls of Judges

If we can't trust the average human capacity for self-reflection, we may believe that judges, with their lengthy careers and wealth of legal experiences, are better equipped to make decisions in the course of a trial than the layman. As such, one may argue that these experts can be fully trusted to make the correct exclusionary decisions, regardless of the language of the relevant evidentiary rule. Unfortunately, that may not be the case. As an initial matter, in most states, judges are elected rather than appointed based on their credentials and illustrious careers.<sup>183</sup> More importantly, however, studies seem to support the idea that no one is immune from the limitations of human cognitions, not even judges.

Judges are just as likely to be influenced by unconscious racial biases,<sup>184</sup> arbitrary situational factors,<sup>185</sup> and judgment errors caused by taking cognitive shortcuts rather than engaging in comprehensive, deliberative processing.<sup>186</sup> Most importantly, however, terror induced derogation has been clearly demonstrated in judicial decision-making.<sup>187</sup> It is an unfortunate truth that even those we entrust with key decisions in our justice system, who may have only good intentions, still fall prey to the unconscious impact of gruesome visual evidence without even being fully aware of it.

### C. The Futility of Screening Jurors

Some may argue that even if we all suffer, to some extent, from unconscious biases, there are surely individuals who are simply better at staving off these impulses. If that were true, then the way to target the effects of gruesome visual evidence would be to simply select, through the voir dire process and the use of peremptory challenges, the jurors least likely to fall prey to cognitive pitfalls.<sup>188</sup> There is a wealth of research investigating both potential "risk factors" for terror management susceptibility as well as potential "buffers" against such susceptibility.

Social scientists have found that individuals with higher self-esteem are less vulnerable to the unconscious processes triggered by gruesome visual evidence because self-esteem acts as a buffer against existential anxiety.<sup>189</sup> A similar effect has been found for trait-based self-control.<sup>190</sup> Conversely, individuals who are high in authoritarianism—"a pattern of traits or generalized behavioral style characterized by high

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183. See, e.g., David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266-68 (2008).

184. See, e.g., Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1196 (2009).

185. See, e.g., Danziger et al., *supra* note 141.

186. See, e.g., Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

187. See, e.g., *supra* notes 71-77 and accompanying text.

188. See, e.g., Arndt et al., *supra* note 77, at 429-30; Blasi & Jost, *supra* note 109, at 1148; Kirchmeier, *supra* note 84, at 98.

189. Harmon-Jones et al., *supra* note 174, at 24-25.

190. Gailliot et al., *supra* note 61, at 59.

regard for authority, rigidity, conventionality, and contempt or disdain for those who are worse off”—are more likely to derogate those who threaten their worldviews when under mortality salience.<sup>191</sup> In theory, retaining as many individuals with high self-esteem and self-control and excluding those high in authoritarianism could help neutralize the effects of terror management. In practice, however, this is infeasible.

The practice of strategically selecting and excluding jurors, commonly called scientific jury selection, has gained a great deal of attention in recent years. Unfortunately, results of empirical evaluations of its effectiveness have not been especially promising. Joel Lieberman argues that “methodological flaws associated with existing research prevent clear conclusions from being drawn.”<sup>192</sup> Specifically, he outlines the lack of meaningful definitions of successful outcomes as well as the concentration of scientific jury selection in cases with wealthy litigants who are able to pay to strengthen other parts of their litigation strategies as well.<sup>193</sup> Furthermore, determining intangible characteristics such as self-esteem or authoritarianism requires standardized psychological testing with measures that are both reliable and valid. This type of testing, however, has not caught on in the courtroom setting because of the costs associated with it.<sup>194</sup> Moreover, such testing is unlikely to catch on simply because busy dockets and strained judicial resources will not permit extensive psychological profiling of each and every juror.<sup>195</sup>

Even if comprehensive evaluations of jurors were practically feasible, it is unlikely that lawyers would use them properly. Lawyers’ preconceived notions of jurors, as well as the hypotheses they are interested in confirming, often bias their subsequent decisions in the jury selection stage.<sup>196</sup> More troubling, however, is that lawyers are frequently overconfident in their predictions regardless of the amount of experience they have in their field.<sup>197</sup> As such, given their already entrenched practices and beliefs, it would be difficult to get lawyers to take a step back and critically examine the strategies they utilize when deciding the make-up of a jury.

We also need to be cognizant of the deeply troubling problems of racialized jury selection. Indeed, in a worrying recent case, *Foster v. Chatman*, the Georgia Supreme Court did not find a violation in the prosecutor’s jury selection strategies even though

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191. Greenberg et al., *supra* note 64, at 313.

192. Joel D. Lieberman, *The Utility of Scientific Jury Selection: Still Murky After 30 Years*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 48, 49 (2011).

193. *Id.*

194. See, e.g., Joseph A. Colquitt, *Using Jury Questionnaires; (Ab)using Jurors*, 40 CONN. L. REV. 1, 16-28 (2007) (outlining the various costs to comprehensive jury questionnaires).

195. See, e.g., WILLIAM W. SCHWARZER & ALAN HIRSCH, THE ELEMENTS OF CASE MANAGEMENT: A POCKET GUIDE FOR JUDGES 1 (2d ed. 2006) (“Faced with crowded dockets, federal judges may worry that they cannot keep up except by working oppressive hours.”).

196. See, e.g., Margaret Bull Kovera & Eugene Borgida, *Social Psychology and Law*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 1366 (Susan T. Fiske et al. eds., 2010); Caroline Crocker Otis et al., *Hypothesis Testing in Attorney-Conducted Voir Dire*, 38 LAW & HUM. BEHAV. 392 (2014).

197. Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes*, 16 PSYCHOL., PUB. POL’Y & L. 133, 149 (2010); cf. Sean Cole, *In Defense of Ignorance: Act Two*, THIS AMERICAN LIFE (Apr. 22, 2016), <http://www.thisamericanlife.org/radio-archives/episode/585/in-defense-of-ignorance> (citing Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One’s Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCHOL. 1121 (1999)) (discussing the Dunning-Kruger effect—that unskilled people suffer illusory superiority, mistakenly believing their ability to be much higher than it actually is).

evidence surfaced that the prosecutor had marked all the black jurors in green highlighter, ranked them, and clearly evinced an intent to have them all removed, leaving an all-white jury to try a black man accused of murder.<sup>198</sup> The fact that this is still a glaring problem in our society makes it unrealistic to claim that we can magically progress to selecting juries in a manner that takes nuanced psychological characteristics into account.

#### *D. Unavailing Post-Hoc Measures*

Another suggested method for overcoming the prejudicial impact of terror management is simply to confront mortality reminders head-on. This could be accomplished by educating jurors about gruesome visual evidence after they have been exposed to such evidence during the course of the trial.<sup>199</sup> For example, lawyers could present empirical evidence regarding the effects of unconscious processes on decision-making or ask for appropriate judicial admonishments during the jury instruction stage of the trial.

As an initial matter, any experienced trial lawyer will tell you that there is something misguided about this approach. Indeed, at Yale Law School, visiting practitioners and professors advise students, year after year, to think about the ramifications of their in-court objections to certain types of evidence.<sup>200</sup> Sometimes, objecting to prejudicial types of evidence actually brings them to the forefront of jurors' minds due to the increased amount of time spent discussing the evidence and the back and forth that inevitably follows between the lawyers and the judge. Conversely, "[e]ven though they know that the judge will order it stricken from the record and will instruct the jury to disregard it, trial lawyers often introduce objectionable evidence they believe favorable to their client in the hope that jurors will nonetheless be influenced."<sup>201</sup> These common practices reveal an implicit understanding by litigators that judicial instructions and clarifications may not serve as a complete panacea for the influence of improper evidence.

Furthermore, it is patently incorrect to think of humans as machines that can simply erase the effects of specific evidence upon instruction by a lawyer or judge. Unfortunately, "[p]eople's inability to disregard relevant but inadmissible evidence has been shown in dozens of psychological experiments."<sup>202</sup> Similarly, studies have shown that jurors do not set aside their erroneous understandings of the law even after careful legal instructions from a judge.<sup>203</sup> Indeed, "even relatively simple instructions failed to revise subjects' existing concepts enough to improve the accuracy of their

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198. Petition for Writ of Certiorari, *Foster v. Chatman*, *supra* note 107, at 2-8.

199. Kirchmeier, *supra* note 84, at 100-01.

200. See, e.g., Hugh F. Keefe, Partner, Lynch, Traub, Keefe & Errante P.C., Trial Practice Class (Feb. 2015); Tom R. Tyler, Macklin Fleming Professor of Law and Professor of Psychology, Yale Law School, Social Science in Law Class (Oct. 2014).

201. James H. Davis et al., *The Empirical Study of Decision Processes in Juries: A Critical Review*, in *LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* 337 (June Louin Tapp & Felice J. Levine eds., 1977).

202. MICHAEL J. SAKS & BARBARA A. SPELLMAN, *THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE* LAW 87 (2016).

203. See, e.g., sources cited *supra* note 47.

decision making.”<sup>204</sup>

Targeting terror management directly faces its greatest obstacle in a phenomenon known as the Reactance Theory.<sup>205</sup> The theory posits “that when free behaviors are threatened, the attractiveness of the threatened behavior increases.”<sup>206</sup> For example, in one of the first studies of reactance, Jack Brehm and John Sensenig asked participants to choose between two pictures of different people and then report their impressions.<sup>207</sup> To induce reactance, some participants were told that a third party thought the participants should choose one specific picture over the other.<sup>208</sup> The rest of the participants were merely informed of the third party’s personal preference.<sup>209</sup> Participants who were merely informed of the third party’s preference were more persuaded to deliver positive impressions of the preferred picture, presumably because the more overt attempt to sway the participants’ judgments threatened participants’ free behavior, thus increasing the attractiveness of the forbidden option.<sup>210</sup> One can easily see how this phenomenon could spill into efforts to curb terror management in legal decision-makers. Warning decision-makers to avoid thoughts of death could have the inverse effect of making death thoughts more attractive.

Even if decision-makers do not make the *explicit* choice to disobey the lawyer or judge, attempts at inoculation may still have the more *implicit* effect of making death thoughts more salient and accessible in jurors’ minds. This phenomenon, described extensively in literature on the Ironic Process Theory,<sup>211</sup> is most famously exhibited by the “white bear” study. Specifically, in the seminal study of Daniel Wegner and David Schneider, participants told not to think of a white bear increasingly reported such thoughts occurring during the course of the experiment.<sup>212</sup> Later studies demonstrated that this phenomenon could also affect cognitive performance. For example, Christian Hart found that individuals who were trying very hard to remember pieces of information recalled less of the information than those who were not trying as hard.<sup>213</sup> It is easy to see how this could similarly apply to jurors trying very hard to suppress thoughts about death. Such jurors could ironically become less effective at suppression due to the subliminal impact of inoculation efforts.

Finally, there is always a danger that, upon instruction, jurors may “overcorrect” by excluding even valid influences on their legal decisions.<sup>214</sup> Indeed, we do not think

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204. Smith, *Prototypes*, *supra* note 47, at 869.

205. See, e.g., JACK W. BREHM, *A THEORY OF PSYCHOLOGICAL REACTANCE* (1966).

206. Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 *PSYCHOL., PUB. POL’Y & L.* 677, 693 (2000).

207. Brehm & Sensenig, *supra* note 46, at 703.

208. *Id.*

209. *Id.*

210. *Id.*

211. See DANIEL M. WEGNER, *WHITE BEARS AND OTHER UNWANTED THOUGHTS: SUPPRESSION, OBSESSION, AND THE PSYCHOLOGY OF MENTAL CONTROL* (1994).

212. Daniel M. Wegner & David J. Schneider, *Paradoxical Effects of Thought Suppression*, 53 *J. PERSONALITY & SOC. PSYCHOL.* 5, 7-12 (1987).

213. Christian L. Hart et al., *Ironic Effects of Attempting to Remember*, 9 *N. AM. J. PSYCHOL.* 201, 201 (2007).

214. Neal R. Feigenson, *Responsibility and Blame: Psychological and Legal Perspectives: Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 *BROOK. L. REV.* 959, 998-99 (2003).

in discrete, mechanistic units. Instead, our thoughts and experiences are highly interconnected, and so the instruction to exclude one very specific piece could spill over into pieces that can and should be taken into account in making findings of fact.

In sum, studies demonstrate that directly attempting to curb the effects of gruesome visual evidence carries its own sets of risks. Doing so may make jurors even more susceptible to unconscious pitfalls than they were originally, either by creating an attractive forbidden option or by making death thoughts more accessible in jurors' minds.

#### *E. The Value of Changing Rules and Standards*

Critics may wonder what the point of a new standard is if it leaves open any avenue for discretion, and thus abuse. Indeed, some judges may be able to strategically use even an altered legal standard to maintain the status quo through skillful argumentation and interpretation. The response to this concern is that while rules are certainly not a panacea, they still have incredible power, both practically and symbolically. Practically, a clear change in rules, accompanied by documents explaining the reasoning for such rules, will significantly alter judges' behavior. This is especially true for lower court judges who are often worried about being overturned.<sup>215</sup> Symbolically, a change in rules symbolizes the values and aspirations of society.<sup>216</sup> It represents a shift in the way people think about the principles underlying our system and the integrity of our procedures. In many ways, the stated values we espouse through our rules shape society's trajectory, and we have the obligation to make sure that the rules point to a more just, fair, and impartial system, rather than simply giving up on the exercise of prudent rule-making altogether.

#### *F. Preserving the Prosecutor's Role and the Adversarial System*

Some may argue that gruesome visual evidence is one of the most important tools for prosecutors in establishing guilt for the crime of murder, especially because they have the higher burden of persuasion. I acknowledge that reality and I do not discount the importance of the prosecutor's ability to introduce crucial evidence. However, as I've discussed extensively in Parts II and IV, we need to critically analyze the argument that gruesome visual evidence is, in fact, "crucial," rather than a distraction from the merits of a case. Additionally, instead of framing this proposal as one that is anti-prosecutor, we should see this as an improvement that is pro-systemic legitimacy. Yale Law School Professor Tom Tyler explains that this faith in the system is what motivates people to obey the law.<sup>217</sup>

This Article seeks to reconcile the prosecutor's important role as an advocate for the government with the prosecutor's equally important role as an ethical practitioner,

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215. See, e.g., Stephen J. Choi et al., *What Do Federal District Court Judges Want? An Analysis of Publications, Citations, and Reversals*, 28 J. L., ECON. & ORG. 518 (2012).

216. Cf. e.g., Johannes Andenaes, *The Moral or Educative Influence of Criminal Law*, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 51 (June Louin Tapp & Felice J. Levine eds., 1977); Saira Mohamed, *Deviance, Aspiration, and the Stories We Tell*, 124 YALE L.J. 1346, 1674 (2015) (introducing the idea of "aspirational expressivism," the belief that the "law declares certain conduct to be behavior to which people should aspire").

217. See generally TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990).



a defender of justice, and a prudent decision-maker. We see many instances of prosecutorial misconduct as an outgrowth of the American “win at all costs” culture.<sup>218</sup> Restricting the extent to which prosecutors can use a tool that naturally lends itself to interference with a jury’s impartiality, while also leaving open many evidentiary alternatives that foreground facts rather than passions,<sup>219</sup> dissuades unethical practice and allows ethical prosecutors to find new and creative ways to construct narratives purely on the merits of a case.

Prosecutors should also be incredibly concerned about wrongful convictions. Indeed, the metric of success should not be confined to the number of convictions an office can get, but also the extent to which the office avoids costly errors that can rob innocent defendants of their life and liberty. Even going beyond the moral argument, wrongful convictions cause an enormous amount of negative press and a decrease in the entire system’s perceived legitimacy. In this manner, a more restrictive exclusionary rule for gruesome visual evidence may actually protect offices from backlash. It could also shield individual prosecutors from internal and external pressures to make use of strategies that could cause irreparable damage to a jury’s impartiality.

Finally, to the extent that we value the adversarial system, the proposals in this Article only strengthen such a system by ensuring that both parties in murder trials can employ their strongest arguments in ways that foreground facts and the merits of a case instead of emotional and cognitive manipulation. This Article encourages comprehensive, thoughtful jury deliberations rather than a reliance on cognitive shortcuts and problematic inter-group “othering.” Furthermore, this Article only seeks to increase the legitimacy and integrity of our unique brand of American justice by subjecting it to critical review in light of empirically supported proposals for change.

#### CONCLUSION

Our American justice system is not perfect. Legal decision-makers are not perfect. Human beings are not perfect. What I hoped to illuminate through this Article is that, despite our shortcomings, our growing repertoire of shared knowledge gives us all hope. We now have the incredible power to reform our systems in ways that can reliably emphasize prudence, fairness, and equality. As such, we have the corresponding obligation to reflect on the type of justice we produce and strive to further our society’s greater values and ideals through our laws and policies. It is my hope that, over time, we can restructure our systems so that they do not take advantage of human weakness but, instead, capitalize on the marvelous potential of human strength.<sup>220</sup>

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218. See, e.g., Amicus Brief from the Ethics Bureau at Yale for Respondent, *Terrance Williams v. Pennsylvania*, No. 15-5040 (U.S. 2016), <http://www.scotusblog.com/wp-content/uploads/2015/12/15-5040-tsac-Ethics-Bureau-at-Yale-et-al..pdf>.

219. See *supra* Part III.C (discussing why this Article’s proposal is limited to gruesome *visual* evidence).

220. Sheldon Solomon, one of three psychologists who proposed and developed Terror Management Theory, poses a question to those of us interested in the implications of his work. He urges us to ask: “How do [we] . . . walk that psychological tightrope . . . and accept the reality of the human condition and parlay that into bringing out the best in us?” Interview by PsychAlive with Sheldon Solomon, Ross Professor for Interdisciplinary Studies, Skidmore Coll., in Saratoga Springs, N.Y. (2012), <http://www.psychalive.org/dr-sheldon-solomon-on-death-awareness-and-psychological-growth-exclusive-interview>.