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BETTER TRIALS THROUGH SCIENCE: A DEFENSE OF PSYCHOLOGIST-LAWYER COLLABORATION

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A concern of some legal commentators is that lawyers may use psychological persuasion techniques to gain an unfair advantage over their courtroom opponents and subvert the justice system. In this Article, the Tanfords respond to an earlier Article in which Professor Victor Gold raised such concerns. The Tanfords argue that commentators like Gold misunderstand jury behavior and trial process, exaggerating the negative impact of lawyers aided by psychologists. To the contrary, lawyer/psychologist collaboration improves rational decision making by identifying existing biases and devising strategies to correct them. The Tanfords conclude these benefits outweigh any possible abuse, and no reason exists to fear scientific knowledge or to control its infusion into the trial process.

One recurring theme in our culture is that science is dangerous. From Dr. Frankenstein's monster to Dr. Chandra's HAL 9000 computer, the creations of scientists seem to have a tendency to run amok. A variation on this theme was expressed recently in the pages of the *North Carolina Law Review*. In *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, Professor Victor Gold raises a cry of alarm that psychologists may have created superlawyers who are able to control the decision making process of juries.¹ Gold claims that, by gathering and disseminating empirical information about persuasion and jury behavior, social scientists have armed trial lawyers with psychological weapons capable of severely damaging jurors' abilities to decide cases based on evidence. He argues that this use of science is subverting the legitimacy of our trial system and must be controlled. With this Article, Professor Gold joins a number of other critics of American trial practice who worry about the erosion of the trial system's truth-seeking function.²

To the contrary, the infusion of scientific knowledge into trial practice has had a generally positive effect. Psychologists have identified a myriad of factors that affect jury decision making but have nothing to do with the merits of the

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1. Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C.L. REV. 481 (1987).

2. See generally J. FRANK, COURTS ON TRIAL 106 (1949); Frankel, *The Search for Truth: An Umpireal View*, in LAWYER'S ETHICS 99, 100 (A. Gerson ed. 1980), both criticizing the trial system for rating truth too low among its goals; see also Etzioni, *Creating an Imbalance*, TRIAL, Nov.-Dec. 1974, at 28 (scientific jury selection gives one side an advantage and should be banned).

case. By communicating this information to trial lawyers, they have decreased the likelihood that these extraneous influences will affect verdicts. This collaborative process of identifying *existing* barriers to rational decision making and devising strategies to reduce their impact has improved the chances that juries will understand and consider each litigant's case without bias.

The purpose of this Article is to respond to critics such as Professor Gold who fear that cooperation between psychologists and lawyers may subvert the truth-seeking function of the trial by enhancing lawyers' abilities to influence and deceive jurors. We believe the critics have made three mistakes in arriving at their pessimistic conclusions. First, they have fundamentally misunderstood several aspects of the science of psychology. They misunderstand basic jury behavior and cognitive processes, erroneously assuming that jurors are naturally unbiased and passive participants in trials. Critics have misread the psychological literature, exaggerating the likelihood that nonevidentiary factors, such as style of speech, will have a relatively high impact on juror decision making compared to legitimate evidence. Also, they have misunderstood scientists, erroneously believing that most psychologists would be willing to participate in partisan deception of jurors. Second, the critics misunderstand or misstate the legal theory and structure of the trial process. They use a trial model in which jurors are presented with a single version of the facts, and persuasion techniques are used only to divert jurors away from those facts. The critics assume that truth seeking is the only legitimate jurisprudential principle of trials, and no legal mechanism exists to prevent tricks and deception. This paradigm is inconsistent with our complex adversary trial process, in which parties present competing images of truth. Third, the critics ignore the benefits that have resulted from psychologist-lawyer collaboration and the ways psycholegal research has improved the likelihood that trials will result in fair, accurate, and unbiased verdicts.

In Part I of this Article we analyze the nature of the attack on psychologist-lawyer collaboration as expressed by Professor Gold. In Part II we explain the ways in which critics have misunderstood the nature of psychological scientific inquiry and exaggerated the kinds of conclusions that can be drawn from psycholegal research. In Part III we argue that the critics have misconceived and oversimplified the nature of our trial system, and we put forth a more appropriate theoretical model that accords adversariness an important role in a complex legal structure. In Part IV we summarize the benefits of the psychologist-lawyer collaboration. We conclude that, on balance, psychologist-lawyer collaboration has begun to produce better trials. We believe these benefits outweigh the risk that it will be misused, and no reason exists to fear scientific knowledge or to try to control its infusion into the trial process.

I. THE ATTACK ON PSYCHOLOGIST-LAWYER COLLABORATION

In Covert Advocacy: Reflections on the Use of Psychological Persuasion

Techniques in the Courtroom,³ Professor Gold has raised serious and troubling charges about the efficacy of collaboration between psychologists and trial lawyers. He argues that because of the increasing body of psychological literature, trial lawyers have been able to improve their courtroom effectiveness to the point where they can covertly control how juries decide cases, and even deceive juries into deciding contrary to the evidence. If these charges were true, it would raise grave doubts about the continued legitimacy of our trial system. Professor Gold argues that this infusion of science into trial practice already has undermined the ability of the jury to function properly, and that it must be controlled to assure that future disputes are fairly settled on their merits within the adversary system.

This criticism and its pessimistic conclusion seem to rest on several implicit assumptions about psychology and the proper functioning of the trial system. They reflect the belief that our trial process produced better results before psychologists started meddling with it; now that lawyers are using sophisticated techniques based on psycholegal research, they are upsetting the natural balance and subverting the proper function of the trial. Moreover, critics claim, trial attorneys have become capable of inducing jurors to make bad decisions based on biases and other improper factors, and no existing mechanism can prevent such abuse. This argument can be broken down into several psychological assumptions about how jurors reach decisions and the nature of psycholegal research, and several legal assumptions about the theory and structure of trials.

A. *The Charges Against Psychology*

The most fundamental assumption one must make in order to condemn psychologist-lawyer collaboration is that the legal system would be better off without psychologists. One must believe that jurors in their "natural" state, not subjected to psychological persuasion techniques, will return more accurate, impartial verdicts, based on a rational consideration of the evidence. The premise that jurors are inherently *unbiased* or that they can easily put aside their biases is implicit throughout Professor Gold's article. Although he recognizes that all people hold personal biases to some extent,⁴ Gold clearly expresses the common belief that it is nevertheless possible to seat an impartial jury that will "in good faith put aside its biases and logically choose which evidence and arguments to accept and which to reject."⁵ He dismisses the idea that "normal" juror decision making is affected by inherent biases and prejudices to a significant extent.⁶ He also rejects the idea that jury decision making is normally affected by extra-

3. Gold, *supra* note 1.

4. Gold, *supra* note 1, at 492.

5. Gold, *supra* note 1, at 501.

6. For example, Gold refers to the Duke law and language project, *see, e.g.*, W. O'BARR, *LINGUISTIC EVIDENCE: LANGUAGE, POWER AND STRATEGY IN THE COURTROOM* (1982); Conley, O'Barr & Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375, as investigating whether "lawyers can induce jurors to make judgments about the credibility of a speaker through manipulation of the 'powerfulness' of the speaker's language," Gold, *supra* note 1, at 484. Gold thereby implies that jurors would not make such judgments without the manipulation. *See also* L. WRIGHTSMAN, *PSYCHOLOGY AND THE LEGAL SYSTEM* 240-41 (1987) (this assumption

neous nonevidentiary factors, such as the presentational styles of attorneys. Professor Gold seems to think that unless lawyers *consciously* use psychological techniques, their presentations do not affect juror information processing.⁷ Thus, the first assumption is that if trials were conducted without the aid of psychologists, "neutral" decision making would occur, because jurors have a natural ability to put aside their biases and reach rational decisions based only on the evidence.⁸

The second basic assumption one must make in order to attack psychologist-lawyer collaboration is that psycholegal research can be used successfully to divert the jury away from the facts. This assumption essentially concerns jurors' cognitive processes—it assumes that during trial, jurors passively receive information and process this information automatically rather than consciously. This assumption is implicit in the title of Professor Gold's Article, "Covert Advocacy." He obviously believes that attorneys can "induce *subconscious* jury decision making on legally improper bases."⁹ He writes: "All advocacy techniques described in [this Article] have at least one thing in common: They persuade subconsciously. 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."¹⁰ Gold fears attorneys can easily deceive jurors into making decisions on improper bases because jurors "cannot scrutinize and choose to reject a message from the advocate that is received on a subconscious level."¹¹ So powerful is his view of subconscious decision making that Gold doubts whether even the jurors' conscious processes can overcome its influence. He writes that the jury may continue to be "unaware that a subconscious process" is taking place even after "*they have been cautioned against [it]*."¹² Thus, the second premise is that in the judgment process, jurors will tend to process nonevidentiary information subconsciously to the detriment of conscious decision making.

Gold also assumes that valid conclusions about psychology can be drawn from the books and articles most easily available to lawyers. He assumes this

is common); Gold, *supra* note 1, at 492 (jurors normally unbiased, and only psychologists think biased jurors exist).

7. For example, Gold refers to experiments concerning attorney style, language, and dress as testing whether juries can be "induce[d] . . . to employ legally irrelevant or improper considerations in their decisionmaking," apparently assuming that an attorney's self-presentation ordinarily would not affect jurors. Gold, *supra* note 1, at 483, 496.

8. Gold is in part making a historical argument that lawyers have only recently begun using psychology to improve their presentations. He is undoubtedly correct that access to psycholegal research is far easier for lawyers today than it ever has been. However, it is doubtful that his model of a "pure" system, in which no lawyers know about psychology, ever has existed in this century. Hugo Muensterberg published *On the Witness Stand* in 1908; Wigmore sarcastically attacked it in 1909. Wigmore, *Professor Muensterberg and the Psychology of Evidence*, 3 ILL. L. REV. 399 (1909). Compare Cleary, *Evidence as a Problem in Communicating*, 5 VAND. L. REV. 277, 278-81 (1952) (complaining that psychologists had not contributed enough to our understanding of trials) with Saks, *The Limits of Scientific Jury Selection: Ethical and Empirical*, 17 JURIMETRICS J. 3, 22 (1976) (psychologist wondering why lawyers ignore the work of psychologists on persuasion).

9. Gold, *supra* note 1, at 483 (emphasis added).

10. Gold, *supra* note 1, at 497; see *id.* at 502.

11. Gold, *supra* note 1, at 498.

12. Gold, *supra* note 1, at 504 (emphasis added).

secondary literature is accurate, contains scientifically justified conclusions, and fairly "reflect[s] an even larger . . . body of academic literature concerning the cognitive processes of the jury."¹³ Gold draws his conclusions about psychology and psychological persuasion techniques almost exclusively from "articles recently published in trial advocacy journals."¹⁴ Thus, the third premise is that articles on psychology written for trial lawyers are scientifically reliable.

A related assumption is that the laboratory results reported in the literature can be generalized to actual trials. Gold makes the assumption, commonly present in trial advocacy materials, that when a scientist finds that some factor affects subjects in a laboratory, it means that factor will have a measurable and significant impact on the decisions jurors make in real trials. For example, from O'Barr's finding that powerless speech affects how subjects evaluate a person's credibility, Gold concludes that in real trials "damage awards [will] decrease commensurately with a decrease in the apparent social status of the plaintiff."¹⁵ Similarly, he concludes that because subjects in experiments are susceptible to indirect assertions of fact, lawyers who infer unprovable facts can cause jurors not only to draw inferences in the absence of evidence, but to hold to those beliefs despite later evidence to the contrary.¹⁶ Gold also states that the use of various "scientific" jury selection techniques, especially community surveys, not only helps lawyers reduce uncertainty in exercising challenges, but actually enables them to identify and select the "most favorably biased juries."¹⁷ He concludes from studies of the effect of attorney self-presentation not just that matters of style and demeanor affect how jurors perceive evidence, but that jurors actually will be misled if attorneys try to enhance their own credibility.¹⁸ Thus, the fourth premise is that if something causes a measurable effect in the laboratory, it causes a significant effect in a real trial.

Part of Professor Gold's attack is based on the assumption that jurors are disproportionately affected by extraneous, nonevidentiary factors and therefore are prone to making decisions not based on evidence. Gold appears to believe that jurors have only a weak ability to put aside induced biases and to reason logically.¹⁹ At the slightest interference from attorneys, jurors lose whatever facility they had to reason analytically and tend to accept simplified explanations and rely on biases and stereotypes.²⁰ He portrays extraneous, nonevidentiary factors such as the order of presentation, style of speech, and manner of dress as tending to overwhelm the merits of the case. Gold rejects the position that ju-

13. Gold, *supra* note 1, at 482.

14. Gold, *supra* note 1, at 482-83. Gold draws his information about psychology from clinical legal education programs, books on trial advocacy, and articles in trial advocacy journals. He does not generally refer to the original scientific literature.

15. Gold, *supra* note 1, at 485-86.

16. Gold, *supra* note 1, at 488-89; *see also id.* at 495 (attorneys can cause jurors to reject expert testimony by "inferring" facts to the contrary).

17. Gold, *supra* note 1, at 493.

18. Gold, *supra* note 1, at 487-88.

19. *See* Gold, *supra* note 1, at 501 (arguing that attorneys can induce jurors to commit errors of logic).

20. Gold, *supra* note 1, at 490.

rors actively evaluate all trial information, both evidentiary *and nonevidentiary*, and that evidence is a far more important factor in decision making than juror biases.²¹ He states that jurors do *not* have "the ability to resist [induced] bias and avoid errors of logic"²² and that they can be easily induced "to commit inferential error[s] in evaluating the meaning of evidence" that cripple their capacity to reason.²³ Thus, the fifth assumption is that jurors are easily diverted from making decisions based on the evidence.

Gold makes an implicit assumption when he calls for controls on psychologist-lawyer collaboration: it has been of only minimal benefit to the trial process. Gold's Article, for example, focuses almost exclusively on the negative side of psychologist-lawyer collaboration. He only grudgingly acknowledges that psychology may be used in any way to facilitate fair and reliable trials. In the entire Article, Gold devotes only one paragraph to ways in which the "use of psychological techniques [could] have a desirable effect on jury decisionmaking."²⁴ He concedes that "some of these techniques [could help] eliminate extralegal distractions[,] detect unfavorable bias in prospective jurors[, and] assist the jury in better understanding . . . the evidence,"²⁵ but argues that it nevertheless must be controlled because psychology will be used primarily for undesirable purposes. Thus, the sixth premise is that the benefits of psychologist-lawyer collaboration are minimal.

The final assumption about psychology concerns psychologists themselves. Gold has a "legocentric" view of people. He assumes that qualified psychologists would be as willing to forsake truth and participate in a partisan effort to deceive the jury as lawyers. He states that "[f]or a price, professional psychologists are available to advise lawyers on all aspects of trial advocacy."²⁶ Gold also assumes that no ethical or institutional constraints inhibit psychologists from performing adversarial roles. He accuses psychologists of not even giving serious consideration to the "broader implications" of misuse of subliminal persuasion techniques because they are "too overcome with the prospects of economic or academic rewards to care much about what they may be doing to another profession."²⁷ Thus, the seventh premise is that psychologists will be willing to participate in jury deception.

B. *The Legal Assumptions Concerning Trials*

Even if the critics' fears about psychology were true, they would still need to make several legal assumptions about trials in order to condemn the use of psychological persuasion. Three such assumptions are implicit in Professor Gold's Article. The first is empirical: trials are one-sided. The second is juris-

21. Gold, *supra* note 1, at 506-07.

22. Gold, *supra* note 1, at 502.

23. Gold, *supra* note 1, at 491; *see also id.* at 483 (arguing that attorneys can induce juries to employ improper considerations in decision making).

24. Gold, *supra* note 1, at 504.

25. Gold, *supra* note 1, at 504-05.

26. Gold, *supra* note 1, at 481.

27. Gold, *supra* note 1, at 483.

prudential: the only legitimate guiding principle of trials is truth seeking. The third is doctrinal: no legal mechanism currently controls attempts to deceive the jury.

The paradigm employed by the critics assumes a one-sided trial in which only one set of "true" facts will be presented at trial, and one lawyer will employ psychological persuasion techniques to try to get the jury to decide contrary to those facts. Implicit throughout Gold's Article is the assumption that the evidence usually will be clear, unconflicting, and not susceptible to different interpretations. For example, when discussing the effects of order of presentation, Gold refers to lawyers altering the *true* probative value of evidence.²⁸ Working against these certain facts is a single lawyer using psychological persuasion techniques. In Gold's paradigm, a lawyer on the other side never seems to be emphasizing the facts and trying to persuade the jury to decide the case based on the evidence. Gold suggests that in order to mislead the jury the lawyer for one side may train her witnesses to use powerful speech, induce the opponent's witnesses to use powerless speech, and use powerful speech herself, while the opponent engages in no such offsetting behavior.²⁹ He assumes that when an attorney pits her credibility against an opposing witness, the jury chooses between them and ignores the opposing lawyer.³⁰ Gold asserts that an attorney can select a favorably biased jury without interference by the opponent,³¹ and that one attorney can successfully make the jury disbelieve the evidence merely by implying untrue facts while the opponent does nothing.³² Although one lawyer apparently will be able to wreak havoc by using psychology, the opponent will neither use similar psychological techniques nor object to improprieties. Gold writes that "advocates are . . . poorly equipped to respond to subconscious persuasion" because "[t]he principle tools of the responding advocate" are limited to "cross-examination, counter-evidence, and argument."³³ Thus, one assumption about trials is that persuasion techniques will be employed primarily by one side to divert the jury from the "true" facts without interference by the other side.

A second premise about trials is jurisprudential. Gold implies that the only legitimate goal which guides trials is seeking the truth. Any component of a trial that does not further that goal is to be condemned. In such a system, it is inappropriate for the lawyer with the weaker case to employ persuasion techniques or try to win; lawyers must facilitate, not obstruct, the search for truth.³⁴ Gold states, for example, that the lawyer's proper purpose during *voir dire* is "to

28. Gold, *supra* note 1, at 495-97.

29. Gold, *supra* note 1, at 484-86.

30. Gold, *supra* note 1, at 487.

31. Gold, *supra* note 1, at 493.

32. Gold, *supra* note 1, at 488-89, 493, 495.

33. Gold, *supra* note 1, at 504.

34. We are certain that most promoters of trials as searches for truth would deny that they hold the extreme position that it is inappropriate for the lawyer with the weaker case to try to win. They probably would allow her to try, *as long as she fails in the effort* and the truth eventually prevails. We submit that such an attitude confirms that they really *do* hold extreme anti-adversarial views and think it wrong for lawyers with weak cases to try to win the verdict.

assist the court in selecting a fair and impartial jury."³⁵ At other times, his view that partisan advocacy is not proper is implicit. He writes that because the demeanor of lawyers is not one of the legal issues at trial, it should not affect the jury's verdict.³⁶ Gold refers to lawyers' attempts to be persuasive as "extralegal"—not just nonevidentiary—bases for decision,³⁷ and accords no jurisprudential significance to such persuasion's long history of acceptance.³⁸ Thus, another premise is that partisan advocacy is improper.

The third assumption concerning the trial process is that no existing legal mechanism prevents lawyers from improperly influencing the jury, which explains the need for new controls on psychologist-lawyer collaboration. Gold's implicit description of trial procedure is that lawyers can do whatever they want; opponents have no grounds on which to object to egregious behavior. He accords no significant abuse prevention role to the objection,³⁹ stating that the only tools available to combat covert advocacy are "cross-examination, counter-evidence, and argument."⁴⁰ Implicit in his argument is that rules of trial procedure do not prohibit lawyers from engaging in activities such as implying unprovable facts in their questions,⁴¹ talking about similarities between prospective jurors and themselves during *voir dire*,⁴² bringing masses of spectators into the courtroom to distract the jury,⁴³ or prolonging their cases-in-chief.⁴⁴ Thus, the final premise about trials is that opposing lawyers cannot object successfully to improper persuasion techniques.

II. THE PSYCHOLOGY OF THE TRIAL PROCESS

Professor Gold's Article indicates that many lawyers fundamentally misunderstand the psychology of jury behavior and the trial process. They misperceive how jurors receive and process information, draw unwarranted conclusions from the psychological literature, and make incorrect assumptions about the extent to which psychologists are willing to assist lawyers in partisan advocacy. Gold's Article is a good vehicle for exploring these misconceptions, because it incorporates both his own conclusions about psychology and those of the lawyers who write trial advocacy articles based on psychology.

Those critical of psychologist-lawyer collaboration tend to assume that jurors in their natural state are either unbiased or can easily put aside their biases, and will therefore decide cases based on the evidence. Although Gold acknowledges that people tend to rely on biases in making decisions, through cognitive

35. Gold, *supra* note 1, at 492.

36. Gold, *supra* note 1, at 484.

37. Gold, *supra* note 1, at 485.

38. See Gold, *supra* note 1, at 507-08.

39. One reason that Gold may accord so little importance to objections is his belief that the opposing lawyer "may not even be aware that covert advocacy is being employed . . ." Gold, *supra* note 1, at 504.

40. Gold, *supra* note 1, at 504.

41. Gold, *supra* note 1, at 488-89, 495.

42. Gold, *supra* note 1, at 487.

43. Gold, *supra* note 1, at 494-95.

44. Gold, *supra* note 1, at 497.

devices such as heuristics⁴⁵ and knowledge structures or "schemas,"⁴⁶ he assumes that these biases affect jurors only when imposed by attorneys. This assumption is inconsistent with what psychologists know about juror behavior. In a complex task such as deciding on a verdict in a trial, cognitive biases are a natural consequence of the decision process. They serve as a means of simplifying and organizing information, and they reflect the way all persons think. Therefore, jurors are susceptible to bias without any assistance from lawyers.

Research demonstrates various ways in which juror decisions are naturally biased. For example, jurors place considerable weight on eyewitness testimony, regardless of its accuracy.⁴⁷ This weight is particularly problematic because one hundred years of research has shown that eyewitness accounts often are quite inaccurate.⁴⁸ Jurors tend to equate eyewitness confidence with accuracy and give more weight to witnesses who claim to be or act as if they were certain of their observations,⁴⁹ when in fact there is a weak relationship between confidence and accuracy.⁵⁰ Other examples abound. Jurors tend naturally to make credibility decisions about witnesses and attorneys based on their social status, style of speech, clothing, or occupation.⁵¹ The order in which evidence or arguments are presented affects the jury's perception of the evidence.⁵² Jurors in criminal cases tend to assume a defendant guilty if he has been charged with several offenses⁵³ or if he has a criminal record.⁵⁴ Biases such as these are not

45. For a general discussion of heuristics, see D. KAHNEMAN, P. SLOVIC & A. TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (1982); Markus & Zajonc, *The Cognitive Perspective Social Psychology*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 137, 186-97 (G. Lindzey & E. Aronson eds., 3d ed. 1985); Sherman & Corty, *Cognitive Heuristics*, in 1 HANDBOOK OF SOCIAL COGNITION 189 (R. Wyer & T. Srull eds. 1984).

46. See Markus & Zajonc, *supra* note 45, at 150-74; Rumelhart, *Schemata and the Cognitive System*, in 1 HANDBOOK OF SOCIAL COGNITION, *supra* note 45, at 161; Taylor & Crocker, *Schematic Bases of Social Information Processing*, in 1 SOCIAL COGNITION: THE ONTARIO SYMPOSIUM 89 (E. Higgins, C. Herman & M. Zanna eds. 1981).

47. See, e.g., Loftus, *Reconstructing Memory: The Incredible Eyewitness*, PSYCHOLOGY TODAY 116, 116-119 (Dec. 1974); Wells, Lindsay & Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOLOGY 440 (1979).

48. See E. LOFTUS, EYEWITNESS TESTIMONY 1-7 (1979); H. MUENSTERBERG, ON THE WITNESS STAND (1908); Penrod, Loftus & Winkler, *The Reliability of Eyewitness Testimony: A Psychological Perspective*, in THE PSYCHOLOGY OF THE COURTROOM 119, 122 (N. Kerr & R. Bray eds. 1982); Wells, *The Eyewitness*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 48-57 (S. Kassir & L. Wrightsman eds. 1985).

49. See Wells & Leippe, *How Do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using Memory for Peripheral Detail Can Be Misleading*, 66 J. APPLIED PSYCHOLOGY 682 (1981); Wells, Lindsay & Tausignant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 LAW & HUM. BEHAV. 275, 278-79 (1980).

50. See Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 LAW & HUM. BEHAV. 243, 257-58 (1980); Wells & Murray, *Eyewitness Confidence*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 155, 159-65 (G. Wells & E. Loftus eds. 1984).

51. See, e.g., Conley, O'Barr & Lind, *supra* note 6; Mehrabian & Williams, *Nonverbal Concomitants of Perceived and Intended Persuasiveness*, 13 J. PERSONALITY & SOC. PSYCHOLOGY 37, 37-38 (1969); Miller, Maruyama, Beaber & Valone, *Speed of Speech and Persuasion*, 34 J. PERSONALITY & SOC. PSYCHOLOGY 615, 615-17 (1976).

52. See Insko, Lind & LaTour, *Persuasion, Recall, and Thoughts*, 7 REPRESENTATIVE RES. IN SOC. PSYCHOLOGY 66, 77-78 (1976); Lawson, *Order of Presentation as a Factor in Jury Persuasion*, 56 KY. L.J. 523 (1968).

53. See Tanford & Penrod, *Biases in Trials Involving Defendants Charged with Multiple Offenses*, 12 J. APPLIED SOC. PSYCHOLOGY 453, 475-78 (1982).

induced by attorneys.

A good example of lawyers misunderstanding the nature of juror bias is Gold's treatment of the research by O'Barr and his colleagues on the effects of different speech styles on the jury. Gold writes that lawyers induce otherwise unbiased jurors to judge witnesses' credibility by either training those witnesses to use powerful speech or tricking them into using powerless speech.⁵⁵

O'Barr and his colleagues view their work quite differently. They discovered that when lawyers do *not* intervene, jurors inaccurately judge the credibility of witnesses based on the jurors' perceptions of the witnesses' social status as indicated by the power of their speech. By publishing their research in a law review, they hoped to help eliminate this inherent bias against witnesses who naturally use a weaker speaking style because of their social class, but who in fact are no less credible than other witnesses.⁵⁶ By training witnesses of lower socioeconomic status to use more powerful speech, lawyers are not misleading the jury into incorrectly giving too much credit to their testimony, as Gold suggests, but are eliminating a natural tendency to mistakenly give too little credit to a witness because of class prejudice.

The assumption that jurors have a natural tendency to put aside their biases and reach accurate verdicts is further undercut by other research. Psychologists have found that jurors tend to have difficulty in consistently finding the facts and applying the law to these facts. They often cannot understand or do not follow the judge's instructions on the law and treatment of evidence.⁵⁷ They often are unable to disregard evidence likely to arouse their prejudices even after it is ruled inadmissible and they are admonished not to consider it.⁵⁸ Jurors also tend to confuse evidence in trials that involve multiple parties, causes of action, or offenses, using evidence admitted on one issue to resolve other issues.⁵⁹ They also tend to make legally forbidden inferences from evidence introduced for impeachment purposes, even in the face of instructions on proper and improper

54. See Doob & Kirshenbaum, *Some Empirical Evidence on the Effect of § 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L.Q. 88, 93-96 (1973); Wissler & Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Credibility Evidence to Decide Guilt*, 9 LAW & HUM. BEHAV. 37, 43-47 (1985).

55. Gold, *supra* note 1, at 484-85.

56. E.g., Conley, O'Barr & Lind, *supra* note 6, at 1376-77.

57. For summaries of research regarding jury instructions, see A. ELWORK, B. SALES, & J. ALFINI, *MAKING JURY INSTRUCTIONS UNDERSTANDABLE* (1982); Elwork & Sales, *Jury Instructions*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE*, *supra* note 48, at 280; Lind, *The Psychology of Courtroom Procedure*, in *THE PSYCHOLOGY OF THE COURTROOM*, *supra* note 48, at 27-31.

58. See Sue, Smith & Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOLOGY 345, 351-53 (1973); Thompson, Fong & Rosenhan, *Inadmissible Evidence and Juror Verdicts*, 40 J. PERSONALITY & SOC. PSYCHOLOGY 453, 460-62 (1981); Wissler & Saks, *supra* note 54, at 43-47; Wolf & Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. APPLIED SOC. PSYCHOLOGY 205, 216-18 (1977).

59. See Bordens & Horowitz, *Information Processing in Joined and Severed Trials*, 13 J. APPLIED SOC. PSYCHOLOGY 351, 366-69 (1983); Tanford & Penrod, *supra* note 53, at 475-78; Tanford & Penrod, *Social Inference Processes in Juror Judgments of Multiple-Offense Trials*, 47 J. PERSONALITY & SOC. PSYCHOLOGY 749, 761-64 (1984).

uses.⁶⁰ Thus, the underlying assumption that jurors naturally reach accurate, unbiased decisions, is belied by the empirical evidence.

A second erroneous assumption often made about juror behavior is implicit in the title of Gold's Article, "Covert Advocacy." By arguing that jurors are passive participants in the persuasion process, whose judgments can be easily manipulated by attorneys without the jurors' awareness, Gold reveals a basic misunderstanding about the cognitive processes of jurors. Professor Gold provides little documentation for this key assumption in his argument, apparently relying primarily on work by Nisbett and his colleagues.⁶¹ They speculated that subjects in their experiments did not have access to their own mental processes; the subjects were unaware that a particular manipulation had affected their behavior. Many psychologists would disagree with this interpretation. Indeed, other research, including a reanalysis of Nisbett's data, shows that under many conditions people do have access to their mental processes and are aware of what has caused their behavior.⁶²

Individuals often are active processors of social information rather than passive recipients.⁶³ In conceptualizing the cognitive process, psychologists distinguish between two modes of information processing—automatic and conscious.⁶⁴ Automatic processes are those that "are directly under the control of the environment and that do not require conscious processing of any kind."⁶⁵ The critics apparently fear that jurors can be influenced at this subconscious level when an attorney manipulates the language, style, and demeanor of a witness' or her own appearance. However, automatic processes are limited to the perceptual stage of processing, when information is initially taken in, and are most likely to influence judgments under situations of low involvement. Low involvement also is characterized by reliance on heuristics and other simplification strategies that require little effort. When people are highly involved in an event, they are likely to use a "systematic" processing strategy that is characterized by careful evaluation of facts and arguments, rather than reliance on heuris-

60. See Tanford & Cox, *Decision Processes in Civil Cases: The Impact of Impeachment Evidence on Liability and Credibility Judgments*, 2 SOC. BEHAVIOUR 165 (1987); Tanford & Cox, *The Impact of Impeachment Evidence on Individual and Group Decision Making* (1987) (unpublished manuscript) (available from authors at Purdue University Psychology Dept.).

61. Nisbett & Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOLOGICAL REV. 231 (1977); see also R. NISBETT & L. ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980) (general textbook on the subject).

62. See Smith & Miller, *Limits on Perception of Cognitive Processes: A Reply to Nisbett and Wilson*, 85 PSYCHOLOGICAL REV. 355 (1978).

63. See Markus & Zajonc, *supra* note 45, at 137-41; Wyer & Srull, *Category Accessibility: Some Theoretical and Empirical Issues Concerning the Processing of Social Stimulus Information*, in 1 HANDBOOK OF SOCIAL COGNITION, *supra* note 45, at 161, 163-73.

64. See Bargh, *Automatic and Conscious Processing of Social Information*, in 3 HANDBOOK OF SOCIAL COGNITION, *supra* note 45, at 1-28; Logan, *Attention and Automaticity in Stroop and Priming Tasks: Theory and Data*, 12 COGNITIVE PSYCHOLOGY 523 (1980); Posner & Snyder, *Attention and Cognitive Control*, in INFORMATION PROCESSING AND COGNITION: THE LOYOLA SYMPOSIUM 55 (R. Solso ed. 1975); Schneider & Shiffrin, *Controlled and Automatic Human Information Processing: I. Detection, Search and Attention*, 84 PSYCHOLOGICAL REV. 1 (1977); Shiffrin & Schneider, *Controlled and Automatic Human Information Processing: II. Perceptual Learning, Automatic Attending, and a General Theory*, 84 PSYCHOLOGICAL REV. 127 (1977).

65. Bargh, *supra* note 64, at 36.

tics.⁶⁶ One certainly would expect the juror's role to be one of high involvement, since jurors must decide the fate of human lives; thus, a juror's involvement is more likely to involve conscious rather than automatic processing.

Even when an individual processes information automatically, he then acts on it consciously to produce relevant judgments and behaviors.⁶⁷ If certain social (nonevidentiary) information does reach the jurors automatically, jurors will weigh it along with other evidence, and the actual decision will result from the conscious evaluation of all information that the jurors perceived. Thus, "there is no evidence supporting the belief that social behavior is often, or even sometimes, automatically determined,"⁶⁸ let alone that behavior as important as deciding a verdict is ever significantly affected by unconscious impressions of the style and demeanor of witnesses and attorneys.

It is obvious from Gold's article that lawyers have difficulty finding, understanding, and drawing proper conclusions from the psychological literature. A large body of scientific literature covering matters of jury behavior, communication, and persuasion is published in psychological journals. For example, *Law and Human Behavior*, a journal of the American Psychological Association's Section on Law and Psychology, is devoted exclusively to psycholegal research and is written in language accessible to both lawyers and psychologists. One of the journal's express purposes is the communication of *accurate* information on the psychology of trial practice to lawyers. Other scientific studies can be found in the *Journal of Personality and Social Psychology*, *Journal of Applied Psychology*, and *Journal of Applied Social Psychology*. These journals have high standards for acceptance, require that all articles survive a peer review process, and are likely to contain some of the best experimental work on courtroom issues. Yet Gold cites only four such articles.⁶⁹

Instead, Gold provides a valuable picture of the kind of information readily available to the lawyer. He cites some of the important books that summarize psycholegal research,⁷⁰ but most of his information comes from "articles recently published in *trial advocacy journals*."⁷¹ Most such secondary articles are written by lawyers or "consultants," not by the scientists who conducted the

66. See Chaiken, *Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion*, 39 J. PERSONALITY & SOC. PSYCHOLOGY 752 (1980).

67. See Bargh, *supra* note 64, at 14-28.

68. Bargh, *supra* note 64, at 36.

69. See Gold, *supra* note 1, at 486 n.24, 488 n.41, 490 n.51.

70. Gold cites the following works: G. BERMANT, C. NEMETH & N. VIDMAR, *PSYCHOLOGY AND THE LAW* (1976); R. HASTIE, S. PENROD & N. PENNINGTON, *INSIDE THE JURY* (1983); I. HOROWITZ & T. WILLING, *THE PSYCHOLOGY OF LAW: INTEGRATIONS AND APPLICATIONS* (1984); S. KASSIN & L. WRIGHTSMAN, *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* (1985); N. KERR & R. BRAY, *THE PSYCHOLOGY OF THE COURTROOM* (1982); P. LIPSITT & B. SALES, *NEW DIRECTIONS IN PSYCHOLEGAL RESEARCH* (1980); E. LOFTUS, *supra* note 48; W. O'BARR, *supra* note 6; M. SAKS & R. HASTIE, *SOCIAL PSYCHOLOGY IN COURT* (1978); B. SALES, *THE TRIAL PROCESS* (1981); R. SIMON, *THE JURY SYSTEM IN AMERICA* (1975); R. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* (1980); J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); L. WRIGHTSMAN, *supra* note 6.

71. Gold, *supra* note 1, at 483 (emphasis added). Gold cites 24 articles from journals that have the goal of promoting advocacy techniques such as *Litigation*, *Trial*, and *Trial Diplomacy Journal*.

experiments.⁷² Relying primarily on these articles causes two problems. First, only a portion of the body of psychological knowledge about courtroom issues is being communicated. Second, some misinformation is being communicated. Many of these articles are unscientific, reach unsupportable conclusions, and would not be considered acceptable to psychologists. Of the fourteen articles Gold calls the "most important . . . published in the last decade,"⁷³ only two were published in professional psychological journals,⁷⁴ only about half would even be remotely acceptable to a reputable psychological journal, and only one set of articles—the O'Barr language studies—would be considered by psychologists as among the "most important" research.⁷⁵

Part of the problem is a lack of critical thinking. Lawyers like Gold and those who write about psychology for the advocacy journals⁷⁶ sometimes appear to lack the ability to distinguish between scientific research and what could be called "pop psychology." Pop psychology is typified by the self-help paperback that one can select in the psychology section of a commercial bookstore. Thus, in the Colley articles that Gold considers among the "most important," one finds the careful experimental research of Hovland, Janis, and Kelley⁷⁷ cited along with *I'm O.K., You're O.K.*⁷⁸ The difference between them is obvious: the former is supported by sound empirical data gathered from controlled scientific experiments; the latter is simply the intuitive theorizing of someone who happens to hold a doctorate. Advice taken from such nonscientific sources is probably no better, and may be worse, than lawyers' own intuitive theories about how to persuade jurors.

One major problem to which lawyers seem susceptible concerns the generalization of the results of psychological experiments. It is erroneous to assume that because a manipulation has an effect on subjects in the laboratory, it will have the same effect on jurors in the courtroom. Perhaps the most cogent example is the research by Asch used repeatedly to support the importance of first impressions in the courtroom.⁷⁹ Asch found that subjects evaluated an individual more favorably when described by a list of traits starting with the most favorable (intelligent, industrious, impulsive, critical, stubborn, envious) than when described by the same list beginning with the least favorable traits (envi-

72. Cf. Linz & Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOLOGY REV. 1 (1984) (summary article written by psychologists who do extensive jury simulation research).

73. Gold, *supra* note 1, at 482 n.7.

74. Kerr, *Beautiful and Blameless: Effects of Victim Attractiveness and Responsibility on Mock Jurors' Verdicts*, 4 PERSONALITY & SOC. PSYCHOLOGY BULL. 479 (1978); Kulka & Kessler, *Is Justice Really Blind?—The Influence of Litigant Physical Attractiveness on Juridical Judgment*, 8 J. APPLIED SOC. PSYCHOLOGY 366 (1978).

75. From among O'Barr's numerous publications, Gold relied on those published in legal rather than psychological journals. See Gold, *supra* note 1, at 484 n.14.

76. E.g., Colley, *Style, Structure and Semantics*, TRIAL, July 1983, at 86; Colley, *First Impressions*, LITIGATION, Summer 1977, at 8.

77. C. HOVLAND, I. JANIS, & H. KELLEY, COMMUNICATION AND PERSUASION (1953).

78. T. HARRIS, *I'M O.K., YOU'RE O.K.* (1967).

79. See, e.g., Parker, *Applied Psychology in Trial Practice*, 7 DEF. L.J. 33, 36 (1960).

ous, stubborn, critical, impulsive, industrious, intelligent).⁸⁰ It is a rather large inferential leap to conclude from this study that jurors exposed to the complexities of a trial that lasts days or even weeks will be most strongly influenced by the first information they hear.

The extent to which empirical research on juror decision making is applicable to actual trials is a topic of great interest and controversy among social scientists.⁸¹ The bulk of the experimental work uses "jury simulation" techniques in which participants are asked to play the role of jurors and make individual decisions about a hypothetical defendant on trial. This research has been criticized on several grounds as not adequately reflecting actual trials. First, much of the research uses college student subjects who are not attitudinally or demographically representative of the juror population. Studies have shown that younger adults may have more weak and changeable attitudes than older adults,⁸² and therefore might be more susceptible to attorney persuasion tactics. Second, the stimulus materials often do not approximate an actual trial. Psychologists have used everything from short written case summaries to videotaped trial reenactments, but these experimental types all share a common characteristic: they are shorter and simpler than actual trials.⁸³ The effect of a nonevidentiary manipulation is likely to be larger in magnitude when subjects have less evidence to consider. Third, decisions of experimental jurors usually have no real consequences for a defendant on trial. Wilson and Donnerstein demonstrated that manipulations of defendant and victim status characteristics had different effects when subjects thought there were consequences than when they thought there were none.⁸⁴ Fourth, only a handful of the many experiments have included group deliberations in their procedures; most studies ask for individual, written decisions. Some research suggests that the effects of extralegal or nonevidentiary biases may be eliminated during deliberation,⁸⁵ although the effects of certain

80. Asch, *Forming Impressions of Personality*, 41 J. ABNORMAL & SOC. PSYCHOLOGY 258 (1946).

81. See Bray & Kerr, *Methodological Considerations in the Study of the Psychology of the Courtroom*, in THE PSYCHOLOGY OF THE COURTROOM, *supra* note 48, at 287; Konecni & Ebbesen, *External Validity of Research in Legal Psychology*, 3 LAW & HUM. BEHAV. 39 (1979); Konecni & Ebbesen, *Social Psychology and the Law: The Choice of Research Problems, Settings, and Methodology*, in THE CRIMINAL JUSTICE SYSTEM: A SOCIAL-PSYCHOLOGICAL ANALYSIS 27 (V. Konecni & E. Ebbesen eds. 1982); Lind & Walker, *Theory Testing, Theory Development, and Laboratory Research on Legal Issues*, 3 LAW & HUM. BEHAV. 5 (1979); Suggs, *The Use of Psychological Research By the Judiciary: Do the Courts Adequately Assess the Validity of the Research?*, 3 LAW & HUM. BEHAV. 135 (1979); Weiten & Diamond, *A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics*, 3 LAW & HUM. BEHAV. 71 (1979).

82. Glenn, *Values, Attitudes, and Beliefs*, in CONSTANCY AND CHANGE IN HUMAN DEVELOPMENT 596 (O. Brim, Jr. & J. Kagan eds. 1980); Sears, *Life-Style Effects on Attitude Change, Especially Among the Elderly*, in AGING: SOCIAL CHANGE 183 (S. Kiesler, J. Morgan & V. Oppenheimer eds. 1981); Sears, *College Sophomores in the Laboratory: Influence of a Narrow Data Base on Social Psychology's View of Human Nature*, 51 J. PERSONALITY & SOC. PSYCHOLOGY 515 (1986).

83. "[A] concession," said Oliver Wendell Holmes, "to the shortness of life." *Reeve v. Dennett*, 145 Mass. 23, 28, 11 N.E. 938, 943 (1887).

84. Wilson & Donnerstein, *Guilty or Not Guilty? A Look at the "Simulated" Jury Paradigm*, 7 J. APPLIED SOC. PSYCHOLOGY 175 (1977).

85. E.g., Kaplan & Miller, *Reducing the Effects of Juror Bias*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 1443 (1978).

evidentiary biases may be exacerbated.⁸⁶ In either case, the effect of a manipulation on actual jurors cannot be predicted without considering the deliberation process. Fifth, many of the studies assess impact not in terms of what verdict a person would reach, but along other lines such as how subjects perceive a witness's credibility.⁸⁷

In response to these criticisms, researchers recently have attempted to increase the realism of their experiments through the use of nonstudent subjects, more realistic materials and procedures, and field experimental techniques. Thus, the generalization of some current research findings may be quite appropriate.⁸⁸ However, most of the research summarized in the trial advocacy materials available to lawyers was conducted in the old way—in laboratory settings quite different from the courtroom.⁸⁹ Findings from such research would be considered low in generalizability. The work on attitudes and persuasion, nonverbal communication, and impression formation that forms the basis of many suggestions concerning attorney tactics is particularly lacking in this respect. Most of the research did not even involve a simulated jury decision task.⁹⁰

Another problem in generalizing the research is that most of it does not reveal the effect an extralegal factor would have on a juror's decision relative to the effect of other evidence. Just because scientists, by carefully controlling the variables, can demonstrate that nonevidentiary factors such as style, demeanor, and speech affect juror behavior, it does not necessarily follow that the effect will be significant in a real trial. Lawyers tend to exaggerate the probable effect such factors will have, ignoring that juror decision making is affected mostly by the strength of the evidence. Most experiments examining the influence of extralegal factors hold evidentiary strength constant while manipulating variables of interest. In addition, an attempt often is made to keep the evidence weak or ambiguous in experiments to assure maximum sensitivity to the manipulation's effect. Studies that have manipulated evidentiary strength demonstrate that extralegal factors exert their greatest impact when the remaining trial evidence is weak or ambiguous, and may have little or no effect when evidence is strong.⁹¹ In addition, the relative impact of extralegal factors may be small compared to

86. See Hans & Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235, 242-43 (1976) (evidence of prior convictions did not affect individual decisions but strongly affected group verdicts).

87. E.g., Asch, *supra* note 80, at 258; Conley, O'Barr & Lind, *supra* note 6, at 1375-77.

88. See sources cited *supra* note 81.

89. Gold cites Sannito, *Nonverbal Communication in the Courtroom*, TRIAL DIPL. J., Summer 1983, at 22, who cites sources such as 3 S. FREUD, *Fragment of an Analysis of a Case of Hysteria*, in COLLECTED PAPERS (1959); A. MEHRABIAN, *NONVERBAL COMMUNICATION* (1972); Hess, Seltzer & Shlien, *Pupil Response of Hetero- and Homosexual Males to Pictures of Men and Women: A Pilot Study*, 70 J. ABNORMAL & SOC. PSYCHOLOGY 165 (1965).

90. E.g., Albert & Dabbs, *Physical Distance and Persuasion*, 15 J. PERSONALITY & SOC. PSYCHOLOGY 265 (1970); Hovland & Mandell, *An Experimental Comparison of Conclusion-Drawing by the Communicator and by the Audience*, 47 J. ABNORMAL & SOC. PSYCHOLOGY 581 (1952).

91. Calder, Insko & Yandell, *The Relation of Cognitive and Memorial Processes to Persuasion in a Simulated Jury Trial*, 4 J. APPLIED SOC. PSYCHOLOGY 62 (1974); Kerr & Sawyers, *Independence of Multiple Verdicts Within a Trial By Mock Jurors*, 10 REPRESENTATIVE RES. IN SOC. PSYCHOLOGY 16 (1979); Sue, Smith & Caldwell, *supra* note 58, at 345; Crowley & Tanford, *Stereotyping in*

the impact of evidentiary factors.⁹²

Even if it were possible for a lawyer, with the aid of a psychologist, to manipulate a jury into returning an unwarranted verdict, the lawyer first would need to find a psychologist willing to participate in such an endeavor. Lawyers are perhaps so socialized into an adversarial world view that they simply take for granted that psychologists would agree to become coconspirators in an attempt to deceive jurors. This assumption is unrealistic. Most social scientists are employed, not as full-time consultants in the adversarial legal system, but in an academic community that values objectivity and truth.⁹³ Although many lawyers would have few qualms about trying to entice a jury into acquitting a guilty client, few psychologists are likely to be willing to go that far. Psychologists are undoubtedly available to help attorneys present their evidence effectively, but are not likely to deviate radically from their professional socialization and knowingly help attorneys try to circumvent evidence.⁹⁴

The appropriate and ethical role for psychologists in the legal arena is of concern to psychologists as well as lawyers.⁹⁵ The basic question is whether the psychologist's primary role as a seeker of knowledge and impartial educator ever permits a scientist to become an advocate, especially for a party who hopes to win an undeserved verdict.⁹⁶ Most psychologists' primary goals are to disseminate accurate knowledge of psychology to the public⁹⁷ and maintain the scien-

the Courtroom: The Effects of Defendant Typicality on Judgments and Memory (1987) (unpublished manuscript) (available from authors at Purdue University Psychology Dept.).

92. See Kaplan & Kemmerick, *Juror Judgment as Information Integration: Combining Evidential and Nonevidential Information*, 30 J. PERSONALITY & SOC. PSYCHOLOGY 493 (1974).

93. Of course, there is no shortage of entrepreneurial "psychological consultants" available for hire. Anyone can hold him or herself out as a psychological consultant, whether or not that person holds a Ph.D. from a reputable university and regardless of whether that person has had any real training in the experimental method. We assume that a lawyer seeks competent psychological assistance, and does not merely try to impress a client or otherwise throw away money. Cf. McConahay, Mullin & Frederick, *The Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little*, 41 LAW & CONTEMP. PROBS. 205, 214 (1977) (attorney hired psychic to aid in jury selection by advising on aura, karma, and psychic vibrations).

94. This discussion has drawn guffaws from several lawyers who have seen it. They assert that they could easily buy Harvard psychologists to do anything the lawyers wanted. However, psychologists who saw the draft deny they are so easily bought and sold. The psychologists generally agreed they would not help a lawyer try to trick or deceive a jury into acquitting a guilty defendant, although there might be some in the profession who would be willing to do so. One reason lawyers may be so quick to assume psychologists are available for even the most extreme kinds of deception is a failure to distinguish between psychologists and the psychotherapists who testify about the insanity defense. See, e.g., Tybor, *Dallas' Doctor of Doom*, NAT'L L.J., Nov. 24, 1980, at 1 (describing psychotherapist known as "Dr. Death" because he had testified in over 50 death penalty cases, sometimes without even examining the defendant, that in his opinion the defendant had no regard for human life, was a remorseless sociopath, and would continue his violent behavior if allowed to live).

95. For example, a recent issue of *Law and Human Behavior* was devoted to this ethical debate as it pertains to expert psychological testimony on eyewitness performance. See *The Experimental Psychologist in Court: The Ethics of Expert Testimony*, 10 LAW & HUM. BEHAV. 1 (1986).

96. See Goldman, *Cognitive Psychologists as Expert Witnesses: A Problem in Professional Ethics*, 10 LAW & HUM. BEHAV. 29 (1986); Hastie, *Notes on the Psychologist Expert Witness*, 10 LAW & HUM. BEHAV. 79 (1986); Loftus, *Experimental Psychologist as Advocate or Impartial Educator*, 10 LAW & HUM. BEHAV. 63 (1986).

97. See Buckhout, *Personal Values and Expert Testimony*, 10 LAW & HUM. BEHAV. 127, 140-41 (1986).

tific integrity of their profession.⁹⁸ Psychologists who have become involved in psycholegal research generally want to prevent miscarriages of justice, not contribute to them. They seek to improve the reliability of the legal system, not to undermine it. These concerns restrict how far psychologists will be willing to go in pursuit of an advocacy goal.⁹⁹

Although some psychologists argue that they should never become involved in litigation in the first place, most agree that if they do, they must avoid deception, distortion, and half-truths. The ethical guidelines of the American Psychological Association require, among other things, objectivity in research and full disclosure of the limitations of data and research techniques. Thus, psychologists who conduct special purpose studies should not allow lawyers to dictate the research design to produce a desired outcome, but should retain their objectivity and use the most reliable methodology.¹⁰⁰ Psychologists who present psychological information to the public, either by writing articles, as consultants, or as witnesses, must "base their statements on scientifically acceptable psychological findings and techniques with full recognition of the limits and uncertainties of such evidence,"¹⁰¹ and provide such information "fairly and accurately, avoiding misrepresentation through sensationalism, exaggeration or superficiality."¹⁰²

The ethical limits of participation in partisan advocacy have been debated by prominent psychologists. Much of the debate has concerned psychologists as expert witnesses. In this context, a consensus exists that because the primary role of science is to impart knowledge, the expert should not participate in the presentation of a distorted view of the results of research either directly or through the half-truth of selecting nonrepresentative data.¹⁰³ Psychologists disagree whether as experts they must disclose all contradictory findings, even those that probably are inaccurate,¹⁰⁴ or should present only the best and soundest research.¹⁰⁵ Most agree, however, that psychologists should not testify about psychological phenomena unless they are confident about their existence based

98. See McCloskey & Egeth, *A Time to Speak, or a Time to Keep Silence?*, 38 AM. PSYCHOLOGIST 573, 574 (1983); Wells, *Expert Psychological Testimony: Empirical and Conceptual Analyses of Effects*, 10 LAW & HUM. BEHAV. 83, 92-93 (1986).

99. But see Loftus, *Trials of an Expert Witness*, NEWSWEEK, June 29, 1987, at 10 (justifying author's decision not to provide expert testimony concerning the problems of eyewitness identification in a trial of an alleged Nazi because she wished to see him convicted).

100. See Loftus, *supra* note 96, at 67-70.

101. AMERICAN PSYCHOLOGICAL ASSOC., ETHICAL PRINCIPLES OF PSYCHOLOGISTS 634-35 (1981).

102. *Id.* at 635. The concern about potential misrepresentation and superficiality has led some psychologists to suggest that scientists should never state generalized conclusions, however well-based in specific research findings. See Pachella, *Personal Values and the Value of Expert Testimony*, 10 LAW & HUM. BEHAV. 145 (1986). Most, however, contend that generalizations may be appropriate if all positive and negative factors are explained. See Hastie, *Notes on the Psychologist Expert Witness*, 10 LAW & HUM. BEHAV. 79, 81 (1986).

103. See Loftus, *supra* note 96, at 66-67.

104. Goldman, *supra* note 96, at 34.

105. Yarmey, *Ethical Responsibilities Governing the Statements Experimental Psychologists Make in Expert Testimony*, 10 LAW & HUM. BEHAV. 101, 112 (1986). But cf. Wolfgang, *The Social Scientist in Court*, 65 J. CRIM. L. & CRIMINOLOGY 239, 243-47 (1974) (arguing that it is ethical for a psychologist to present only the research that supports a party's position).

on a body of research rather than on one or two tentative studies.¹⁰⁶

The logic of this debate carries over to situations in which a psychologist is considering giving advice on how to improve a lawyer's trial performance. Ethical psychologists will require a certain quality and quantity of data before suggesting, either personally or by writing articles, that the lawyer can improve her trial performance.¹⁰⁷ They will not recommend that an attorney act on a psychological premise unless a body of reliable research clearly supports a particular conclusion,¹⁰⁸ and that conclusion is consistent with general theories of human behavior extending beyond the courtroom.¹⁰⁹ Issues of external validity further limit the applicability of some research to courtroom settings.¹¹⁰ Much of the research referred to in Gold's Article that seems to suggest ways in which attorneys can deceive jurors by varying their behavior and demeanor are isolated studies that have not been replicated, are inconsistent with general psychological theory, or were conducted under conditions very dissimilar to trials. No qualified psychologist hired as a consultant would recommend that attorneys act on such studies.

How will this overall concern for truth, replication, and professional ethics affect the specific issue raised by Professor Gold? Will most psychologists agree to participate in an effort to covertly deceive jurors into returning a verdict contrary to the facts? First, because little reliable scientific evidence exists that this goal is at all possible, it is unlikely that qualified psychologists would pretend they could help lawyers accomplish such deception just to make extra money. Second, if a psychologist perceived that his participation would have a deleterious effect on jurors by misleading them from the truth or causing them to misinterpret or misapply the information in some way, that psychologist would not be likely to participate. On this issue, agreement is virtually unanimous among psychologists: it is inconsistent with their role as scientists to facilitate deception or unnecessary harm. Several researchers emphasize that the purpose of collaboration with lawyers is to allow jurors to make better, more informed, and more rational judgments.¹¹¹ Psychologists are advised to consider the possible consequences of their research on jurors in deciding whether and how to provide information.¹¹² In addition, psychologists must consider whether the data will be

106. See Yarmey, *supra* note 105, at 109-11. This empirical approach dovetails with the requirement of evidence law that expert testimony is admissible only if generally accepted as true within the appropriate scientific community. For example, a sufficiently large body of knowledge has accumulated on the various factors that affect eyewitness performance. See Monahan & Loftus, *The Psychology of Law*, 33 ANN. REV. PSYCHOLOGY 441, 450 (1982). But cf. Konecni & Ebbesen, *Courtroom Testimony by Psychologists on Eyewitness Identification Issues: Critical Notes and Reflections*, 10 LAW & HUM. BEHAV. 117, 123 (1986) (consensus among scientists not equivalent to being correct).

107. See Konecni & Ebbesen, *supra* note 106, at 121; Lempert, *Social Sciences in Court: On "Eyewitness Experts" and Other Issues*, 10 LAW & HUM. BEHAV. 167, 175-79 (1986); Yarmey, *supra* note 105, at 112.

108. Yarmey, *supra* note 105, at 101-02.

109. See Lempert, *supra* note 107, at 168-70; Yarmey, *supra* note 105, at 108-09.

110. See *supra* text accompanying notes 79-92.

111. E.g., Bersoff, *Psychologists and the Judicial System: Broader Perspectives*, 10 LAW & HUM. BEHAV. 151, 152-53, 159-60 (1986); Goldman, *supra* note 96, at 33-34; Hastie, *supra* note 96, at 81.

112. Goldman, *supra* note 96, at 29-30.

used by lawyers in an undistorted fashion. Thus, any attempt by attorneys to use research findings to lead jurors away from "truth" is likely to be met with resistance rather than cooperation from social scientists.

Some psychologists, however, undoubtedly will become "hired guns" who work for lawyers regardless of the merits of their cases. Several of the articles used to support Gold's argument are written by consultants whose livelihoods depend on this partisan work. Is there really anything to fear from a few such individuals? We think not, for several reasons. First, if they go so far as to misrepresent research to support one side or another, they are likely to be discovered and exposed by ethical members of the psychological profession.¹¹³ Second, many ethical members of the legal profession will not be willing to hire them to deliberately deceive jurors. Third, to the extent that they claim to be able to turn a bad case on the facts into a winner through psychological ploys, these consultants are greatly exaggerating their powers. Although lawyers, especially those with desperate cases, will occasionally fall prey to such snake-oil salesmen,¹¹⁴ it is unlikely they will be able to successfully deceive jurors.

Obviously, competent psychological consultants are readily available for a host of purposes that fall short of outright deception of jurors. Reputable psychologists undoubtedly will be willing to help a lawyer identify and challenge biased jurors, tutor witnesses, and structure arguments. In close cases, if such advice is sought only by one side, psychology may indeed play some role in the outcome. It is always possible that one side will outperform the other in part because of disparity in resources, including legal talent. This aspect of the problem is hardly unique to the use of psychology by lawyers, but is inherent in the adversary structure of trials.

III. THE LEGAL STRUCTURE OF THE TRIAL PROCESS

Critics who fear that psychologist-lawyer collaboration will damage the legitimacy of the American trial process tend to arrive at their conclusions in part by mischaracterizing the nature of the existing trial system. Implicit in their attack are three main premises concerning trials. The first is empirical. They utilize a paradigm in which trials present the jury with a single, unambiguous version of "the truth," from which a lawyer will try to divert the jury by using persuasion. The second is jurisprudential. The critics posit that truth seeking is

113. See Buckhout, *supra* note 97, at 142; Loftus, *supra* note 96, at 77.

114. Lawyers can better understand the psychology of the courtroom, avoid errors of interpretation, and make intelligent choices about consultants by following several suggestions. Lawyers should be suspicious of articles written by persons who have no university affiliation and are published in trial advocacy journals or popular paperbacks. More reliable sources of information are found in the references cited *supra* note 70. Second, lawyers must be cautious about drawing generalized conclusions, especially if an experiment was conducted in an unrealistic laboratory setting. Third, lawyers should remember that the strength of the evidence is likely to affect jurors more strongly than nonevidentiary factors. Fourth, lawyers should give jurors credit for having the mental capability to weigh evidentiary and nonevidentiary factors carefully and consciously. Fifth, lawyers must be wary of consultants who make exaggerated claims that they can influence jurors covertly or turn a loser into a winner. If psychological consultants seem too good to be true, they probably are.

the only legitimate guiding principle of trials, so it is improper for lawyers with weak cases to try to persuade juries to decide contrary to the apparent weight of the evidence. The third is doctrinal. They assume existing legal rules of trial procedure do not adequately prevent lawyers from defrauding jurors in an effort to win an undeserved verdict.

This picture of the trial process is misleading. The underlying empirical assumption is inaccurate in two respects. Some significant percentage of cases going to trial will involve two or more plausible versions of uncertain facts, rather than one set of certain facts. Also, most trials will involve efforts by both lawyers to persuade the jury, usually in a manner consistent with the evidence. The underlying jurisprudential assumption also is wrong. Although truth seeking is undoubtedly one of the goals of a trial, it is not the sole guiding principle of trial jurisprudence. Equally fundamental is the principle of partisan adversariness. Finally, the underlying doctrinal assumption is erroneous. Existing legal rules of trial procedure adequately prevent most attempts by lawyers to subvert rational decision making or induce jurors to use some basis other than the evidence for their decision.

A. *An Empirical Model of Trials*

The attack on psychologist-lawyer collaboration is based in part on an empirical premise about trials: persuasion is used by the lawyer with the weaker case to divert the jury away from the facts. This assumes that in most cases the evidence is clear and consistent rather than conflicting, and that only the lawyer representing the weaker side will use persuasion to divert the jury away from those facts. Both assertions seem dubious. Many cases will not present only a single clear set of facts from which the jury can be diverted. Even in cases in which the evidence does predominate in favor of one side, there will not only be a lawyer trying to distract the jury, but also another lawyer using the same kinds of techniques to persuade the jury to follow the evidence.

Although one of the goals of a trial may be to reconstruct historical fact, the reality is that human memory is notoriously unreliable.¹¹⁵ As witnesses with faulty memories, biases, and personal interests in the outcome try to reconstruct an event, it is likely that conflicting versions of what happened will emerge as often as a single consistent picture. Professor Gold himself suggests at one point that the "close cases" are the ones likely to go to trial.¹¹⁶ This is an empirical assumption shared by most other legal scholars.¹¹⁷ Kalven and Zeisel's empirical study of the American jury found that many cases involved conflicting evi-

115. See E. LOFTUS, *supra* note 48, at 20-109; L. TAYLOR, *EYEWITNESS IDENTIFICATION* (1982); A. YARMEY, *THE PSYCHOLOGY OF EYEWITNESS TESTIMONY* (1979).

116. Gold, *supra* note 1, at 507. This suggestion is somewhat inconsistent with Gold's fear that attorneys will divert jurors away from the facts in cases in which the facts are clear. In close cases the jury justifiably could decide in favor of either side, so fears of attorney persuasion resulting in miscarriages of justice are misplaced.

117. See, e.g., R. KEETON, *TRIAL TACTICS AND METHODS* xi (1954) (trial is a competition of inconsistent versions of facts); Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1369-72 (1985) (giving case to jury recognizes that there is evidence on both sides; if facts were clear, judge would decide case on directed verdict). *But see*

dence that provided no clear picture of the events that had transpired.¹¹⁸ More recent empirical studies have confirmed this finding.¹¹⁹

Additional evidence that not all cases involve one set of clear facts comes from appellate opinions. To find reversible error, appellate judges usually must determine whether the error could reasonably have had an effect on the outcome. When the facts are clear enough that any reasonable jury would have reached a particular result, errors are harmless.¹²⁰ Yet, in only about twenty-five percent of cases in which the appellate courts find errors are those errors determined to be harmless. It is more likely that appellate judges, after reviewing the record, will determine that the case was relatively close on the facts. Thus, the jury's verdict might have been affected, and the judge will order a new trial despite the costs.¹²¹ In many of these cases, the appellate courts made it clear that the facts were in conflict and both sides had presented credible evidence.¹²² Such cases do not involve only a single set of certain facts from which the jury can be diverted, and the jury would be justified in returning a verdict for either side.

The other part of the empirical premise is that persuasion takes place in only one direction—away from the facts. Gold's paradigm is a trial in which one lawyer exerts maximum influence on the jury, and the opposing lawyer does nothing. For example, he worries that psychologist-lawyer collaboration will enable one side "to select [a] favorably biased jury,"¹²³ or use O'Barr's work¹²⁴ to boost the credibility of their witnesses and reduce the credibility of the opponent's witnesses.¹²⁵ This is not a useful model of the trial process. It seems obvious that an opposing attorney would not sit idly by while her opponent conducted the entire trial as he saw fit. This adversarial structure provides rea-

M. FRANKEL, *PARTISAN JUSTICE* 49 (1980) (most criminal defendants are in fact guilty and facts prove it).

118. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 134 (1971). According to Table 32, judges evaluated 43% of the criminal cases they heard as being closely balanced on the evidence.

119. P. DiPERNA, *JURIES ON TRIAL* 31 (1984); L. WRIGHTSMAN, *supra* note 6, at 17-19, 203-04.

120. See generally Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973) (thorough discussion of harmless error doctrine).

121. These conclusions are based on a random sample of 700 cases from all 50 states and federal circuits in which the courts reviewed allegations of legal error in the way closing argument was conducted. In 503 cases, the courts determined that a legal error had occurred. In 163 of those cases (32%), the judgments were reversed. In 126 cases (25%), the error was held harmless. In 112 cases (22%), the appellant had defaulted on the claim by failing to properly object and preserve it for the record. In 79 cases (16%), the error had been cured by subsequent action during trial. In 39 cases (8%), the error was found to have been invited. Some cases gave more than one reason for affirming. A list of the cases is available from Alexander Tanford.

122. See, e.g., *Powell v. United States*, 455 A.2d 405, 411 (D.C. 1982) (close case); *People v. Blackman*, 88 A.D.2d 620, 450 N.Y.S.2d 38, 39 (1982) (close factual issue).

123. Gold, *supra* note 1, at 492; see also Etzioni, *Creating an Imbalance*, *TRIAL*, Nov.-Dec. 1974, at 28 (prominent social scientist criticizing scientific jury selection). Fear of jury stacking obviously assumes that one side uses scientific assistance and the other side does nothing, an unrealistic assumption. Such fears also are based on the assumption that attorneys have the power to select jurors, which they do not. The attorneys' only power is to *unselect*—to prevent a potentially biased juror from being seated. See Tanford, *An Introduction to Trial Law*, 51 MO. L. REV. 623, 628-38 (1986). A "favorably-biased" juror cannot be selected to sit, and is likely to be removed by the other side.

124. See Conley, O'Barr & Lind, *supra* note 6, at 1375.

125. Gold, *supra* note 1, at 485.

sonable guarantees that in the critics' worst-case scenario—a desperate lawyer using psychology to try to distract the jury from the evidence—another lawyer will be attempting the far easier task of persuading the jury to follow the evidence. Although there is obviously some danger that in an occasional trial one lawyer will significantly outperform the other and thereby affect the outcome, this danger hardly seems unique to lawyers using scientific knowledge.¹²⁶ Its potential negative effect is offset by the tendency of jurors to rely on evidence regardless of what the lawyers do.¹²⁷

B. *The Jurisprudence of Trials*

The attack on psychologist-lawyer collaboration is based in part on the jurisprudential premise that truth seeking is the only legitimate guiding principle of trials. Therefore, the only proper role for the attorney is to facilitate that search for truth; it is wrong for her to obstruct the truth-seeking process. As a statement of the jurisprudence of trials, this premise is simplistic and wrong.¹²⁸ An equally important guiding principle is that the process is adversarial. All litigants are entitled to partisan advocates who will present their proofs and argue their positions regardless of the apparent strength of the evidence. It is just as important functionally and philosophically to maintain this adversary structure as it is to strive to determine the truth, and the adversariness principle has had as much of an effect as truth seeking on the development of trial law.

The debate over the guiding principles of trials and the proper role for attorneys is not new. A few scholars agree with Gold that truth seeking is either the sole or the most important function of the trial, so that lawyers should be limited to assisting that goal and criticized when they diverge from it.¹²⁹ A few assert radically opposite theories, arguing that trials are not searches for truth at all, but instead are primarily or exclusively games¹³⁰ or tools for social engineering.¹³¹

126. See Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 517-18 (1978) (studying jury selection in 12 trials and concluding that in one the performance of the two lawyers was so disproportionate that it probably affected the verdict).

127. See *supra* text accompanying notes 91-92.

128. As a statement of a utopian ideal, we are less certain that it is incorrect, although the evidence is considerable that overly zealous truth seeking leads to an unacceptable sacrifice of individual rights. See *infra* text accompanying notes 134-35. However, meaningful jurisprudence must be rooted in reality to some extent.

129. See Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057 (1986) (criticizing Nesson for suggesting that rules of trial procedure result from a desire to promote public acceptance of verdicts rather than a desire for verdict accuracy); Saks & Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC. REV. 123, 125 (1980-81) (a trial may indeed be more than a search for the truth in a given matter, but surely it is not less; no evidence that symbolic functions are important). See generally sources cited *supra* note 2 (criticizing trial practice generally for ignoring truth).

130. See Pulaski, *Criminal Trials: "A Search for Truth" or Something Else?*, 16 CRIM. L. BULL. 41, 44-45 (1980) (trials are not conducted to find out what happened—police, prosecutor and defense attorney all probably know what happened—but as a game to persuade the community that proof is strong enough to justify punishment.).

131. See Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 437 (1980); see also L. WRIGHTSMAN,

Most scholars, however, reject the notion that the jurisprudence of trials is simple and unidimensional. Trials do not function solely as searches for truth, games, or any other single purpose. Although ascertaining the truth is important,¹³² it is not the only principle by which trials are conducted. Even most of those who champion truth seeking as the sole legitimate function of trials readily concede they are not describing the trial process as it exists, but as they wish it were.¹³³ The scholarly consensus is that the adversarial process by which results are reached is just as important as the accuracy of those results. For one thing, trials serve a symbolic, or legitimating, function. It is essential that both the present and future disputants perceive that the decision making process is a fair one; otherwise, disputes may be settled in the streets rather than in the courts.¹³⁴ The adversarial structure reassures litigants that they will be fully heard before anyone deprives them of liberty or property. Beyond that, some scholars argue that the process must not only be perceived as fair, but must in fact be fair. The adversary structure fills this need by allowing the decision maker to remain neutral and avoid the natural human tendency to jump quickly to conclusions through heuristic reasoning.¹³⁵

The principle of adversariness is an important part of the jurisprudence of appellate judges as well as scholars. It is apparent from an examination of appellate cases concerning trial procedure that judges try to maintain the adversarial structure of trials. Courts repeatedly have stated that "a fair trial is one in which evidence [is] subject to adversarial testing,"¹³⁶ and that the adversarial procedures are "so important" that they are essential to the "ultimate integrity" of the process.¹³⁷ For example, all courts have held that the right to make a partisan, even illogical, argument by employing oratorical and rhetorical devices that could distract the jury from the facts,¹³⁸ is essential to a fair trial. It has

supra note 6, at 205-06 (trials are rituals in which perception of truth seeking is more important than real truth seeking).

132. *But see* Brilmayer, *Wobble, or the Death of Error*, 59 S. CAL. L. REV. 363, 375 (1986) (concluding from an examination of appellate review that overall there is a lack of interest whether the result was correct; only concern about whether procedures were followed); Markus, *A Theory of Trial Advocacy*, 56 TUL. L. REV. 95, 98-99 (1981) (not possible to reconstruct truth several months or years after an event).

133. *E.g.*, M. FRANKEL, *supra* note 117, at 11-12, 89 (criticizing trial process as it exists because its central theory is a fighting or sporting theory, and adversarial premise has never really been questioned).

134. Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 200-08 (1983) (must command community respect for fairness of process); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 372-81 (1978) (adversary presentation substitutes peaceful for violent means of settling disputes); Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 2-3, 32 (1986) (trial serves vital legitimating function by giving interested parties their day in court); Nesson, *supra* note 117, at 1360, 1368-69 (trial procedure rules result from desire to promote public acceptance of verdicts); Pulaski, *supra* note 130, at 47 (appearance of fairness important); Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 241 (1966) (one of the goals served by trials is "tranquilizing disputants").

135. Fuller & Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160 (1958); Fuller, *supra* note 134, at 382-85. For a discussion of heuristic reasoning, see sources cited *supra* note 45.

136. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

137. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980).

138. *See, e.g.*, *Powell v. Sears, Roebuck & Co.*, 598 S.W.2d 449, 450 (Ark. Ct. App. 1980) (court

been held to be a constitutional right that cannot be curtailed even when the evidence against that position is overwhelming.¹³⁹ Appellate judges also indirectly demonstrate how strongly they believe in this sporting aspect of trials by the frequency with which they use analogies to sports to explain legal rules. For example, one of the most often repeated phrases in appellate opinions concerning proper trial procedure is that an attorney "may strike hard blows but is not at liberty to strike foul ones."¹⁴⁰

The influence of this adversariness principle is also evident in the development of many of the legal doctrines of trial procedure. Several distinctive rules of trial procedure have emerged that tend to frustrate the goal of truth seeking while promoting other values, including adversariness. One is the doctrine of retaliation, or invited error. It permits one side to respond to an improper argument by making its own improper argument rather than by objecting. For example, if a plaintiff were to argue that a large verdict should be returned based on defendant's wealth rather than on the merits, it usually would be reversible error for a court to permit this argument.¹⁴¹ But if the plaintiff makes the argument in retaliation for an equally impermissible argument by the defendant that the jury should return a small verdict based on the absence of insurance coverage rather than on the merits, it is not error, despite the fact that the jury is now more likely to believe their decision should be based on ability to pay rather than on the evidence. The two errors are considered "offsetting fouls." Under this doctrine, courts have even affirmed verdicts that were likely to have been affected by racial prejudice¹⁴² or by irrelevant evidence from other cases.¹⁴³

A second such doctrine that shows the influence of adversariness is procedural default. Under the rules concerning objection procedures, judges have no obligation to enforce the rules of evidence and trial law on their own. For example, rules designed to facilitate reliable truth seeking by excluding hearsay and rumor, restricting evidence of bad character and criminal activity, and forbidding evidence about the relative wealth of the parties, will be enforced or not depending on whether the attorneys object. The parties bear the responsibility for initiating objections, putting them in the proper form, and making all the appropriate supplemental motions needed to enforce a favorable ruling. If the attorney fails to comply with all the procedural requirements, the appellate

held that a display emphasizing only certain jury instructions was not prejudicial); *Thorsen v. City of Chicago*, 74 Ill. App. 3d 98, 104-05, 392 N.E.2d 716, 721 (1979) (court recognized that "partisanship and heat of battle inherent in a lawsuit" favor granting counsel wide latitude).

139. See *Herring v. New York*, 422 U.S. 853, 858 (1975) ("counsel for defense has a right to make a closing summation . . . no matter how strong the case for the prosecution"; court cites 26 cases and a treatise); see also *Sodousky v. McGee*, 27 Ky. (4 J.J. Marsh.) 267, 271 (1830) (natural law right); *Turley v. Kotter*, 263 Pa. Super. 523, 532, 398 A.2d 699, 704 (1979) (constitutional right in civil cases).

140. The phrase appears to have originated in *Berger v. United States*, 295 U.S. 78, 88 (1935).

141. See, e.g., *Manninger v. Chicago & Northern Transp. Co.*, 64 Ill. App. 3d 719, 729, 381 N.E.2d 383, 391 (1978) (when counsel makes comments that will prejudice the jury, appellate court will reverse).

142. E.g., *State v. Lee*, 631 S.W.2d 453, 455-56 (Tenn. Crim. App. 1982) (prosecution's reference to race was not prejudicial where it was in response to one made by defendant's counsel).

143. E.g., *People v. Gangestad*, 105 Ill. App. 3d 774, 784, 434 N.E.2d 841, 849 (1982) (jury told that codefendant received death penalty).

courts will not review an issue for error, not even for most constitutional errors.¹⁴⁴ If an attorney makes no objection at all to inadmissible evidence such as insurance—whether through ignorance, neglect, or as part of a deliberate strategy—the evidence will be admitted and may be considered by the jury, even if it has nothing to do with the merits of the case and could distract the jury from its search for the truth.¹⁴⁵ Both these doctrines promote efficiency as well as adversariness, although only the latter concerns us in this Article.

The wisdom of preserving adversariness sometimes is debated solely in terms of whether it facilitates or inhibits the search for truth, as if it were merely a component of that principle. The adversary system has been defended on the ground that it furthers the search for truth. Partisan cross-examination is said to be an excellent vehicle for discovering and exposing the falsehoods of mendacious witnesses.¹⁴⁶ The adversary structure has been touted as giving lawyers an incentive to dig deeply for evidence; if more evidence is discovered and presented to a jury, a truer picture of what really happened will emerge.¹⁴⁷ Some evidence even shows that adversary procedures reduce the likelihood that triers of fact will render biased decisions.¹⁴⁸ Conversely, the adversary nature of the system has been criticized on the ground that it distracts the jury from truth seeking and thus undermines the legitimacy of the trial process.¹⁴⁹

But it is a mistake to restrict the debate over the adversary nature of our trial system to the question whether it facilitates the search for truth in all cases. To do so is to insist that truth seeking be the only legitimate principle of trials. Adversariness is a separate principle that should be debated and evaluated on its own merits—whether it is a requirement of justice, fairness, or morality.¹⁵⁰

The adversarial structure turns out to have a utilitarian value apart from whether it furthers truth seeking. In a society operating under the rule of law, court decisions generally must be accepted by the citizens. Psychologists have demonstrated that social acceptance of verdicts does not automatically follow from verdict accuracy. The problem is more complex. Whether trials are perceived as resulting in good verdicts depends not only on whether the truth appears to have been discovered, but also on whether good procedures seem to have been followed. Both participants and nonparticipants evaluate adversarial

144. See *County Court of Ulster v. Allen*, 442 U.S. 140, 148-54 (1979); *Estelle v. Williams*, 425 U.S. 501, 508-13 (1976).

145. See *Thomas v. State*, 423 N.E.2d 682, 686 (Ind. App. 1981).

146. See, e.g., 5 WIGMORE ON EVIDENCE § 1367 (Chadbourn rev. 1974) (adversary cross-examination "greatest legal engine ever invented for the discovery of truth").

147. See Fuller, *supra* note 134, at 382-85. Psychologists doubt this is always the case. See, e.g., J. THIBAUT & L. WALKER, *supra* note 70, at 28-40 (results of experiment using first-year law students suggest that discovery and presentation evidence in an adversary system operates differently than postulated by legal theorists); Lind, *supra* note 57, at 21-22.

148. Lind, Thibaut & Walker, *A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Processes on Bias in Legal Decisionmaking*, 62 VA. L. REV. 271 (1976); Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972).

149. M. FRANKEL, *supra* note 117, at 12; Gold, *supra* note 1, at 498.

150. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1977) (defining a jurisprudential principle as a standard which is observed because it is thought to be a requirement of justice, fairness, or morality).

trials as fairer and better than inquisitorial ones, because adversarial trials maximize participation and appear to protect individual rights and interests.¹⁵¹

One of the strongest theoretical defenses of the adversarial structure of trials comes from Lon Fuller. He argues that the adversarial presentation of proofs and reasoned arguments is essential to the very development of the rule of law. Because law evolves at least in part from decisions in specific cases, legitimate laws will exist only if trials fully and fairly permit all sides to present their arguments to neutral decision makers. Fuller maintains that the rule of law itself, by which society substitutes peaceful for violent ways of settling disputes, can exist only if disputants can present their proofs and arguments in court.¹⁵² Therefore, the principle of adversariness is a valuable part of our dispute resolution system independent of whether it facilitates or detracts from the search for truth.

C. *The Law of Trials*

Critics who fear the use of psychology will damage the trial system are making a doctrinal assumption that the law of trials allows lawyers to do as they please. Gold's concern that new controls may have to be placed on psychologist-lawyer collaboration assumes that existing legal rules of trial procedure are inadequate to prevent abuses. The premise that attorneys are free to subvert the trial process by injecting extralegal factors, encouraging disregard of the law, or manufacturing evidence, is false. Although lawyers and judges may underutilize them, a comprehensive system of legal rules exists to prohibit most of the lawyer trickery about which critics worry.¹⁵³ Although it is beyond the scope of this Article to describe all the rules that constrain the conduct of attorneys at trial, the point can be illustrated by examining the specific types of conduct in which Professor Gold fears lawyers will engage.

Gold describes four general ways in which a lawyer, using psychology, might successfully subvert the legitimate trial process: by selecting a biased jury, by arousing biases in the jurors, by constantly inferring untrue or unprovable facts, and by distracting jurors from the merits of the case.¹⁵⁴ He also suggests

151. Lind, *supra* note 57, at 15-19; Loh, *The Evidence and Trial Procedure*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE*, *supra* note 48, at 16; Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978).

152. Fuller, *supra* note 134, at 372-85. Fuller's full philosophical defense of the adversarial structure is, of course, not as simple as we have presented it.

153. They are described in Tanford, *supra* note 123; see also F. BUSCH, *LAW AND TACTICS OF JURY TRIALS* (1959) (five volumes containing hundreds of short chapters on the early twentieth-century law of trials); S. THOMPSON, *LAW OF TRIALS IN ACTIONS CIVIL AND CRIMINAL* (1889) (description of trial law in nineteenth century).

154. See Gold, *supra* note 1, at 483-98. Gold also makes a fifth claim—that lawyers may improperly try to inject their own credibility and demeanor into the case. *Id.* In this claim, he is undoubtedly correct that lawyer credibility is an improper basis for decision and lawyers are prohibited from directly raising this issue. See *United States v. Morris*, 568 F.2d 396, 402 (5th Cir. 1978) (error to state personal opinion of witness' credibility); *Missouri K. T. R.R. v. Ridgway*, 191 F.2d 363, 369-70 (8th Cir. 1951) (error to impugn motives of opponent); *People v. Smylie*, 103 Ill. App. 3d 679, 686, 431 N.E.2d 1130, 1136 (1981) (error to accuse opponent of improper tactics and fabricating evidence); *State v. Smith*, 279 N.C. 163, 181 S.E.2d 458 (1971) (error to inject personal evaluation of merits of case); *Boyd v. State*, 643 S.W.2d 700, 706 (Tex. Crim. App. 1982) (error to

several specific ways lawyers might try to distract the jury: talk about themselves during *voir dire* or use *voir dire* to indoctrinate jurors, imply untrue facts in their questions to witnesses or misstate facts during argument, bring in masses of spectators, prolong their cases-in-chief, induce powerless speech in opposing witnesses, and encourage evasion of law in their arguments.¹⁵⁵ In each example, the existing legal rules of trial procedure—if asserted by the opponent and enforced by the courts—will prevent the attorney from engaging in the feared conduct.

The legal rule structure of *voir dire* restricts a lawyer's power to select a favorably biased jury or induce bias in jurors during the jury selection process. In the first place, it is a mistake to think of the *voir dire* process as "selection" at all. Attorneys have no opportunity to pick anyone, biased or not, to sit on a jury. The rules of *voir dire* permit attorneys only to *unselect*—to prevent a potentially biased juror from being seated.¹⁵⁶ If potential jurors are obviously biased, they may be challenged and excused for cause.¹⁵⁷ Even if the bias is not obvious, the opponent is entitled to remove jurors peremptorily¹⁵⁸ and is likely to remove the very jurors favorably disposed toward the opponent.

The fear that lawyers will induce bias in jurors through their questions also overlooks legal rules prohibiting such conduct. The modern trend is to restrict the participation of attorneys in *voir dire* and give most of the responsibility for questioning to the judge.¹⁵⁹ This procedure restricts attorneys' opportunities to "induce bias" in jurors by their questions. If an attorney does try to engage in extensive indoctrination, ingratiation, or other diversionary tactics during *voir dire*, the rules of trial procedure prohibit it. They limit attorneys to questions relevant to the discovery of bias or other grounds for challenge¹⁶⁰ and prohibit questions that seek to indoctrinate jurors about the law¹⁶¹ or favorable facts.¹⁶²

inject personal opinion). Gold is also probably correct that there exists no effective way to stop such conduct. However, the credibility and demeanor of attorneys will inevitably affect jurors, whether or not the attorney intends to create such an effect, so this problem is not unique to cases involving an attorney who employs psychologically sophisticated tactics.

155. See Gold, *supra* note 1, at 487-89, 494-95, 497.

156. See Tanford, *supra* note 123, at 628-38.

157. E.g., N.C. GEN. STAT. § 15A-1212 (1983); OKLA. STAT. ANN. tit. 22, § 659 (West 1969).

158. See, e.g., Swain v. Alabama, 380 U.S. 202, 220 (1965). Cf. Batson v. Kentucky, 476 U.S. 79 (1986) (prosecutor may not exercise peremptory challenges on the basis of race).

159. In federal courts, attorneys usually are limited to submitting written questions to the judge, who may or may not ask them. See G. BERMANT, CONDUCT OF THE VOIR DIRE EXAMINATION: PRACTICES AND OPINIONS OF FEDERAL DISTRICT JUDGES 5 (1977). In state courts, judges are now taking over much of *voir dire* and limiting the participation of attorneys. See FLA. R. CRIM. P. 3.300(b); ABA STANDARDS FOR CRIMINAL JUSTICE 15-2.4 (1980).

160. See, e.g., Mallott v. State, 608 P.2d 737, 749-50 (Alaska 1980) (questioning to determine bias from pretrial publicity allowed); Commonwealth v. Davis, 282 Pa. Super. 51, 53-58, 422 A.2d 671, 672-74 (1980) (questions to determine if a juror was a victim of similar crime are relevant in exposing bias); Crosby v. Southeast Zayre, Inc., 274 S.C. 519, 521-23, 265 S.E.2d 517, 518-19 (1980) (questioning permitted to show bias because of employment relationship with legal counsel); Trevino v. State, 572 S.W.2d 336, 336-37 (Tex. Crim. App. 1978) (questioning to determine if a juror had a bias in favor of police was within proper scope of *voir dire*). See generally Tanford, *supra* note 123, at 638-44 (summarizing cases from a number of jurisdictions).

161. See generally Gold, *Voir Dire: Questioning Prospective Jurors on Willingness to Follow Law*, 60 IND. L.J. 163, 166-75 (1984) (good description of case law).

162. See, e.g., Hopkins v. State, 429 N.E.2d 631, 635 (Ind. 1981); Rankin v. Blue Grass Boys

The specific concern expressed by Professor Gold—that lawyers would disclose personal facts about themselves to ingratiate themselves with the jurors—is probably prohibited, although direct precedent is sparse.¹⁶³ Similarly, lawyers may not use *voir dire* questions as pretexts for injecting racial prejudice into a case,¹⁶⁴ emphasizing the existence of liability insurance,¹⁶⁵ or preconditioning jurors to a particular verdict.¹⁶⁶ One study showed that these rules are routinely enforced by many judges, even in the absence of objection.¹⁶⁷

Rules also prohibit attorneys from trying to arouse biases in jurors at other stages of the trial. In opening statements, attorneys are prohibited from trying to arouse sympathy for or antipathy against a party;¹⁶⁸ appealing to class, racial, ethnic, or religious prejudices;¹⁶⁹ injecting insurance, wealth, poverty, or other information about a defendant's ability to pay a verdict;¹⁷⁰ or appealing to fear, vigilantism, or the desire for vengeance.¹⁷¹ During the presentation of evidence, attorneys are prohibited from introducing evidence of little probative value if it will unduly confuse issues or arouse the emotions of the jury.¹⁷² In closing argument, attorneys are similarly prohibited from trying to arouse emotions or prejudices in jurors;¹⁷³ suggesting that they decide the case based on the emotions of the community or because the community desires a certain verdict;¹⁷⁴ suggesting that the verdict will have a personal impact on the jurors;¹⁷⁵ or rais-

Ranch, Inc., 469 S.W.2d 767, 772-73 (Ky. 1971); *State v. Manley*, 54 N.J. 259, 270, 255 A.2d 193, 199 (N.J. 1969); *Commonwealth v. Werts*, 483 Pa. 222, 224-25, 395 A.2d 1316, 1317-18 (1978). See generally *Fortune, Voir Dire in Kentucky: An Empirical Study of Voir Dire in the Kentucky Circuit Courts*, 69 Ky. L.J. 273, 313-15 (1981) (survey of actual practices of trial judges).

163. See *Taylor v. Ross*, — Ohio App. —, 78 N.E.2d 395 (dictum disapproving of attempts by lawyer to ingratiate himself with jurors), *rev'd on other grounds*, 150 Ohio St. 448, 83 N.E.2d 222 (1948). See generally ABA STANDARDS FOR CRIMINAL JUSTICE 4-7.2 (1980) (*voir dire* not to be used to present inadmissible matter to the jury); Tanford, *supra* note 123, at 643-44 (using *voir dire* for ingratiation and indoctrination is improper).

164. See *Hawk v. Superior Court*, 42 Cal. App. 3d 108, 120-21, 116 Cal. Rptr. 713, 720-21 (1974), *cert. denied*, 421 U.S. 1012 (1975).

165. See *Yust v. Link*, 569 S.W.2d 236, 238-39 (Mo. Ct. App. 1978); *Roman v. Mitchell*, 82 N.J. 336, 347-49, 413 A.2d 322, 328 (1980).

166. See *Hopkins v. State*, 429 N.E.2d 631, 634-35 (Ind. 1981). A few jurisdictions permit such questions at the judge's discretion. See, e.g., *Geehan v. Monahan*, 382 F.2d 111, 115-16 (7th Cir. 1967).

167. See *Fortune, supra* note 162, at 297-98; see also Strawn, *Ending the Voir Dire Wars*, JUDGES J., Spring 1979, at 45 (suggestions to judges on when to intervene in *voir dire*).

168. E.g., *Nevels v. State*, 351 So. 2d 762, 763 (Fla. Dist. Ct. App. 1977) (statement concerning suffering of victim's family held improper); *Hartford Accident & Indem. Co. v. List*, 424 S.W.2d 761, 764-66 (Mo. Ct. App. 1968) (opponent's husband in prison).

169. E.g., *Donald v. Matheny*, 276 Ala. 52, 57, 158 So. 2d 909, 913 (1963); *Manning v. State*, 195 Tenn. 94, 257 S.W.2d 6, (1953).

170. E.g., *Palmer v. Emery Transp. Co.*, 130 Ill. App. 2d 125, 128-30, 268 N.E.2d 238, 240-41 (1970).

171. E.g., *People v. Johnson*, 43 Ill. App. 3d 649, 659, 357 N.E.2d 151, 159 (1976).

172. E.g., FED. R. EVID. 403.

173. See *McWilliams v. Sentinel Pub. Co.*, 339 Ill. App. 83, 104-05, 89 N.E.2d 266, 275 (1949) (error to try to arouse religious prejudices); *State v. Wilson*, 404 So. 2d 968, 969-71 (La. 1981) (error to attempt to arouse racial prejudice); *People v. Leverette*, 112 Mich. App. 142, 315 N.W.2d 876, 880-82 (1982) (error to try to arouse sympathy for crime victim).

174. See *Hines v. State*, 425 So. 2d 589, 591 (Fla. Dist. Ct. App. 1983) (error to argue that jurors should use this opportunity to send message to other criminals); *Prado v. State*, 626 S.W.2d 775, 776-77 (Tex. Crim. App. 1982) (error to ask jury to convict because it was desire of community).

175. See *Byrns v. St. Louis County*, 295 N.W. 2d 517, 520-21 (Minn. 1980) (error to suggest that

ing issues concerning the wealth, poverty, or insurance of the parties.¹⁷⁶

One of the recurring concerns expressed by Professor Gold is that lawyers, acting on the advice of psychologists, will constantly allude to untrue or unprovable facts until the jury comes to believe them to be true.¹⁷⁷ This tactic is hardly new. Trial lawyers often have claimed that they can affect the verdict by insinuating unprovable facts,¹⁷⁸ and appellate courts have been reversing such fraudulently obtained judgments for a hundred years.¹⁷⁹ The law prohibits lawyers from using a question to make a rhetorical point,¹⁸⁰ from insinuating facts that the witness denies to be true,¹⁸¹ from implying they believe a witness to be lying,¹⁸² and from suggesting the existence of a fact they cannot legally prove.¹⁸³ Thus, if a lawyer were to try constantly to infer unprovable facts, the opponent may object, and the court should sustain that objection, cautioning the attorney or holding her in contempt if she persists.¹⁸⁴ In addition, it is unethical to try this tactic. The ABA Model Rules of Professional Conduct state: "[A] lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."¹⁸⁵

Neither may the attorney misstate, exaggerate, or imply the existence of unintroduced facts during jury argument. In an opening statement, it is improper to allude to inadmissible evidence¹⁸⁶ or facts that are unprovable because

jury consider verdict's impact on tax rate); *Finney v. G.C. Murphy Co.*, 400 Pa. 46, 49-50, 161 A.2d 385, 387 (1960) (error to suggest that a plaintiff's verdict would cause insurance rates in community to rise).

176. See *Klein v. Herring*, 347 So. 2d 681, 682 (Fla. Dist. Ct. App. 1977); *Manninger v. Chicago & N.W. Transp. Co.*, 64 Ill. App. 3d 719, 725-31, 381 N.E.2d 383, 388-92 (1978); *White v. Piles*, 589 S.W.2d 220, 221-22 (Ky. Ct. App. 1979).

177. See Gold, *supra* note 1, at 488-89, 495.

178. E.g., J. ERLICH, *THE LOST ART OF CROSS-EXAMINATION* 142-47 (1970) (attorney claimed he obtained Billie Holiday's acquittal on drug charges by insinuating she had been framed although he was unable to offer any actual evidence of that claim).

179. See, e.g., *People v. Wells*, 100 Cal. 459, 462-63, 34 P. 1078, 1079 (1893) (improper for a lawyer to ask a question he knows is inadmissible and wrong); *Deilkes v. State*, 141 Ind. 23, 26-27, 40 N.E. 120, 121 (1895) (error to insinuate victim was quarrelsome and dangerous man).

180. See *Self v. Dye*, 257 Ark. 360, 364-65, 516 S.W.2d 397, 400 (1974); *In re Will of Kemp*, 236 N.C. 680, 685, 73 S.E.2d 906, 910 (1953).

181. See *State v. Cuevas*, 288 N.W.2d 525, 531-32 (Iowa 1980); see also *State v. Barcomb*, 136 Vt. 141, 142, 385 A.2d 1089, 1089-90 (1978) (improper to misquote and exaggerate witness testimony).

182. See *State v. Blount*, 4 N.C. App. 561, 567-68, 167 S.E.2d 444, 448-49 (1969); see also Denbeaux & Risinger, *Questioning Questions: Objections to Form in the Interrogation of Witnesses*, 33 ARK. L. REV. 439, 485-86 (calling the problem "argumentative editorial comment").

183. See *Franks v. State*, 262 Ind. 649, 658, 323 N.E.2d 221, 226 (1975) (error to insinuate client passed lie detector test).

184. See *Hawk v. Superior Court*, 42 Cal. App. 3d 108, 128-29, 116 Cal. Rptr. 713, 726-27 (1974), *cert. denied*, 421 U.S. 1012 (1975) (lawyer held in contempt for deliberately asking question insinuating existence of inadmissible prior conviction). Gold suggests that the opponent is ill-equipped to respond, possessing only the "tools of . . . cross-examination, counter-evidence, and argument." Gold, *supra* note 1, at 504. Gold omits reference to the fourth formidable weapon in the opponent's arsenal: objections.

185. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1983); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C) (1980) (similar); ABA STANDARDS FOR CRIMINAL JUSTICE 3-5.7, 4-7.6 (1980) (it is unprofessional conduct for a lawyer to ask a question that implies the existence of a factual predicate for which a good faith belief is lacking).

186. E.g., *United States v. DeRosa*, 548 F.2d 464, 470 (3d Cir. 1977); *Smith v. Covell*, 100 Cal.

no witness is available to testify to them.¹⁸⁷ In closing argument, it is similarly improper to allude to facts not in the record or to misstate testimony, especially if it relates to a central issue,¹⁸⁸ is cumulative of similar attempts to go beyond the record,¹⁸⁹ or is done in contravention of an express ruling by the court.¹⁹⁰

Another recurring concern is that attorneys will use various ploys to distort the merits of the case or distract the jury away from them. Gold specifically mentions four methods: lawyers might bring in a large number of spectators to divert the jury's attention,¹⁹¹ prolong their cases-in-chief so the jury will forget the opponent's evidence,¹⁹² induce powerless speech in the other side's witnesses so their credibility is diminished,¹⁹³ or encourage jurors to invoke their personal values to nullify the law.¹⁹⁴ None of these scenarios is realistic; legal rules prohibit or restrict such tactics. Packing the courtroom with distracting or intimidating spectators is prohibited, and the judge in such cases may clear the courtroom before proceeding.¹⁹⁵ Attorneys do not have sole discretion over how long they take to present their cases. The court may place time limits on a party's presentation or restrict the presentation of cumulative or delay-causing evidence.¹⁹⁶ As to inducing powerless speech in the opponent's witnesses, the rules restrict an attorney's access to the most important opposing witness—the opposing party.¹⁹⁷ The rules give a witness the right to refuse to talk to lawyers at all,¹⁹⁸ and give the court power to restrict a lawyer's access to a witness if she

App. 3d 947, 957-60, 161 Cal. Rptr. 377, 383-85 (1980); *State v. Waste Management, Inc.*, 81 Wis. 2d 555, 573-74, 261 N.W.2d 147, 155, *cert. denied*, 439 U.S. 865 (1978).

187. *E.g.*, *People v. Parks*, 49 Ill. App. 3d 65, 67, 363 N.E.2d 93, 95 (1977); *State v. Kenny*, 128 N.J. Super. 94, 109-11, 319 A.2d 232, 240-41 (1974), *aff'd*, 68 N.J. 17, 342 A.2d 189 (1975).

188. *See, e.g.*, *Berger v. United States*, 295 U.S. 78, 86-89 (1935); *Hughes v. State*, 437 A.2d 559, 568-71 (Del. 1981); *State v. Monk*, 286 N.C. 509, 516-17, 212 S.E.2d 125, 131 (1975).

189. *See People v. Cart*, 102 Ill. App. 3d 173, 185-86, 429 N.E.2d 553, 563 (1981) (prosecutor attempted to focus jury's attention on defendant's failure to testify as corroborative of guilt; one reference would be permitted, but six would require reversal), *cert. denied*, 459 U.S. 942 (1982).

190. *See, e.g.*, *United States v. Hickman*, 468 F.2d 610 (5th Cir. 1972) (*per curiam*); *Intermountain Farmers Ass'n v. Fitzgerald*, 574 P.2d 1162, 1165-66 (Utah 1978), *cert. denied*, 439 U.S. 860 (1978).

191. Gold, *supra* note 1, at 494.

192. Gold, *supra* note 1, at 497.

193. Gold, *supra* note 1, at 485.

194. Gold, *supra* note 1, at 498-500. It is not entirely clear that Gold thinks jury nullification is bad. He seems to approve of jurors using community values to nullify laws, but disapproves of jurors using their own personal values.

195. *See People v. Craig*, 86 Cal. App. 3d 905, 919-20, 150 Cal. Rptr. 676, 684-85 (1978) (court should not permit interference by spectators and pickets if the conduct is prejudicial to defendant or influences the verdict); *State v. Franklin*, 327 S.E.2d 449, 454-55 (W. Va. 1985) (fair trial denied when judge did nothing to prevent presence of 20-30 spectators wearing Mothers Against Drunk Driving buttons).

196. *See M.C.I. Communication Corp. v. American Tel. & Tel.*, 708 F.2d 1081, 1170-72 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983); *Maloney v. Wake Hosp. Sys.*, 45 N.C. App. 172, 180, 262 S.E.2d 680, 684-85 (1980); *see also* FED. R. EVID. 403 (needlessly cumulative, repetitive evidence that causes undue delay may be excluded although relevant).

197. *E.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rules 4.2, 4.3 (1983) (prohibiting most communications with adverse party); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1980) (similar).

198. *See People v. Mitchell*, 16 Ill. App. 2d 189, 193, 147 N.E.2d 883, 885 (1958).

attempts to influence how or to what the witness will testify.¹⁹⁹ It also is improper for attorneys to urge that jurors nullify or evade the law for any reason, directly or indirectly.²⁰⁰

Finally, Professor Gold fears that the use of such psychological trickery is virtually undetectable by the opposing attorney and by the judge, so they have no realistic way to prevent it.²⁰¹ To some extent, of course, he is correct. The opposing lawyer can determine neither whether another lawyer is wearing a blue suit on purpose or by chance, nor if she is consciously trying to take advantage of primacy and recency effects. However, effects from such events are going to be present whether intended or not. The lawyer must wear some kind of clothing, and some arguments must come first and last. Fear that a deliberate attempt to use such techniques to influence the jury will go undetected is misplaced if nothing could be done to remedy it if such a ploy were detected. Such nonevidentiary effects are not eliminated if we make the lawyer change her suit or make another argument first—they are merely changed.

The more serious kinds of diversionary activities are those that seek to add something to the trial that would not otherwise be present. Such activities are carried out in the open and are readily detectable. It should be obvious if during *voir dire* an attorney talks about herself, tries to indoctrinate on the law or favorable facts, tries to precommit jurors to a certain verdict, or injects racial or other emotional issues. It also should be obvious if the attorney tries to insinuate unprovable or untrue facts or appeals to the jurors' emotions during any stage of the trial, brings in large numbers of spectators, prolongs the presentation of evidence, or encourages jury nullification. That in a large number of cases the propriety of such tactics is reviewed on appeal demonstrates that lawyers and judges can detect their use.²⁰² In such cases, the only thing not detectable is whether the attorney was trying to use psychology or her own intuition. Rules of trial procedure have never turned on such a distinction.

IV. THE BENEFITS OF PSYCHOLOGIST-LAWYER COLLABORATION

The critics of psychologist-lawyer collaboration speculate about possible

199. See, e.g., *Walker v. Superior Court*, 155 Cal. App. 2d 134, 139-40, 317 P.2d 130, 133-34 (1957); *State v. Storrs*, 112 Wash. 675, 677-79, 192 P. 984, 985-86 (1920).

200. See *State v. Thomas*, 239 N.W.2d 455, 456-57 (Minn. 1976) (error in closing argument to suggest that jury circumvent law); *People v. Fields*, 27 A.D. 2d 736, 277 N.Y.S.2d 21 (1967) (similar); *Lewes v. John Crane & Sons*, 78 Vt. 216, 219-20, 62 A. 60, 61 (1905) (attorneys prohibited in opening statement from suggesting that jurors can do anything other than take law from judge). Professor Gold's position that jury nullification based on community values is a fundamental part of the legitimacy of the trial process is unique. Most legal scholars, and appellate courts in 48 out of the 50 states, believe that juries have no power to disregard state or federal law that conflicts with community values. See generally Schefflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51 (Autumn 1980) (surveying issue). It is difficult to imagine that Gold really means a jury could apply community values to permit the local school board to segregate classes and require mandatory Christian prayer, however much that decision might reflect prevailing community values. The only area in which juries effectively have nullification power is in criminal cases in which an acquittal is unreviewable.

201. See Gold, *supra* note 1, at 483, 497, 504, 511.

202. See *supra* notes 153-200.

negative aspects of this cooperation, separating such aspects from the broader context of general psycholegal research. They seem to assume that psychology is only useful for deceiving jurors and interfering with accurate verdicts. They completely overlook the possibility that the truth-seeking function of trials might benefit from this collaboration. Taken as a whole, psycholegal research is not aimed predominantly at improving adversarial presentation at the expense of verdict accuracy, but at improving the fairness of trials and the reliability of verdicts.²⁰³ This interdisciplinary collaboration has, on balance, improved the just operation of the trial system, and has the potential to improve it even more.

Psychologists have discovered numerous flaws in the structure of the legal system that raise doubts about the accuracy of many jury verdicts. Perhaps the most significant of such research demonstrates that, although jurors tend to accept eyewitness testimony unquestioningly, in fact eyewitnesses often are wrong. Many factors can reduce the reliability of an eyewitness' initial perception,²⁰⁴ cause deterioration of memory,²⁰⁵ or induce inaccurate recollection.²⁰⁶ Psychologists also have demonstrated that other factors may cast doubt on the accuracy of verdicts. Many traditional pattern jury instructions are too complex and difficult for jurors to understand.²⁰⁷ Some accepted rules of trial procedure have been shown to have unintended biasing effects.²⁰⁸ For example, it has been

203. Psycholegal research has also proved beneficial to the structuring of fair methods of alternative dispute resolution, such as negotiation and mediation. The research has assessed the effectiveness of various dispute resolution strategies in terms of outcomes, perceptions of fairness, and satisfaction among parties. See Heuer & Penrod, *Procedural Preference as a Function of Conflict Intensity*, 51 J. PERSONALITY & SOC. PSYCHOLOGY 700 (1986); Houlden, *Impact of Procedural Modifications on Evaluations of Plea Bargaining*, 15 LAW & SOC'Y REV. 267 (1981); Rubin, *Experimental Research on Third-Party Intervention in Conflict: Toward Some Generalizations*, 87 PSYCHOLOGICAL BULL. 379 (1980). A full description of this research is beyond the scope of this Article.

204. E.g., B. CLIFFORD & R. BULL, *THE PSYCHOLOGY OF PERSON IDENTIFICATION* 82-89 (1978) (cross-racial identifications are less accurate than own race identifications); Hintzman, *Repetition and Memory*, in 10 *THE PSYCHOLOGY OF LEARNING AND MOTIVATION* 47, 53-54 (G. Bower ed. 1976) (eyewitness identifications are not very accurate if viewing time was short); Penrod, Loftus & Winkler, *supra* note 48, at 124-44 (situational factors such as stress, seriousness of the offense viewed, and presence of weapons or disguises affect eyewitness accuracy). The research is summarized in *EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES*, *supra* note 50; Levine & Tapp, *Eyewitness Identification: Problems and Pitfalls*, in *THE CRIMINAL JUSTICE SYSTEM: A SOCIAL-PSYCHOLOGICAL ANALYSIS*, *supra* note 81, at 99.

205. E.g., Shepard, *Recognition Memory for Words, Sentences, and Pictures*, 6 J. VERBAL LEARNING & VERBAL BEHAV. 156 (1967) (identifications less accurate as the time between viewing and identification increases).

206. For example, inaccurate recall can be induced by police questioning, see E. LOFTUS, *supra* note 48, at 88-109; Loftus & Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585 (1974) (questions containing suggestions as to how the questioner views the event affects how witnesses recall it), or by suggestive lineup procedures, see Malpass & Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOLOGY 482 (1981); Wells, *The Psychology of Lineup Identifications*, 14 J. APPLIED SOC. PSYCHOLOGY 89 (1984).

207. See A. ELWORK, B. SALES & J. ALFINI, *supra* note 57, at 3-24; Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1318-20 (1979); Elwork, Sales & Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163, 178 (1977); Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153 (1982).

208. Some of the research is summarized in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE*, *supra* note 48; J. THIBAUT & L. WALKER, *supra* note 70, at 54-66; Lind, *The Psychology of Courtroom Procedure*, in *THE PSYCHOLOGY OF THE COURTROOM*, *supra* note 48, at 24-27.

demonstrated that jurors can be biased against a defendant and inclined to believe him guilty in the absence of evidence if he is charged with multiple offenses²⁰⁹ or if they hear evidence of a criminal record.²¹⁰ Attempts to correct the biasing effect of such evidence with a limiting or cautionary instruction, long assumed to be effective by the courts, often turn out to aggravate rather than ameliorate the prejudice.²¹¹

Psychological research not only identifies such flaws, but offers concrete suggestions for improving these weaknesses in our legal system. Psychologists have discovered ways in which law enforcement officials could improve eyewitness accuracy²¹² and have suggested how courts can assist jurors in discriminating between accurate and inaccurate identifications.²¹³ They have used psycholinguistic principles to devise techniques for making instructions more comprehensible²¹⁴ and have discovered that some general instructions may only be effective if given at the start, rather than the end, of trial.²¹⁵ Fairer, less biased, and more accurate trials would be possible if stricter standards for allowing joinder of offenses were imposed,²¹⁶ or if instructions to disregard generally were eliminated in favor of simple rulings sustaining the inadmissibility of prejudicial evidence.²¹⁷

209. See Bordens & Horowitz, *supra* note 59, at 366-69; Bordens & Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 LAW & HUM. BEHAV. 339 (1985); Greene & Loftus, *When Crimes Are Joined at Trial*, 9 LAW & HUM. BEHAV. 193 (1985); Horowitz, Bordens & Feldman, *A Comparison of Verdicts Obtained in Severed and Joined Criminal Trials*, 10 J. APPLIED SOC. PSYCHOLOGY 444 (1980); Tanford & Penrod, *supra* note 53; Tanford & Penrod, *supra* note 59; Tanford, Penrod & Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 LAW & HUM. BEHAV. 319, 332-335 (1985).

210. See Cornish & Sealy, *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208, 215-18; Doob & Kirshenbaum, *supra* note 54, at 93-96; Hans & Doob, *supra* note 86, at 242-43; Wissler & Saks, *supra* note 54, at 43-47.

211. See Sue, Smith, & Caldwell, *supra* note 58, at 351-53; Tanford & Cox, *Decision Processes in Civil Cases: The Impact of Impeachment Evidence on Liability and Credibility Judgments*, 2 SOC. BEHAV. (1987) (giving limiting instruction on use of convictions for impeachment aggravates inference of negative character); Thompson, Fong & Rosenhan, *supra* note 58; Wolf & Montgomery, *supra* note 58, at 216-18.

212. See, e.g., Krafka & Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. PERSONALITY & SOC. PSYCHOLOGY 58 (1985) (using memory aids, such as context reinstatement, may further improve eyewitness identifications); Lipton, *On the Psychology of Eyewitness Testimony*, 62 J. APPLIED PSYCHOLOGY 90, 94 (1977) (witnesses describing an event in narrative form may be more accurate than when answering specific questions); Wells, *Applied Eyewitness Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 1546 (1978) (suggesting that eyewitness accuracy can be improved through better lineup and interrogation methods); Wells, *supra* note 206 (using an initial blank lineup not containing the actual suspect may lead to more accurate identifications in a second lineup).

213. See Wells, *supra* note 98, at 89-91 (use of psychological experts to educate jurors improves their ability to discriminate between accurate and inaccurate identifications).

214. See, e.g., A. ELWORK, B. SALES & J. ALFINI, *supra* note 57, at 145-80.

215. See Kassir & Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, 37 J. PERSONALITY & SOC. PSYCHOLOGY 1877 (1979) (instruction about proof beyond reasonable doubt). Indeed, the modern trend is to give such general instructions at the beginning. See, e.g., FED. JUDICIAL CENTER COMM. TO STUDY CRIMINAL JURY INSTRUCTIONS, *PATTERN CRIMINAL JURY INSTRUCTIONS* 1-2, 5 (1982).

216. See Bordens & Horowitz, *supra* note 209; Greene & Loftus, *supra* note 209; Horowitz, Bordens & Feldman, *supra* note 209; Tanford & Penrod, *supra* note 53.

217. See Wolf & Montgomery, *supra* note 58. Experiments by one of the authors of this article show that this issue is complex. In at least some cases, when the inadmissible evidence does not

Psycholegal research also can contribute to lawmakers' decisions on how best to structure the trial system. It has played a central role in formulating two important legal rules. The first concerns acceptable jury size. Psychological research shows that smaller juries are less representative of the community, are less likely to recall significant trial information, spend less time deliberating, and are more likely to pressure minority factions into conformity. Psychologists have found that twelve-member juries produce better verdicts than six-member juries, and that verdict reliability deteriorates significantly with fewer than six jurors.²¹⁸ The United States Supreme Court in *Ballew v. Georgia*²¹⁹ followed only part of the findings and set the minimum constitutionally acceptable jury at six persons, apparently willing to give up some verdict reliability for the sake of efficiency and federalism.

The second issue to which psycholegal research could make a significant contribution concerns the effect of "death qualifying" a jury. Research has clearly shown that by excluding from capital juries those persons who are unwilling to consider the death penalty, the resulting jury is conviction prone,²²⁰ unrepresentative of the community,²²¹ and attitudinally biased.²²² Further evidence suggests that the death penalty questioning process itself produces additional biases in jurors.²²³ On this issue, the Supreme Court has chosen to ignore the research and permit such biased juries to decide guilt despite the reduced likelihood of reliable verdicts.²²⁴ In response, psychologists have begun experi-

involve criminality or immorality, instructions to disregard can reduce, although not eliminate, prejudice. Cox & Tanford, *Effects of Evidence and Instructions in Civil Trials: An Experimental Investigation of Rules of Admissibility* (1987) (unpublished manuscript) (compromise offers, remedial measures).

218. See R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 70, at 27-36; Kerr, Atkin, Stasser, Meek, Holt & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. PERSONALITY & SOC. PSYCHOLOGY 282 (1976); Roper, *Jury Size and Verdict Consistency: "A Line Has to Be Drawn Somewhere,"* 14 LAW & SOC'Y REV. 977 (1980); Tanke & Tanke, *Getting Off a Slippery Slope: Social Science in the Judicial Process*, 34 AM. PSYCHOLOGIST 1130 (1979); Valenti & Downing, *Differential Effects of Jury Size on Verdicts Following Deliberation as a Function of Apparent Guilt of a Defendant*, 32 J. PERSONALITY & SOC. PSYCHOLOGY 655 (1975). Perhaps the best explanation and analysis of the jury size research is M. SAKS, *JURY VERDICTS* (1977).

219. 435 U.S. 223, 229-44 (1978).

220. American Psychological Ass'n, *In the Supreme Court of the United States: Lockhart v. McCree*, 42 AM. PSYCHOLOGIST 59 (1987) (research clear and convincing); see Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53, 67-78 (1984); Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567, 582-85 (1971).

221. See Bronson, *On the Conviction-Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1, 15-30 (1970); Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 39-48 (1984).

222. See Fitzgerald & Ellsworth, *supra* note 221, at 39-48; Jurow, *supra* note 220, at 585-88; Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1258-62 (1974).

223. See Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984); Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133 (1984). Some research has indicated that different questioning procedures can reduce the prejudice of the death qualification process. See Cox & Tanford, *An Alternative Method of Capital Jury Selection* (1987) (unpublished manuscript).

224. *Lockhart v. McCree*, 106 S. Ct. 1758 (1986). Justice Rehnquist's majority opinion, which tried to explain away the psychological research, is an excellent example of how laypersons tend to reject scientific knowledge in favor of folklore and traditional ignorance. *Id.* at 1762-64.

menting with different questioning procedures to see if they can increase the pool of eligible jurors and thereby reduce the biasing effect normally associated with death qualification.²²⁵

Psychological research also benefits the trial system in another way. It can help lawyers identify and counteract biases and prejudices in jurors that would otherwise interfere with their ability to reach reliable verdicts. Lawyers who collaborate with psychologists or read the psychological literature can gather more reliable evidence before trial, more effectively identify and eliminate biased jurors during *voir dire*, reduce the biasing effect of evidence presented during trial, and present clearer and more understandable arguments.

The work of social scientists has made possible the gathering of more reliable information from witnesses before trial. For example, it has been demonstrated that witnesses are more accurate when they describe an event in narrative form than when they are asked specific questions,²²⁶ because the way questions are worded actually can affect a witness' memory.²²⁷ Witnesses also are more accurate if interviewed promptly, because their memories of what happened deteriorate drastically after a few days.²²⁸ Social scientists have discovered that interviewer bias can influence the fact-gathering process and have offered suggestions for reducing its impact.²²⁹ They have made lawyers aware of the importance of nonverbal communication and cues,²³⁰ and of how to use these cues to detect deception.²³¹ Much also has been written about inhibitors and facilitators of communication,²³² including strategies for overcoming witness reluctance to cooperate.²³³ Psychologists have even shown that where the interviewer sits in relation to the witness affects the flow of information.²³⁴ This knowledge enables investigators to conduct better interviews with witnesses, which produce more reliable information and facilitate more informed jury decisions.

When cases go to trial, most people would probably agree it is important to seat an impartial and unbiased jury that will fairly hear what both sides have to say.²³⁵ Psychologists have studied inherent juror biases and have suggested ways lawyers can uncover them or reduce their probable impact. Survey re-

225. See Cox & Tanford, *supra* note 223.

226. See Lipton, *supra* note 212.

227. See Loftus & Palmer, *supra* note 206.

228. See Shepard, *supra* note 205.

229. See, e.g., R. KAHN & C. CANNELL, *THE DYNAMICS OF INTERVIEWING* 59-61, 180-83, 187-93 (1957).

230. See, e.g., R. BIRDWHISTELL, *KINESICS AND CONTEXT* 157-58 (1970).

231. See Ekman & Friesen, *Nonverbal Leakage and Clues to Deception*, 32 *PSYCHIATRY* 88, 93-94 (1969).

232. E.g., R. GORDEN, *INTERVIEWING: STRATEGY, TECHNIQUES, AND TACTICS* 104-09, 112-19, 123-33 (rev. ed. 1975).

233. See *id.* at 190-92, 451-52; R. KAHN & C. CANNELL, *supra* note 229, at 143-48.

234. See Broekmann & Moller, *Preferred Seating Position and Distance in Various Situations*, 20 *J. COUNSELING PSYCHOLOGY* 504 (1973); Patterson & Sechrest, *Interpersonal Distance and Impression Formation*, 38 *J. PERSONALITY* 161 (1970).

235. But see *Lockhart v. McCree*, 106 S. Ct. 1758, 1764, 1766 (1986) (jury biased in favor of state is constitutionally acceptable to further state's interest in enforcing death penalty laws).

search techniques have been devised which can be used prior to trial to uncover community biases that could prevent a fair and impartial trial in that venue.²³⁶ Psychologists also have identified certain personality traits, present in large segments of the population, which tend to predispose such persons toward particular verdicts regardless of evidence, and have suggested ways in which these traits can be identified in a panel of prospective jurors.²³⁷ Social psychological research on attitudes has identified ways in which the negative impact of inherent prejudices can be reduced during jury selection. Simply forewarning the jurors about specific biases and prejudices that might arise during trial can lessen their impact on the verdict.²³⁸ Obtaining public commitments from the jurors during *voir dire* to follow the law and put aside biases helps assure that the promised behavior will be enacted.²³⁹

Psychological research also can help attorneys identify which prospective jurors might be biased against their sides in particular cases. Psychologists have demonstrated that the traditional practice of asking jurors fairly specific questions may not effectively identify biased jurors.²⁴⁰ They have studied the terribly difficult problem of obtaining honest answers from prospective jurors in a formal, public setting in which they will be inclined to give socially acceptable responses.²⁴¹ They have shown that open-ended individual questions that encourage jurors to talk are more apt to uncover juror prejudices, although significant self-disclosure is likely to occur only through nonpublic questioning.²⁴² Studies have indicated that jurors may disclose more about themselves when the attorney stands relatively close to the juror and appears to be of slightly higher

236. See Nietzel & Dillehay, *Psychologists as Consultants for Changes of Venue: The Use of Public Opinion Surveys*, 7 LAW & HUM. BEHAV. 309 (1983). Surveys demonstrating bias have been successfully used to achieve changes of venue when fair trials would have been unlikely in the original venue. See McConahay, Mullin & Frederick, *supra* note 93, at 209-13; Vidmar & Judson, *The Use of Social Science Data in a Change of Venue Application: A Case Study*, 59 CANADIAN B. REV. 76 (1981).

237. See T. ADORNO, E. FRENKEL-BRUNSWICK, D. LEVINSON & R. SANFORD, *THE AUTHORITARIAN PERSONALITY* 224-42 (1950); Berkowitz & Wolkon, *A Forced Choice Form of the F-Scale—Free From Acquiescent Response Set*, 27 SOCIOMETRY 54 (1964); Boehm, *Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 1968 WIS. L. REV. 734, 738-50; Fitzgerald & Ellsworth, *supra* note 221, at 39-50; Jurov, *supra* note 220, at 588-98.

238. See Linz & Penrod, *supra* note 72, at 17-24; McGuire, *Inducing Resistance to Persuasion*, in 1 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 191 (L. Berkowitz ed. 1964); McGuire, *Attitudes and Attitude Change*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 45, at 233, 263-64, 272-73; Petty & Cacioppo, *Forewarning, Cognitive Responding, and Resistance to Persuasion*, 35 J. PERSONALITY & SOC. PSYCHOLOGY 645 (1977).

239. See McGuire, *Attitudes and Attitude Change*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 45, at 293; Pallak, Cook & Sullivan, *Commitment and Energy Conservation*, in 1 APPLIED SOCIAL PSYCHOLOGY ANNUAL 235 (L. Bickman ed. 1981). For background placing commitments in a broader theoretical context, see C. KIESLER, *THE PSYCHOLOGY OF COMMITMENT* (1971); R. WICKLUND & J. BREHM, *PERSPECTIVES ON COGNITIVE DISSONANCE* (1976).

240. See Balch, Griffiths, Hall & Winfree, *The Socialization of Jurors: The Voir Dire as a Rite of Passage*, 4 J. CRIM. JUST. 271 (1976); Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 505-21 (1965).

241. See Helmreich & Collins, *Situational Determinants of Affiliative Preference Under Stress*, 6 J. PERSONALITY & SOC. PSYCHOLOGY 79 (1967); McGhee & Teevan, *Conformity Behavior and Need for Affiliation*, 72 J. SOC. PSYCHOLOGY 117 (1967).

242. See Suggs & Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 260 (1981).

social status.²⁴³ Psychologists have tried to provide guides to interpreting non-verbal behavior cues which can indicate when more probing is necessary or even when a juror is being deceptive.²⁴⁴

Psychologists also have suggested how lawyers can most effectively use this information to challenge jurors likely to be biased in favor of the other side.²⁴⁵ Their research has shown that, contrary to many traditional "common sense" theories of exercising challenges,²⁴⁶ few general characteristics of jurors will predict how they will decide particular cases.²⁴⁷ Instead, psychological research suggests that lawyers should assess specific attitudes relevant to each particular case, because specific attitudes are likely to be better predictors of juror behavior than are general attitudes.²⁴⁸ They caution against making decisions on which jurors to challenge based on stereotypes.²⁴⁹ Reducing the frequency with which lawyers rely on racial and ethnic stereotypes also has had the side effect of improving the appearance of justice.

In the trial's evidence presentation phase, psycholegal research can help attorneys present evidence more coherently so that it is heard, understood, and remembered by jurors. For example, researchers on the Duke Law and Language Project discovered that witnesses who used "powerless" speech patterns associated with low social status were viewed by jurors as less convincing, truthful, competent, intelligent, and trustworthy than other witnesses.²⁵⁰ Work on primacy and recency effects, although it has been overemphasized, has helped attorneys structure witness testimony so that its important parts are emphasized and more likely to be remembered and understood.²⁵¹ Similar work has shown the importance of repetition and vivid presentation techniques in helping the

243. *Id.* at 253-56, 262-64.

244. See Miller & Burgoon, *Factors Affecting Assessments of Witness Credibility*, in *THE PSYCHOLOGY OF THE COURTROOM*, *supra* note 48, at 169; Suggs & Sales, *Using Communication Cues to Evaluate Prospective Jurors During the Voir Dire*, 20 ARIZ. L. REV. 629, 632-38 (1978).

245. In his article, Professor Gold uses this same research on how to identify biased jurors to argue that lawyers will identify favorably biased jurors, put them on the jury, and thereby create a biased jury. He overlooks the fact that lawyers have no power to select a favorably biased juror to sit; lawyers may only remove a negatively biased juror. See *supra* note 123. If both lawyers identify and remove those jurors most extremely biased against them, the resulting jury will obviously be more impartial than it otherwise would have been.

246. See, e.g., 1 F. LANE, GOLDSTEIN TRIAL TECHNIQUE §§ 9.29 -32 (2d ed. 1971) (suggesting, for example, that in personal injury cases, overweight men between 30 and 55 years of age with Irish, French, Spanish, Italian, or Jewish heritage and no prior jury service are desirable for plaintiff).

247. See R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 70, at 121-50; Hans & Vidmar, *Jury Selection*, in *THE PSYCHOLOGY OF THE COURTROOM*, *supra* note 48, at 39, 63-72.

248. See generally I. AJZEN & M. FISHBEIN, *UNDERSTANDING ATTITUDES AND PREDICTING SOCIAL BEHAVIOR* (1980); M. FISHBEIN & I. AJZEN, *BELIEF, ATTITUDE, INTENTION AND BEHAVIOR* (1975) (thorough general reviews and difficulties of predicting specific behavior based on attitudes).

249. See R. HASTIE, S. PENROD, & N. PENNINGTON, *supra* note 70, at 149-50.

250. See Conley, O'Barr & Lind, *supra* note 6, at 1385-89.

251. See J. THIBAUT & L. WALKER, *supra* note 70, at 54-66; Anderson, *Integration Theory Applied to Cognitive Responses and Attitudes*, in *COGNITIVE RESPONSES IN PERSUASION* 371 (R. Petty, T. Ostrom, & T. Brock eds. 1981); Lawson, *supra* note 52, at 541-42. But see *supra* text accompanying notes 79-80 (caution about primacy effect data).

jury to remember the important evidence.²⁵²

The research efforts of psychologists also have helped attorneys present their arguments more clearly, so that their sides of cases are understood by the jury. The research has shown, for example, that arguments should be simplified and kept focused on a few main points, because trying to resolve too many minor issues is only confusing.²⁵³ The literature on primacy and recency effects²⁵⁴ has helped attorneys structure their arguments so the important issues and factual disputes get emphasized and the jury is not misled into focusing on unimportant issues. Similarly, research has shown that jurors remember and understand complicated facts better if they are written on an exhibit.²⁵⁵ Psychologists also have discovered ways in which attorneys may unintentionally interfere with their own presentations by making erroneous psychological assumptions. Deliberate attempts to speak slowly in order to be understood better may actually result in a decrease in comprehension.²⁵⁶ Attorneys may intentionally stand far away from the jury to avoid making them uncomfortable, or very close to adopt a "country lawyer" approach, hoping thereby to facilitate comprehension. Again, the result in either case will probably be a reduction in successful communication.²⁵⁷ Similarly, attorneys may stand behind a lectern in an effort to appear more expert, not knowing that such positioning has a negative effect on communication.²⁵⁸ Psychologists also have debunked the old trial lawyer's myth that they should leave an important conclusion implicit, because if jurors draw the conclusion themselves, they will be more committed to it. The most likely real result of such a strategy is that jurors will not understand the attorney's message.²⁵⁹ Finally, psychological research has itself provided at least a partial answer to the concern that the opposing lawyer may try to deceive the jury or arouse their biases. By exposing an opponent's tricks, especially if the jury can be forewarned, an attorney can reduce the biasing effect to a minimum.²⁶⁰

It is certainly true that the legal profession does not always use research findings in the way psychologists would like them to be used. Some of the exper-

252. See Cacioppo & Petty, *Effects of Message Repetition and Position on Cognitive Response, Recall, and Persuasion*, 37 J. PERSONALITY & SOC. PSYCHOLOGY 97 (1979); McCullough & Ostrom, *Repetition of Highly Similar Messages and Attitude Changes*, 59 J. APPLIED PSYCHOLOGY 395 (1974).

253. See Calder, Insko & Yandell, *supra* note 91; Linz & Penrod, *supra* note 72, at 28-29.

254. See Insko, Lind & LaTour, *supra* note 52; Lind & Ke, *Opening and Closing Statements*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE, *supra* note 48, at 229 (recommends opening arguments instead of statements to overcome potential bias).

255. Chaiken & Eagley, *Communication Modality as a Determinant of Message Persuasiveness and Message Comprehensibility*, 34 J. PERSONALITY & SOC. PSYCHOLOGY 605 (1976); Linz & Penrod, *supra* note 72, at 7-8.

256. See Miller, Maruyama, Beaber & Valone, *supra* note 51, at 617.

257. See Albert & Dabbs, *Physical Distance and Persuasion*, 15 J. PERSONALITY & SOC. PSYCHOLOGY 265 (1970).

258. See J. RUESCH & W. KEES, NONVERBAL COMMUNICATION: NOTES ON THE VISUAL PERCEPTION OF HUMAN RELATIONS 128 (1956).

259. See Linz & Penrod, *supra* note 72, at 26-27; McGuire, *Attitudes and Attitude Change*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 45, at 271-73.

260. See Linz & Penrod, *supra* note 72, at 17-24; Petty & Cacioppo, *supra* note 238.

iments by psychologists could be used by an unscrupulous attorney to try to divert the jury away from the merits of the case. Lawyers with losing causes have been trying to do this for centuries; there is no evidence they have been successful, and the trial system seems to have survived. But we cannot let concerns about the possibility that science will be misused blind us to its potential benefits. Even if the critics were justified in their fears, they would not make a convincing case that, on balance, we need to control psychologist-lawyer collaboration. In this case, the benefits seem worth the risk.

V. CONCLUSION

Science has not created another monster that must be controlled. Critics like Professor Gold who fear that psychologists have produced superlawyers capable of controlling juries and determining the outcome of trials have misunderstood both the psychological and legal nature of the trial process. Perhaps they have taken too seriously the sales pitches of the entrepreneurs who promise great results to lawyers who will hire them as consultants, and have read too little of the actual scientific literature. That research refutes the notion that attorneys can influence jurors to make decisions on a subconscious level based on nonevidentiary factors. Instead, psycholegal research demonstrates the existence of latent biases and tests ways in which their impact can be reduced so that fewer verdicts will be decided on nonevidentiary bases. Lawyers who try to use so-called psychological persuasion techniques to deceive jurors and divert them from the evidence are unlikely to be successful, and will find few competent psychologists willing to assist in deliberate juror deception. Within our adversarial trial system, psychological research is of greatest benefit when lawyers use accurate understanding of jurors' cognitive processes to both counteract existing biases and make sure their clients' sides are heard and understood.

What the critics' fears boil down to is the worry that psychology can turn a bad case into a winner. If one side is weak on the facts, can it get back in the game by relying on psychology? Leading psychologists whose lives are dedicated to this research think not:

The social psychologist cannot provide the attorney with a simple set of sure fire tricks that will automatically increase persuasiveness in the courtroom [U]sing the opening statement as a vehicle for providing the jurors with a theme, theory, or story will be of little use if the attorney's theory is weak or implausible. . . . Likewise, it is unlikely that presenting the jurors with counterarguments to your opponent's position will be of value if the counterarguments are weak or unconvincing. The same holds true in the presentation of expert witnesses. The attorney cannot expect a highly credible witness to carry the day if her testimony is weak. Similarly, the attorney should not underestimate the impact of the testimony of the opponent's low credibility witness. While social psychologists can assist the trial attorney by making an already good case better, they cannot turn a bad case into a good

one.²⁶¹

Psychological persuasion techniques are most productively employed to further fair and impartial trials, to identify and weed out the most biased persons before they get on the jury, to reinforce the evidence, and to assist the jurors in overcoming their inherent biases so they can return better verdicts.

The real concern is the possibility of disparity of resources. If one side has money and access to psychological consultants, might it be able to swing the jury its way in close cases? Perhaps. The problem of disparity of resources, including legal talent, is not new; it has plagued our system for generations. At least in this case, however, the solution is obvious. The solution is not to control or ban the use of psychology, as some have suggested,²⁶² but to continue to disseminate scientific information to all lawyers and to expand what is already being made available. Collaboration between psychology and law through law schools, bar associations, professional journals, and continuing legal school education programs should be encouraged. Lawyers should be educated in rudimentary research methods and statistics so they can learn to recognize valid advice and make productive use of psychological knowledge. If all lawyers knew enough psychology to maximize their courtroom presentation, this would be one area in which disparate resources would not be a problem. Both the reliability of verdicts and the adversarial function of trials would improve. We should not fear the infusion of scientific knowledge into the courtroom. We should welcome it.

261. Linz & Penrod, *supra* note 72, at 46-47.

262. See Gold, *supra* note 1, at 509-14; Etzioni, *Threatening the Jury Trial*, Washington Post, May 26, 1974, at C3, col. 1.