Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom

Victor Gold

COVERT ADVOCACY: REFLECTIONS ON THE USE OF PSYCHOLOGICAL PERSUASION TECHNIQUES IN THE COURTROOM

VICTOR GOLD†

Throughout their history trial lawyers have exploited a variety of psychological principles derived from intuition and experience. Now, however, these amateur efforts are giving way to science. Today's trial lawyers are being trained to employ the discoveries and techniques of modern psychology. In this Article Professor Gold examines the problems posed by this increased reliance on psychology in trial advocacy. He argues that many of the psychological techniques currently being employed are designed to influence juries subconsciously and induce decisions on legally improper bases. He argues also that this "covert advocacy" threatens to deprive the jury of its ability to function properly. Thus, the increased use of modern psychological techniques in trial advocacy threatens the legitimacy of both the jury and adversary systems. Professor Gold considers possible means of controlling covert advocacy. He recommends expanding the jury's powers as a means of avoiding more drastic restructuring of the manner in which trials are conducted.

For centuries trial lawyers have exploited psychological principles derived from intuition and experience.[1] But amateur courtroom psychology is now giving way to science. For a price, professional psychologists are available to advise lawyers on all aspects of trial advocacy including what to say, where to stand, how to select a jury, when to object, and what clothes to wear.[2] In the words of one expert, " 'all in all, we help lawyers position their cases to juries in much the same way you would sell a bar of soap . . . .' "[3]

Historically, lawyers have employed such experts when the economic or

---

† Professor of Law, Loyola Law School, Los Angeles. B.A. 1972, University of California at Los Angeles; J.D. 1975, University of California at Los Angeles.

1. One early writer noted:

> Thus, as everyone knows, the virtue of oratory is most effectively displayed in arousing the anger, disgust, or indignation of an audience, or in turning them from such excitement of feeling to mercy and pity; and here no one but a man who has made himself thoroughly familiar with the characters of men, and the whole range of human feeling, and the motives whereby men's minds are excited or calmed, will ever be able to produce by his words the effect which he desires.

Cicero, *On the Character of the Orator*, in BASIC WORKS OF CICERO 189 (M. Hadas ed. 1951).

2. *See, e.g.*, Dancoff, *The Jury Molders*, L.A. LAW., Oct. 1981, at 18, 22.

3. Dancoff, *Hidden Persuaders of the Courtroom*, BARRISTER, Winter 1982, at 8, 17 (quoting Mark Wilkins). The use of psychologists to assist the lawyer after jury selection is a relatively recent development. In 1976 one student of both the law and psychology wrote:

> No lawyer would be harming his client by taking advantage of scientific jury selection. But if he wanted to have an even greater influence over the outcome of the trial, he ought to hire social scientists to help build and structure the evidence to be presented. Curiously enough, if there is anything social psychologists know about, it is the process of persuasion, which they have studied intensively for many years. One has to wonder why no lawyers or

political issues at stake warranted the expense.[4] Today, however, lawyers are developing the capacity to employ psychological courtroom techniques systematically on their own. Continuing legal education programs currently are offered on these subjects.[5] Recently published books on trial advocacy are devoted in whole or in part to psychology.[6] In the last decade scientists have published in journals for trial lawyers dozens of articles describing various psychology-based advocacy techniques.[7] These articles reflect an even larger and still growing body of academic literature concerning the cognitive processes of the jury.[8] As psychologists refine this research and as the advocacy techniques based on it become more effective, an increasing number of lawyers will likely use those techniques. Like executives in other growth industries, trial lawyers are eager to

---

social psychologists have thought to consult with each other on that, instead of playing around with the less important matter of jury selection.

Saks, *Social Scientists Can't Rig Juries*, PSYCHOLOGY TODAY, Jan. 1976, at 57.

4. The war in Viet Nam and other major American political issues of the 1960s and 1970s precipitated the first significant involvement of behavioral and social scientists in the American trial process. Concerned with prevailing community attitudes toward defendants in several highly politicized trials, a number of academics volunteered their services to defense counsel to assist in the selection of juries. Lawyers and scientists joined efforts in the defense of Angela Davis, Philip Berrigan, the Camden 28, the Gainsville Eight, the Attica inmates, the Wounded Knee defendants, and the Panther 21 conspiracy defendants, among others. *See* Starr, *Behavioral Science in the Courtroom*, TRIAL DIPL. J., Spring 1981, at 10. Some of these academics participated in the founding of the National Jury Project, which today continues to apply social science techniques to jury selection and the trial process in cases selected due to the political or social issues involved. The Project devotes its efforts to civil plaintiffs and criminal defendants. *See* JURY WORK, SYSTEMATIC TECHNIQUES vii-x (E. Krauss & B. Bonora 2d ed. 1984).

In the trial of former Attorney General John Mitchell and former Secretary of Commerce Maurice Stans, one sociologist volunteered to help the defendants select a fair jury, but not necessarily a winning one. He told the defense lawyers that he would not tell them how to pick a jury biased in their favor. The defense, however, hired a market research expert instead of the sociologist. *See* N.Y. Times, Feb. 26, 1974, at 14, col. 3. The United States Supreme Court acquitted Mitchell and Stans of the charge of conspiracy to sell favorable government decisions for campaign contributions. *See generally* Saks, *supra* note 3, at 48-57 (criticizing overemphasis of scientific jury selection in influencing the outcome of the trial). The attitudes of counsel for Mitchell and Stans are not unusual. *See infra* note 65 and accompanying text.

5. *See, e.g.*, *The Docket*, NAT'L INST. FOR TRIAL ADVOC., Fall 1985, at 5; *see also* Mackey, *Jury Selection: Developing The Third Eye*, TRIAL, Oct. 1980, at 22, 23 ("Numerous seminars now are being held throughout the country on the psychology of jury selection and the trial process.").

6. *See, e.g.*, D. HERBERT & R. BARRETT, ATTORNEY'S MASTER GUIDE TO COURTROOM PSYCHOLOGY: HOW TO APPLY BEHAVIORAL SCIENCE TECHNIQUES FOR NEW TRIAL SUCCESS (1980).

7. *See, e.g.*, Colley, *Friendly Persuasion: Gaining Attention, Comprehension and Acceptance in Court*, TRIAL, Aug. 1981, at 42, 45 (importance of physical positioning of counsel in courtroom); Crawford, *The Psychology of Evidence*, TRIAL DIPL. J., Fall 1982, at 31, 33 (placing emphasis on attorney credibility to divert attention from the evidence); Sannito, *Nonverbal Communication in the Courtroom*, TRIAL DIPL. J., Summer 1982, at 22, 28 (manipulation of voice volume). Many of the most important articles published within the last decade are cited *infra* notes 14, 21, 24, 27, 31, 65, 75 & 81.

8. A number of recently published books focus on this subject. *See, e.g.*, R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY (1983); THE JURY SYSTEM IN AMERICA (R. Simon ed. 1975); E. F. LOFTUS, EYEWITNESS TESTIMONY (1979); NEW DIRECTIONS IN PSYCHOLEGAL RESEARCH (P. Lipsett & B. Sales ed. 1980); W. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER AND STRATEGY IN THE COURTROOM (1982); PERSPECTIVES IN LAW AND PSYCHOLOGY, VOLUME II: THE TRIAL PROCESS (B. Sales ed. 1981); PSYCHOLOGY AND THE LAW (G. Bermant, C. Nemeth & N. Vidmar ed. 1976); PSYCHOLOGY OF THE COURTROOM (N. Kerr & R. Bray ed. 1982); M. SAKS & R. HASTIE, SOCIAL PSYCHOLOGY IN COURT (1978); R. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY (1980); J. THIBAUT & L. WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

employ the latest scientific or technical advances to gain a competitive advantage.

Little concern has been expressed—in the legal community or elsewhere—about this use of psychology as an advocacy tool. Perhaps lawyers are too busy embracing psychology as the long awaited means of controlling the uncertainties of a jury trial to consider its broader implications in much detail.[9] Behavioral scientists may be too overcome with the prospects of economic or academic rewards to care much about what they may be doing to another profession.[10] Judges seem largely unaware of the development.

There is reason for concern, however. Lawyers can use many psychology-based advocacy techniques to induce juries to employ legally irrelevant or improper considerations in their decisionmaking. These considerations include seemingly innocuous matters such as attorney language, dress, and other elements of what might be called courtroom style. But some techniques also involve unabashed efforts to induce jury reliance on bias. Lawyers can use other techniques to induce juries to evaluate evidence illogically; lawyers can produce this illogic by confusing the meaning of evidence or distorting the jury's perception of it.[11]

This Article examines the problems posed by the use of psychology in trial advocacy. The first section describes the psychological techniques discussed in articles recently published in trial advocacy journals. It demonstrates how these techniques seek to induce subconscious jury decisionmaking on legally improper bases. The second section shows that this subconscious persuasion, which this Article calls "covert advocacy," threatens to deprive the jury of its capacity to evaluate evidence critically and reflect community values reliably in its verdict. As a consequence, this Article argues that covert advocacy threatens the legitimacy of both the jury and adversary systems in a way and to a degree never before posed by conventional advocacy methods. The final section considers possible controls on covert advocacy and recommends expanding the powers of the jury as a means of avoiding a more drastic restructuring of the way lawyers try cases.

I. PRINCIPLES AND TECHNIQUES OF COVERT ADVOCACY

This section surveys the advocacy techniques described by behavioral scientists in articles written for trial practitioners. It is helpful to divide the tech-

---

9. There are some exceptions, however. *See, e.g.*, Dancoff, *supra* note 3, at 8, 17. Dancoff quotes a prominent California trial attorney:

> "So the market researchers have stepped in [and] . . . it's dangerous. It preempts the original, melting-pot idea of the jury system, which is that a jury should represent a cross-section, and puts the entire emphasis on winning . . . . [U]sing these techniques is grossly unfair to the side that can't afford them."

Id. (quoting Attorney Maxwell Blecher).

10. There are some notable exceptions. *See, e.g.*, W. O'BARR, *supra* note 8, at 113-118; Hans & Vidmar, *Jury Selection*, in THE PSYCHOLOGY OF THE COURTROOM 75-76 (N. Kerr & R. Bray ed. 1982).

11. *See infra* notes 12-94 and accompanying text..

niques described into two groups according to their intended effect on the jury. The first group consists of techniques designed to induce the jury to employ an extralegal basis for decisionmaking. The second group consists of techniques designed to induce illogical evaluation of evidence.[12] This section also describes some of the psychological principles on which scientists base these techniques. Analysis reveals that many of the advocacy techniques in question are aimed at subconsciously inducing the jury to commit inferential error.

A. *Techniques to Induce the Use of Extralegal Bases for Decisionmaking.*

Trial practitioner journals frequently make reference to psychological techniques aimed at inducing the jury to employ an extralegal basis for its decision. This Article considers a decisionmaking input to be extralegal when it is either irrelevant to the legal or factual issues of a case or is considered by the law to be an otherwise improper basis for decisionmaking. This group of techniques can be classified into two subgroups: (1) courtroom style techniques and (2) techniques aimed at inducing the use of bias.

1. Courtroom Style as an Extralegal Basis for Decisionmaking

Courtroom style refers to how lawyers and witnesses tell their stories in the courtroom. Courtroom style techniques involve body movement, physical appearance, demeanor toward the jury, and use of language. Courtroom style is an extralegal basis for decisionmaking because the demeanor of lawyers or witnesses usually has no connection to the legal or factual issues that should be the basis for the jury's verdict.[13]

Language and voice are important elements of courtroom style. For example, no fewer than six articles recently written by behavioral scientists for trial lawyers focus on a series of studies undertaken by the Duke University Law and Language Project concerning the use of various verbal strategies in the courtroom.[14] In one experiment scientists found that lawyers can induce jurors to make judgments about the credibility of a speaker through manipulation of the "powerfulness" of the speaker's language.[15] Powerless speakers use hedge words (sort of, kind of, around), intensifiers (very, really), meaningless filler words (you know), and terms of personal reference (my good friend, Mrs.

12. There is a significant amount of overlap between these two groups. A number of the techniques discussed in this Article could have been classified in either group. This Article classifies each technique according to what seems to be its primary effect on jury decisionmaking.

13. Of course, when witness demeanor is a reliable indicator of witness credibility then the jury properly may base a decision on that demeanor.

14. *See, e.g.*, Abbey & O'Barr, *Law and Language: The Duke University Studies*, TRIAL DIPL. J., Winter 1981/82, at 26; Colley, *Style, Structure and Semantics*, TRIAL, July 1983, at 86, 87; Conley, *Language in the Courtroom*, TRIAL, September 1979, at 32; Goodman & Loftus, *Social Science Looks at Witness Examination*, TRIAL, April 1984, at 52, 56; O'Barr & Conley, *When a Juror Watches a Lawyer*, BARRISTER, Summer 1976, at 8; Sannito, *Psychological Courtroom Strategies*, TRIAL DIPL. J., Summer 1981, at 30, 34. For a more complete description of the studies conducted by the Duke University Law and Language Project, see W. O'BARR, *supra* note 8; Conley, O'Barr & Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375.

15. W. O'BARR, *supra* note 8, at 61-75.

Smith). Another element of powerless speech is the use of an inquisitive intonation at the end of a declarative sentence, suggesting that the speaker seeks the listener's approval for the declaration. Powerful speech avoids the characteristics of powerless speech.[16] In experiments jurors consistently evaluated powerful speakers as more credible than powerless speakers and gave plaintiffs with powerful speech witnesses substantially larger damage awards than plaintiffs with powerless speech witnesses.[17] However, linking credibility with speech style proved to be a mistake. The researchers found that the "power" component of linguistic style was not correlated with witness truthfulness. Instead, it was correlated with witness social status.[18] Witnesses who were poor, uneducated, or unemployed had a tendency to use powerless speech while witnesses with business or professional backgrounds tended to use powerful speech.[19] Nonetheless, the perceived correlation between speech style and credibility was strong; jurors persisted in linking credibility with the power component of speech even when the judge's instructions cautioned against it.[20]

These results encourage lawyers to train their own witnesses to use powerful speech and to use that linguistic style themselves. These results further encourage lawyers to induce powerless speech in opposing witnesses. Because the distinction between powerful and powerless witness speech is not probative of witness credibility or any other relevant matter, however, efforts to exploit that distinction represent an attempt to make use of an extralegal basis for jury decisionmaking.[21] If the jury believes the distinction is probative of witness truthfulness, it has been misled. Furthermore, when counsel uses powerful speech to enhance his or her credibility, the lawyer seeks to focus the jury's attention on another extralegal matter. The credibility of counsel is irrelevant and it is not evidence.[22]

The covert manner in which these extralegal matters shape jury decisionmaking makes them particularly dangerous. Most jurors would reject an overt suggestion to evaluate witness credibility based on social status. When an attorney makes the suggestion covertly through manipulation of linguistic style, however, the jury may be unable to detect and reject the subtle thrust of the

---

16. W. O'BARR, *supra* note 8, at 64.

17. W. O'BARR, *supra* note 8, at 71-75.

18. W. O'BARR, *supra* note 8, at 69-71.

19. W. O'BARR, *supra* note 8, at 69.

20. W. O'BARR, *supra* note 8, at 94-96.

21. *See generally* Call, *Psychology in Litigation*, TRIAL, March, 1985, at 48-49 (discussing speech manipulation as an extralegal basis for decisionmaking). Call notes:

> If and when, by his own demeanor and questions, an attorney influences a witness to "move" psychologically and thus respond verbally and nonverbally less appropriately, the cross-examining attorney has won. The witness has in effect destroyed his or her own credibility. Thus, the attorney has introduced extralegal information to the jury—and not always fairly!

Id. at 50.

22. *See* 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5163, at 29 (1978) ("arguments of counsel are not evidence"). Of course, the credibility of witnesses is a legitimate issue in every case. Aspects of witness demeanor, including linguistic style, that reveal credibility are legitimate matters for the jury's consideration.

attorney's efforts. Similarly, a verdict overtly based on considerations of social status would raise serious moral and constitutional questions that any trial or appellate judge could identify.[23] When damage awards decrease commensurately with a decrease in the apparent social status of the plaintiff and those witnesses associated with the plaintiff, the law improperly values individual rights and life differently for the powerful than it does for the powerless.[24] These issues are no less pertinent when counsel influences a verdict subtly by exploiting the psychological divisions between the linguistic patterns of the poor and inaccurate stereotypes of supposedly more credible speech.[25] But the likelihood that any judge could detect the use of this technique and, thus, the presence of these issues, seems slim.[26]

Many other courtroom style techniques seek to capitalize on this psychological correlation between credibility and social status. Recommendations concerning dress,[27] physical positioning of counsel relative to the witnesses and the jury,[28] and other aspects of attorney courtroom demeanor[29] are aimed at enhancing the perceived credibility of counsel by manipulating his or her social image.[30] By seeking to create the impression of power, these techniques focus the jury's attention on extralegal bases for decisionmaking: the social status and credibility of counsel are irrelevant to the issues in the trial. These techniques always affect jury decisionmaking through subtle means because an overt request to consider the attorney's social status probably would be ineffective, if not offensive.

23. Due process and equal protection issues arise when the status of the litigants and their witnesses overcomes the proper legal issues. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 518 (1978) (contrasting due process and equal protection analysis).

24. *See generally* Kulka & Kessler, *Is Justice Really Blind?—The Influence of Litigant Physical Attractiveness on Juridical Judgment*, 8 J. APPLIED SOC. PSYCHOLOGY 366, 374-75 (1978) (study revealed that physical attractiveness affects both the verdict and amount of damages awarded). In a related study concerning criminal cases it was found that juries which estimated the probabilities of guilt no differently for an attractive and an unattractive defendant nonetheless convicted the unattractive defendant more often. This finding suggests juries require a lower standard of proof to convict defendants who are socially unattractive. Kerr, *Beautiful and Blameless: Effects of Victim Attractiveness and Responsibility on Mock Juror's Verdicts*, 4 PERSONALITY & SOC. PSYCHOLOGY BULL. 479 (1978). Again, this may suggest that juries subconsciously believe that socially inferior defendants simply have less to lose when their liberty or life is at issue.

25. In fact, the inequities may be more serious in this context. Counsel presumably can exploit this psychological connection most effectively by employing a psychologist to assist in preparing for the examination of witnesses. Normally only wealthier litigants can afford the expense of such expert assistance. Thus, covert appeals to prejudice in favor of the rich and powerful witness can be exploited only by rich and powerful litigants.

26. *See infra* note 170 and accompanying text; text accompanying note 171.

27. *See, e.g.*, Colley, *First Impressions*, LITIGATION, Summer 1977, at 8, 9; Crawford, "*Courtroom Lovers*," TRIAL DIPL. J., Spring 1983, at 19, 20. Courts already are sensitive to the subconscious effect on the jury of clothing worn by a defendant in a criminal prosecution. *See, e.g.*, United States v. Harris, 703 F.2d 508 (11th Cir. 1983) (forcing defendant to wear jail clothing to *voir dire* examination of prospective jurors improper); People v. Taylor, 31 Cal. 3d 488, 645 P.2d 115, 183 Cal. Rptr. 64 (1982) (forcing defendant to wear jail clothing to trial improper).

28. *See, e.g.*, Colley, *supra* note 7, at 45.

29. *See, e.g.*, Sannito, *supra* note 7, at 28 (voice volume "is related to perceived credibility, the trait of dominance").

30. Numerous jury studies have documented the link between attractiveness and perceived credibility. *See, e.g.*, H. KALVEN & H. ZEISEL, THE AMERICAN JURY 385 (1966).

Powerful social status is only one of many personal images that behavioral scientists have encouraged attorneys to cultivate covertly.[31] In fact, behaviorists have encouraged attorneys to change their image as they move from one courtroom to another, thereby taking into account changes in the make-up of the jury.[32] For instance, an attorney appearing before a predominately male jury is instructed to appear confident and efficient because men are said to believe that the attorney's primary job is to win.[33] On the other hand, the same attorney appearing before a largely female jury is encouraged to appear sincere and likable because women allegedly admire these qualities most.[34] The attorney can even tailor his or her image for each individual juror. One psychologist recommends, "[b]ring out similarities between you and the jurors during *voir dire*. For example, if the juror served in Viet Nam and you did too, ask him about a few of the places and events with which you are familiar, to establish a common bond."[35] This same psychologist carefully notes that these efforts to curry favor with the jury must not be too overt in order to avoid the appearance of "shallow 'ingratiation,' "[36] even though this would be a completely accurate interpretation of the attorney's motives. The goal of this technique is, again, to enhance the credibility of counsel in the eyes of the jury. Social psychologists have found that similarities between the source and the recipient of a communication increase the attractiveness and, hence, the credibility of the source in the eyes of the recipient.[37]

One expert in communications goes so far as to suggest that attorneys should pit their personal credibility directly against the credibility of adverse witnesses:

> Supposing, for instance . . . you know you cannot damage the testimony through cross examination. . . . The traditional advice is to ask no questions. I am suggesting that contemporary communication research offers a different answer. That is, stand up and with confidence face the witness and ask just enough questions to tell the jury that you do not like, believe, accept, etc., the witness. . . . What you are saying to the jury is, "It's either him or me."[38]

The apparent aim of this technique is to erode the value of the testimony given on direct examination by focusing attention away from the testimony and on

---

31. *See, e.g.*, Wells, *Lawyer Credibility*, TRIAL, July 1985, at 69 (trial lawyers should give the impression of expertness, trustworthiness, and dynamic personality).

32. *See, e.g.*, Sannito, *supra* note 14, at 30, 33.

33. *See* Lind & O'Barr, *The Social Significance of Speech in the Courtroom*, in LANGUAGE AND SOCIAL PSYCHOLOGY 66, 87 (H. Giles & R. St. Clair eds. 1979).

34. *Id.*

35. Sannito, *supra* note 14, at 33.

36. Sannito, *supra* note 14, at 33.

37. *See* Linz & Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOLOGY REV. 1, 38-39 (1984). Fortunately, there are limits to the efficacy of this technique. *Id.* at 39. Lawyers have been encouraged to enhance the credibility of their client by taking advantage of this same psychological phenomenon. *See* Wells, *supra* note 31, at 71 ("[L]awyers should use voir dire to find out as much as possible about the jurors' educations, socioeconomic backgrounds, attitudes, and beliefs, and then highlight those aspects of the client's personal profile that are most similar to the jurors'.")

38. Crawford, *supra* note 7, at 33.

counsel's credibility. Attention is focused on counsel because the value of the testimony could not have been eroded by legitimate cross-examination on the substance of the testimony. If the technique works the jury will undervalue the testimony given on direct examination. Obviously, counsel cannot draw the attention of the jury to counsel's credibility overtly because any effort to do so would highlight the objectionable nature of such a strategy.[39]

Thus, the result is not only to distract the jury with extra-legal matters but also to obscure the import of relevant evidence. The goal of courtroom style techniques aimed at enhancing attorney credibility is to influence how jurors perceive the evidence. Attorneys can have this influence because jurors tend to evaluate evidence in light of the credibility of the attorneys presenting or attacking that evidence. But, by focusing the jury's attention on the extralegal matter of attorney credibility, these techniques mislead the jury as to the actual meaning or value of the evidence. Attorney credibility simply is not a reliable basis on which to evaluate evidence.

Other courtroom techniques dealing with linguistic style seek to exploit additional psychological tendencies of the jury. For example, research reveals that juries are highly susceptible to the indirect assertion of facts by a lawyer during witness examination.[40] Simply asking a question sometimes is sufficient to induce the jury to draw an inference, even in the absence of confirming testimony. Perhaps the most famous example of this phenomenon is the questioning of a rape victim regarding prior sexual history. Research suggests that juries typically infer the validity of the unspoken premise of the questions—that the victim encouraged the rape—irrespective of the strength of the responding testimony supporting that inference.[41] This has been termed "the biasing effect" of a question: Jurors tend to misperceive the evidence due to biases contained in the question, regardless of the answer.[42] Due in part to recognition of this effect, many jurisdictions now limit the admissibility of evidence concerning a rape victim's prior sexual history.[43]

However, the opportunity for lawyers to assert facts indirectly by manipulating the form of questions is not limited to rape cases. Moreover, the use of this technique often is not so obvious. Research suggests that "jurors [in all cases] enter the courtroom with the tendency to draw . . . inferences from the manner in which [questions are] phrased, in accordance with" rules of speech commonly followed in society.[44] For example, assume an attorney asks the witness "The defendant is not a friend of yours, is he?" The question can imply that the defendant and the witness are enemies. But compare the question "The

39. The attorney's opinions and personal credibility are not evidence and are irrelevant. *See* 22 C.WRIGHT & K. GRAHAM, *supra* note 22, § 5163, at 29.

40. *See* Goodman & Loftus, *supra* note 14, at 55.

41. *See* Feild, *Rape Trials and Jurors' Decisions: A Psycholegal Analysis of the Effects of Victim, Defendant, and Case Characteristics*, 3 LAW & HUMAN BEHAVIOR 261, 279 (1979).

42. *See* Goodman & Loftus, *supra* note 14, at 52, 55.

43. *See, e.g.*, FED. R. EVID. 412 (evidence of victim's past sexual behavior can be admitted only under limited circumstances).

44. *See* Goodman & Loftus, *supra* note 14, at 56.

defendant is not an enemy of yours, is he?" This question does not imply that the defendant and witness are friends, despite the identical structure of the two questions. Instead, the implication is that the defendant and the witness are neither friends nor enemies.

The reason for the difference in the ability of these questions to convey an assertion of fact apparently is based on commonly held beliefs concerning socially acceptable verbal behavior. People usually regard as unpleasant explicit statements that a person is an enemy. When we criticize someone socially we frequently are given to understatement or implication. Social rules lead us to avoid making more direct critical assertions that might generate social conflict. However, there usually is no social motive to avoid direct statements about friendship. Thus, people often make statements about friendship explicitly and tend not to imply such a relationship from ambiguous language.[45]

Research also indicates that attorneys can use their knowledge of such everyday conversational and psychological rules to formulate nonleading questions that indirectly communicate information to the jury. Jurors who accept the premises embedded in such questions resist rejecting those premises even when the responsive testimony or other evidence suggests the premises are invalid.[46] In this manner counsel can covertly communicate theories and arguments subconsciously to the jury simply by asking questions during witness examination.[47] Because an attorney's questions are not themselves evidence,[48] when an attorney exploits this knowledge he or she again seeks to induce the jury to employ an extralegal basis for decisionmaking.

Obviously, it is not always clear why juries are influenced by courtroom style. Most of the research discussed in this Article reveals only that juries are so influenced. This research tends not to focus on the cognitive processes jurors employ which produce that influence. Consideration of the nature of those processes, however, reveals the dangers that courtroom style techniques present.

The influence of many courtroom style techniques on jury verdicts seems to be the product of the jury's improper use of heuristic reasoning. Heuristics are cognitive simplifying strategies used to reduce the complexity of information that must be considered in making a decision.[49] Heuristics permit decisionmakers to sift through available information and select that information which is most important. For example, in deciding whether to categorize a particular plant as a tree or a bush, a decisionmaker may wish to avoid a systematic study of the subject plant and the science of botany in favor of a quick search of the plant's most salient characteristics. The decisionmaker can then compare these characteristics to presumed characteristics of trees and bushes. Using this

45. Goodman & Loftus, *supra* note 14, at 55-56.

46. Goodman & Loftus, *supra* note 14, at 55-56.

47. Goodman & Loftus, *supra* note 14, at 56.

48. *See* 22 C. WRIGHT & K. GRAHAM, *supra* note 22, § 5163, at 29.

49. *See generally* R. NISBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 6-8 (1980) (heuristics involve use of knowledge stored in one's memory to make judgments about new information).

shortcut, a decisionmaker may classify the plant as a bush if it appears mature, but is only two feet high. However, this strategy, while effective in many cases, can often lead to inferential error. For example, the process described above might lead to an inferential error if the decisionmaker is unfamiliar with the bonsai tree—a small tree no bigger than most bushes when fully grown. Thus, while simplifying available data, heuristics sometimes direct our attention toward vivid, anecdotal information that may be misleading, and away from more pallid, complex evidence that may be highly probative.

One form of this cognitive strategy, called the representativeness heuristic, reduces problems of estimating the relationship between events or physical objects to what essentially are similarity judgments. As in the tree/bush hypothetical described above, people who apply this heuristic to the problem of categorizing objects "assess the degree to which the salient features of the object are representative of, or similar to, the features presumed to be characteristic of the category."[50] If the plant is relatively short, the representativeness heuristic suggests to the decisionmaker that it is a bush, not a tree. If the attorney and witness look and sound authoritative, the representativeness heuristic can produce the impression that evidence offered by them is reliable while focusing the jury's attention away from gaps or inconsistencies in the evidence that are far more probative of reliability.

Thus, although courtroom style may be the most vivid or salient aspect of an attorney's presentation of evidence, that style hardly establishes the reliability of the evidence. Like candidates in political debates, however, attorneys realize that the "voters" on the jury often judge the message by the medium. In so doing, the jury employs a cognitive process that may lead it to commit inferential errors.

The danger presented by this improper heuristic reasoning is heightened because the process generating that error has an aura of logic that may inspire a strong feeling of confidence in the decision made and discourage self-analysis by the decisionmaker.[51] The covert manner in which courtroom style techniques induce the jury to employ heuristic reasoning reinforces the jury's disinclination to engage in self-analysis. If a lawyer overtly advocated the jury's use of this reasoning process, that effort would direct the jury's attention toward the process and the jury might be more likely to question its logic.

Some courtroom style techniques seem to affect jury decisionmaking through another cognitive process. An analysis of heuristics deals with the procedures by which humans process data. But human understanding may depend less on these procedures than it does on the wealth of general knowledge stored in our brains. Humans seldom evaluate objects and events as if they were sui generis. Rather, they relate these things to information stored in their memories concerning past experiences. People use this stored information to form general beliefs or theories about the world and the things in it. Scientists have called

50. *Id.* at 24.

51. This phenomenon has been referred to as the "illusion of validity." *See* Kahneman & Tversky, *On the Psychology of Prediction*, 80 PSYCHOLOGICAL REV. 237, 248-49 (1973).

these theories knowledge structures.[52]

Like heuristics, knowledge structures are vital and often reliable tools for processing data. These tools allow for the minimization of computing time and effort by taking advantage of the redundancies of our world. They can be propositional (for example, people who use hedge words are not credible) or schematic (for example, the knowledge concerning conventions or rules of speech commonly followed in society).[53]

Knowledge structures may lead to inferential error when they are inaccurate representations of the real world. All of us possess some unreliable knowledge structures. These preconceptions tend to make us resist conflicting evidence and accept confirming evidence, coloring the manner in which we interpret everything in between.[54] In addition, we may apply these preconceptions unconsciously, misleading ourselves into believing that we are evaluating data objectively.[55]

Courtroom style affects jury decisionmaking through the operation of one or more knowledge structures. Those knowledge structures might be associated with a widely accepted social stereotype linking high status, attractiveness, and powerful demeanor with a high degree of personal credibility. That stereotype may be resistant to conflicting empirical evidence and judicial instructions indicating that this link is unreliable.[56]

Thus, the danger of courtroom style techniques is not merely that it focuses jury attention on an extralegal basis for decisionmaking. Through the improper use of heuristics and knowledge structures, these techniques also induce the jury to commit inferential error in evaluating the meaning of evidence and cripple the jury's capacity to detect and prevent that error.[57]

---

52. *See generally* R. NISBETT & L. ROSS, *supra* note 49, at 28-42 (discussing knowledge structures such as theories, beliefs, and schemas as tools for analyzing new information).

53. R. NISBETT & L. ROSS, *supra* note 49, at 28.

54. *See generally* R. NISBETT & L. ROSS, *supra* note 49, at 167-92 (discussing the extent to which new data forces the revision of pre-existing beliefs). The power of theories or preconceptions is such that, even when evidence that is used to create a theory or preconception is discredited, the theory still may survive. *Id.* at 175-79; *see infra* text accompanying notes 81-86.

55. *See generally* R. NISBETT & L. ROSS, *supra* note 49, at 195-227 (examining people's success and accuracy in self-characterization). Because error resulting from the unconscious application of a bias or preconception may not be subject to the safeguard of self-control, it is more dangerous than overt appeals to bias. Moreover, when the application of a bias is unconscious the ability of the advocates to induce the jury to reject use of that bias is limited. For the same reason, judicial efforts to prevent the unconscious use of bias may be ineffective. Many courts, however, simply assume that instructions will successfully minimize bias. *See, e.g.*, United States v. Dennis, 625 F.2d 782, 801 (8th Cir. 1980); United States v. Lutz, 621 F.2d 940, 944 (9th Cir. 1980), *cert. denied*, 449 U.S. 859 (1980), 449 U.S. 1093 (1981). A number of cases, however, have recognized the limited efficacy of instructions to cure bias. *See, e.g.*, United States v. Figueroa, 618 F.2d 934, 943 (2d Cir. 1980); United States v. Schiff, 612 F.2d 73, 82 (2d Cir. 1979).

56. *See* W. O'BARR, *supra* note 8, at 94-96. Even if the link is reliable, there still may be problems. When attorneys manipulate their image and that of witnesses to give the misleading impression that they fit the stereotype, the knowledge structure becomes an unreliable basis for judging credibility.

57. A significant body of literature exists documenting the potential of various cognitive processes to produce error. *See, e.g.*, R. NISBETT & L. ROSS, *supra* note 49. The implications of this literature for the law have only begun to be considered. *See, e.g.*, Edwards & von Winterfeldt, *Cognitive Illusions and their Implications for the Law*, 59 S. CAL. L. REV. 225 (1985); Gold, *Federal*

2. Bias as an Extralegal Basis for Decisionmaking

The trier of fact's lack of bias is a fundamental aspect of fairness.[58] The jury should decide a case solely on the evidence presented in open court, not on knowledge or beliefs the jurors bring with them to court.[59] Bias, then, is an extralegal basis for decisionmaking. Some researchers suggest, however, that in controversial trials or in trials in which the evidence is not clear cut, extralegal bias may influence the result in as many as half the cases.[60]

Juror bias clearly is an issue when lawyers examine the qualifications of prospective jurors during *voir dire*. The lawyer's stated purpose during *voir dire* is to assist the court in selecting a fair and impartial jury.[61] An indication of bias or opinion, such as knowledge of facts relevant to the case or familiarity with a party, is cause for disqualification.[62]

To psychologists, however, the unbiased juror does not exist.[63] Jurors, like all other human decisionmakers, cannot evaluate evidence as if it were sui generis but must always relate it to past experiences and preconceived beliefs about the world: the knowledge structures they have accumulated over a lifetime.[64] Based on this premise some psychologists have concluded that the purpose of jury selection cannot be the selection of an impartial jury. Rather, it must be the selection of the most favorably biased jury.[65]

Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence, 58 WASH. L. REV. 497 (1983).

58. *See, e.g.*, Murphy v. Florida, 421 U.S. 794, 799 (1975) ("[C]onstitutional standard of fairness requires . . . 'a panel of impartial "indifferent" jurors.' ") (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)); *In re* Murchison, 349 U.S. 133, 136 (1955) ("[F]air trial in a fair tribunal is a basic requirement of due process. Fairness . . . requires an absence of actual bias."); Jackson v. United States, 408 F.2d 306, 308 (9th Cir. 1969) ("[D]efendant is entitled to be tried by an unprejudiced and legally qualified jury.").

59. *See, e.g.*, Irvin v. Dowd, 366 U.S. 717, 722 (1961) (juror must be indifferent to case and base verdict on evidence presented at trial). The need for objectivity, however, has not been construed to require complete ignorance concerning the facts of a case. *See id.*; United States v. Rosado, 728 F.2d 89, 94 (2d Cir. 1984); United States v. McNeill, 728 F.2d 5, 9 (1st Cir. 1984); Matthews v. Lockhart, 726 F.2d 394, 397 (8th Cir. 1984). Knowledge of matters implicated in the trial will not require excusing the jury provided the jurors will evaluate the facts presented without any preconceived biases. *See* Murphy v. Florida, 421 U.S. 794, 800 (1975) (quoting *Dowd*, 366 U.S. at 723); United States v. Blanton, 719 F.2d 815, 824-28 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984).

60. *See* Hans & Vidmar, *supra* note 10, at 74; Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 525-30 (1978).

61. *See* Colley, *supra* note 7, at 43.

62. *See* Reynolds v. United States, 98 U.S. 145, 155 (1878) (preconceived opinion sufficient cause for discharge of juror); Sims v. United States, 405 F.2d 1381, 1384 n.5 (D.C. Cir. 1968) (discharge for cause of juror related to victim or holding same occupation as victim). However, as with prior knowledge of the case, *see supra* note 59 and accompanying text, acquaintance with a party or with a party to a similar suit is not always regarded as automatic grounds for removal. *See* Stokes v. Delcambre, 710 F.2d 1120, 1128 (5th Cir. 1983) (trial court may exercise discretion in removing only some jurors with prior acquaintance to party); United States v. Anderson, 626 F.2d 1358, 1374 (8th Cir. 1980) (prior acquaintance will not always require removal), *cert. denied*, 450 U.S. 912 (1981); United States v. Jones, 608 F.2d 1004, 1008 (4th Cir. 1979) (relative of victim to similar crime not subject to per se disqualification), *cert. denied*, 444 U.S. 1086 (1980).

63. *See, e.g.*, Call, *supra* note 21, at 48.

64. *See supra* text accompanying notes 52-56.

65. *See, e.g.*, Gallagher, *The Use of a Consultant in* Voir dire, TRIAL DIPL. J., Winter 1984, at 24, 25; Sorensen, *Juror Selection and the Behavioral Sciences*, LITIGATION, Winter 1976, at 30

Working from this logic, psychologists have developed a number of techniques for jury selection, commonly labeled "scientific" or "systematic" jury selection techniques.[66] Perhaps the most famous tool of systematic jury selection is a survey of the community from which the jury panel will be drawn. Psychologists gear the survey to the particular case, seeking to determine attitudes among various segments of the community toward specific issues and parties. Psychologists then use the data obtained to develop demographic profiles of jurors with favorable and unfavorable biases.[67]

The use of this data to select the most favorably biased jury is just the first step. Having selected a jury susceptible to bias, the presentation of evidence is then tailored to induce the jury to apply its biases in decisionmaking. For example, a professional jury consultant has described a case in which a young mother brought suit against a pharmaceutical company on behalf of her brain-damaged child who had been delivered with a labor-inducing drug previously shown to be dangerous.[68] The doctor administering the drug admitted knowledge of its potential danger, but used it anyway to speed delivery so he could make a golf date. Surprisingly, jury selection research suggested that the best jurors for the defense would be young mothers. The research indicated that young mothers approached the case with the preconceived and irrelevant belief that plaintiff was bringing the suit for her own benefit and that she did not really love her child. The importance of this discovery for defendant's trial strategy was clear to the jury consultant: "We realized that the mother's perceived lack of love for her child could be used as an important psychological anchor for the defense. Nothing to say outright, but something to constantly infer."[69]

Such efforts to induce jury reliance on bias influence jury decisionmaking covertly. Obviously, the jurors do not know they have been selected because of bias. In fact, it is likely counsel tells them before, during, and after *voir dire* that the purpose of jury selection procedures is to find an impartial jury. The author of a book on psychological aspects of trial advocacy recommends explicitly that counsel tell the jury that the purpose of *voir dire* is to select an impartial jury to better conceal the covert goal of inducing bias.[70] Similarly, the appeal to bias by

("More frequently, the social scientist is being retained by lawyers who do not necessarily want a representative jury, but rather want jurors whose individual characteristics best match a profile of the ideal juror from the local community."). Gallagher notes:

> A consultant selected to assist must understand the adversary nature of jury selection and be willing to participate in a process which has as its goal the selection of the maximum number of jurors favorable to your case. It is of no use to have an "ivory tower" consultant assist in selecting a "fair and impartial jury" because the opponent will be seeking jurors favorable to his or her position.

Gallagher, *supra*, at 25.

66. *See, e.g.*, Hans & Vidmar, *supra* note 10, at 68-72.

67. Hans & Vidmar, *supra* note 10, at 68-72.

68. Dancoff, *supra* note 3, at 17, 52.

69. Dancoff, *supra* note 3, at 17, 52. Another author, who provides communication and psychology consultant services to trial lawyers, suggests that *voir dire* be used to find out as much as possible about the backgrounds and beliefs of the jurors so that during trial the lawyer can "select themes consistent with the backgrounds of jurors" and portray the client as being similar in background and belief. *See* Wells, *supra* note 31, at 71-72.

70. D. HERBERT & R. BARRETT, *supra* note 6, at 406-07.

counsel during trial is covert. The jury consultant quoted in the preceding paragraph was aware of the need merely to "infer" the intended message. The need to conceal the thrust of counsel's efforts is vital: jurors who realize that a lawyer is attempting to arouse their biases might not only take offense, but might also conclude that the lawyer does not believe that his or her case is sound. The jury thus might rely on that lawyer's judgment of the quality of his or her case.[71] Hence, the goal of covert advocacy is to induce the jury to employ bias while concealing from the jury their reliance on bias. Empirical studies suggest that this goal is well within reach. Juries often apply bias subconsciously while operating under the misapprehension that data is being evaluated objectively.[72] When the jury is unaware of its use of bias, it cannot evaluate the appropriateness of that use critically in the same way the jury would evaluate an overt appeal to bias. A similar result was produced by covert advocacy techniques that focus on courtroom style.[73] As described in section II of this Article, this effect of covert advocacy compromises the legitimacy of the jury system and the adversary process.[74]

B. *Techniques to Induce Illogical Evaluation of Evidence*

The second category of psychological techniques described in trial practitioner journals seeks to induce the jury to evaluate the evidence illogically. The jury evaluates evidence illogically when it incorrectly decides that evidence is or is not probative of a fact in issue. This Article labels techniques directed at inducing these errors of logic "meaning manipulators." The jury also evaluates evidence illogically when it permits evidence to have an effect on decisionmaking that is disproportionate to the probative value of that evidence. This Article labels techniques designed to induce these errors "weight manipulators." Psychological techniques designed to mislead the jury as to the meaning or weight of evidence attempt to interfere with either the jury's inferential or perceptual abilities.

1. Meaning Manipulators

One article discussing the psychology of courtroom perception notes that lawyers can diminish the ability of jurors to perceive evidence simply by manipulating other stimuli in the courtroom.[75] The author, a behavioral scientist specializing in advising trial lawyers, suggests that

[a]s a defensive tactic, an attorney can load the courtroom with specta-

71. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68, 107 n.84 (1981).

72. *See generally* R. NISBETT & L. ROSS, *supra* note 49, at 195-227 (examining people's success and accuracy in self-evaluation of cognitive processes). Because the application of a bias may be unconscious, the ability of the opposing advocate to point out the misleading nature of the bias is limited. For the same reason, the efficacy of instructions against the use of bias may be questioned. *See* W. O'BARR, *supra* note 8.

73. *See supra* notes 23-25 and accompanying text.

74. *See infra* text accompanying notes 122-25.

75. Vinson, *Juries: Perception and the Decision-making Process*, TRIAL, March 1982, at 52, 54.

> tors, presenting a variety of new contextual stimuli which might succeed in drowning out the stimuli presented by the opposing lawyers. . . . [A] particularly damaging witness for the opposing side can be made through various techniques to blend into the background stream, so that it is difficult for the jurors to remember what he or she said.[76]

Such efforts to disrupt jury perception in the courtroom could cause the jury to commit an error of logic: the jury could accord perfectly probative evidence no effect. Of course, the attorney must engage in such manipulation covertly. The effect on jury decisionmaking would be very different if the jury knew who had procured the attendance of the distracting new spectators and why.

Another article illustrates how an attorney might induce a jury to err in the opposite direction by according evidence probative value when it has none.[77] The article describes a case in which a woman had become a quadriplegic as the result of an accident in defendant's swimming pool. When the woman was pulled from the pool, one of her arms was bright blue. Medical experts for both the prosecution and the defense agreed they could not find a cause for the phenomenon or ascribe any meaning to it. However, jury simulations conducted by behavioral scientists employed by the defense revealed that the blue arm evidence was important to a mock jury.[78] The consultants suggested that defense counsel "constantly infer" to the jury throughout the trial that the blue arm meant that the woman had some prior physiological problem that made her susceptible to drowning.[79] Counsel were apparently cautioned against making overt efforts at attributing this interpretation to the blue arm because that interpretation was not supported by any of the expert testimony or by any other evidence.[80] Thus, counsel were able to give the appearance of importance to evidence with little or no probative value.

Lawyers can also manipulate the meaning that the jury attributes to evidence by following some simple psychological principles in ordering the presentation of evidence. For example, several articles suggest that attorneys should present the most favorable evidence first because it will then have its greatest possible impact.[81] This so called "primacy effect" is a product of the fact people are "theorists" in their approach to information. The jury uses early encountered evidence to form initial theories about the issues in the case. These theo-

---

76. *Id.* Distraction has long been used as an advocacy device. Clarence Darrow is said to have once placed a wire through the center of his cigar to prevent the ash from falling. As the ash grew impossibly longer during the course of the trial, all eyes in the courtroom were directed on the cigar rather than the witnesses. See Sannito, *supra* note 14, at 30.

77. Dancoff, *supra* note 2, at 22.

78. Dancoff, *supra* note 2, at 22.

79. Dancoff, *supra* note 2, at 22.

80. Dancoff, *supra* note 2, at 22.

81. *See, e.g.*, Begam, *Opening Statement: Some Psychological Considerations*, TRIAL, July 1980, at 33, 36; Crawford, *Opening Statement for the Defense in Criminal Cases*, LITIGATION, Spring 1982, at 26, 26; Sannito, *supra* note 14, at 31.

ries bias the interpretation of all later encountered evidence.[82] The first evidence, in effect, forms the basis for a knowledge structure relevant to the issues in the case.[83] Thus, later received evidence inconsistent with theories built on the initial evidence tends either to be disregarded or misinterpreted. The jury tends to accord more weight to later received consistent evidence than logic permits.[84] Jurors tend to sustain belief in the validity of their initial theories long after logic suggests those theories have been discredited.[85] This process proceeds without the jury's conscious awareness, misleading the jury into believing that it is evaluating evidence objectively.[86] Thus, the lawyer can manipulate the meaning that the jury attributes to the evidence by carefully choosing what evidence to present to the jury first.

Sometimes the attorney can gain an advantage simply by rendering the meaning of evidence unclear. For example, one study reveals that defense attorneys in criminal cases can improve their prospects for acquittal by using abstract or vague language, legal jargon, and generalities.[87] This would surprise most trial advocacy scholars who tend to consider clarity the highest of courtroom virtues.[88] The results of the study might make sense, however, in light of the burden of proof prevailing in a criminal prosecution. So long as the jury is confused, regardless of the source of that confusion, it may conclude that the prosecution has failed to prove its case beyond a reasonable doubt.

2. Weight Manipulators

The jury commits another error of logic when it ascribes significance to evidence to an extent that is either greater or less than the probative value of the evidence. Behavioral scientists have identified several psychological principles that trial lawyers can exploit to induce such errors.

Again, manipulating the order of evidence can affect the weight accorded to it by the jury. The first[89] and last[90] bits of evidence heard by the jury tend to have a disproportionately large influence over jury decisionmaking because they tend to be especially memorable. Similarly, the jury is more likely to perceive, store in memory, and retrieve for use in decisionmaking that evidence which is repeated[91] or portrayed in vivid form.[92] But the order in which lawyers offer

82. See R. NISBETT & L. ROSS, *supra* note 49, at 172.

83. *See supra* notes 52-56 and accompanying text.

84. *See generally* R. NISBETT & L. ROSS, *supra* note 49, at 167-92 (discussing the extent to which data forces the revision of beliefs).

85. R. NISBETT & L. ROSS, *supra* note 49, at 175-79. This finding calls into question the efficacy of impeachment and cross-examination, and underscores the advantage given to the party allowed to put on its case first.

86. *See* Linz & Penrod, *supra* note 37, at 10 ("It is important to note that the 'weighting' process proceeds without the perceiver's actually being aware of it.").

87. Parkinson & Parkinson, *Speech Tactics for Successful Trials*, TRIAL, September 1979, at 36.

88. *See, e.g.*, T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 50-51 (1980).

89. *See* R. NISBETT & L. ROSS, *supra* note 49, at 172.

90. *See* Colley, *supra* note 7, at 46.

91. Colley, *supra* note 7, at 46.

items of evidence, the frequency of their appearance, and the vividness of their form or content have no logical connection to probative value. However, counsel can manipulate all these characteristics covertly to induce the jury to overestimate the importance of the evidence. Counsel can also manipulate the presentation of evidence to induce the jury to underestimate its probative value. For example, one psychologist has suggested that defense counsel could undermine the force of a plaintiff's evidence simply by lengthening the presentation of the defendant's case, thereby causing the jury's memory of the plaintiff's evidence to fade.[93]

These jury errors are produced by another inappropriate application of heuristic reasoning. Like the representativeness heuristic, the availability heuristic is a cognitive procedure designed to simplify the process of choosing data used in making a decision. The data most available to the decisionmakers' perceptions and memories is selected for consideration.[94] To the extent the availability of data actually is associated with objective reality, the availability heuristic can be a useful tool for judgment. For example, memory formed from years of experience concerning the likelihood of rain during the summer can be a reliable basis for predicting rainfall next August. When the availability of data is controlled not by objective reality but by trial counsel, however, use of this heuristic easily can lead to error.

II. IMPLICATIONS OF COVERT ADVOCACY FOR THE JURY SYSTEM AND THE ADVERSARY PROCESS

All advocacy techniques described in the preceding section have at least one thing in common: They persuade subconsciously.[95] These techniques are intended to affect the jury's thinking about the case covertly, without the jury's full conscious awareness of what is affecting its thinking or why. This section demonstrates why this makes covert advocacy problematic.

---

92. *See, e.g.*, R. NISBETT & L. ROSS, *supra* note 49, at 44-45 (examining the greater inferential impact of vivid information); Colley, *supra* note 14, at 87.

93. Sannito, *supra* note 14, at 32.

94. *See generally* R. NISBETT & L. ROSS, *supra* note 49, at 18-23 (describing the potential for bias resulting from the use of the availability heuristic).

95. A detailed psychological explanation of the subconscious and how subconscious persuasion takes place is beyond the scope of this Article. In brief, however, it has been theorized that there are two levels of human mental activity. The conscious level is characterized by the ability to recall and discuss surrounding events immediately. At the preconscious level, mental activity takes place that is incapable of being immediately recalled and discussed. *See* J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND LAW 274 (1967). A distinction should be made between the subconscious persuasion that is the subject of this Article and subliminal persuasion. Part of the definition of subliminal perception is the "eliciting of contingent responses by stimulation below the absolute awareness threshold, when this threshold is itself defined as the lowest level of stimulus energy at which the subject ever reports hearing (or seeing) anything of the stimulus." N. DIXON, SUBLIMINAL PERCEPTION—THE NATURE OF A CONTROVERSY 18 (1971). The covert advocacy techniques described in this Article do not involve subliminal persuasion because the stimuli generated by counsel—words, body language, dress—are perceived by the jury above the awareness threshold. Covert advocacy involves subsconscious persuasion in that, although the jury is consciously aware of the stimuli perceived, it is not similarly aware of the effect of that stimuli on its inferential processes. The jury employs bias and illogic without full conscious awareness of its mental activities.

The legitimacy of the jury system is based on the assumption that, when permitted to choose what evidence to accept and what community values to reflect in its verdict, the jury has the ability to choose consistent with both logic and fairness. Jury independence, therefore, is central to jury legitimacy. The choices must be made by the jury, which has this ability, and not made for it by the adversaries through bribery, duress, or otherwise. Covert advocacy erodes jury cognitive independence because a juror cannot scrutinize and choose to reject a message from the advocate that is received on a subconscious level. Once the message is received, it can then subconsciously affect other choices made by the jury about subsequently received evidence. Thus, covert advocacy not only prevents the jury from exercising a choice to reject the specific message conveyed, it can also erode the cognitive independence of the jury when it evaluates subsequent evidence. As the following analysis demonstrates, this erosion of jury independence can prevent the jury and the adversary process from fulfilling their proper roles in our system of justice.

A. *Roles of the Jury and the Adversary Process*

Elements of our justice system as basic as the jury and the adversary process were not created and have not been sustained through historical accident. These institutions do not embody the only possible methods for presenting and deciding cases. They remain part of our justice system because they give effect to important social and political values.

The jury system and the adversary process are both commonly justified on the grounds that they are fair and produce accurate results.[96] Empirical evidence suggests most people believe this to be true.[97] However, many have disputed the accuracy and fairness of these pillars of the American judicial system.[98] It seems unlikely that either side will ever win this debate.

Regardless, the jury and the adversary process are justifiable on the grounds they serve a set of values even more deeply planted in the American psyche. Both institutions serve to fragment decisionmaking power in the courtroom, thereby depriving the state—in the form of the judge—of the opportunity to use the judicial system as a tool of governmental oppression. The power is taken from the government and given to the people: litigants, their attorneys, and, most importantly, the jury.

The jury is the most obvious courtroom symbol of democratic ideals. The common meaning of democracy is "government or rule by the people, either

96. *See, e.g.*, H. KALVEN & H. ZEISEL, *supra* note 30, at 149-62 (reporting data that, for the most part, reflects positively on the jury's ability to understand its charge and the evidence); Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1065 (1975) ("truth is a basic value and the adversary system is one of the most efficient and fair methods designed for finding it").

97. *See, e.g.*, J. THIBAUT & L. WALKER, *supra* note 8, at 74 (adversary system more satisfactory than inquisitorial system regardless of verdict or subjects' belief about guilt).

98. *See, e.g.*, J. FRANK, COURTS ON TRIAL 124 (1949) (attacking trial by jury); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (attacking the adversary system).

directly or through elected representatives."[99] In theory, the jury is composed of individuals reflecting a representative cross-section of the people living in the community in which the case arises.[100] The resemblance to representative democracy does not end there. The concept of democracy noted above refers to a method of governing that specifies who rules, or, in other words, who decides what values will control the resolution of disputes.[101] The jury is imbued with the power to select these controlling values through the doctrine of jury nullification.[102] Under this doctrine the jury is expected to inject community values into its verdict even in derogation of the law created by the legislature and described by the judge in instructions.[103] This power controls abuses by the trial judge who, as a member of the governing elite, may be prone to neglect the values of the people in favor of a morality of the elite.[104] This view of nullification prevailed at the time the United States Constitution was adopted.[105] The Founding Fathers knew that, absent jury nullification, judicial tyranny not only was a possibility, but was a reality in the colonial experience.[106] Although scholars continue to debate the historical and policy justifications for jury nullifi-

99. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 390 (College ed. 1966).

100. *See, e.g.*, Glasser v. United States, 315 U.S. 60, 86 (1941) ("[T]he officials charged with choosing federal jurors . . . must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community."); Smith v. Texas, 311 U.S. 128, 130 (1940) ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."); Green v. Alaska, 462 P.2d 994, 997 (Alaska 1969) ("A jury under our constitution must be an 'impartial' one. This is an expression of the notion of what a proper jury is—a body truly representative of the community. Such a notion is in keeping with our basic, traditional concept of a democratic society and representative government."); *see also* D. Bazelon, *The Adversary Process—Who Needs It?*, 12th Annual James Madison Lecture, New York University School of Law (April 1971), *reprinted in* 117 CONG. REC. 12675, 12678 (1971) ("the jurors, as representatives of the community, have the opportunity to inject into the proceedings at hand their sense of the standards that prevail in the community").

101. H. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 23-24 (1960).

102. *See generally* Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972) (advocating the restoration of jury nullification that gives the jury the inherent right to set aside court instructions and reach a verdict based on jurors' own consciences).

103. *Id.* at 174-75, 190.

104. The Supreme Court has noted:

> The purpose of the jury trial . . . is to prevent oppression by the Government. "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." . . . Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.

Williams v. Florida, 399 U.S. 78, 100 (1970) (quoting Duncan v. Louisiana, 391 U.S. 145, 146 (1968)).

105. Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968); *see also*, 2 WORKS OF JOHN ADAMS 253-55 (C.F. Adams ed. 1856) (The common people who comprise the jury have the right, under the guidance of the judge, to reach a verdict according to their "own best understanding, judgment, and conscience, though in direct opposition to the direction of the court."); 3 WORKS OF THOMAS JEFFERSON 81-82 (H.A. Washington ed. 1854) (Judges "acquire an *Esprit de corps*," are "liable to be tempted by bribery," and "are misled by favor, by relationship, by a spirit of party, by a devotion to the executive or legislative power"; in contrast, "the opinion of twelve honest jurymen gives still a better hope of right.").

106. *See* Scheflin, *supra* note 102, at 173-74.

cation, there can be no doubt that American juries exercise that power.[107] Many established trial procedures insulate from judicial review all but a few of the most egregious examples of jury lawmaking.[108]

Given this background, the importance of maintaining the jury's independence is clear. If the choice between competing values in a case is made for the jury and not by it, the jury cannot represent the community properly or restrain judicial power when necessary.

The adversary process also is justifiable as a means of diffusing power in the courtroom, thereby preventing an excess concentration of power in the hands of the judge. In nonadversarial systems the judge actively participates in the investigation of facts or directly receives the reports of the principal fact gatherers. The judge, therefore, enters the courtroom with an intimate knowledge of this investigation and with all the biases that information produces.[109] The judge may then control most if not all of the presentation of evidence. He or she may call and question witnesses intensively, confront witnesses with discrepancies in their testimony, and control the presentation of the evidence.[110] By giving these powers to the advocates, our adversarial system diminishes the power of the judiciary significantly, thereby complementing the jury's role in preventing governmental oppression.[111]

Although this diffusion of power in the courtroom advances certain political values it also presents dangers. The principal danger is that certain characteristics of the jury and the adversary process will undermine the reliability of jury factfinding and, accordingly, the justness of verdicts. The problem with juries is that, although they control the biases of the government reflected by the judiciary, jurors bring their own biases into the courtroom. As in the case of any democratic institution, majority rule itself can produce oppression when the majority uses its values to demean the rights of minorities.[112] Moreover, jurors frequently are not as well educated as judges, arguably making them more susceptible to errors of logic because they may be less capable of understanding the evidence. The problems posed by the adversary process compound these weak-

107. *See* Brooks & Doob, *Justice and the Jury*, 31 J. SOC. ISSUES 171, 174 (1975); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 170 n. 2 (1964). Jury nullification probably does not occur with great frequency. There is empirical evidence suggesting that civil jurors rarely ignore a law merely because they think it is wrong. Jury nullification is likely to occur only when the facts in a case are close, making it reasonable to decide a case either way. *See* R. NISBETT & L. ROSS, *supra* note 49, at 267.

108. R. NISBETT & L. ROSS, *supra* note 49, at 267.

109. *See* H. ABRAHAM, THE JUDICIAL PROCESS 105 (1980) (describing the functions of the examining magistrate or *juge d'instruction*, in the French system).

110. *Id.* at 105-07. For provisions on the manner of examining witnesses, see the following criminal procedural codes: THE FRENCH CODE OF CRIMINAL PROCEDURE arts. 20331-32 (The American Series of Foreign Penal Codes No. 7 J. Moreau & G. Mueller trans. 1960); THE CODE OF CRIMINAL PROCEDURE OF THE RSFSR arts. 150, 158, in SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES (H. Berman & J. Spindler trans. 2d ed. 1972); CODE OF CRIMINAL PROCEDURE art. 216 (Collection of Yugoslav Laws No. 19, M. Damaska trans. 1969).

111. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 23, at 499 ("The [United States Supreme] Court has demonstrated a consistent belief that the adversary process is best designed to safeguard individual rights against action by the government.").

112. THE FEDERALIST No. 10, at 70 (J. Madison) (C. Beard ed. 1959).

nesses of the jury. Ethical considerations aside, advocates are not concerned with the truth so much as they are with winning.[113] Thus, when it advances their cause advocates may not hesitate to exploit jury biases or induce the jury to commit errors of logic.[114] Because due process gives a party the right to present a case to a factfinder capable of understanding the facts,[115] the legitimacy of the entire judicial system is jeopardized when lawyers use the adversary process to erode the jury's ability to evaluate the evidence accurately.

The dangers inherent in the jury and the adversary process are considered tolerable because of a vital assumption our society makes about the jury's abilities to resist bias and avoid errors of logic. We assume that the jury can in good faith put aside its biases and logically choose which evidence and arguments to accept and which to reject.[116] This assumption is analogous to assumptions underlying democratic political theory: given the opportunity to choose freely between competing thoughts, parties, or candidates, the people can exercise sufficient judgment to justify a system of self-government.[117]

Thus, the legitimacy of the jury and the adversary process depends on affording the jury the opportunity to make two choices: (1) what values to express in its verdict and (2) what evidence and arguments to accept. These must be independent choices made by the jury and not by the advocates. Our system assumes only the jury can reflect community values accurately and evaluate the evidence reliably in an unbiased and logical fashion, while we know the advocates will do neither.

The diffusion of power in the courtroom arguably has had its intended political effect. Many perceive American courts—the "least dangerous" branch[118]—as constituting the branch of government most solicitous of individual rights and most suspicious of governmental power.[119] At the same time, there is evidence that the dangers posed by the diffusion of power in the courtroom seem to have been restrained within tolerable limits. Some may dispute the intelligence and reliability of the American jury,[120] but others have provided

113. *See* Hart & McNaughton, *Evidence and Inference in the Law*, in EVIDENCE AND INFERENCE 48, 52-53 (D. Lerner ed. 1958).

114. *See supra* note 65 and accompanying text.

115. *See In re Japanese Elec. Prods.*, 631 F.2d. 1069, 1084 n.14 (3d Cir. 1980) ("due process guarantees a comprehending factfinder"); Lempert, *supra* note 71, at 88.

116. *See In re Japanese Elect. Prods.*, 631 F.2d at 1084 ("[t]he law presumes that a jury will decide rationally; it will resolve each disputed issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of relevant legal rules").

117. *See* THE FEDERALIST No. 55, at 346 (J. Madison) (C. Beard ed. 1959).

118. THE FEDERALIST No. 78, at 465 (A. Hamilton) (C. Beard ed. 1959).

119. During the heyday of the civil rights movement through the immediate post-Watergate period, this characteristic of American courts was widely criticized but reflected values ultimately accepted by the political process. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 52 (1978). Today, this same characteristic is the basis for many of the political attacks leveled against judges running for reelection. For example, in 1986 three members of the California Supreme Court, including its chief justice, were attacked for overturning death penalty verdicts on various procedural due process grounds. All three were voted out of office. L.A. Times, Nov. 5, 1986, § 1, at 8, col. 2.

120. *See, e.g.*, J. FRANK, *supra* note 98, at 138-39 ("trial by jury, which affirms that all grades of capacity above drivelling idiocy are alike fitted for the exalted office of sifting truth from error, may excite the derision of future times").

important empirical evidence of those qualities.[121]

The danger remains real, however. The diffusion of power in the courtroom among the judge, jury, and advocates has been motivated by a desire to avoid an excess concentration of power in the hands of the judge. However, little attention has been paid to the possibility that power could become too concentrated in the hands of the advocates. The great danger of the adversary process always has been that advocates might become too good at what they do. As the following discussion demonstrates, covert advocacy erodes jury independence and the jury's capacity to control the excesses of the adversary process. As a result, the advocates may supplant the judiciary as the greatest courtroom threat to truth and democratic ideals.

B. *Covert Advocacy and Jury Independence*

The goal of covert advocacy is to prevent the jury from independently choosing what values to reflect in its verdict and what evidence and arguments to accept or reject. As the following analysis demonstrates, the jury's choices are not independent when they are influenced subconsciously. Covert advocacy explodes the assumption that the jury has the ability to resist bias and avoid errors of logic because that assumption deals with cognitive processes of the jury that operate on a conscious level. The presumed good faith and common-sense intelligence of the jury are ineffective controls against subconscious persuasion.

Subconscious persuasion interferes with the jury's ability to express its values accurately in a verdict. Only when an individual is consciously aware of the influences on his or her mental activity are personal autonomy and the expression of personal values possible.[122] Absent that conscious awareness, an individual is incapable of distinguishing between personal values and values that have been suggested by some external source.[123] Without the conscious awareness that a value has been presented by some external source, an individual may not scrutinize that value for consistency with his or her own values.[124] The individual then may simply mistake the value as his or her own. Thus, when an attorney influences the jury subconsciously to employ a bias in its decisionmaking, the autonomy of jury decisionmaking is eroded. Courtroom style techniques that enhance the apparent credibility of counsel facilitate the effectiveness of such efforts to induce the use of bias by the jury subconsciously. When a person hears a statement or argument from a supposedly credible source, a psychological process called "internalization" may take place.[125] When a person internal-

121. *See* H. KALVEN & H. ZEISEL, *supra* note 30, at 33-65.

122. *See* Branden, *Free Will, Moral Responsibility and the Law*, 42 S. CAL. L. REV. 264, 272 (1969) ("It is awareness that makes any other values possible . . . ."); Note, *The Subconscious Taken Captive: A Social, Ethical, and Legal Analysis of Subliminal Communication Technology*, 54 S. CAL. L. REV. 1077, 1094 (1981) ("An individual's awareness of his own mental activity and his capacity to think about that activity make possible all other values.").

123. Note, *supra* note 122, at 1094 ("When one is *aware* of his mental processes, an external impetus to behave in a certain manner will not mandate that exact behavior.").

124. Note, *supra* note 122, at 1095.

125. *See* Linz & Penrod, *supra* note 37, at 34.

izes a statement or argument, he or she subconsciously integrates it into his or her own set of beliefs and values. The values expressed in the jury's verdict thus may more accurately reflect those of counsel and client than those of the jury and the community it should represent.

Covert advocacy similarly interferes with the jury's independent evaluation of the evidence and arguments. When counsel conveys information subconsciously, the jury may be unaware of what, if anything, has been conveyed. As a result the jury may be unable to scrutinize the information for illogic or bias. Courtroom style techniques that create the impression that the attorney is a credible source of information further erode the extent to which the jury scrutinizes the evidence. Those techniques tend to inhibit scrutiny of the evidence by the jury, focusing attention on the supposed credibility of its source.[126] The jury's inability to base a verdict rationally on the evidence due to its failure to scrutinize that evidence for illogic and bias may present due process issues that call into question the very legitimacy of the jury system.[127]

Several factors might mitigate the force of this analysis. For example, one could argue that a jury cannot be induced even subconsciously to employ a bias or express a value it does not already embrace. The psychological conflicts between existing personal biases and values and those communicated subconsciously could be so great that a juror would be unable to act on the subconscious message.

Even if this argument is true, however, the jury still may be prevented from effectively fulfilling its role as the representative of community values. If the psychological conflicts between existing personal values and those communicated subconsciously is too great to allow the latter to be acted on, that conflict may also prevent the former from being acted on. One might cancel the other. The jury then still would be unable to give effect to the values of its community.

Even if the bias or value supported by counsel's subconscious message does not raise such a conflict but is one the jury independently subscribes to, the subconscious push to follow that already existing inclination still erodes the jury's capacity to represent the values of its community. When we give expression to a bias or value in a decision, we frequently select that bias or value from a set of competing and conflicting biases and values that reside simultaneously in our minds. For example, a juror can believe "once a crook always a crook" at the same time he or she believes "there are no bad boys." In the political arena, competing politicians can appeal to the very same voters by calling for "fiscal responsibility" and "a social safety net." For every notion that has become an accepted part of our society's collective wisdom there seems to be an equal but opposite "truth" that has achieved generally the same level of acceptance.

126. Linz & Penrod, *supra* note 37, at 34.

127. *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1084 (3d Cir. 1980) (due process precludes trial by jury when jury is unable to reach a verdict rationally due to complexity of facts and issues). *See generally* Lempert, *supra* note 71, at 86-97 (exploring conflict between right to jury trial and right to due process when the jury is incapable of assessing the facts rationally in light of the law).

Choosing among this smorgasbord of conflicting ideas may be the jury's principle function when performing its role as the representative of community values. Even when the advocates influence that choice by just a slight subconscious push, the ability of the jury to reflect the priority of community values accurately is compromised.

In defense of covert advocacy one could argue that the problems it poses can be dealt with adequately by the advocates themselves. If one advocate influences jury decisionmaking on a subconscious level, the advocate's opponent presumably can attempt to negate that influence. Advocates, however, are poorly equipped to respond to subconscious persuasion. The principle tools of the responding advocate are cross-examination, counter-evidence, and argument. These tools are well-suited to attacking the reliability of the opponent's evidence, but not to attacking the manner in which the jury is influenced by that evidence subconsciously. Because covert advocacy affects jury decisionmaking subconsciously, the efficacy of any response or attack that is understood by the jury on a conscious level is problematic. The jury may be unaware that a subconscious process they have been cautioned against is even taking place.[128] For the same reason, opposing counsel may not even be aware that covert advocacy is being employed and needs response. Responding to covert advocacy with covert advocacy may be even less promising. It is unlikely that a jury subconsciously exposed to bias and illogic favoring one side will be moved back toward fairness and logic by subconscious exposure to bias and illogic favoring the other side. Such a result unrealistically presumes a precision of and control over psychological forces akin to that which might be achieved in a physics experiment with billiard balls.

One could also support courtroom use of psychological techniques and principles on the grounds they can have a desirable effect on jury decisionmaking. Counsel can use some of these techniques to enhance communication between counsel and the jury by helping to identify and eliminate extralegal distractions such as dress, linguistic style, and other aspects of courtroom demeanor.[129] For example, many articles describe how lawyers can avoid distracting or counterproductive courtroom styles.[130] Similarly, several articles describe jury selection techniques that can be used to detect unfavorable bias in

128. When people are required to conduct self-analyses to determine why they act a certain way or think certain thoughts, they are subject to making the same errors they tend to make when engaging in any other inferential task. *See* R. NISBETT & L. ROSS, *supra* note 49, at 195-227. This finding suggests that, even if counsel warns jurors about the potentital for inferential error, they may not perceive correctly if and when they might commit that error. Instructions to the jury from the judge to avoid certain types of errors frequently are ineffective. *See, e.g.*, *infra* note 136 and accompanying text. *See generally* Lind, *The Psychology of Courtroom Procedure*, in THE PSYCHOLOGY OF THE COURTROOM 29-31 (N. Kerr & R. Bray ed. 1982) (reviewing studies concerning jury obedience to instructions).

129. *See, e.g.*, Stefano, *Body Language and Persuasion*, LITIGATION, Summer 1977, at 31 (body language should not contradict or detract from counsel's message).

130. *See, e.g.*, O'Barr & Conley, *supra* note 14, at 11 (lawyers should avoid interrupting witnesses to avoid undermining image of fairness and intelligence).

prospective jurors.[131] Other techniques have been identified that actually can assist the jury in better understanding and critically evaluating the evidence.[132]

Limited to this function of eliminating inappropriate grounds for decisionmaking, psychological advocacy techniques obviously are not objectionable. But the same jury selection techniques that can be used to detect unfavorable bias can be used to detect favorable bias. The same psychological principles applicable to identifying extralegal courtroom styles that subconsciously convey an unfavorable message can be used to identify styles suggesting a favorable message subconsciously. The articles describing these techniques to trial lawyers do not limit their descriptions to those applications that may have no objectionable effect on jury decisionmaking. It seems unlikely that lawyers will have the self-restraint to use these techniques only for nonobjectionable purposes.[133]

Another defense of sorts for covert advocacy may be based on doubts concerning whether it actually works. Since the earliest days of modern psychology its proponents have asserted the relevance to witness reliability of studies concerning human perception and memory.[134] Lawyers traditionally have rejected these studies on the assumption that the problems of understanding human mental processes are so complex and varied that it is impossible to make valid generalizations about them.[135] Taking this same approach, judges may be unconcerned with covert advocacy because they believe it does not work.

It admittedly is true that the cognitive processes of jurors are enormously complex and that generalizations about them are risky. But it is also true that the law already relies on many such generalizations. The courts constantly make broad and unproven assumptions about how juries think. For example, courts commonly assume that instructions to the jury to avoid bias or ignore evidence they have heard will be scrupulously followed.[136] Some courts assume

---

131. *See, e.g.*, Call, *supra* note 21, at 48; Covington, *State of the Art in Jury Selection Techniques*, TRIAL, Sept. 1983, at 84; Sorensen, *supra* note 65, at 30.

132. *See generally* Linz & Penrod, *supra* note 37, at 18 ("Social psychological research on forewarning, counterargumentation, and innoculation against future persuasion attempts may give advocates ideas about how to provide jurors with the cognitive skills needed to better evaluate communications during the trial and ultimately make better decisions.").

133. *See supra* note 65.

134. *See, e.g.*, H. MUENSTERBERG, ON THE WITNESS STAND (1908).

135. *See, e.g.*, J. WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF § 20249, at 634 (2d ed. 1931). Wigmore noted:

> But how could it be otherwise? The task is next to insuperable. . . . The conditions required for truly scientific observation and experiment are seldom practicable. The testimonial mental processes are so complex and variable that millions of instances must be studied before safe generalizations can be made. And the scientist in this field is deprived (except rarely) of that known basis of truth by which the aberrations of witnesses must be tested before the testimonial phenomena can be interpreted.

Id.

136. *See* cases cited *supra* note 55. The assumptions made by the courts concerning when instructions to disregard evidence will be followed and when they will not are also unproven and sometimes seemingly contradictory. *Compare* United States v. Gray, 468 F.2d 257, 259-60 (3d Cir. 1972) (the prosecutor's question "You say your wife was killed. You killed her, didn't you?," posed to defendant in a bank robbery case, "irretrievably seared itself into the conscious and subconscious minds of the jury") *with* United States v. Heckman, 479 F. 2d 726, 730-31 (3d Cir. 1973) (testimony that defendant in prosecution for conspiracy was told "you did a fine job of firebombing the . . . Building" did not "irretrievably [sear] itself into the conscious and subconscious minds of the jury").

that a jury can digest the evidence rationally and decide the issues even in enormously complex and lengthy litigation.[137] In fact, the very entrusting of ultimate decisionmaking power to the untrained citizens that sit on juries is not only the embodiment of a democratic ideal, it also is the product of an assumption that juries have the cognitive ability to evaluate evidence logically and in an unbiased fashion.[138] Courts have engaged in many other efforts at amateur psychology, usually with no data or analysis supporting their assumptions.[139]

On the other hand, the psychological principles underlying covert advocacy techniques usually are based on the results of empirical studies conducted by professional psychologists. Although these principles and even the empirical results may be open to dispute and revision, they offer a far more reliable basis for predicting the probable effects of advocates and evidence on jury cognition than does judicial intuition. In the face of this data and in light of the importance of the interests threatened by covert advocacy, reliance on the intuitive belief that covert advocacy simply does not work is misplaced.

A more sophisticated argument is that covert advocacy has not been shown to work so well that society need be overly concerned about it at this time. First, an empirical study reveals only the frequency of occurrence of a given response from the subjects studied. The results of the study permit a conclusion concerning the probability of the response in a similar group of subjects. There are never guarantees that the response will occur—only statements of probabilities. Thus, notwithstanding the optimistic promises of those experts selling their services in this field, the studies that form the basis for the principles and techniques of covert advocacy do not guarantee results in the courtroom. Most important, even the results that might be expected may not be overly dramatic. The techniques described in the first section of this Article seem merely to chip away at the cognitive independence of the jury rather than undermine it in any fundamental sense. Empirical research suggests that the amount and strength of evidence in a case is far more important in determining a jury's verdict than the juror pretrial biases that might be the focus of covert advocacy.[140] Furthermore, the susceptibility of a jury to illogic or bias should not be exaggerated. Evidence suggests that, in general, the problem-solving efficiency of a group of individuals, such as a jury, is actually superior to that of individuals.[141] Finally, the results of covert advocacy, even if some occur, may not be susceptible to control. Counsel may attempt to induce the jury to employ a certain bias, but might induce a very different and unintended bias in the process. For example, offering evidence of a defendant's prior conviction might produce the intended negative bias, but it might also induce sympathy on the part of some jurors who conclude that the defendant has paid his or her debt to society. Counsel might

137. *See, e.g., In re* United States Fin. Sec. Litig., 609 F.2d 411, 430-31 (9th Cir. 1979).

138. *See supra* notes 116-17 and accompanying text.

139. *See generally* Gold, *supra* note 57, at 532 (assumptions made by courts concerning jury psychology relevant to Federal Rule of Evidence 403).

140. Saks, *The Limits of Scientific Jury Selection: Ethical and Empirical*, 17 JURIMETRICS J. 3, 16-17 (1976).

141. R. NISBETT & L. ROSS, *supra* note 49, at 267.

be reluctant to employ an advocacy tool that is so unpredictable. Given all these uncertainties, the costs of implementing covert advocacy may be too high for the vast majority of cases.

At most this reasoning suggests that the current efficacy of covert advocacy techniques may be limited. But this Article does not claim that psychology can now or will in the near future bestow Svengali-like powers on lawyers. It is clear, however, that psychological techniques now available can affect jury decisionmaking. It is also clear that any technique capable of reducing the uncertainties of a jury trial even slightly is likely to be attractive to many lawyers. This alone should be enough to make covert advocacy cause for concern.

Although one should not overestimate the dangers of covert advocacy, neither should one underestimate those dangers. Bias and illogic can be expected to play a relatively greater role in jury decisionmaking when the proper bases for decision are conflicting or inconclusive.[142] The cases that get tried rather than settled, however, tend to be the close cases in which there is conflicting evidence. Furthermore, many of the basic rules of the substantive law and the law of remedies that juries are called on to apply provide only the most inconclusive bases for decisionmaking. For example, the incomprehensible legalese of jury instructions defining negligence[143] and the uncertainties of calculating a dollar equivalent for pain and suffering[144] are open invitations to juries to rely on more familiar and appealing biases and emotions.

Finally, it is a mistake to defend covert advocacy as simply business as usual.[145] Admittedly, attorneys and other orators for centuries have used techniques that persuade subconsciously.[146] Even before the first Ph.D. set foot in a

142. Professors Kalven and Zeisel developed what they considered "a central proposition about jury decision-making . . . fundamental to the understanding of jury psychology and jury process," which they termed the "liberation hypothesis." They observed that the jury rarely consciously and explicitly yields to emotion when the law regards emotion as an improper basis for decision. Their research indicated, however, that juries do unconsciously yield to emotion when the meaning of the evidence or the proper inferences to be drawn therefrom are doubtful. Juries in such situations begin unconsciously to rely on emotion to resolve their doubts, enabling them to draw an inference or reach a verdict. In this way emotion liberates the jury from the purely logical implications of the evidence. H. KALVEN & H. ZEISEL, *supra* note 30, at 164-65 (1966).

143. *See, e.g.*, CALIFORNIA JURY INSTRUCTIONS—CIVIL—BOOK OF APPROVED JURY INSTRUCTIONS 3.11 (1977).

> One test that is helpful in determining whether or not a person was negligent is to ask and answer whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated that someone might have been injured by or as a result of his action or inaction. If the answer to that question is "yes," and if the action or inaction reasonably could have been avoided, then not to avoid it would be negligence.

Id. For a description of studies concerning the comprehensibility of jury instructions, see Lind, *supra* note 128, at 27-29.

144. *See generally* R. THOMPSON & J. SEBERT, REMEDIES: DAMAGES, EQUITY AND RESTITUTION 7-63 to 7-65 (1983) (suggesting that the uncertainties of expressing award for pain and suffering in dollars invites trial lawyer to focus jury's attention on the plaintiff's appearance and personality).

145. *See, e.g.*, Call, *supra* note 21, at 48, 56 ("Attorneys have used these methods for hundreds of years. They are novel only in their melding of psychological theory and research with systematized data collection to provide attorneys with information to better represent their clients and thus ensure ultimate fairness.").

146. *See supra* notes 1, 76.

courtroom, trial lawyers were using psychological principles derived from intuition and experience to persuade juries. But a history of covert advocacy does not make it a virtue or even mitigate the problems it now raises. When covert advocacy was based on intuition rather than scientific study, the advocates posed relatively little threat to the judicial system. Armed with even a formidable amount of experience and intelligence, the lawyer was still just one person, not formally schooled in the psychological principles he or she sought to exploit, pitted against twelve jurors, a skeptical judge, and a hostile opponent. The risk that the lawyer could overcome these odds to affect significantly the jurors' subconscious would seem to be slim. One can conclude that the benefit to be derived from the adversary system—diffusing the powers of the judge—is worth the risk presented by amateur psychology.

But the introduction of professional behavioral science into the courtroom increases those risks. Although modern psychological techniques come with no guarantees, they increase the probability that counsel will breach jury cognitive independence successfully and erode the jury's ability to decide cases logically and in an unbiased fashion. As techniques are further refined,[147] the risks will increase. The balance of risks against benefits must then change. That balance is not merely between the benefits of limiting potentially oppressive judicial power and the risk that covert advocacy will prevent the jury from evaluating the evidence rationally. The realities of covert advocacy throw a new weight onto the balance. It is wealthy or popular litigants, including the government, who can best afford the cost of experts schooled in covert advocacy techniques. Moreover, many covert advocacy techniques are aimed at encouraging more favorable jury treatment for the socially powerful and less favorable treatment for the socially powerless.[148] Tolerance for the damage done by covert advocacy to the jury system, therefore, does not necessarily buy freedom from oppression. It may merely shift the suspected source of that oppression from the bench to the counsel table and the psychologist's office. Thus, the danger remains that judgments will be dominated by the morality of an elite.[149]

The development of covert advocacy comes at an especially sensitive time for the legal profession and for legal institutions in this country. Public perceptions concerning prevailing ethical standards in the legal profession are anything

147. Experiments recently have been undertaken to determine the feasibility of using computer technology to evaluate the effect on jury thinking of attorney presentations, advocacy tactics, and witness testimony. *See* "Judge and Jury Wired in Nita City," *The Docket*, Winter 1986, at 1. This work may greatly expand the ability of lawyers to test and perfect covert advocacy techniques. Importantly, these experiments have been undertaken under the aegis of one of the most respected and influential advocacy training programs in the country, the National Institute for Trial Advocacy.

148. *See supra* notes 14-30 and accompanying text.

149. It is interesting to note that some of the most famous cases in which covert advocacy techniques have been employed have produced verdicts for defendants notorious for their radical politics. *See supra* note 4. By selectively and successfully applying their services for litigants representing a political viewpoint with which they agree, behavioral scientists already have demonstrated that they are willing to use their powers in an attempt to influence the values employed in deciding important cases. *Id.*

but favorable. Respect for our courts and the rule of law also is in decline.[150] Our judicial system must have respect in the eyes of the people to ensure compliance with its decisions. Participation by people on juries has been a way to gain that respect. In a democracy the legitimacy of governmental institutions is enhanced when the people participate in the formation and application of the law.[151] Thus, preservation of the power of juries to make the value judgments that decide cases independently is fundamental to maintaining respect for our justice system. Any part played by lawyers in the erosion of this power can only further tarnish the prestige of the legal profession and undermine the force of law.

III. CONTROLLING COVERT ADVOCACY

A. *The Dangers of Controls*

Controls on covert advocacy should be designed to enable the jury to perform its proper role in the courtroom. Thus, controls should be aimed at preserving the jury's opportunity to choose independently what community values to express in its verdict and what evidence and arguments to accept.[152]

But the imposition of any controls on covert advocacy creates an obvious dilemma: a decrease in the power of advocates probably cannot be brought about without increasing the power of judges. This may not eliminate the threat to the jury, but rather it may merely shift the locus of that threat back to its original,[153] reinvigorated source. Thus, covert advocacy dangers could be avoided easily by entirely supplanting the adversary trial process with an inquisitorial system. However, the judge under such a system would emerge with great power to subvert the role of the jury. The powers of judges in such systems are so great that they need not resort to subtle psychological techniques to subvert jury independence. Under such a system the jury's power to select what evidence to accept could be easily undermined by the judge who has control over what evidence is presented.[154] Similarly, because the judge in an inquisitorial system decides also what issues will be raised he or she can manipulate the range of values that could be given effect in a verdict.[155] In effect, juries are superfluous in inquisitorial systems.[156]

If the effectiveness of covert advocacy continues to increase, however, a shift to an inquisitorial system with all its attendant dangers might be inevitable. If the jury becomes the unwitting puppet of the advocates, little purpose would

150. *See generally* Burger, *The State of Justice*, A.B.A. J., April 1984, at 62 (citing a sharp decline of public confidence in lawyers).

151. *See* Scheflin, *supra* note 102, at 189.

152. *See supra* notes 99-117 and accompanying text.

153. *See supra* notes 102-106 and accompanying text.

154. *See generally* H. ABRAHAM, *supra* note 109, at 105-07 (1980) (discussing the French system).

155. H. ABRAHAM, *supra* note 109, at 105-07.

156. H. ABRAHAM, *supra* note 109, at 117 ("The French . . . adherence to the inquisitorial mode in the judicial process leaves little or no genuine purpose for the existence of a trial jury per se.").

be served by retaining the current jury system.[157] At least an inquisitorial system presents the possibility of producing an unbiased decision that reflects the truth.[158]

Thus, fashioning effective controls for covert advocacy requires a fine sense of balance. If the controls are too heavy handed the resulting increase in judicial power may exacerbate rather than limit the threat to the jury. If the controls are weak and ineffective the future legitimacy of the jury system and the adversary process may be in doubt. Thus, the ultimate purpose of controls should be to make adjustments in the way the jury, judge, and advocates currently interact to prevent a more fundamental and disruptive restructuring of our judicial system in the future.

B. *Judicial Control of Covert Advocacy*

Judges already have broad discretion to exclude evidence that threatens to mislead, confuse the issues, or work unfair prejudice.[159] Thus, evidence that threatens to induce the jury to employ an extralegal basis for decisionmaking or act illogically can be controlled by the traditional power of the court to exclude such evidence.[160] Short of excluding evidence, judges have the power to control also what takes place in the courtroom during trial to ensure that the trial is fair and the jury understands the evidence that is introduced.[161] Courts have invoked this power to reorder evidence,[162] prohibit confusing questions,[163] ask clarifying questions,[164] separate issues for trial,[165] limit irrelevant questioning,[166] and force counsel to ask a particular question.[167] Many courtroom style

157. *See* Lempert, *supra* note 71, at 87 ("However highly one values the jury system, little of value is preserved by retaining juries that cannot function rationally . . . .").

158. *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F. 2d 1069, 1085 (3d Cir. 1980), in which the court stated:

> A jury unable to understand the evidence and legal rules is hardly a reliable and effective check on judicial power. Our liberties are more secure when judicial decisionmakers proceed rationally, consistently with the law, and on the basis of evidence produced at trial. If the jury is unable to function in this manner, it has the capacity of becoming itself a tool of arbitrary and erratic judicial power.

159. *See, e.g.*, FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

160. *See generally* Gold, *supra* note 57, at 506 (evidence should be excluded as unfairly prejudicial when it threatens to induce the jury to commit an inferential error).

161. *See, e.g.*, FED. R. EVID. 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment and undue embarrassment.").

162. *See, e.g.*, Cranberg v. Consumers Union of U.S., Inc., 756 F. 2d 382, 392 (5th Cir. 1982), *cert. denied*, 106 S. Ct. 148 (1985).

163. *See, e.g.*, United States v. Clark, 613 F.2d 391, 406-07 (2d Cir. 1979), *cert. denied*, 449 U.S. 820 (1980).

164. *See, e.g.*, Dixon v. Maritime Overseas Corp., 490 F. Supp. 1191, 1196-97 (S.D.N.Y.), *aff'd*, 646 F.2d 560 (2d Cir. 1980), *cert. denied*, 454 U.S. 838 (1981); *see also* FED. R. EVID. 614 (permitting court to call and interrogate witnesses).

165. Emerick v. United States Suzuki Motor Corp., 750 F.2d 19, 22 (3d Cir. 1984).

166. United States v. Carrion, 463 F.2d 704, 707 (9th Cir. 1972).

techniques[168] and other techniques designed to manipulate the meaning or weight of evidence[169] could be controlled by more extensive use of this authority.

Judicial education is the first step necessary if these controls are to become effective means of dealing with covert advocacy. Judges must become acquainted with the psychological principles that form the basis for covert advocacy techniques. Without that knowledge judges cannot hope to detect the use of covert advocacy or determine how to apply their powers to control its abuses. Education in relevant psychological principles could be augmented by making expert consultants available in specific cases. Because the advocates already have these resources available to them, these same resources must be made available to the judges if the judges are to understand the import of what the advocates do in the courtroom.[170]

However, education and expert assistance may not be sufficient to enable judges to apply these traditional controls effectively to covert advocacy. Because covert advocacy by definition operates subtly, it may be difficult for educated judges and even experts to identify its use. The same subtle effect that permits covert advocacy to elude detection by the jury and the opposing advocate[171] can also prevent detection by the judge.

A judge can be sure counsel is employing covert advocacy only if counsel discloses that fact to the judge. Accordingly, judges could be given the power to compel that disclosure. This disclosure could take the form of a pretrial memorandum to the judge describing advice received from behavioral science consultants and plans to implement that advice at trial. This pretrial disclosure would provide the judge with sufficient time to consider the appropriateness of counsel's intentions and develop a sense of what controls will be necessary.

It is clear that giving the judge the power to compel such a disclosure in a sense increases the power of the judge and decreases the power of the advocates. Under current trial practice, judges generally do not inquire into litigation strat-

167. United States v. Atkinson, 512 F.2d 1235, 1238 (4th Cir. 1975).

168. For example, it has been suggested that the court could control the language employed by counsel in closing argument and coach witnesses in linguistic style to avoid the effects of powerless/powerful speech patterns. Conley, O'Barr & Lind, *supra* note 14, at 1398; *see supra* notes 14-20 and accompanying text.

169. For example, the court might avoid improper weighting of evidence by merely reordering the sequence of presentation proposed by counsel. *See supra* notes 81-86 and accompanying text.

170. The cost of education for judges should be minimal. Instruction in relevant psychological principles could be included in the regular judicial education programs conducted in many jurisdictions. Retention of experts to assist in specific cases would be more costly, however. In some cases it might make sense to shift this cost to the parties in the same way that the cost of court appointed expert witnesses can be shifted. *See, e.g.*, FED. R. EVID. 706(b) (expert witnesses may receive reasonable compensation in any amount allowed by the court, "payable in funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment"). Although some increase in costs is inevitable, the significance of what is threatened by covert advocacy justifies the expense. *See supra* text accompanying notes 122-127. In criminal cases involving indigents it might be especially important to appoint an expert to assist the court because it is unlikely that the defendant will have an expert to help identify problems presented by covert advocacy. A number of courts apparently have allocated funds for this purpose. *See* JURY WORK, SYSTEMATIC TECHNIQUES, *supra* note 4, App. A.

171. *See supra* text accompanying note 128.

egy or the substance of pretrial expert consultations that will not be the subject of expert testimony. But the extent to which power would be shifted by such a proposal is not overly dramatic. The proposal does not suggest that opposing counsel could discover this information. The information merely would be revealed to the judge for the purpose of facilitating rulings on the admissibility of evidence and the appropriateness of other influences on jury decisionmaking. Similar procedures are now sometimes employed in connection with deciding claims to evidentiary privileges.[172] Thus, there should be no concern that opposing counsel could profit from the work product embodied in such a disclosure.[173] Disclosure simply would enable the judge to apply his or her traditional powers over the admission of evidence and the conduct of the trial intelligently and effectively.[174]

However, the efficacy of this proposal to control covert advocacy might be limited. Because the court has no independent means of discovering counsel's use of behavioral science consultants, the order compelling disclosure would depend on voluntary compliance. Assuming counsel discloses the advice received from behavioral science experts, that disclosure still might not reveal the full extent to which covert advocacy techniques are employed at trial. Most of the psychology literature described in this Article theoretically allows lawyers to employ these techniques on their own without expert advice.[175] Extending the disclosure requirement to include a description to the judge of what techniques counsel has developed without expert assistance may run the risk of increasing judicial control over the advocates to an unacceptable degree. Advocates could not do their job effectively if required to obtain court approval for every decision they make about language, evidence, or witnesses. Distinguishing between strategies that present a threat to jury cognitive independence and those that constitute legitimate efforts to persuade could dissolve into a never ending, ultimately futile effort to evaluate counsel's state of mind. The chilling effect on the advocates of such an inquiry could establish the judge as a serious source of governmental oppression.

Thus, judicial controls on covert advocacy could not be entirely effective without threatening the independence of the advocates. There remains only one other courtroom actor to impose control on courtroom advocacy; the jury itself.

C. *Jury Control of Covert Advocacy*

The jury traditionally plays a passive role during trial. Judges and lawyers share only between themselves the power to control what takes place in the

172. *See, e.g.*, CAL. EVID. CODE § 915 (b) (West 1966 & Supp. 1986) (*in camera* evaluation of material allegedly protected by privileges for official information, informer identity, and trade secrets).

173. Statutory restrictions on the discovery of attorney work product are directed at opposing parties, not the judge. *See, e.g.*, FED. R. CIV. PROC. 26(b)(3) (limiting the extent to which a party may "obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by . . . another party").

174. *See supra* notes 159-169 and accompanying text.

175. *See supra* notes 5-8 and accompanying text.

courtroom. In fact, much of the law that has developed concerning trial procedure, including almost all of the law of evidence, can be viewed as a means of keeping the jury in its place. It is somewhat novel, then, to consider the jury as a means of controlling the excesses of lawyers. But such a role is a logical one given the interests threatened. Because covert advocacy undermines the independence and reliability of the jury's cognitive processes, it only makes sense to combat covert advocacy by giving the jury the means to protect those processes.[176]

A number of reforms could be instituted to help the jury resist covert advocacy appeals to extralegal matters, bias, and illogic. These reforms can be classified into three categories.

1. Expanding the Jury's Powers

The first and possibly most radical type of reform involves changing the nature of the jury's role from one of almost complete passivity to one of greater involvement in the conduct of the trial. One reform already practiced by a number of courts is to allow jurors some limited opportunity to question witnesses.[177] For example, after the parties have completed questioning a witness the jurors could write out their own questions. The judge then would screen the questions and put those deemed appropriate to the witness. The resulting testimony necessarily would be spontaneous and free of extralegal courtroom style developed by witness rehearsal with counsel. Witness demeanor in response to the jury questions could be compared to demeanor during examination by counsel, possibly revealing the effects of rehearsal in an embarrassing way. Responses to jury questions could also reveal that examination by counsel had been calculated to confuse the meaning of evidence now clarified only after the jury's intervention. The potential damage done by such revelations might be sufficient to dissuade some attorneys from using covert advocacy techniques.[178]

Another reform would permit jurors to take notes during the conduct of the trial.[179] Now prohibited in most courts, notetaking would increase the likelihood that evidence will be recalled during deliberation. Providing the jury with a daily transcript in those cases in which it is available would serve the same purpose. Covert advocacy techniques to manipulate memory and, hence, the perceived importance of evidence might thereby be nullified.

---

176. Many of the suggestions described in this Article for enhancing the reliability of the jury's cognitive processes are based on Professor Lempert's discussion concerning a related problem: the competence of the jury in complex civil litigation. *See* Lempert, *supra* note 71, at 106-30.

177. *See* Lempert, *supra* note 71, at 123.

178. A significant advantage to this and most of the other proposals made in this Article concerning jury control of covert advocacy is that their efficacy does not depend on the jury's conscious awareness of the effects of covert advocacy. These proposals reduce the impact of subconscious persuasion simply by increasing the jury's resistance to bias and illogical thinking. By comparison, it would be unreasonable to expect much benefit from an instruction to the jury to beware of the effects of covert advocacy. Instructions understood on a conscious level are of little help in combatting subconscious persuasion.

179. *See* Lempert, *supra* note 71, at 122.

2. Increasing and Improving the Flow of Information to the Jury

A second, less radical, type of reform involves providing the jury with certain information early in the trial that might assist the jury in resisting some covert advocacy techniques. For example, instructing the jury on the law before the presentation of evidence begins rather than waiting, as is customary, for the close of evidence might help the jury better focus on the issues during trial and resist appeals to extralegal matters. A more intriguing example would involve instructing the jury about the nature and object of covert advocacy itself. Thus, the jury could be instructed as follows:

> Ladies and Gentlemen of the jury, in considering the testimony of the witnesses and the arguments of the lawyers, please keep in mind that the lawyers may have selected you to serve on the jury because they believe you have certain prejudices that will favor their clients. They may have presented evidence to ignite those prejudices. They may have tried to confuse the meaning of their opponent's evidence and may have argued their own evidence is more important than it really is. When they did these things they tried to appear as attractive and friendly toward you as they could in order to convince you that they were being honest.[180]

Although such an instruction understood on a conscious level may not reduce the jury's susceptibility to covert advocacy, which operates subconsciously,[181] its utterance might dissuade many attorneys from using at least the most obvious covert advocacy techniques.

3. Improving the Jury

A third category of reforms involves changing the character of the jury itself. Steps could be taken to improve the quality of jurors in terms of education and sophistication. Such jurors presumably would be more resistant to covert advocacy appeals to illogic and bias. Improving the quality of jurors could be effectuated by increasing the amenities associated with jury service, such as fees, parking, and other civil privileges.[182] Perhaps the greatest advance toward improving the quality of people willing to serve on juries would be accomplished by effectuating some of the suggestions made above for reducing the jury's passive role. As jury service becomes more intellectually engaging, more people presumably will be willing to participate. A related reform would entail returning to twelve member juries. Reducing the number of jurors to below twelve reduces the cognitive resources juries as a group can bring to bear against covert advocacy appeals to bias and illogic.[183]

---

180. For a similar proposal, see Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. LEGAL ED. 69, 74 n.8 (1982).

181. *See* W. O'BARR, *supra* note 8.

182. *See* Lempert, *supra* note 71, at 118.

183. For a review of the psychological literature on this subject, see M. SAKS & R. HASTIE, *supra* note 8, at 72-88; *see also* Ballew v. Georgia, 435 U.S. 223, 231-44 (1978) (citing the relevant literature).

IV. CONCLUSION

The use of professional psychology as an advocacy tool endangers the jury system and raises new questions concerning the legitimacy of the adversary process. This is perhaps the inevitable result of the application of science in legal processes. Science can be as political as the law, yet it lacks the procedures erected by the law to control the political factor in decisionmaking.[184] Any effective control on covert advocacy, whether originating with the judge or the jury, will be costly. Judicial education in psychology, court appointed experts, increased jury fees, and expanded jury panels all entail significant expense. But so does erroneous jury decisionmaking. It is the responsibility of the law to develop procedures to meet this new threat.

184. 21 C. WRIGHT & K. GRAHAM, *supra* note 22, § 5026, at 154 (1977).