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EMOTIONS, RISK PERCEPTIONS AND BLAMING IN 9/11 CASES*

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Emotions combine with cognition to shape our perceptions, memories and judgments. Social psychologists have conducted many studies, especially in the last fifteen years or so, seeking to identify the roles of affect in social judgments, including legal judgments. Psychologists have also studied how people perceive risks to their (or others') health and safety and, in particular, how their perceptions and related decisions may be biased by various factors that expert risk analysts would consider extraneous to those judgments. In this Article, I draw on some of this research to explore the roles that emotions and risk perceptions may play in jurors' decision making in cases arising out of the September 11, 2001 attacks on the World Trade Center, should any such cases get that far.

People reacted and continue to react to the 9/11 attacks with strong and complicated emotions, including horror, fear, anger, sympathy and sadness. But how might these or other emotions influence jurors' attributions of responsibility and blame to, for instance, the Port Authority in a lawsuit alleging (among other things) negligence in the reinforcement and fireproofing of the towers,[1] or to Saudi princes, banks and

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[1] Mulligan v. Port Authority, No. 02 Civ. 6885 (S.D.N.Y. Sept. 6, 2002);

charitable organizations in a case alleging (among other things) that these defendants financially aided and abetted the terrorists who committed the attacks?[2]

In the first portion of this Article, I survey the empirical research on the effects of people's moods and emotions on their judgments of legal responsibility and blame. This complex body of research indicates that jurors' emotions may influence their legal judgments in two kinds of ways: by affecting how carefully jurors process trial information, and by inclining jurors toward particular attributions of responsibility or blame. This Section concludes with a discussion of the processes by which emotions influence attributions of responsibility and blame. In the second Section, I summarize more briefly some of the research on lay risk perceptions, the intersections between people's risk perceptions and their emotions and how both may affect decisions regarding legal responsibility.

In the third Section of this Article, I apply these cognitive and social psychological findings to 9/11 cases against the Port Authority and the Saudis, respectively. The research suggests that while the overall effect of jurors' emotions and risk perceptions on their judgments in 9/11 cases may very well be increased blaming of defendants, those effects may be quite nuanced and complicated. Jurors' sympathy for the victims of 9/11 is predicted to incline them to blame the defendants more than they otherwise would, because they will be more inclined to compensate the victims, and the only way they can do this is to hold the defendants liable. Jurors' anger may increase blaming through several processes: their increased reliance on heuristic cues (e.g., stereotype-based appeals); their increased tendency to interpret ambiguous behavior as blameworthy; and their use of anger itself as a signal that the defendants deserve

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David W. Chen, *Suits by 950 Families Allege Safety Lapses at the Towers*, N.Y. TIMES, Sept. 14, 2002, at B3. In an order dated September 6, 2002, Judge Hellerstein ruled that the plaintiffs, by suing the Port Authority but otherwise allowing the suit to remain "dormant" as defined therein, did not abandon their right to file a claim for compensation under the September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, §§ 401-409, 115 Stat. 230, 237 (2001) (codified in 49 U.S.C.); by filing such a claim, however, a plaintiff would be barred from proceeding with a suit against the Port Authority. Section 201 of the Aviation and Transportation Security Act, Pub. L. No. 107-71 §§ 110-15, 115 Stat. 597, 646 (2001) (codified in scattered sections of 49 U.S.C.), limits the liability of the Port Authority (and any other "person with a property interest in the World Trade Center, on September 11, 2001") to its liability insurance coverage, which is $650 million. *See also* James V. Grimaldi, *After a Respectful Pause, Lawyers Line Up to Sue*, WASH. POST, Sept. 9, 2002, at E1.

[2] Burnett v. Al Baraka Inv. & Dev. Corp., No. 1:02CV01616 (D.D.C. Nov. 22, 2002).

blame and punishment. Moreover, fear provoked by the attacks may lead to blaming through at least two distinct processes. Under one process, fear increases the perceived risks of terrorism, which, in combination with the hindsight bias, may lead jurors to hold defendants liable for not having done more to avoid that risk. And to manage the terror that contemplation of their own deaths would otherwise provoke, jurors are likelier to respond punitively to defendants whom they perceive to have challenged their shared cultural norms and symbols.

The complexity of emotional responses and contextual features of juror decision making, however, suggests that the effects of emotions on blaming in these cases are likely to be moderated by several case-specific factors, including the identity of the defendant(s); the legal theory of recovery; the strength of the parties' respective arguments; and the emotional tonality encouraged by lawyers' case presentations. In particular, while jurors' sympathy may play a role in both the case against the Port Authority and the case against the Saudis, their anger and fear are more likely to increase blaming of the Saudis. I also briefly discuss the extent to which jurors may be expected to adjust their judgments appropriately to correct for any emotional influences they perceive to be undesirable.

In a relatively brief Article, I can only skim the surface of the immensely complicated subject of the effects of emotions and risk perceptions on each other and on social judgments. Speculations about likely effects are especially problematic where, as here, the underlying research is inconclusive, the emotions are so complex and conflicting and many situational variables could affect both emotional responses and ultimate judgments. And, of course, what happens in a single case cannot confirm or disconfirm inferences derived from research that yields probabilistic findings. Nevertheless, theory and research on the emotions and risk perception may help us to understand better not only 9/11 litigation but also legal decision making in less exceptional cases.

I. THE ROLE OF EMOTIONS AND MOODS IN ATTRIBUTIONS OF RESPONSIBILITY AND BLAME

It will help to start with a very brief introduction to emotion theory.[3] While any capsule description is bound to be problematic, "emotion" may be defined as:

> a complex set of interactions . . . mediated by neural/hormonal systems, which can (a) give rise to affective experiences such as feelings of arousal, pleasure/displeasure; (b) generate cognitive processes such as emotionally relevant perceptual effects [and] appraisals . . . ; (c) activate widespread physiological adjustments to the arousing conditions; and (d) lead to behavior that is often, but not always, expressive, goal-directed, and adaptive.[4]

That is, emotions combine affect,[5] cognition and action (or inclinations to act, whether or not realized).

The primary function of emotions is to signal changes in the environment that are important to the person experiencing the emotion, and to help that person choose among and coordinate competing goals and values.[6] While some of this processing occurs pre- and subconsciously, the signaling function is inescapably cognitive. The cognitive theory of emotions,[7] which just about all research on emotions and social judgment takes to be valid, explains that each emotion depends on an (implicit) appraisal of the significance for the person of changes in that person's environment. And emotions, or groups of them, can be differentiated based on the general cognitive structures of these appraisals. These cognitive structures are also known as their "appraisal structures" or "core relational themes."[8] For instance, the cognitive structure of anger is "disapproving of someone else's blameworthy action and being displeased about the related event;"[9] its core relational theme is

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[3] For a brief overview of the psychology of the emotions, from which the following material in the text is adapted, see NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 69-86, 235-41 (2000).

[4] ROBERT PLUTCHIK, THE PSYCHOLOGY AND BIOLOGY OF EMOTION 5 (1994).

[5] Within the general category of affect, "*moods*, which tend to be less intense, more diffuse, and relatively enduring, and to lack a readily identifiable source, may be distinguished from *emotions*, which tend to be more intense and short-lived, and to have an identifiable cause." FEIGENSON, *supra* note 3, at 235.

[6] *See* ANTONIO R. DAMASIO, DESCARTES' ERROR 165-201 (1994).

[7] *See, e.g.*, ANDREW ORTONY ET AL., THE COGNITIVE STRUCTURE OF EMOTIONS (1988).

[8] Richard Lazarus, *Universal Antecedents of the Emotions*, *in* THE NATURE OF EMOTION (Paul Ekman & Richard J. Davidson eds., 1994).

[9] ORTONY ET AL., *supra* note 7, at 148.

to have perceived "a demeaning offense against me and mine."[10] The core relational theme of sympathy is to "be moved by another's [undeserved] suffering and want to help."[11]

Emotions and moods can influence social judgments in at least two kinds of ways. They can affect the depth of information processing: how carefully people think through the task or message before them. They can also affect how people make particular kinds of judgments, such as estimating risks or attributing blame. I discuss these types of effect in turn.

A. *The Influence of Emotions and Moods on Information Processing*

Research has uncovered robust effects of emotions and moods on information processing, including receptivity to persuasive messages. Many studies, for instance, have shown "that people in a (moderately) positive mood tend to think more creatively and to be better at drawing associations and [at] inductive reasoning than people in a neutral mood, whereas people in a (moderately) negative mood tend to be . . . better at analytic and deductive reasoning."[12] Research supporting the prominent Elaboration Likelihood Model ("ELM") of attitude change, for instance, shows that negative moods lead to more deliberate, bottom-up information processing, more careful consideration of the content of persuasive messages and less reliance on peripheral and heuristic cues.[13]

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[10] Lazarus, *supra* note 8, at 164. In addition, emotional response, expression and interpretation are also shaped by culture, see, e.g., EMOTION AND CULTURE (Shinobu Kitayama & Hazel Rose Markus eds., 1994), even if certain "basic" emotions and their expressions seem to be experienced and recognized across cultures, see, e.g., Paul Ekman, *All Emotions are Basic*, *in* THE NATURE OF EMOTION 15 (Paul Ekman & Richard J. Davidson eds., 1994). I put these complications to the side.

[11] Lazarus, *supra* note 8, at 164. Lazarus does not include "undeserved" in his expression of sympathy's core relational theme, but extensive research by Bernard Weiner (*see infra* notes 19-21 and accompanying text) and others warrants its inclusion. *See* Neal Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 4-8 (1997) (definitions and conditions of sympathy).

[12] FEIGENSON, *supra* note 3, at 240; Joseph P. Forgas, *Affect and Social Judgments: An Introductory Review*, *in* EMOTION AND SOCIAL JUDGMENTS, 15-16 (Joseph P. Forgas ed., 1991).

[13] Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, *in* 19 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 123 (Leonard Berkowitz, ed., 1986). Relatedly, framing a message negatively (to emphasize risks over benefits) has been shown to induce greater message processing, although this effect is moderated by the audience's need for cognition and expectations regarding the message frame; i.e., persons low in need for cognition who were led by the title of the stimulus article to expect a negatively framed message engaged in less processing of such a message. Stephen M. Smith & Richard E. Petty, *Message Framing and*

An increasing amount of research traces the influence of affect on information processing not (only) to the valence of the affective state—whether the mood or emotion is positive or negative—but to particular qualities of the specific emotion experienced. For instance, some studies have found that although anger and sadness are both negatively valenced emotions, only anger leads to less systematic information processing (i.e., greater reliance on heuristics).[14] This effect is due to what scholars have labeled the "appraisal tendencies" of the respective emotions. Specifically, some emotions such as anger, disgust and happiness are typically associated with a greater sense of certainty; other emotions, such as hope, anxiety and some forms of sadness, are typically associated with uncertainty. The more certain people feel, the less inclined they are to process information systematically, because they are more confident that they already know what they need to know to address the task at hand. Accordingly, Larissa Tiedens and Susan Linton found that the higher degree of certainty associated with anger, as opposed to sadness (or fear), leads to greater susceptibility to heuristic cues.[15] In one experiment, for instance, participants were asked to indicate how much they agreed with an essay on grading policies. In one condition, the essay was presented as a published work and attributed to an education professor (expert); in the other, it was presented in typewritten format, authored by a student (non-expert). Participants who had been induced to feel angry (or another emotion associated with certainty) were influenced by the expertise cues (they registered greater agreement with the "expert" essay); those induced to feel worry were unaffected by these cues. Tiedens and Linton also found that angry

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Persuasion: A Message Processing Analysis, 22 PERSONALITY & SOC. PSYCHOL. BULL. 257 (1996).

Among the explanations offered for the general effect of mood on level of information processing, it has been argued that people generally want to avoid negative moods–such moods signal that things are not right in the world–so people in negative moods are motivated to repair those moods, which may require systematic, careful thinking. Positive moods, by contrast, signal that the world is safe, so that there's less need to expend scarce cognitive resources. *See* Forgas, *supra* note 12.

[14] Sadness, by contrast, leads to more careful information processing. *See* Carolyn Semmler & Neil Brewer, *Effects of Mood and Emotion on Juror Processing and Judgments*, 20 BEHAV. SCI. & L. 423 (2002) (reporting that mock jurors whom simulated case facts made sad were better able to identify testimonial inconsistencies than mock jurors whose mood remained neutral).

[15] Larissa Z. Tiedens & Susan Linton, *Judgment Under Emotional Certainty and Uncertainty: The Effects of Specific Emotions on Information Processing*, 81 J. PERSONALITY & SOC. PSYCHOL. 973, 974 (2001).

participants were less able to distinguish substantively stronger from weaker arguments. Other researchers have similarly found that anger leads people to consider fewer factors when making judgments[16] and makes them more likely to be influenced by stereotypes in making related social judgments.[17]

B. *The Influence of Emotions and Moods on the Attribution of Responsibility and Blame*

Psychologists have also identified relationships between emotions and particular judgmental tasks, such as attributing responsibility and blame, as well as the actions or inclinations to act (such as punishing or awarding compensation) associated with those attributions. This research provides varying degrees of evidence for at least four sorts of judgmental paths involving jurors' emotional responses:

- Path one: from construal of target features to attributions of responsibility to emotional response (and associated actions or inclinations to act);
- Path two: from construal of target features to emotional response to attributions of responsibility (and associated actions or inclinations to act);
- Path three: from emotional state to construal of target features to attributions of responsibility (and associated actions or inclinations to act);
- Path four: from emotional state to attributions of responsibility (and associated actions or inclinations to act).

Differentiating these paths is useful for reviewing the relevant literature and summing up the present state of psychological

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[16] Jennifer S. Lerner et al., *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 563 (1998).

[17] Galen V. Bodenhausen, *Emotions, Arousal, and Stereotypic Judgments: A Heuristic Model of Affect and Stereotyping*, *in* AFFECT, COGNITION, AND STEREOTYPING 13 (Diane M. Mackie & David L. Hamilton eds., 1993); Galen V. Bodenhausen et al., *Negative Affect and Social Judgment: The Differential Impact of Anger and Sadness*, 24 EUR. J. SOC. PSYCHOL. 45 (1994). Bodenhausen also reports a study showing that anxiety, like anger, leads to increased stereotypic processing. Most of the studies of the effects of specific emotions on information processing, however, distinguish anger (and happiness) from sadness (or neutral conditions). *See* Bodenhausen, *supra*.

knowledge on this topic. Most importantly, differences between the paths may affect how emotions relevant to potential 9/11 cases are likely to figure in jurors' decision making.[18]

In path one, relevant features of a case can affect attributions of responsibility and blame, which in turn affect emotional responses and associated action tendencies. The research design takes some stimulus of interest—say, how blameworthy the victim is—as the *independent* variable, and measures emotional response and inclination to act on it as the *dependent* variable. For instance, in a series of studies spanning a generation, Bernard Weiner and his associates have found that emotional responses to suffering depend on attributions of responsibility.[19] When an observer perceives a person in need of aid (including a victim of accident, disease or natural disaster), the observer attempts to discern the cause of the need. If the cause is perceived to be outside the sufferer's control,[20] the observer reacts with sympathy and is inclined to help. If the cause is perceived to be within the sufferer's control, the observer reacts with anger and is inclined to ignore the sufferer.[21] Thus, emotion figures as an output of the attribution of responsibility or blame.

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[18] I do not mean to argue that emotions, even where jurors feel them, entirely drive their legal judgments, or that those judgments may not also be subject to other, non-emotional cognitive biases (such as availability, representativeness, framing effects and so on). Further, I do not address in this Article the difficult question of the extent to which the law (notwithstanding the formal proscription of emotional influence typically found in jury instructions) does or ought to accommodate or even welcome jurors' emotions. It can be argued that many aspects of evidence law and trial procedure acknowledge jurors' emotions and perhaps even enhance their salience, e.g., through dramatic concentration. *See generally* ROBERT P. BURNS, A THEORY OF THE TRIAL (1999). And whether legal decision making ought to incorporate emotions to an even greater degree than it does has been the subject of much spirited debate. *See, e.g.*, THE PASSIONS OF LAW (Susan Bandes ed., 1999). (I thank my colleagues Steve Latham, Greg Loken and Linda Meyer for raising these issues.)

[19] Much of the research is collected and synthesized in BERNARD WEINER, JUDGMENTS OF RESPONSIBILITY: A FOUNDATION FOR A THEORY OF SOCIAL CONDUCT (1995).

[20] The dependent variables in the cited research variously include attributions of control, responsibility and blame; these can be treated as synonymous for the present purposes. *See* Feigenson, *supra* note 11, at 58 n. 247.

[21] Other researchers have posited other factors as well, such as the actor's intent and the absence of adequate justification for the act, as preconditions for a response of anger. *See, e.g.*, Brian M. Quigley & James T. Tedeschi, *Mediating Effects of Blame Attributions on Feelings of Anger*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 1280, 1280-81 (1996). Quigley and Tedeschi found that attributions of blame mediated the effect of these variables and of the extent of the harm on participants' anger. They used a different research design, however, in which participants were asked to remember an incident in which someone had harmed them, to rate the perceived levels of harm, blameworthiness and justification, and then to report the amount of blame

In path two, relevant features of a case may provoke emotional responses, which in turn affect attributions of responsibility or blame.[22] That is, the emotion is an input to, not an output of, the attribution. This path is established by research showing that jurors' emotions *mediate* the effects of case features, such as the severity of an accident or a party's blameworthiness, on attributions of responsibility and damage awards.[23] The case features are the independent variables; the attributions are the dependent variables; the former affect the latter *because* of the effect they have on jurors' emotions.

For instance, Brian Bornstein has found that sympathy mediates the effect of outcome severity on mock jurors' responsibility judgments.[24] In one set of experiments, a product liability lawsuit against the manufacturer of a birth control pill, mock jurors were more sympathetic to the more seriously injured plaintiff, and this greater sympathy made them more likely to find the defendant liable.[25] Similarly, Jai Park, Peter Salovey and I found in comparative negligence cases that anger mediated the effect of the parties' blameworthiness and the severity of the outcome on participants' apportionments of fault (but not their damage awards).[26] Increasing the severity of the accident made participants angrier at the defendant, which led them to apportion more fault to the defendant. Increasing the

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they attributed to the other person in their remembered scenario and the amount of anger and resentment they felt toward that person (as well as other felt emotions). The researchers then measured correlations among the various responses. The structural model they developed to account for their findings, in which blame mediated the effects of harm, intent and justification on anger and anger mediated the effects of those same variables on blame, is consistent with path one (and two) but, due to the differences in experimental design, does not directly support either. *See infra* note 62.

[22] Similarly, *moral intuitionism* posits that people's intuitive, affective responses to features of the target drive their moral judgments, with moral reasoning playing a secondary, post hoc role. *See* Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001). In this model, affective responses are distinguished only by valence (i.e., like-dislike, good-bad), not by specific emotional appraisals.

[23] *See* Reuben M. Baron & David A. Kenny, *The Moderator-Mediator Variable Distinction in Social Psychological Research: Conceptual, Strategic, and Statistical Considerations*, 51 J. PERSONALITY & SOC. PSYCHOL. 1173 (1986) (defining and explaining "mediation" in social psychological research design).

[24] Brian Bornstein, *From Compassion to Compensation: The Effect of Injury Severity on Mock Jurors' Liability Judgments*, 28 J. APPLIED SOC. PSYCHOL. 1477 (1998).

[25] *Id.*

[26] Neal Feigenson et al., *The Role of Emotions in Comparative Negligence Judgments*, 31 J. APPLIED SOC. PSYCHOL. 576 (2001); *see also* Quigley & Tedeschi, *supra* note 21, at 1284 (noting effects of harm on blame mediated by anger).

plaintiff's blameworthiness made them angrier at the plaintiff, which led them to apportion more fault to the plaintiff.[27]

Why do emotions figure in people's blaming in these ways? What functions do emotions serve in these first two paths—what are emotions doing, for instance, when they mediate the effect of case features on jurors' attributions of blame? The most plausible explanation is that in these situations, people use their current emotional state (affect) as an *informational cue* regarding the judgment target. For example, because the cognitive or appraisal structure of anger is "disapproving of someone else's blameworthy action and being displeased about the related event,"[28] being angry sends a *signal*[29] to the person that the target of judgment has behaved in a blameworthy fashion and, therefore, deserves to be blamed (path two). Similarly, because the cognitive structure of sympathy includes an awareness that another is suffering undeservedly and a desire to help,[30] feeling sympathy for a target thus signals that the person is not to blame (path two) and deserves to be helped (path one).

These paths involve what may be labeled *intrinsic* emotion sources: Features of the judgment target itself provoke decision-relevant affective responses. *Extrinsic* emotions, ones provoked by stimuli incidental or extraneous to the judgment task, have also been shown to affect attributions of responsibility and blame, as well as other kinds of judgments.[31]

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[27] Outcome severity is, of course, legally relevant to the determination of damages if the defendant is found liable. It may even be legally relevant to the determination of fault to the extent that the decision maker uses the (type and) extent of the harm that actually occurred to infer the harm that should have been foreseen, and hence whether the defendant failed to use reasonable care when it failed to avoid (or otherwise increased the risk of) that harm. Such reasoning, however, is prone to the hindsight bias and anchoring effects, among other non-emotional cognitive biases. The research cited in the text does not dispute these contentions; it simply shows that outcome severity can affect attributions of fault and liability *because* it affects the amount of anger jurors feel toward the responsible party.

[28] ORTONY ET AL., *supra* note 7, at 148.

[29] *See* DAMASIO, *supra* note 6.

[30] *See* Feigenson, *supra* note 11, at 4-8 (noting definitions and conditions of sympathy).

[31] *See* Reid Hastie, *Emotions in Jurors' Decisions*, 66 BROOK. L. REV. 991 (2001). Hastie classifies as "anticipated emotions" most of what I regard as intrinsic emotions, arguing that the sympathy, anger and so on that the case itself may engender are best understood in terms of the decision maker's desire to decide in such a way as to relieve the emotional disquiet the case produces; thus, anticipated emotions concern the expected consequences of the decision. *Id.* at 1004-06. Hastie reserves for the category of "decision-relevant" emotions the effects on information processing believed to obtain while the decision maker is deciding. *Id.* at 1002-04.

Paths three and four start from emotional responses to extrinsic stimuli.

In path three, extrinsically induced emotion affects the way people construe the relevant features of the target, which in turn affects their subsequent judgments. For instance, research consistently shows that people who are angry tend to blame more. Jennifer Lerner, Julie Goldberg and Philip Tetlock found that participants who viewed an anger-provoking video clip and then read several vignettes of accident cases blamed the defendants who caused the injuries more than did participants who had watched an emotion-neutral video.[32] Similarly, Dacher Keltner, Phoebe Ellsworth and Kari Edwards found that angry participants tended to attribute more responsibility to the person than to the situation regarding ambiguous social mishaps; sad participants did the opposite.[33] Keltner and his colleagues found that anger and sadness affected participants' attributions of causal responsibility, which in turn affected blaming.

The process or mechanism posited to explain this influence of extrinsic emotion on subsequent judgments of responsibility is *appraisal tendency*, the same process offered to explain the effects of specific emotions on information processing mentioned above.[34] Experiencing an emotion makes

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[32] Lerner et al., *supra* note 16.

[33] Dacher Keltner et al., *Beyond Simple Pessimism: Effects of Sadness and Anger on Social Perception*, 64 J. PERSONALITY & SOC. PSYCHOL. 740 (1993). The only other study of specific extrinsic emotion effects on blaming judgments that I have been able to find is Dennis Gallagher & Gerald Clore, *Effects of Fear and Anger on Judgments of Risk and Evaluations of Blame* (unpublished paper presented at proceedings of Midwestern Psychological Association, May 4, 1985) (discussed *infra* note 46).

[34] *See supra* notes 15-16 and accompanying text. Appraisal tendency may appear to resemble closely what the literature refers to as *affect priming*, at least in a loose sense of that phrase which encompasses any exposure preceding the judgment task to a stimulus with properties congruent, or that the participant may perceive to be congruent, with properties of the judgment target. *See, e.g.*, Forgas, *supra* note 12, at 10-13. Thus, in the appraisal tendency research, the appraisal theme or cognitive structure of the experienced emotion biases subsequent judgments that relate to that theme or structure, and does so in the directions one would expect. Anger makes people blame more by priming them to interpret ambiguous features of a scenario consistently with anger's appraisal theme, in which human agency causes bad outcomes. Anger makes people less pessimistic about future risks because anger's appraisal tendency includes a sense of control and certainty, which makes them think that future events can be known and controlled. This sense of control tends to undermine the perceived seriousness and frequency of future events, according to the psychometric model of risk perception. *See infra* notes 75-83 and accompanying text. In the strict sense, priming may bypass cognitive appraisals entirely. Robert B. Zajonc, *Feeling and Thinking: Closing the Debate Over the Independence of Affect*, *in* FEELING & THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION, 31, 49-50 (Joseph P. Forgas ed., 2000) [hereinafter

features of that emotion's cognitive structure more accessible and thus more likely to be utilized (consciously or not) in subsequent perceptions and judgments.[35] Accordingly, angry people blame more because the cognitive structure of the anger they experience (e.g., "disapproving of someone else's blameworthy action and being displeased about the related undesirable event"[36]) makes salient the role of *other people*, as opposed to situational factors, as causes of harm, which in turn engenders blame.[37] In this way, emotion influences blaming judgments *indirectly*: path three proceeds from extrinsic emotion to attribution (of causation or fault) and thence to judgment of blame and inclination to punish.

One especially interesting feature of the appraisal tendency process is that even when people are aware that the source of their emotional state has nothing to do with the judgment target, the emotion continues to affect their judgments. Anger, for instance, has been shown to persist past the emotion-provoking episode in the form of a residual arousal

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FEELING AND THINKING]. Jennifer Lerner told me that she views appraisal tendencies "as a kind of affect priming [that] go beyond the general 'priming' label by specifying the mechanisms" by which the effects on judgments occur (personal communication, September 24, 2002). Another way of thinking about this is that appraisal tendency refers to the "functional ends" of appraisal, while priming, as generally understood, does not require this functionalist orientation. Jennifer S. Lerner & Dacher Keltner, *Fear, Anger, and Risk*, 81 J. PERSONALITY & SOC. PSYCHOL. 146, 147 (2001).

[35] This is true whether the emotion induction itself involved appraisals of causal responsibility (e.g., stories meant to provoke anger or sadness) or was purely physical (e.g., adoption of facial expressions and postures indicated by anger and sadness) and thus largely non-cognitive, proving that it was the experience of the emotion rather than the cognitive appraisals alone that influenced subsequent attributions. Keltner et al., *supra* note 33, at 748-49.

[36] ORTONY ET AL., *supra* note 7, at 148.

[37] Keltner et al., *supra* note 33. Arguably, Keltner, Ellsworth and Edwards's article is the only set of studies that unambiguously shows appraisal tendency effects on judgments of blame. In *Sober Second Thought*, Lerner et al. do not clearly state that appraisal tendency is the process behind their finding that angry participants blamed and punished more; they even state that their findings "might represent a form of misattribution," but then carefully explain in a footnote why they do not believe that affect as information best accounts for their results. Lerner et al., *supra* note 16, at 570, 573 n.9. It does not seem that the emotion effects in Lerner et al.'s study, by enhancing the salience of human agency in ambiguous situations, had similar results to those in Keltner et al., *supra* note 33, because in all four scenarios, the causal role and indeed culpability of the human protagonist was quite clear. Lerner et al., *supra* note 16, at 572. In their subsequent papers on the effects of emotions on risk perception, however, Lerner and her colleagues define the appraisal tendency model more thoroughly and provide empirical evidence. *See, e.g.*, Lerner & Keltner, *supra* note 34; Jennifer S. Lerner & Dacher Keltner, *Beyond Valence: Toward a Model of Emotion-Specific Influences on Judgment and Choice*, 14 COGNITION & EMOTION 473 (2000) [hereinafter *Beyond Valence*]. In these papers, they cite *Sober Second Thought* as well as Keltner et al.'s 1993 paper as instances of appraisal tendency effects.

or excitation, which may then influence subsequent, unrelated decisions.[38] Apparently, people remain at least partly unaware of the ways in which that emotion has primed them to construe the target.[39]

In path four, as in paths one and two, people take their experience of an emotion as *directly informative* about the target of their judgment.[40] Indeed, the literature describes path four as the *affect-as-information* model.[41] The difference between this path and paths one and two is that here, the real source of the emotion is extrinsic. But how can extrinsic emotion, which by definition is not provoked by the judgment target, possibly be regarded as directly informative of the judgment target? It can when people *misattribute* their emotional response to the target instead of its true source. For instance, in a classic study, people asked on rainy days to gauge their life satisfaction gave more negative responses than did people asked on sunny days.[42] When the attention of the former group of respondents had been called to the weather, however, the difference disappeared.[43] That is, people took their current mood (negative or positive) as informative about the judgment target ("How satisfied am I with my life?"). In effect, they misattributed the experienced emotion, which was provoked by something not relevant to the target of judgment, to the target. When the misattribution was corrected by

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[38] *See* Dolf Zillmann, *Transfer of Excitation in Emotional Behavior*, *in* SOCIAL PSYCHOPHYSIOLOGY 215 (John Cacioppo & Richard E. Petty eds., 1983).

[39] Lerner et al., *supra* note 16, at 570; *see also* Zajonc, *supra* note 34, at 51-52 (finding that affective priming influenced liking even when participants were told about possible extrinsic source effects).

[40] Thus, while path four resembles path three in that the source of the emotion is extrinsic, it differs from path three in that the effect on social judgment is direct rather than indirect.

[41] Gerald L. Clore et al., *Affective Causes and Consequences of Social Information Processing*, *in* 1 HANDBOOK OF SOCIAL COGNITION 323 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 2d ed. 1994); Norbert Schwarz, *Feelings as Information: Judgments and Processing Strategies*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 534 (Thomas Gilovich et al. eds., 2002) [hereinafter *Feelings as Information*]; Norbert Schwarz, *Feelings as Information: Informational and Motivational Functions of Affective States*, *in* 2 HANDBOOK OF MOTIVATION AND COGNITION 527 (E. Tory Higgins & R. Sorrentino eds., 1990); Norbert Schwarz & Gerald L. Clore, *How Do I Feel About It? The Informative Function of Affective States*, *in* AFFECT, COGNITION AND SOCIAL BEHAVIOR 44 (Klaus Fiedler & Joseph Forgas eds., 1988); Norbert Schwarz & Gerald L. Clore, *Mood, Misattribution, and Judgments of Well-Being: Informative and Directive Functions of Affective States*, 45 J. PERSONALITY & SOC. PSYCHOL. 513 (1983) [hereinafter *Mood and Misattribution*].

[42] Schwarz & Clore, *Mood and Misattribution*, *supra* note 41, at 519.

[43] *Id.* at 520.

identifying the true source of their emotion, the effect disappeared.[44]

Extrinsic emotion effects on many sorts of decisions, from judgments of life satisfaction to risk perceptions,[45] have been explained in terms of the affect-as-information mechanism. This process has also been invoked to explain extrinsic emotion effects on judgments of blame,[46] although, to the best of my knowledge, no studies directly test the process using such judgments as the dependent variable.

Another type of emotion influence on blaming and other social judgments that is highly relevant to the inquiry into 9/11 cases and can be prompted by either intrinsic or extrinsic stimuli is described by *terror management theory*. According to this line of research, people's awareness of their own mortality and what would otherwise be their consequent terror at the prospect of personal annihilation engenders two levels of defensive reactions: conscious efforts to suppress thoughts of death or to rationalize death-risking conduct, and subconscious efforts to defend the cultural worldview that is one's bulwark against impermanence and meaninglessness.[47] The terror or fear that drives this latter defensive process is not consciously experienced (at least, not if the defenses are working), so it is not the emotion, but rather emotion-relevant thoughts, that mediate the effects of mortality salience on consequent

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[44] *Id.*

[45] David DeSteno et al., *Beyond Valence in the Perception of Likelihood: The Role of Emotion Specificity*, 78 J. PERSONALITY & SOC. PSYCHOL. 397 (2000).

[46] Gallagher & Clore, *supra* note 33. This brief, unpublished research report does not clearly distinguish between the affect-as-information and appraisal tendency processes. The authors write that "[t]he idea guiding the present work is the notion that people use their momentary feelings as information for making judgments," which is the main idea of affect-as-information. *Id.* (manuscript at 2). They also conclude that "[t]he effects observed in this study are consistent with the notion that feeling states provide the experiencing person with information with which to make judgments." *Id.* (manuscript at 8). Their finding that anger influenced an anger-related judgment (by leading participants to blame more) and not a fear-related judgment, however, is consistent with affect priming as well. Norbert Schwarz, one of the leading proponents of the affect-as-information account, also explains the findings of Keltner, Ellsworth and Edwards in *Beyond Simple Pessimism: Effects of Sadness and Anger on Social Perception* in these terms, although, as noted above, Keltner et al.'s studies seem to provide the least ambiguous support for the appraisal tendency model. Schwarz, *Feelings as Information*, *supra* note 41, at 541, 544 (explaining Keltner et al., *supra* note 33).

[47] Jeff Greenberg et al., *Terror Management Theory of Self-Esteem and Cultural Worldviews: Empirical Assessments and Conceptual Refinements*, *in* 29 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 61 (1997); 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. 835 (1999).

judgments.[48] Nevertheless, terror regarding the threat of personal annihilation is the motivating force for this process.

When people's mortality is made salient, they punish more severely those who transgress cultural norms.[49] They also feel greater attachment to shared cultural symbols. For instance, participants in one experiment were asked to sift sand from dye and were given either a white cloth or an American flag to do the job; everyone did it, but those who had been induced to think about their death took longer to use the flag and expressed greater reluctance about doing so.[50] They indulge in more racial/cultural stereotyping.[51] And they attribute more blame to members of outgroups. In another experiment, participants were shown a video of an auto accident said to be the result of a defect in either an American or Japanese car. Those who had been induced to think about their mortality blamed the Japanese car manufacturer more than did those who had not.[52]

At least in theory, jurors' decision making in 9/11 (or other) cases could reflect the impact of any or all of the emotions mentioned so far—sympathy, anger, fear—as well as any or all of the paths of emotional influence described above.[53]

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[48] Pyszczynski et al., *supra* note 47, at 836-37. Hence, the effect of mortality salience on subsequent judgments most resembles path two, except that emotion-relevant *thoughts*, rather than emotional experience, mediate the effect of the independent variable (mortality salience) on the dependent variable (e.g., blame or punishment).

[49] 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).

[50] 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. 1221 (1995). The mortality salience manipulation varies from one experiment to another. In the cited experiment, researchers asked participants to "please describe briefly the emotions that the thought of your own death arouses in you" and to "jot down, as specifically as you can, what you think will happen to you as you physically die and once you are physically dead." *Id.* at 1223.

[51] Greenberg et al., *supra* note 47, at 82-83.

[52] Lori J. Nelson et al., *General and Personal Mortality Salience and Nationalistic Bias*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 884 (1997). Mortality salience did not affect blaming of the American manufacturer. *Id.*

[53] For instance, research suggests that extrinsic emotion may affect jurors' decision making through both paths three and four, i.e., through both the appraisal tendency or priming and affect-as-information processes. According to the most comprehensive model of the relationships between affect and social cognition, the Affect Infusion Model ("AIM"), affects priming and affect as information could influence jurors' decision making, although it is not clear which process would be more important. *See* Joseph P. Forgas, *Affect and Information Processing Strategies: An Interactive Relationship*, *in* FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL

It is worth identifying the processes as well as the emotions because jurors' judgments are likely to depend on the *how* as well as the *what* of affective influence. I sketch a few possibilities below.

While all emotional responses reflect an appreciation (even if partly subconscious) of the relevance for the self of something in the perceiver's environment,[54] some emotions implicate the ego more than others. Specifically, the anxiety aroused by the awareness of one's own mortality, which leads to a variety of defensive coping mechanisms, such as terror management, is a more highly ego-driven response to the environment than, say, sympathy (or anger resulting from other processes). This difference may be important because highly ego-driven emotional responses may be more durable, and their effects less amenable to correction or debiasing, than others.

Among the "cooler," less ego-driven emotional effects, we need to distinguish intrinsic from extrinsic sources of emotion. Because intrinsic emotion sources are located in the judgment target itself—the parties and the facts of the case—lawyers are likelier to succeed in arousing the corresponding emotions (should they choose to do so, and perhaps in some instances even if they do not). The probative value of the potentially emotion-provoking evidence is less likely to be outweighed by the danger of undue prejudice than it is when the emotion source is recognizably dubious or of no legal relevance, as it is when the source is extrinsic.[55] Therefore, simply in the course of appropriately presenting evidence and making arguments regarding the severity of the harm the plaintiffs suffered and the blameworthiness of the defendants' conduct, lawyers are likely to trigger the emotional effects described by paths one

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COGNITION 253 (Joseph P. Forgas ed., 2000); Joseph P. Forgas, *The Role of Emotion in Social Judgments: An Introductory Review and an Affect Infusion Model (AIM)*, 24 EUR. J. SOC. PSYCHOL. 1 (1994); *see also* FEIGENSON, *supra* note 3, at 237-38. This dual effect (for both priming and affect as information on juror judgments) would also be consistent with the Elaboration Likelihood Model ("ELM") of persuasion: Appraisal tendency or priming would be likely to occur under what ELM describes as "high elaboration" conditions (what Forgas refers to as "substantive" processing), while affect as information would more likely occur under "low elaboration" conditions (what Forgas refers to as "heuristic" processing). *See* Richard E. Petty & Duane T. Wegener, *The Elaboration Likelihood Model: Current Status and Controversies*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 41 (Shelly Chaiken & Yaacov Trope eds., 1999).

[54] *See supra* note 7 and accompanying text.

[55] *See* FED. R. EVID. 403.

and two (and, in the case of 9/11, by terror management theory).[56]

Extrinsic emotion sources should fare differently *to the extent that they are recognized as extrinsic.* When people are made aware that the source of their emotion is actually extrinsic to the target, they should regard the emotion as irrelevant to their judgment task; the emotion should, therefore, cease to have any directly informational effect.[57] The affect-as-information mechanism from extrinsic emotion to judgment depends on the misattribution of that emotion to the target. By definition, this mechanism works only when the true source of the emotion is unrecognized. Relatedly, jurors are more likely to follow judicial instructions to disregard emotional influences that the jurors themselves perceive to be extrinsic, and therefore irrelevant to their judgment task.[58]

By contrast, even recognized extrinsic emotion may influence judgment through the appraisal tendency process.[59]

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[56] Compare the doctrine of "intrajudicial" vs. "extrajudicial" bias as it pertains to the disqualification or recusal of judges. The federal standard regarding extrajudicial bias is set forth in 28 U.S.C. § 455(b)(1) (2002): A judge should disqualify himself whenever he has a "personal bias or prejudice concerning a party . . . ." With regard to bias arising from the litigation itself–intrajudicial bias–disqualification is warranted only when the judge's remarks "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." Liteky v. United States, 510 U.S. 540, 555 (1994).

[57] *See supra* text accompanying notes 43-44.

[58] *See* Jonathan M. Golding et al., *Instructions to Disregard Potentially Useful Information: The Effects of Pragmatics on Evaluative Judgments and Recall*, 29 J. MEMORY & LANGUAGE 212 (1990) (finding that jurors follow instructions to disregard evidence when they believe that the evidence has been excluded for irrelevance, and not for "technical" reasons that do not undermine its relevance). For research indicating that people take extrinsically induced emotion into account when they deem it relevant to their decision task but not otherwise, see Karen Gasper & Gerald L. Clore, *Do You Have to Pay Attention to Your Feelings To Be Influenced by Them?*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 698 (2000). Extrinsic emotion effects on judgment would also seem to be normatively unjustifiable, see Hastie, *supra* note 31, at 1002, but judges' instructions typically advise jurors not to be influenced by *any* emotions: "Your verdict must be based absolutely and solely upon the evidence . . . . You should not be swayed or influenced by any sympathy or prejudice for or against any of the parties." Douglass B. Wright & William L. Ankerman, 1 CONNECTICUT JURY INSTRUCTIONS (CIVIL) § 312, at 510 (1993). *See* Feigenson, *supra* note 11, at 13 (discussing law's exclusion of emotion). Standard instructions do not distinguish between what is labeled here as extrinsic or intrinsic sources of emotion; if anything, the standard instruction quoted above focuses on intrinsic sources.

[59] *See supra* notes 32-37 and accompanying text. It can be argued that with regard to extrinsic specific emotions (as opposed to moods), appraisal tendency is a more likely mechanism than affect as information, because people are less likely to misattribute the source of a specific emotion (to the target) than they are a more diffuse mood. *See* Klaus Fiedler, *Affective Influences on Social Information Processing*, *in* HANDBOOK OF AFFECT AND SOCIAL COGNITION 163, 174-75 (Joseph P. Forgas ed., 2001); Lerner et al., *supra* note 16, at 573 n.9. *But cf. supra* note 45 and accompanying

In this process, as discussed earlier, emotion influences attributions of responsibility by priming people to interpret an ambiguous situation in accordance with the cognitive structure of the emotion.[60] This suggests that for appraisal tendency effects to occur, the claim or defense must implicate emotion-relevant features (e.g., human agency as an element of blameworthiness), and those features cannot already be so salient that there is no room for the emotion to make them significantly *more* salient.

Yet this is not all. So far I have discussed more or less linear paths between individual emotions and judgments. Affective responses, especially to a tragedy like 9/11, are likely to be more complex than this. Researchers have identified three kinds of complex relationships among multiple emotions and attributions of responsibility and blame.

First, the relationship between an emotion and an associated pattern of blaming or other judgment can form a feedback loop. For instance, blame arising from the construal of target-relevant features, or the construal of those features itself, can generate anger (paths one and two, respectively). That anger then makes salient the role of other people as causes of harm, which engenders blame (path three).[61] Thus, anger and attributions of blame comprise a feedback loop, a reciprocal relationship in which each can increase the other.[62]

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text (showing evidence for affect-as-information effects of specific emotions).

[60] In *Beyond Simple Pessimism: Effects of Sadness and Anger on Social Perception*, which reports the experiments that most clearly articulate path three, the judgment scenarios were highly ambiguous as to human versus situational agency. Keltner et al., *supra* note 33. In *Sober Second Thought*, at least two of the four scenarios quite plainly indicated that the defendant was responsible. Lerner et al., *supra* note 16. Effects were still found for extrinsically induced anger, but it is difficult to interpret these as other than consistent with path three, because the authors did not separately measure attributions of causation and collapsed their measures of blame, deservingness of punishment, etc. into a single punitiveness measure. *Id.* at 567, 572.

[61] Keltner et al., *supra* note 33.

[62] *See* Quigley & Tedeschi, *supra* note 21; *cf.* Larissa Z. Tiedens, *The Effect of Anger on the Hostile Inferences of Aggressive and Nonaggressive People: Specific Emotions, Cognitive Processing, and Chronic Accessibility*, 25 MOTIVATION & EMOTION 233, 248 (2001) (noting that aggressiveness, anger and the drawing of hostile inferences create a vicious cycle). Additional evidence of a feedback loop is suggested by a study showing that experimental instructions to adopt the perspective of a target person, leading to more sympathy for that person, leads participants to attribute to the target more of the participants' own positive traits. *See* Mark H. Davis et al., *Effect of Perspective Taking on the Cognitive Representation of Persons: A Merging of Self and Other*, 70 J. PERSONALITY & SOC. PSYCHOL. 713 (1996). If sympathy, which includes perspective taking, is elicited by case-relevant features (paths one and two), that sympathy might then affect jurors' subsequent interpretations of the facts of the case, further biasing the judgments they derive from those interpretations. *See* Feigenson,

Second, the effects of one emotion can be *overcome* by the effects of another. For instance, in a study of judgments in comparative negligence cases, Jai Park, Peter Salovey and I found that mock jurors' sympathy for an accident victim was partly overcome by their anger toward the victim.[63] What alerted us to this possibility was the finding that participants' decisions were biased against victims: The more serious the accident, the more participants blamed the victim, not the defendant. Participants did feel sympathy for the victims (as Weiner's research would predict[64]), and they felt more sympathy the more seriously the victim was injured (as Bornstein found[65]). Yet, they also grew angrier at the victim and were less able to imagine themselves in the victim's place, the more blameworthy the victim was. This anger and lack of empathy are hallmarks of defensive attribution, an intuitive habit of thought in which observers, by blaming an accident victim, distance themselves from the victim and preserve their belief that they will not find themselves in the same position. Defensive attribution is a way of coping with fear.[66] Thus, anger, driven by fear, can at least partly trump sympathy for an accident victim.

Third, different emotional responses can also *complement* one another. In another study of comparative negligence judgments,[67] participants seem subconsciously to have taken into account their emotional responses to each party in deciding how they felt about the other party. Correlational analyses indicated that the angrier participants got at the defendant, the more sympathy and sadness they felt

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supra note 11, at 11-12, 63-64.

The notion of the feedback loop suggests that appraisal tendency effects may not be limited to extrinsic emotion. Although, to the best of my knowledge, there is as yet no research that directly shows appraisal tendency effects using intrinsic emotion sources, Quigley and Tedeschi used what is best described as an intrinsic stimulus to obtain significant paths from blame to anger and also from anger to blame. Quigley and Tedeschi cited, among other sources, Keltner et al., as consistent with their findings. Quigley & Tedeschi, *supra* note 21; Keltner et al., *supra* note 33.

[63] Neal Feigenson et al., *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 LAW & HUM. BEHAV. 597 (1997).

[64] *See supra* notes 19-20 and accompanying text.

[65] *See supra* notes 24-25 and accompanying text.

[66] That is, the more seriously injured the accident victim, the more anxious our mock jurors became about the prospect of suffering such a terrible fate themselves, and the more inclined they were to respond defensively to that fear.

[67] Feigenson et al., *supra* note 26, at 592.

for the plaintiff; the angrier they felt toward the plaintiff, the greater their sympathy for the defendant.[68]

In sum, the important connections between emotions and blaming judgments that may be especially germane to jury decision making in 9/11 cases are as follows: Sadness leads to more careful, systematic information processing; anger leads to less careful thinking and more reliance on stereotyping and other heuristic cues. Sympathy for victims and anger (whether extrinsic or aroused by the defendant) both lead to greater blaming of defendants, although anger directed at the victim (through defensive attribution) can trump sympathy and thus (through complementarity) decrease blame for the defendant. And just as anger may increase blame, greater blaming in turn may lead to more anger, creating a feedback loop. Finally, the subconscious effort to suppress the fear or anxiety created by mortality salience leads to greater stereotyping of outgroup members and more punishment for those perceived to have violated shared cultural norms or symbols.

II. RISK PERCEPTIONS, EMOTIONS AND RELATED JUDGMENTS

Let me move on to the topic of people's risk perceptions and their susceptibility to emotional and other kinds of bias. First, I introduce one of the leading theories that seek to explain lay risk perception, the *psychometric theory*. Then I discuss some recent findings on how emotions may bias risk perceptions. Finally, I briefly mention how media coverage of a risk may also bias risk perceptions and related judgments.

A robust finding in the risk perception literature is that popular estimates of the likelihood and seriousness of various risks, as indicated in survey responses and associated behaviors, often diverge from expert estimates of the objective probability and severity of those risks. For instance, people (based on data from about twenty years ago) tended vastly to overrate the riskiness of nuclear power plants and underrate the riskiness of smoking and motor vehicle accidents, relative to the respective risks as experts perceived them.

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[68] FEIGENSON, *supra* note 3, at 104. This suggests that participants were attempting to balance emotional accounts between the parties (and not just legal accounts, as the law of comparative negligence required by instructing that the assigned percentages of fault sum to 100%). This and other evidence suggests that jurors try to conceive of their decision as a satisfying whole, emotionally as well as cognitively. *See id.*

Why? Various theories have been proposed to account for this and other patterns in popular risk perception. One leading theory is the psychometric paradigm,[69] which posits that ordinary people perceive risks to be more serious the more *dreaded* and the more *unknown* the risks are.

A risk is dreaded to the extent it is perceived to be uncontrollable, involuntary and potentially catastrophic in its consequences. A risk is unknown to the extent it is new, not observable and not understood. Thus, people dread a nuclear reactor accident because they think that there is nothing they can do about it and the consequences would be catastrophic; it is unknown because nuclear radiation cannot be seen, its workings are obscure to laypeople and it is thought to be "unnatural." Hence, people (in the early 1980s) perceived it to be among the most serious risks. Motor vehicle accidents, by contrast, are much less dreaded because people think they can control their vulnerability ("It won't happen to me because I drive more safely than most people"); such accidents are also not unknown because they are a familiar, easily visualized risk. People tended to take them much less seriously.[70] The point of the psychometric model is not that popular risk perceptions usually diverge from those of experts–often they do not–or that they are "wrong" when they do,[71] but simply that factors other than objective data tend to guide popular risk perceptions.

One relevant research finding consistent with the psychometric paradigm is that the more people dread a risk, the more people believe that steps should be taken to regulate or eliminate it. For instance, dread of cancer led to the Delaney Clause, which requires the FDA to ban any carcinogenic substance added to food, regardless of the cost of avoiding the risk or the benefits of declining to avoid it.[72]

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[69] Paul Slovic et al., *Behavioral Decision Theory Perspectives on Protective Behavior*, *in* TAKING CARE: UNDERSTANDING AND ENCOURAGING SELF-PROTECTIVE BEHAVIOR 14 (Neil D. Weinstein ed., 1987) [hereinafter *Behavioral Decision Theory*]; Paul Slovic et al., *Characterizing Perceived Risk*, *in* PERILOUS PROGRESS: TECHNOLOGY AS HAZARD 91 (R.W. Kates et al. eds., 1985); Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 463 (Daniel Kahneman et al. eds., 1982).

[70] *See* Slovic et al., *Behavioral Decision Theory*, *supra* note 69, at 28-35.

[71] *See, e.g.*, Baruch Fischhoff, *Heuristics and Biases in Application*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 41, at 730.

[72] The Delaney Clause, 21 U.S.C. § 348(c)(3)(A) (1994). HOWARD MARGOLIS, DEALING WITH RISK 171, 174-75 (1996). Margolis offers a "risk matrix" approach to

People's moods and emotions can influence their risk perceptions. A classic study by Eric Johnson and Amos Tversky showed that negative mood, consisting of sadness and anxiety, induced by reading a story about a person's death tended to increase the perceived likelihood of all kinds of health and safety risks, whether or not related to the subject matter of the story.[73] Thus, negative affect had a generalized effect on risk perception.[74]

More recent research on the role of affect in risk perceptions, like that on affect and judgments of responsibility and blame, has pursued the influences of specific emotions rather than more generalized moods. Jennifer Lerner and Dacher Keltner have found that fearful people are more likely to think that bad things will happen to them; i.e., they make pessimistic risk estimates.[75] Angry people are more optimistic, and less likely to believe that bad things will happen to them.[76] Lerner and Keltner argue that angry people make more optimistic risk estimates than sad people because the *appraisal tendency* of anger is associated with greater certainty and control, which tends to reduce or negate those qualities of risks that (according to the psychometric approach) make people concerned about them—the extent to which those risks are dreaded and unknown. Thus, emotion affects risk perception because the cognitive structures or appraisal tendencies of the respective emotions (anger, fear) either do or do not respond to the cognitive components of perceived risk, as explained by the psychometric approach.[77] Moreover, these emotion effects are

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account for divergences between lay and expert risk perceptions; his approach differs in some respects from the psychometric model, but resembles it in that he thinks that lay risk perceptions and lay judgments regarding the advisability of risk-avoidance measures are based on people's "visceral" sense of the seriousness of risks, rather than the kind of cost-benefit analysis based on objective data that a professional risk analyst would favor. *See generally id.*

[73] Eric Johnson & Amos Tversky, *Affect, Generalization, and the Perception of Risk*, 45 J. PERSONALITY & SOC. PSYCHOL. 20 (1983).

[74] *Id.*

[75] Lerner & Keltner, *supra* note 34; Lerner & Keltner, *Beyond Valence*, *supra* note 37.

[76] Lerner & Keltner, *supra* note 34; Lerner & Keltner, *Beyond Valence*, *supra* note 37.

[77] *Cf.* DeSteno et al., *supra* note 45 (finding emotional congruence in risk perceptions: Angry people believe that angering events are more likely to occur than sad ones; sad people believe the opposite). DeSteno et al.'s findings, which they explain in terms of the affect-as-information process, are not directly in conflict with those of Lerner and Keltner, due in part to the different dependent measures used in the respective studies. A direct test of the two approaches to emotion effects on risk perception could be conducted, e.g., by measuring the effects of anger on items high on

most pronounced when the certainty and controllability of the future event are ambiguous; clearly controllable or uncontrollable events do not display the same pattern.[78]

Most recently and most directly on point, Lerner and other colleagues have found, in a study conducted since 9/11, that asking people to reflect on the fearful aspects of the 9/11 attacks increased their subsequent estimates of the risk of terrorism as well as other, unrelated negative events (e.g., getting the flu or being victimized by violence other than another terrorist attack), while asking them to reflect on the anger-provoking aspects of the attacks reduced those estimates.[79] People's emotional reactions to 9/11 displayed several other interesting features as well.[80] First, their post-9/11 risk estimates were wildly inflated relative to any plausible objective measure. For instance, respondents rated the likelihood that they themselves would be hurt in a terrorist attack in the year following 9/11 at 20.5% (and the likelihood that the "average American" would be hurt at 47.8%).[81] Second, as these and other figures exemplify, people also believed that bad things are much more likely to happen to others than to themselves—the "optimism bias."[82] Finally, people's emotional responses to 9/11 also affected their policy judgments. Those whose anger at 9/11 was induced more strongly supported more

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the psychometric dread and unknown scales: If anger increased people's perceptions of those risks, the affect-as-information approach would be supported; if it decreased people's perceptions of those risks, the appraisal tendency approach would be supported. (I thank both Dave DeSteno and Jennifer Lerner for taking the time to explain their research to me; the interpretations of their work in this paper–and any errors in the representation or construal of their findings–are mine alone.)

[78] Lerner & Keltner, *supra* note 34, at 151-52. In unambiguous situations, emotional valence alone predicted risk estimates: Angry and fearful people were more optimistic, happy people less.

[79] Jennifer S. Lerner et al., *Effects of Fear and Anger on Perceived Risks of Terrorism*, PSYCHOLOGICAL SCIENCE (forthcoming). Lerner et al. also found that women were much more pessimistic than men, but that differences in self-reported emotion (women reported being sadder, men angrier, in response to 9/11) explain most of this gender variance. Incidentally, this research also shows that Lerner's previous research on the effects of emotion on risk perception generalizes from the perceived likelihood of self-relevant outcomes ("will it happen to me?") to other-relevant outcomes as well. *See supra* notes 75-76 and accompanying text.

[80] Lerner et al., *supra* note 79. These observations are based on mean risk estimates, collapsed across emotion condition.

[81] *Id.* (manuscript at 12-13, 25-26).

[82] Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980). For instance, respondents estimated their likelihood of being the victim of a non-terrorist violent crime at 22%, but the likelihood that the average American would be so victimized at 43%. Lerner et al., *supra* note 79 (manuscript at 26).

punitive policies (deporting foreigners without valid visas) and less strongly supported more conciliatory policies (building ties with Moslem countries) than did those who were prompted to feel sad about 9/11.[83]

One additional influence on lay risk perceptions is worth mentioning in the current context: media effects. Media coverage of a risk can influence perceptions and related judgments regarding that risk by making particular information about that risk more available to audiences of that coverage,[84] and/or by framing the risk as something worth or not worth avoiding.[85] For instance, Dan Bailis and I found that print media coverage of air bag risks that overemphasized, in comparison with objective data, the dangers of air bag deployment (persons, especially children, killed or injured by air bags going off in low-speed collisions) relative to air bag benefits (saving people from death or serious injury in high-speed collisions) led readers to overestimate the magnitude of air bag risks and to adopt less favorable views toward air bags.[86]

In sum, people judge risks to be more serious, and fear them more, the more the risks are dreaded and unknown. The more a risk is dreaded, the more people believe that something should be done to regulate or eliminate it. Furthermore, people's emotional states influence their risk perceptions: The most consistent finding is that fearful people tend to be more pessimistic, and angry people less pessimistic. Finally, media coverage helps shape the frame in which people make risk-related judgments. These findings regarding people's emotions, risk perceptions and judgments of responsibility may help us to understand the possible decision-making processes of jurors in two types of cases that have arisen from the 9/11 attacks on the World Trade Center.

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[83] Lerner et al., *supra* note 79 (manuscript at 13, 27-28).

[84] Slovic et al., *Behavioral Decision Theory*, *supra* note 69, at 19-21.

[85] Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AMER. PSYCHOLOGIST 341 (1984).

[86] Neal R. Feigenson & Daniel S. Bailis, *Air Bag Safety: Media Coverage, Popular Conceptions, and Public Policy*, 7 PSYCHOL. PUB. POL'Y & L. 444 (2001).

III. THE ROLE OF EMOTION AND RISK PERCEPTION IN ATTRIBUTIONS OF RESPONSIBILITY AND BLAME IN 9/11 CASES

Roughly 1,000 plaintiffs have filed dozens of suits against the Port Authority alleging various acts of negligence in connection with 9/11, including the arrangement of and building materials used in the stairwells, the condition of the fire prevention materials and equipment (including non-compliance with fire safety rules) and the evacuation procedures (especially the announcement encouraging South Tower employees to remain at or return to their offices).[87] As in any negligence case, these plaintiffs must prove not only that the defendant was careless, but also that its carelessness was the legal (or proximate) cause of their injuries. While it is difficult to predict confidently until more information is gathered, even if the plaintiffs can show that the Port Authority breached its duty of care by carelessness in design, construction, procedures and the like, proving legal cause will be a daunting challenge. Causation requires persuading the judge and jury that the attacks were sufficiently foreseeable to charge the Port Authority with responsibility for not doing more to avoid the consequences, and that the intervening malicious behavior of the terrorists was not a superseding cause of the tragedy, relieving the Port Authority of responsibility.[88]

In another case, about 600 families of victims have filed an action against the government of Sudan, three members of the Saudi royal family and several Saudi banks and charities, seeking over $100 trillion in damages.[89] In addition to various statutory causes of action and other common law counts, the complaint includes counts for wrongful death, conspiracy and aiding and abetting, all of which charge the defendants with knowingly or deliberately "engaging in, sponsoring, financing, aiding and abetting and/or otherwise conspiring to commit acts of terror including the terrorist attacks of September 11, 2001."[90] To simplify, I focus on the Saudi defendants and the

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[87] Chen, *supra* note 1.

[88] *See, e.g.*, W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 263-64, 301-11 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS §§ 430-49 (1979).

[89] Burnett v. Al Baraka Inv. & Dev. Corp., No. 1:02CV01616 (D.D.C. Nov. 22, 2002).

[90] Plaintiffs' Complaint at 244, Burnett v. Al Baraka Inv. & Dev. Corp.

charge of aiding and abetting only. Again, as relevant information is only beginning to emerge,[91] any forecasts about eventual trial outcomes remain highly speculative, but the plaintiffs likely will face, among other difficulties, the challenge of linking the defendants specifically to the 9/11 attacks, as required by applicable tort doctrine.[92]

A. *Emotion and Attributions of Responsibility and Blame in 9/11 Cases*

While jurors' emotional responses to these cases are likely to be both complex and individually variable, some general characteristics appear probable. First, jurors' emotional reactions to 9/11 are likely to be strong even years after the tragedy. Many of their initial reactions may be somewhat attenuated or changed by the passage of time, but they are also likely to be revived by repeated media exposure, especially extensive coverage around anniversaries of the attacks, as well as by exposure to accounts of the attacks in the courtroom itself.[93] Second, although jurors may experience at trial all of the emotions they initially felt—horror, fear, sympathy, anger and sadness—some emotions may dominate others. For instance, research indicates that in the immediate aftermath of the attacks, anger was a more prevalent response than fear.[94] Third, media coverage of 9/11 not only continues to stimulate emotional responses but also tends to model

(D.D.C. Nov. 22, 2002) (No. 1:02CV01616).

[91] *See, e.g.*, Tim Golden & Judith Miller, *Al Qaeda Money Trail Runs From Saudi Arabia to Spain*, N.Y. TIMES, Sept. 21, 2002, at A10.

[92] A third party's advice, encouragement, inducement or support for a tortious act may make that third party liable for that tortious act under a theory of aiding and abetting or concert of action or the like, but the third party is not liable for acts that were not reasonably foreseeable by him. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979). The same factors used to determine generally whether an intervening cause is considered a superseding cause are used to determine the foreseeability required for liability in the context of aiding and abetting. *Id.* §§ 442-442B. It is possible that in interpreting "aiding and abetting" for purposes of these plaintiffs' claims, the court will be guided by its interpretation of the Anti-Terrorism Act, 18 U.S.C. §§ 2331-39 (2001), relied on by the plaintiffs and construed by another court to permit civil tort aiding and abetting liability. Plaintiff's Complaint at 82, Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1015-21 (7th Cir. 2002). On aiding and abetting in the context of claims brought under the Alien Tort Claims Act, see Anthony J. Sebok, *Should American Courts Punish Multinational Companies for their Actions Overseas?*, Findlaw, *available at* http://writ.news.findlaw.com/sebok/20020729.html (last visited Dec. 11, 2002).

[93] The perceived exceptionality of the 9/11 attacks also contributes to heightening emotional responses generally. *See* ORTONY ET AL., *supra* note 7, at 64-65.

[94] Lerner et al., *supra* note 79 (manuscript at 9).

"appropriate" emotional responses to the attacks—sympathy for victims; determination in the face of adversity; communal spirit; anger at perpetrators resolved into righteous indignation—and this modeling may shape jurors' thinking about which emotions they ought to take into account when determining responsibility and damages in civil cases.

We also need to keep in mind the various contextual factors that may moderate emotion and risk perception effects; i.e., emotions, risk perception and blaming will influence one another differently in different situations. The most likely moderators, as noted earlier,[95] will be: the identity of the defendant(s) (i.e., Port Authority or Saudis); the legal theory of recovery (e.g., negligence, aiding and abetting); the strength of the parties' respective arguments; and the emotional tonality encouraged by lawyers' case presentations (i.e., the ways they weave the law and facts together into their narrative theories of the case).

According to the research discussed earlier, the generally negative valence of jurors' moods relating to 9/11 would be predicted to lead them to think more carefully about their decision-making task. But, as noted earlier, recent research suggests that only sadness, and not anger, will have this effect.[96] Now, while the precise mix of moods and emotions 9/11 jurors may experience is impossible to predict accurately, it is likely to have something to do with what emotions the lawyers tend to emphasize.[97] To whose advantage would it be to evoke one emotion or the other?

It might seem at first glance that the party with the weaker evidence and argument would be advised to elicit jurors' anger (so long as it can be diverted from the client), so that jurors would consider the substance of the case less carefully. Given what currently is known, this party appears to be the plaintiffs in both cases.[98] Conversely, to the extent that

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[95] *See supra* p. 961.

[96] *See supra* notes 15-17 and accompanying text.

[97] Of course, the lawyers would be advised not to do this too overtly, because rules of evidence and trial practice forbid undue, explicit appeals to jurors' emotions.

[98] I assume that emotion and risk perception effects would be largest where the case is closely balanced and would diminish as the case becomes one-sided in either direction. *Cf., e.g.*, HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 164-66 (1966) (stating that where evidence is closely balanced, jurors' emotions affect their verdicts by leading them to construe evidence one way or the other). I further assume that if the case gets to the jury, it is not entirely one-sided, or else the judge would already have directed a verdict (or dismissed the case before trial on summary judgment). Within this considerable range, based on the current state of information, I speculate that the

the plaintiffs' case against the Port Authority depends on jurors' careful consideration of somewhat counterintuitive notions of legal responsibility—that the Port Authority should be held liable for its negligence even though another party's intervening intentional wrongdoing more immediately brought about the harm[99]—the plaintiffs' lawyers may want to foster the jurors' deliberate processing of the complex trial information. The lawyers might do this either by specifically seeking to elicit sadness or by relying on the dominantly negative valence of jurors' less differentiated mood.

What about the attributional effects of particular emotions? A good place to start is with jurors' likely sympathy for the victims of 9/11, which may very well incline them to attribute more responsibility for the tragedy to the defendants in both cases than they would if not so moved. Three factors enhance sympathy: the greater the extent of the suffering;[100] the less the victims are themselves judged to be responsible for their plight;[101] and the more unusual the event leading to the suffering.[102] The victims of 9/11 should be highly sympathetic on all counts.[103]

According to Brian Bornstein's research, greater sympathy for the victims should make jurors more likely to hold the defendant responsible because sympathy inclines observers to help, and jurors know the only way they can help a tort plaintiff is by holding someone else liable.[104] Paths one and

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defendants will have the stronger case, apart from any of the potential effects discussed here.

[99] *See* RESTATEMENT (SECOND) OF TORTS § 449 (1979) (stating that if the likelihood that a third person may act tortiously or even criminally is one of the hazards that makes a person negligent, the fact that such a tortious or criminal act occurs does not relieve the person of liability). I believe that jurors may find this principle counterintuitive because their common sense will tell them that if a criminal act more immediately brought about the plaintiffs' harm, the criminal should be *the* blameworthy party. Compare the idea of "monocausality" discussed in FEIGENSON, *supra* note 3, at 51-52. For an example of courts' awareness that juries may be prone to consider one party's criminal culpability as relieving another party, negligent or strictly liable, from responsibility for the event, see *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978).

[100] Bornstein, *supra* note 24.

[101] WEINER, *supra* note 19, at 65.

[102] Dale Miller et al., *Counterfactual Thinking and Social Perception: Thinking About What Might Have Been*, *in* 23 ADVANCES IN EXP. SOC. PSYCHOL. 305 (Mark Zanna ed., 1990).

[103] This sympathy, moreover, could very well be enhanced (or at least sustained) in the local jury pool by the victims' stories featured in the *New York Times* and elsewhere after 9/11.

[104] *See supra* note 24 and accompanying text.

two, described earlier,[105] predict these influences of sympathy on jurors' judgments. Confidence in the prediction is enhanced for two reasons: The empirical support for these paths is more extensive than for paths three and four;[106] and the intrinsic nature of the source of the emotion may make jurors less inclined to disregard the resulting emotional influence even if so instructed. Yet, at least with regard to the Port Authority, jurors may very well also feel some sympathy for the defendant—the Port Authority, after all, had offices in the World Trade Center and lost employees in the attack—and greater sympathy for the defendant may mean less sympathy for the plaintiff[107] and hence less anger at the defendant, reducing blame.

Jurors' anger is a more complicated matter. At first glance, we might assume that jurors' anger at the 9/11 attacks would also incline them to blame the defendants in both cases. The blameworthiness of the defendants' alleged conduct should provoke anger, more so in the case of allegedly intentional wrongdoing (the Saudi defendants) than in the case of allegedly negligent wrongdoing (the Port Authority).[108] The catastrophic harm caused by the attack may also increase jurors' anger,[109] and according to the research, anger will make jurors likelier to blame the party they hold responsible for that harm,[110] which will be the defendants, if anyone, not the plaintiffs. Paths one and two, at least, appear to support these effects. Moreover, the complementarity of jurors' emotional responses[111] predicts that the great sympathy jurors are likely to feel toward the victims of 9/11 may indicate more anger toward the defendant, and thus, more blame for the defendant.[112]

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[105] *See supra* notes 19-27 and accompanying text.

[106] *Id.*

[107] Although we did not find that more sympathy for one party meant less for the other, Feigenson et al., *supra* note 26, at 592, Brian Bornstein has found this in one study. Brian Bornstein, *David, Goliath, and Revered Bayes: Prior Beliefs About Defendants' Status in Personal Injury Cases*, 8 APPLIED COGNITIVE PSYCHOL. 233 (1994).

[108] *See* FRITZ HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS 113-14 (1958) (discussing levels of personal responsibility).

[109] ORTONY ET AL., *supra* note 7.

[110] Feigenson et al., *supra* note 26; Keltner et al., *supra* note 33.

[111] *See supra* notes 67-68 and accompanying text.

[112] This is a likelier outcome than the other possible configuration of sympathy and anger mentioned earlier—that sympathy for the victim might be trumped by anger toward the victim arising from defensive attribution—because there does not seem to be any plausible psychological basis for jurors to derogate or otherwise distance themselves from the victims of the 9/11 attacks. Indeed, people's spontaneous

To pursue this further, we need to return to the distinction between intrinsic and extrinsic emotion sources. I assume that the *terrorists* will be the focal point for jurors' most intense anger. It is unclear, though, whether jurors' likely anger at the terrorists should be considered intrinsic or extrinsic. This anger appears intrinsic in that it is provoked by the events at issue, considered as a whole, as opposed to some obviously judgment-irrelevant stimulus.[113] But the anger may also be considered extrinsic because the terrorists are not parties and thus are not an explicit judgment target.[114]

To the extent that the source of jurors' anger is considered to be extrinsic because it is directed at the terrorists rather than the defendants, *and jurors do not recognize it as such*, it may bias their judgments toward blame through either the appraisal tendency (path three)[115] or the affect-as-information process (path four),[116] regardless of who the defendants are. But if, as may be expected, the defendants' lawyers in both cases try to call jurors' attention to the terrorists as the "real" source of jurors' angry responses, then jurors may recognize the source of their anger as extrinsic: not the defendant. Any *misattribution* of the anger to the judgment target should be eliminated. Therefore, the *informational* value of the extrinsic emotion—i.e., jurors blaming the judgment target more because their current anger tells them that "this person is blameworthy, deserving of punishment"—should disappear.

We would then be left with the appraisal tendency process. According to the study that most unambiguously supports this model in the context of attributions of responsibility,[117] anger biases people toward blaming others for bad outcomes because it makes more salient the role of human beings as causes of harm where both situational and human

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responses in the form of memorials and repeated media coverage have displayed and encouraged precisely the opposite phenomenon: enhanced empathy and sympathy for the victims.

[113] As in the classic affect-as-information and appraisal tendency studies; *see supra* notes 32-44 and accompanying text.

[114] It could be that the intrinsic/extrinsic distinction is not always as tidy in real cases, especially complex, high-profile cases like these, as it is in the psychology lab, and that the lawyers' case presentation strategies will have something to do with whether jurors treat anger at the terrorists as one or the other (as I discuss below).

[115] *See, e.g.*, Keltner et al., *supra* note 33.

[116] *See, e.g.*, Schwarz & Clore, *Mood and Misattribution*, *supra* note 41.

[117] Keltner et al., *supra* note 33.

factors are plausible targets of attribution.[118] In both kinds of 9/11 cases, however, the role of human causes of disaster—the terrorists—is already highly salient. Appraisal tendency could, presumably, also explain bias arising from the heightened salience of other components of anger's cognitive structure, such as the severity of the outcome. But here, too, the horrific consequences are already obvious. So the appraisal tendency model generates the possibly counterintuitive prediction that anger at the terrorists, recognized as such, would not have much of an effect on jurors' judgments because there is little or no room for that emotional bias to operate.[119]

Nevertheless, I think that jurors' anger will matter, and that its effect will be moderated by (among other things) the identity of the defendant and the plaintiffs' legal theory. Consider the case against the Saudis. The plaintiffs' legal strategy in a claim for aiding and abetting or concert of action is to join the defendants with the terrorists in a kind of common enterprise. This is most explicit in the plaintiffs' count of conspiracy. These causes of action *link* the defendants to the terrorists. Jurors may thus be encouraged to view their anger at the causes of the 9/11 attack as intrinsic, not extrinsic. If this is the case, then the effect of anger will not depend on priming or appraisal tendency mechanisms. To the contrary, the emotional signal the anger provides will be viewed as informative of the judgment to be made, along paths one and/or two.

Another psychological process, *assimilation and contrast*, may help us to understand this. Assimilation and contrast effects can occur whenever a target (here, the Saudis) is evaluated differently in the presence of other targets than it would be alone—either more like those other targets in the case of assimilation, or more unlike them in the case of contrast.[120] The upshot for the case against the Saudis is that jurors may be led to *assimilate* the defendants to the terrorists and thus get angrier at the defendants (and, consequently,

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[118] *See supra* note 37 and accompanying text.

[119] This might also be described as a "ceiling effect": Because the values on the blameworthiness and severity scales are already so high, they're close to the ceiling that jurors could plausibly assign to them, leaving little room for the influence of other variables.

[120] Norbert Schwarz & Herbert Bless, *Constructing Reality and Its Alternatives: An Inclusion/Exclusion Model of Assimilation and Contrast Effects in Social Judgment*, *in* THE CONSTRUCTION OF SOCIAL JUDGMENTS 217 (Leonard Martin & Abraham Tesser eds., 1992).

blame them more) than they otherwise would—anger and blame for which the terrorists are the "proper" target. In addition, angry jurors are likelier to engage in stereotyping.[121] Stereotyping would probably work to the advantage of the plaintiffs in the case against the Saudis but not in the case against the Port Authority, both because jurors' anger may be greater against the Saudis (for the reasons just explained) and because the defendants' ethnicity will provide more salient cues for stereotyping.

Conversely, in the case against the Port Authority, anger at the terrorists may not lead to more anger at the defendant, because jurors are likelier to regard the source of their anger as extrinsic to the target. That anger, therefore, should not be regarded as informative of the decision; i.e., path four, the affect-as-information model, should not be implicated. Further, because appraisal tendency effects (path three) may be minimized by the pre-existing salience of the severity and human causes of the harm, that process is not likely to be very influential either.[122]

Indeed, anger at the terrorists may even lead to *less* anger at the Port Authority, due to assimilation and contrast effects. If one defines the category of surrounding judgment targets to include the terrorists, jurors may readily *contrast* the defendant to those obviously more culpable persons, which should reduce the level of blame attributed to the defendant (compared to the blame that would attach in the absence of a salient comparison category).[123] Similarly, once the terrorists are a salient comparison, lawyers for the Port Authority may encourage jurors to assimilate the Port Authority instead to the innocent plaintiffs ("We're all unsuspecting victims of this terrible attack"), which would be harder to do without the terrorists as a foil.[124] The complementarity of emotional

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[121] *See* Bodenhausen et al., *supra* note 17.

[122] *See supra* notes 60, 118-19 and accompanying text.

[123] The Port Authority's lawyers might benefit from the extrinsic anger source even beyond what the contrast effect suggests: In a kind of "reverse misattribution," they may be able to get jurors to misattribute their *intrinsic* anger to the obvious extrinsic source, reducing the former. *Cf. supra* notes 40-44 and accompanying text.

[124] Contrast effects may also help the defendant in another way: Jurors may contrast the plaintiffs to those victims who have accepted Victim's Compensation Fund payouts in lieu of suing and trying to recover even more. *See, e.g.*, David W. Chen, *Fund for Terror Attack Victims Offers Awards in 14 Test Cases*, N.Y. TIMES, Sept. 30, 2002, at B1. Considering popular mythologies of tort plaintiffs, they may conclude that the plaintiffs are greedy, perhaps even un-American, and thus, undeserving. *See, e.g.*, Valerie Hans & William Lofquist, *Jurors' Judgments of Business Liability in Tort*

responding may also lead jurors to contrast the defendants with the terrorists: The angrier jurors are at the terrorists, the less anger and more sympathy they may feel for others involved in the tragedy, and the Port Authority, after all, was victim as well as possible tortfeasor.[125]

On the other hand, jurors' anger may work against the Port Authority. First, outcome severity may be regarded as an intrinsic anger source that biases judgments through path two. Second, under the relevant law of apportionment of liability, in which jurors will be instructed, a defendant whose negligence consists of failing to protect the plaintiffs from a specific risk of intentional wrongdoing is liable for the intentional wrongdoer's share of responsibility as well as its own.[126] This law may prompt jurors to attribute to the Port Authority not only the blame but also (some of) the anger they feel toward the terrorists, in effect leading jurors to treat that anger as intrinsic. Third, even to the extent that jurors regard their anger at the terrorists as extrinsic, they may be at least partly unaware of some residual anger,[127] which may then affect their judgments through either affect as information or appraisal tendency. Fourth, for jurors to integrate their emotions (specifically anger), cognitions and judgment into a relatively

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Cases: Implications for the Litigation Explosion Debate, 26 LAW & SOC'Y REV. 85 (1992). *Cf.* Philip K. Howard, *Facing the Limits of Law, and of Lawsuits*, N.Y. TIMES, Sept. 21, 2002, at A15 (arguing that lawsuits by 9/11 victims are futile because dollars can't make up for lost lives, will "harm all of society" by draining resources from other uses and fomenting bitterness, and should be prohibited by Congress).

[125] *See supra* notes 67-68. Relatedly, according to the cognitive heuristic of monocausality, one sufficient cause (the terrorists) tends to occupy the attributional field and reduce blaming of others. *See* FEIGENSON, *supra* note 3, at 51-52.

[126] RESTATEMENT (THIRD) OF TORTS § 14 (2000) (discussing apportionment of liability). If a person is liable based on a failure to protect another from the specific risk of an intentional harm, that person is jointly and severally liable for the share of responsibility assigned to the intentional tortfeasor. (I thank Brad Saxton for pointing this out to me.) Under New York law, non-parties can be assigned a percentage of comparative responsibility for plaintiffs' non-economic losses, but the Port Authority will not be able to reduce its liability for these losses by any percentage of fault attributed to the terrorists if, as seems likely, the plaintiffs, after exercising due diligence, will not be able to get jurisdiction over the terrorists. N.Y. C.P.L.R. § 1601 (2003); *see also* Siler v. 146 Montague Assocs., 228 A.D.2d 33, 38-41, 652 N.Y.S.2d 315, 319-21 (2d Dep't 1997) (ruling that negligent defendant may seek apportionment of liability against non-party intentional tortfeasor, but not if the plaintiff shows that with due diligence it was unable to obtain jurisdiction over the non-party). It is possible that jurisdiction will be obtainable over other arguably culpable persons besides the terrorists (e.g., one or more of those named as defendants in the case against the Saudis).

[127] *See supra* note 38 and accompanying text.

satisfying whole,[128] they may be inclined to do something and blame *someone*. The only targets for blame before the court in this case would be the plaintiffs and the defendant Port Authority, and as between the two of them, the defendant will be a far more likely candidate for blaming.

Fear or anxiety may also have ramifications for blaming as indicated by terror management theory. Under this theory, the effects are very likely to be moderated by the defendant's identity: Any such effects are likely to be seen in the case against the Saudis and not the case against the Port Authority. Jurors whose mortality is made salient to them—and no event in recent American history has done this more emphatically than the 9/11 attacks—are more inclined toward nationalistic impulses and more inclined to punish a blameworthy member of an outgroup than a member of an ingroup who has behaved identically.[129] Obviously, the Saudi defendants would more readily be classified as outgroup members than would the Port Authority.[130]

Terror management theory also predicts a greater inclination on the part of those who are made to think about their own mortality to punish those who transgress against cultural symbols. The World Trade Center was certainly such a symbol, one of American capitalist wealth and might, which is why the terrorists twice chose it as a target.[131] The Saudi defendants are especially vulnerable to this effect because it will be easier to portray them as belonging to an outgroup. Indeed, the Saudis could potentially be assimilated to the specific outgroup (fundamentalist terrorists) who have been challenging another, even more treasured cultural symbol: the American flag.[132]

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[128] *See* FEIGENSON, *supra* note 3, at 107.

[129] Nelson et al., *supra* note 52.

[130] Similarly, the racial stereotyping that mortality salience increases would also be predicted to work against the Saudi defendants and not the Port Authority. *See supra* note 121 and accompanying text.

[131] *See, e.g.*, Stephen Labaton & Jonathan D. Glater, *Twin Towers at Center of Legal Brawl*, N.Y. TIMES, Nov. 3, 2001, at C1 (quoting leaseholder of World Trade Center as saying, "What these terrorists have tried to do is destroy the symbol of . . . our economic progress, our strength, our way of life").

[132] Consider the prominence of the flag in post-9/11 events, from the one(s) recovered at the World Trade Center site, to the ones used to drape coffins of police officers and firefighters who died there, to the ubiquitous images of the flag in television programs and videos about 9/11; and consider also the televised images, going back at least to Iran in 1979, of Islamic fundamentalist protesters burning American flags.

B. *Risk Perceptions and Attributions of Responsibility and Blame in 9/11 Cases*

Jurors' risk perceptions are likely to affect and be affected by their emotions and to play a role in how they assign blame for 9/11. Here again, the defendants' identity will be important: Risk perception effects are much likelier to occur in the case against the Port Authority than in the case against the Saudis. The argument proceeds in two steps. First, jurors' emotions will lead them to take the risk of terrorism very seriously and to favor taking significant steps to reduce that risk. Second, the *hindsight bias* may lead them to think that such steps should have been taken before 9/11, and to blame the defendant for not having done so.

Jurors' perceptions regarding the risk of terrorism are likely to engender fear, as indicated by the psychometric model. Terrorist threats rank high on the dread dimension: People sense that they have little control over the prototypical feared attack (a plane used as a missile, a bomb), and the consequences of a terrorist attack could very well be catastrophic, as 9/11 was. Terrorist threats are also feared because they are unknown. Of course, people now have a sense of what can happen (e.g., a suicide bomber), but the various possibilities are beyond comprehension. What, for instance, would a release of toxic chemicals in the middle of a city be like? Moreover, the sheer variety of possible methods of attack, plus the complete uncertainty about where and when such an attack might occur, make the specific threat an unknown.[133] There may even be a kind of feedback loop, in which the dread and unknown nature of the terrorism risk enhances people's fear, which in turn leads them to be even more pessimistic about the prospects of a terrorist attack (which leads them to be even more fearful, and so on).[134]

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[133] The government's vague warnings about "terror alerts" may well have served to increase this sense that the risk is unknown–even by experts.

[134] Recall that Lerner and her colleagues found that fearful people (as opposed to angry people) tend to think that another terrorist attack is more likely. *See* Lerner et al., *supra* note 79. Lerner and Keltner found that fearful people make more pessimistic risk estimates (and angry people, less pessimistic ones) only when the predicted event is ambiguous with regard to perceived certainty and controllability. Lerner & Keltner, *supra* note 34, at 151-52. I have argued that terrorist attacks are uncertain and uncontrollable, but I suppose it could be argued that they are ambiguous at least in terms of controllability—they are unknown but people may believe that they, or the government, can control their likelihood—which would make these emotion effects more likely to occur.

One might think that people's elevated perceptions of terrorism and other risks[135] would be attenuated as time passes, since the likeliest explanation for the heightened risk perceptions is the availability of words and images about the attacks in the media, which were most pronounced in the immediate aftermath of the attacks. It is very likely, however, that by the time of any trial in a 9/11 case, media coverage will have kept the risk of terrorism salient, thus reinforcing how seriously people take that risk. Every juror will have seen repeated images of the attacks, both at the time and in television specials and print media coverage since. In addition, media coverage of the war against terrorism (in all its many guises, in Afghanistan, Iraq and elsewhere, including perhaps also coverage of suicide bombings in the Middle East) will serve to keep the idea of the 9/11 attacks in the foreground of public awareness.[136] Moreover, media coverage that emphasizes the risks of terrorism, as opposed to the costs of avoiding those risks, would be predicted to underscore this perception.[137]

Research consistent with the psychometric approach shows that the more a risk is dreaded, the greater the support for strict regulation to reduce or eliminate the risk.[138] And with regard to an "off the charts" risk like that of a terrorist attack, jurors may well believe that the risk is to be avoided at (almost) any cost, especially if most of those costs (e.g., defense budget expenditures, infringement of civil liberties) remain "off-screen" for most jurors.[139]

In addition to these risk perception habits, jurors are susceptible to the hindsight bias. Their judgments of the *ex ante* likelihood or foreseeability of an event are influenced by knowing the *ex post* outcome (whether the event occurred or

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[135] *See supra* note 81 and accompanying text.

[136] This is not to say that media coverage will provide the exclusive frame for perceptions of the risks of terrorism, especially in New York City, where just about everyone in the jury pool will have visited Ground Zero or at least looked at the skyline since 9/11 and reflected on the destruction of the buildings.

[137] In the absence of a systematic content analysis, I cannot say that media coverage of terrorism has been biased in the way that, say, Dan Bailis and I found regarding coverage of air bag safety, but I conjecture that the same slant toward the risks (or the benefits, as opposed to the costs, of risk avoidance) would be found. Feigenson & Bailis, *supra* note 86. Certainly, it seems that this slant characterizes the current administration's rhetoric, and hence most media coverage, of the recent invasion of Iraq–a leading rationale for which is a supposed risk avoidance benefit, reducing the likelihood of future terrorist attacks against the United States.

[138] *See supra* note 72 and accompanying text.

[139] *Cf.* MARGOLIS, *supra* note 72 (offering a "risk matrix" approach to the understanding divergence between lay and expert risk perceptions).

not). Studies show that the hindsight bias affects mock jurors' tort decisions. In determining whether someone should have foreseen that harm might occur—an essential component of negligence liability—jurors are influenced by knowing that the harm did occur.[140] In this situation, the hindsight bias would make jurors more likely to think that the Port Authority should have known that a catastrophic terrorist attack might occur. If we presume that jurors may believe that practically no precaution would be deemed too great in the face of such a serious risk, jurors may well believe that a party who failed to do more to avoid that risk should be blamed for not having done so.[141]

This line of thinking—from dreaded risk to fear to even more dreaded risk, and from that to increased blaming via the hindsight bias—is not, however, likely to be much of a factor in the case against the Saudis. There, the alleged misconduct that claims of aiding and abetting or conspiracy evoke looks much more like intentional wrongdoing. The main issue is not so much whether the Saudi defendants should have foreseen the attacks, but how closely connected they were to the actual perpetrators.[142] If the plaintiffs' argument is that the Saudis are liable because they tried to help bring about a particular action, the foreseeability of that action seems beside the point.[143]

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[140] *See* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998); *see also* FEIGENSON, *supra* note 3, at 62-64.

[141] Another theoretically possible effect of fear on jurors' decision making can be discounted: It is unlikely that jurors' fear will lead to defensive attribution, the distancing or even angry response that could override jurors' great sympathy for the victims. First, it may be that fear leads to victim-blaming only when there is some plausible basis for blame. In our first comparative negligence study, for instance, we found that participants attributed some fault even to victims in the low-blameworthiness condition, whose conduct was designed to be legally blameless. *See* Feigenson et al., *supra* note 63. There were gaps in our brief scenario, however, that participants plausibly could have filled in with victim behavior that would warrant blame. In the case of 9/11, most if not all occupants of the World Trade Center were obviously innocent. There would seem to be no psychologically plausible way for observers to hold them responsible for what happened (except, perhaps, with regard to particular victims who are known to have delayed leaving their offices or to have returned for no good reason). It is also possible that any tendency toward defensive attribution and its emotional distancing of observers from victims will be overcome by the communal and patriotic fervor engendered by 9/11. It may be harder to maintain (even subconsciously) an "us-them" attitude after months of genuine (and media-encouraged) rallying together.

[142] As noted *supra* note 92, the foreseeability of the harmful act does limit the liability of one who allegedly aided and abetted that act.

[143] Not only jurors' fear, but also their anger may, via their risk perceptions, affect their inclination to blame. It might seem that jurors' anger would lead to *less*

C. *Debiasing Jurors in 9/11 Cases*

Before drawing conclusions about the possible role of emotions and risk perceptions in 9/11 cases, it is important to consider the likelihood that jurors, pursuant to the judge's instructions or otherwise, will be able to avoid or reduce any unwanted influence of their emotions on their responsibility judgments.[144] Generally speaking, the research on *debiasing* (or *correction*) indicates that in order to purge judgments of unwanted bias, the decision maker must be: (i) aware of the unwanted influence; (ii) motivated to correct the bias; (iii) aware of the magnitude and direction of the bias; and (iv) able to adjust the response appropriately.[145]

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blaming in this regard: Angry people make more optimistic risk estimates, and thus are less likely to elevate the likelihood of a terrorist attack. *See supra* notes 76-77 and accompanying text. This, in turn, would be predicted to make them less susceptible to believing that no precaution is too great when terrorism is the threat, which, in turn, may make them less likely to judge in hindsight that the defendant is to blame for not having foreseen the risk and not having done more to protect against it. But recall that the reason that angry people make more optimistic risk estimates is that experiencing the emotion primes them to perceive risks as controllable and/or certain. *See supra* note 77 and accompanying text. And the likelier jurors are to believe that the risk was controllable, the more likely they are to believe (in hindsight) that the defendant should have controlled for it. Again, this line of thinking seems to be especially applicable to the Port Authority, because with regard to the Saudi defendants, the claim is not that they could have controlled the risk and failed to but instead that they deliberately helped to create (and realize) the risk. Note also that Lerner and her colleagues recently found that it was angry people, not fearful people, who were most supportive of punitive measures to reduce the risk of terrorism. *See supra* note 83 and accompanying text.

[144] As noted *supra* note 18, I am not directly addressing whether emotions *should* be regarded as an "unwanted influence" on legal judgment; I am simply outlining how jurors would have to go about reducing that influence if they *did* perceive it to be unwanted.

[145] Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117 (1994); Timothy D. Wilson et al., *Mental Contamination and the Debiasing Problem*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 41, at 185. In addition, people who try to respond to bias in their decision-making processes do so in accordance with their naïve theories regarding the source and extent of the bias. This is explained by Richard Petty and Duane Wegener's "flexible correction model." Richard E. Petty & Duane T. Wegener, *Flexible Correction Processes in Social Judgment: Correcting for Context-Induced Contrast*, 29 J. EXP. SOC. PSYCHOL. 137 (1993); Duane T. Wegener & Richard E. Petty, *The Flexible Correction Model: The Role of Naïve Theories of Bias in Bias Correction*, *in* 29 ADVANCES EXP. SOC. PSYCHOL. 141 (1997) [hereinafter *The Flexible Correction Model*]. Other research, however, indicates that if an instruction to adjust or correct for bias is sufficiently blatant, people will correct their judgment in the direction suggested by the instruction rather than in accordance with any intuitive theory regarding the bias. Diederik A. Stapel et al., *The Smell of Bias: What Instigates Correction Processes in Social Judgments?*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 797, 801-03 (1998).

Not all jurors' judgments will be strongly "contaminated" by emotional influence.[146] A number of factors should mitigate contamination. For instance, voir dire should exclude at least some of the most evidently biased prospective jurors.[147] Judicial pre-instruction, where available, also may help focus jurors more on the applicable legal rules and less on the lawyers' emotion-laden stories of the case. Additionally, adversarial argument, judicial instructions to jurors not to use their emotions in deciding[148] and group deliberations may prompt jurors to engage in correction processes.[149] Nevertheless, it seems unlikely that 9/11 jurors will be able to adjust their judgments appropriately to correct for all emotional influences.

First, jurors may perceive no need to correct for bias ("Despite what the judge is saying, my emotional reactions aren't influencing my judgment"). These jurors are likely to remain unaware of many sources of unwanted influence on or "mental contamination" of their decision making, if only because people usually believe that their own thinking and judgments are unbiased.[150] This may be especially true in the case against the Port Authority, in which emotions other than sympathy may be less salient.[151] They may also (perhaps incorrectly) believe that they have already (properly) put aside any extrinsic emotional responses in compliance with the judge's instructions.

Second, jurors may not be motivated to correct for any emotional influence, believing that taking at least certain

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[146] "Contamination" refers to the title of Wilson and Brekke's leading article on the subject. *See* Wilson & Brekke, *supra* note 145.

[147] I thank Brad Saxton for suggesting this point.

[148] *See supra* note 18.

[149] Each of these potential sources of debiasing, however, may also increase rather than decrease the role of jurors' emotions in their decisions. Lawyers may use voir dire to begin presenting their theories of the case, with all their emotional ramifications; judicial pre-instruction may frame the case for the jurors in a way that draws out their emotions (e.g., in addressing whether the fault of non-party intentional tortfeasors may be taken into account, the judge may enhance assimilation and/or contrast effects and their emotional implications, discussed *supra* notes 120, 123-24 and accompanying text); adversarial argument may emphasize as well as attenuate emotion-provoking factors; and the support of fellow jurors during deliberations for a given juror's own emotion-driven positions may increase the strength of that juror's commitment to those positions.

[150] Wilson et al., *supra* note 145, at 189-90.

[151] *See* Stapel et al., *supra* note 145, at 801-03 (finding that participants who received "subtle" instruction to adjust for context-driven bias in their judgments if they should perceive any adjusted only when that bias was salient).

emotional responses into account—such as their sympathy for accident victims—is proper.[152] Third, jurors may not want to correct for the effects of the fear of mortality described by terror management theory, precisely because the self-protective mechanisms that mortality salience triggers—such as blaming outgroup members—are so highly motivated.[153] Fourth, judicial instructions to disregard emotional influence may even lead to a "paradoxical" effect in which that influence is enhanced, not diminished, due to the increased availability of the proscribed influence.[154]

Fifth, jurors may not know how to adjust appropriately even if they perceive the need to debias and are motivated to try.[155] For instance, decision makers who are made highly aware of their feelings and are highly motivated to reach a fair and accurate decision may *overcorrect* for any emotional influence.[156] This happens when people overestimate, in accordance with their naïve views of their own cognitive processes,[157] how much their feelings are distorting their judgment, and consequently overadjust to achieve the correct result they seek.[158] Overcorrection may also occur as a consequence of the demand characteristic of the situation: Sufficiently blatant instructions not to be influenced by a given contextual feature may lead people to presume that their judgments have been so influenced, regardless of whether they actually were, and to instigate the (unnecessary) correction process.[159] Overcorrection is very possible, for instance, with regard to jurors' awareness of their sympathy for 9/11 victims: Their emotion will be strong and they may very well (correctly)

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[152] *See* FEIGENSON, *supra* note 3, at 37-38.

[153] *See supra* p. 975.

[154] Kari Edwards & Tamara Bryan, *Judgmental Biases Produced by Instructions to Disregard: The (Paradoxical) Case of Emotional Information*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 849 (1997).

[155] *See* Wilson & Brekke, *supra* note 145.

[156] Leonard Berkowitz et al., *On the Correction of Feeling-Induced Judgmental Biases*, *in* FEELING AND THINKING, *supra* note 34, at 131.

[157] Wegener & Petty, *The Flexible Correction Model*, *supra* note 145; Wilson & Brekke, *supra* note 145.

[158] This may occur because jurors, without being aware of it, already implicitly adjusted for the unwanted influence. Wilson et al., *supra* note 145.

[159] Stapel et al., *supra* note 145. The typical judicial instructions to disregard emotional influence seem closer to the "blatant" than the "subtle" instruction condition in Stapel et al.'s study, which suggests the viability of the overcorrection hypothesis. It is unclear, however, whether this possible effect would outweigh the contrary reasons to predict undercorrection or no correction. *See supra* notes 150-54 and accompanying text.

believe that sympathy may bias their judgment in favor of the plaintiffs and against the defendants, yet they may overestimate the extent of that bias. Overcorrection for the perceived biasing effects of anger is especially likely in the case against the Saudis, in which that and other emotions are likely to be more salient.

Conversely, there is some evidence that jurors can follow instructions not to let their emotions improperly influence them. David DeSteno and his colleagues found that participants with high need for cognition could avoid the biasing effects of emotion on risk perception when instructed to be careful and accurate (and where the emotion manipulation was very salient).[160] Moreover, knowing that one will be accountable for one's decision has been shown to attenuate the effect of extrinsic emotional influence on that decision, specifically, anger leading to punitiveness.[161] Yet, the emotion source in that study was extrinsic and participants knew that it was. Accountability may not have the same effect with regard to either intrinsic or unrecognized extrinsic emotional influences.[162]

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[160] DeSteno et al., *supra* note 45, at 407-11. Note that of the studies that have found emotion effects on social judgments, including judgments of responsibility and blame, some—especially those illustrating path two—included more or less realistic instructions to participants not to use their emotions in making their decisions; others, especially those illustrating the extrinsic emotion effects described in paths three and four, did not. *See supra* notes 19-46 and accompanying text. So the research is not yet conclusive that emotion may affect legal judgments through any or all of the four paths, notwithstanding judicial instructions to the contrary. However, the literature on jurors' willingness and ability in general to follow limiting instructions and instructions to disregard, and the research finding paradoxical effects for instructions to disregard emotion, support the thrust of my claim that such instructions are likely not to be effective as intended. The likelihood that jurors' emotions in actual 9/11 cases would be much stronger than those induced experimentally in the studies cited also supports the claim. *See, e.g.*, Saul Kassin & Christina Studebaker, *Instructions to Disregard and the Jury: Curative and Paradoxical Effects*, *in* INTENTIONAL FORGETTING: INTERDISCIPLINARY APPROACHES 413 (Jonathan M. Golding & Colin M. MacLeod eds., 1998); Edwards & Bryan, *supra* note 154.

[161] Lerner et al., *supra* note 16, at 568-72.

[162] On the other hand, in *Second Sober Thought*, Lerner et al. explain that the effect of accountability on emotional influence seems to have been mediated by systematic rather than heuristic or automatic thinking. *Id.* at 571. For example, accountability attenuated anger-driven punitiveness, not by reducing the anger participants felt, but by influencing how they dealt with that anger. So their findings regarding accountability may generalize to other emotion sources.

CONCLUSION

The preceding analysis is subject to some limitations. First, I have greatly oversimplified my discussion of mood and emotion effects on social judgment. Emotions and moods are very complicated in themselves; they are especially complicated when, as here, so many different emotions and moods are likely to be involved. Further, moods and emotions work together with other cognitive and social psychological phenomena (e.g., availability, norm theory, assimilation and contrast), some of which I have mentioned in passing, others not at all. Moreover, the research on the effects of emotion on social judgments, while more developed than it was fifteen years ago, is still very fragmentary. Some aspects of the models I use here as a basis for inferences or predictions about legal decision making are at present directly supported by only one or two studies, or only indirectly supported. Therefore, any inferences from the research to outcomes in particular cases must remain tentative.

Second, I have spoken very generally about hypothetical 9/11 cases. A basic finding of social psychology, however, is that human judgment and behavior is highly dependent on the situation in which people find themselves.[163] As noted, relevant contexts that must be considered include the defendants' identities, the nature of the plaintiffs' legal theories and the strength of each side's proof and arguments, as well as the broader context of previous and continuing media coverage of relevant events. It is especially hard to predict with any assurance how the context in which relevant risks are perceived may change by the time these cases go to trial: Perhaps media coverage will by that point not emphasize the risk of terrorism as much as it has, or perhaps the emphasis will be even greater. Moreover, it is also difficult to predict the particular facts that will emerge before or at trial that could affect jurors' judgment (e.g., information suggesting recklessness or knowing disregard of risks by the Port Authority). Finally, jurors' emotional and cognitive responses to the case and their legal judgments will depend in part on how the lawyers for the respective parties frame their stories of the plaintiffs, the defendant and the 9/11 attack. Although I

[163] *See, e.g.*, RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980); LEE ROSS & RICHARD NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY (1991).

have suggested some possible approaches here, we cannot know precisely how the lawyers will strategize and present their respective cases.

Third, I have not discussed individual differences in emotional response and risk perception, which would of course play a role in any jury determination.[164] The impact of 9/11 on voir dire in other sorts of cases is already a matter of speculation in the profession;[165] the impact on cases dealing with 9/11 will obviously be significant. Nor have I addressed the possible impact of deliberations on the decision-making process.

Despite these limitations, I hope that this summary of research on the emotions, risk perceptions and social judgments has shed some light not only on the litigation that has already begun in the wake of 9/11, but more generally on decision making in more routine cases. I also hope that by attempting to trace some of the complex connections among the habits of thought and feeling that cognitive and social psychologists have identified, I have indicated where further empirical research is needed.

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[164] The venue of any 9/11 cases may affect jurors' emotional responses. For instance, people geographically closer to the attacks may be relatively sadder and more fearful because they are likelier to know family, friends or co-workers who died; in those farther removed from the attacks, anger may be a more dominant emotion. (I thank Linda Meyer for suggesting this.)

[165] *See, e.g.*, Mark Curriden, *Violence Shaping Verdicts*, A.B.A. J., Feb. 2002, at 36 (discussing how 9/11 may be affecting jurors' views about crime and punishment).