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# CRIMINOLOGY

## JUROR REACTIONS TO ATTORNEYS AT TRIAL\*

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It is often suggested that attorneys have a powerful influence on trial outcomes, and that jurors react as much or more to the attorneys as to the testimony presented by witnesses. Yet few studies have investigated the extent of that influence, the factors that affect juror perceptions of attorneys, or how those perceptions affect trial outcomes. The structure of our study of jury decisionmaking in antitrust and death penalty cases and the measures we collected permit us to explore how jurors respond to what attorneys say and do.

Analysis of the different ways that attorneys can influence and impress jurors can be found in both trial advocacy books<sup>1</sup> and law journal articles.<sup>2</sup> The widely available litigation advice, though inconsistent, uniformly assumes that the lawyer's behavior is crucial to

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<sup>1</sup> See F. LEE BAILEY & HENRY B. ROTHBLATT, *SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS* (2d ed. 1985); THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* (1980); ALAN E. MORRILL, *TRIAL DIPLOMACY* (2d ed. 1972).

<sup>2</sup> Daniel G. Linz & Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 *LAW & PSYCHOL. REV.* 1 (1984).

the outcome of the case. The empirical literature on juror reactions to attorneys reveals a less extensive collection of findings. Several studies have shown how variations in opening statements can influence outcomes.<sup>3</sup> A few have tested various cross-examination tactics and found varying effects on the evaluation of the attorneys and juror verdict.<sup>4</sup>

In addition to examining only a few aspects of attorney performance, the small body of literature on juror reactions to attorneys generally has studied college students rather than jurors or jury-eligible adults.<sup>5</sup> Only a handful of empirical studies have examined the post-verdict reactions of jurors in real trials<sup>6</sup> and none of the simulations has systematically analyzed the discussions about attorneys during deliberations.

Our research, which employs an elaborate set of simulations using citizens called for jury service, explores a variety of juror reactions to attorneys. These reactions include references the jurors made to the attorneys during their deliberations. It also includes assessments of the attorneys based on the attorneys' approach to cross-examination of expert witnesses. We also consider the common claim that opening statements effectively determine the outcome of the case by convincing 80-90% of jurors what the outcome should be. This attempt to take a more comprehensive look at juror reactions to attorneys reveals that the attorneys, like other trial participants, contribute to, but do not single-handedly determine, the outcome of a trial. Even stronger evidence about the effects of attorneys on juror decisions would be provided by a study which employed a large sample of

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<sup>3</sup> See E. Allen Lind & Gina Y. Ke, *Opening and Closing Statements*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 229, 229-52 (Saul M. Kassir & Lawrence S. Wrightsman eds. 1985); Thomas A. Pyszczynski et al., *Opening Statements in a Jury Trial: The Effect of Promising More Than the Evidence Can Show*, 11 *J. APPLIED SOC. PSYCHOL.* 434, 434-44 (1981); Thomas A. Pyszczynski & Lawrence S. Wrightsman, *The Effects of Opening Statements on Mock Jurors' Verdicts in a Simulated Criminal Trial*, 11 *J. APPLIED SOC. PSYCHOL.* 301, 301-13 (1981).

<sup>4</sup> See Margaret S. Gibbs et al., *Cross-Examination of the Expert Witness: Do Hostile Tactics Affect Impressions of a Simulated Jury?*, 7 *BEHAV. SCI. & L.* 275, 375-81 (1989) (hostile approach to cross-examination of expert witnesses does not consistently reduce ratings of witness effectiveness); Saul M. Kassir et al., *Dirty Tricks of Cross-Examination*, 14 *LAW & HUM. BEHAV.* 373, 373-83 (1990) (presumptuous cross-examination questions may influence a juror's perception of a witness depending on the witness's and attorney's reactions); Robin Reed, *Jury Simulation: The Impact of a Judge's Instructions and Attorney Tactics on Decisionmaking*, 71 *J. CRIM. & CRIMINOLOGY* 68, 68-72 (1980) (the use of high levels of impeachment and incrimination tactics does not affect verdicts).

<sup>5</sup> JOHN GUINTEHER, *THE JURY IN AMERICA* 221 (1980).

<sup>6</sup> See *id.*; NORBERT L. KERR, *THE CRIMINAL JUSTICE SYSTEM: A SOCIAL-PSYCHOLOGICAL ANALYSIS* 261 (1982); Valerie P. Hans & Krista Sweigart, *Jurors' Views of Civil Lawyers*, 68 *IND. L.J.* 1297 (1993).

cases and attorneys. However, our use of two very different cases<sup>7</sup> provides some evidence for the generalizability of our findings on juror reactions to attorneys.

### I. DESIGN OF THE STUDY

The participants in this research were citizens serving as jurors in two Cook County (Illinois) courthouses. Cook County uses a one day/one trial system so that if a juror is selected for a trial, the juror serves until the trial ends. If not selected for a trial, the juror completes his or her service at the end of the day. On days when the jury venire exceeded court needs, we invited randomly selected jurors to participate in our research; over 90% agreed.

*Main Study:* We showed 1,925 jurors a simulated videotaped case involving either an antitrust price-fixing case (one of twelve versions) or a death penalty hearing (one of seven versions).

*The Antitrust Case:* The antitrust case involved a price-fixing agreement in which two suppliers of crushed rock who controlled 70% of the business in Colorado agreed to set the same price for their product. The plaintiff was a road construction company, a long-time customer of the two suppliers. An earlier trial established that the defendants had indeed formed an illegal price-fixing agreement. The issue for the jurors in this trial was to determine what damages were suffered by the plaintiff as a result of the agreement.

*The Death Penalty Case:* The offense which led to the death penalty hearing was the armed robbery and murder of a stranger who the defendant robbed in order to buy beer. The defendant was a thirty-year-old man with a history of six prior convictions, including two armed robberies. The prosecution witnesses included the defendant's companion at the time of the offense and a psychiatrist who testified about the dangerousness of the defendant. The defense witnesses included the defendant, his sister, a former employer, and, in one of the versions of the case, a psychologist who testified about the defendant's potential for change.

We began by administering a brief questionnaire that included background questions similar to those that jurors would answer during a jury selection: demographic characteristics and attitudinal information. The jurors then viewed one version of the videotaped trial. In the antitrust case, there were twelve versions of the trial: six differ-

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<sup>7</sup> The cases we used were a death penalty hearing in which strong values were implicated and an antitrust case on damages in which the jurors were faced with unfamiliar and complex statistical issues.

ent instruction conditions<sup>8</sup> combined with two different expert conditions.<sup>9</sup> In the death penalty case, there were seven versions of the trial: two different instruction conditions<sup>10</sup> combined with three different expert conditions, plus an additional version to test a fourth expert condition.<sup>11</sup> Each trial lasted approximately one hour and fifteen minutes, and each contained all elements of a trial from opening statements to judicial instructions. The roles of the judge, attorneys, and witnesses were played by professional actors who followed a prepared script.

After viewing the trial, jurors each filled out a brief form indicating their predeliberation vote. In the antitrust case the question was how much the plaintiff should receive in damages, and in the death penalty hearing it was whether the death penalty should be imposed on the defendant.<sup>12</sup> At this point, six jurors in the antitrust case (twelve in death penalty case<sup>13</sup>) were randomly selected to become the deliberating jury.<sup>14</sup> The jury was then taken to lunch as a group

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<sup>8</sup> The instruction conditions varied in the information they provided to jurors about the fact that the damage award would be trebled. See Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences*, 26 LAW & SOC'Y REV. 513 (1992).

<sup>9</sup> See *infra* Section IV.A for a description of the two expert conditions.

<sup>10</sup> In one condition, jurors were instructed that the defendant would be sentenced to prison if not sentenced to death, but they were given no information about how long that sentence would be. In the other condition, jurors were told that if the defendant was not sentenced to death, he would be sentenced to life in prison without the possibility of parole.

<sup>11</sup> See *infra* Section IV.B for a description of the expert conditions.

<sup>12</sup> The question in the antitrust case was, "Would you award damages to the plaintiff, Granite Road Company? (yes or no) If yes, how much would you award? (\$\_\_\_\_\_)." The jurors in the death penalty case were asked, "As a juror in this case, do you vote to impose the death penalty on John Henry Smith? (yes, I vote to impose the death penalty or no, I vote not to impose the death penalty)." Juror confidence was also assessed in the death penalty case: "At this point, how confident are you about this vote? (1=not at all confident, 7=extremely confident)."

<sup>13</sup> Twenty-eight of the death penalty juries consisted of 12 jurors; six had 11 members.

<sup>14</sup> In the death penalty case, the initial questionnaire that jurors filled out before watching the tape contained questions on the juror's willingness to consider imposing the death penalty. The jurors randomly selected to deliberate were chosen from the pool of jurors who were death-qualified according to the following criteria. The two death qualification questions we employed included a traditional question which asked whether the subject would (1) never vote to impose the death penalty in any case or (2) would consider voting to impose the death penalty in some cases. A second question, reflecting more recent practice, had four possible positions: (1) would always vote for the death penalty if the defendant was found guilty of a murder for which the law allowed the jury to impose a death sentence; (2) am in favor of the death penalty but would not necessarily vote for it in every case where the law allowed the jury to choose it; rather would consider the facts in the particular case; (3) have certain reservations about the death penalty but they would not prevent or substantially interfere with my voting for a death sentence if the facts of the case showed that the defendant should be given a death sentence; (4) have such strong reservations that they would prevent or substantially interfere with my voting for a death sentence, no matter what the facts of the case were.

and the jury members were instructed that they could discuss anything but the case during lunch.

While the deliberators were at lunch, the remaining jurors, the non-deliberators, filled out a lengthy questionnaire assessing their reactions to the trial and the witnesses. They were then excused. When the deliberating jury members returned from lunch, they deliberated for a maximum of seventy-five minutes,<sup>15</sup> and we videotaped the deliberations. At the end of the deliberations, they too individually filled out questionnaires indicating their reactions to the trial and to deliberations.<sup>16</sup> The data discussed in this article are the deliberation transcripts and questionnaire responses of the 1022 jurors who viewed one of the antitrust trials and the 696 death-qualified jurors who viewed one of the death penalty hearings.

*Death Penalty Tracking Study:* In a supplementary study, 126 death-qualified jurors filled out the background questionnaire and then watched a videotape of one of four versions of the death penalty hearing described above. After each attorney's opening statement, after each witness' direct and cross-examination, after each attorney's closing statement, and at the end of the judge's instructions, we stopped the videotape and jurors filled out a brief questionnaire indicating their reaction to the attorney and/or witness<sup>17</sup> and their tentative vote at that point in the hearing.<sup>18</sup>

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Under the older practice, an answer of (1) to the traditional question would result in exclusion. See e.g., *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968). Under more recent practice, an answer of (1) or (4) to the second question would also result in disqualification. See e.g., *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). Jurors were selected as deliberators based on their response to the first question. In this study, 26 of the deliberators (6.5%) would have been disqualified under *Morgan*, and 11 (2.7%) would have been disqualified under *Witt*. In addition, one juror was incorrectly selected as a deliberator although that juror answered "never" on the traditional exclusion question. In the analyses reported in this article, we exclude all jurors who answered either the traditional question with the response "never" or the newer question with the response "always" or "substantially interfere." Thus, in all analyses, whether tabulating juror comments during deliberations or questionnaire measures, we are reporting on the responses of the 696 death qualified jurors.

<sup>15</sup> Sixty of the 70 antitrust deliberations and all of the 34 death penalty deliberations were videotaped and transcribed.

<sup>16</sup> For a more detailed description of the study and procedures, see Diamond & Casper, *supra* note 8, at 521-29.

<sup>17</sup> An additional 29 death-qualified jurors participated in the tracking study; the procedure was identical except that the tape was stopped after each opening or closing statement, after each prosecution witness' direct and cross-examination, and at the end of the judge's instructions, but not after each defense witness' testimony. We include these 29 cases in the analyses presented in Table 4, *infra*, which report on witness ratings and verdict preferences following the prosecution witness' cross-examination.

<sup>18</sup> Jurors were asked: If the hearing ended now, would you vote that the defendant should or should not receive the death penalty? They were also asked to rate their confidence in this judgment (0 = not at all confident, 8 = completely confident).

## II. TALK ABOUT ATTORNEYS

## A. ARE THE ATTORNEYS A FOCAL POINT FOR JUROR DISCUSSION AND A CENTRAL FACTOR IN JURY DECISION MAKING?

In the videotaped trials that the jurors watched in this study, the attorneys played substantial roles. The attorneys in both cases were active, articulate, and highly visible to the jurors throughout the trial. When an attorney was giving his opening or closing statement, the camera focused on him. When an attorney was conducting a direct or cross-examination, the attorney doing the questioning was shown throughout the examination in a window which occupied the lower right hand quadrant of the screen so the jurors always had a clear view of the attorney's face. In addition, the jurors saw the attorneys respond to some questions from the judge and to some of the actions of the opposing counsel.

One indicator of the potential influence of attorneys on jurors is the discussion about them that occurs in the course of deliberations. We examined the frequency of attorney references in ninety-four deliberations (sixty antitrust juries and thirty-four death penalty juries), identifying each instance in which the word "lawyer" or "attorney" or one of the attorneys' names was mentioned by a juror. In the entire set of deliberations, jurors mentioned attorneys 379 times—248 times on the antitrust juries and 131 times on the death penalty juries. Those totals amount to a rate of four comments per deliberation.

The number of comments referring directly to the attorneys may underestimate their influence in at least two respects. The behavior of the attorneys (e.g., qualities of their opening and closing statements, choices in witness selection, effectiveness of direct and cross-examination) may have an influence on jurors not reflected in comments during deliberation. Moreover, we could identify only comments in which the attorney was explicitly mentioned. If a juror adopted the position or argument of an attorney without ascribing that position to the attorney, such an influence was not included in our count. Thus, the four-per-case rate of comments is likely an underestimate of attorney influence on deliberations. Nonetheless, the picture of jurors focusing on the attorneys independent of other aspects of the trial is clearly inconsistent with the pattern of behavior we observed in both the antitrust and death penalty cases.<sup>19</sup> The content of the comments jurors made about the attorneys in the two sets of deliberations provides further evidence on the nature of juror reac-

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<sup>19</sup> Hastie, Penrod, and Pennington reported a similar finding in their murder trial: "[T]here was almost no discussion of the attorneys' behavior or their tactics." REID HASTIE ET AL., *INSIDE THE JURY* 170 (1983).

tions to attorneys.

B. DO JURORS DISCUSSING ATTORNEYS FOCUS ON THEIR PERSONAL CHARACTERISTICS?

We coded each comment referring to an attorney on three dimensions: content, the attorney identity, and valence. The first dimension, content, included six categories: (1) general, which covered general comments about the case and its participants; (2) substantive, which referred to matters dealt with in the trial; (3) personal, which included statements about the personal attributes of the attorneys or statements about an attorney which lacked any reference to the testimony or arguments; (4) attorneys in general, which referred to attorneys other than those who took part in the trial; (5) fees, which covered comments about attorneys' fees (only in the antitrust trial); and (6) strategy, which referred to strategies employed by the attorneys. The second dimension, attorney identity, indicated that the comment referred to: (1) the prosecutor or plaintiff's attorney; (2) the defense attorney; or (3) both attorneys, or it was unclear which attorney. The third dimension, valence, indicated the side of the case that the comment favored, so that if a negative comment was made about the plaintiff's case, the valence of the comment favored the defendant. All comments were coded as: (1) favoring the prosecution or plaintiff; (2) favoring the defense; or (3) neutral. In Appendix A, we present examples of juror statements for each category.

Table 1 shows the distribution of comments across the two cases.<sup>20</sup> Despite the common belief that personal attributes and style of the attorneys play a significant role in juror decisions, only twenty-five of the jurors' comments (7% in the antitrust case; 6% in the death penalty case) referred to their personal reactions to the attorney. The majority of comments about attorneys were intimately entwined with the evidence in the case, often referring specifically to the testimony of a particular witness. In the antitrust case, 32% of the comments about attorneys referred to attorneys' fees. Of the remaining 168, 51% related to a substantive point brought out by an attorney. In the death penalty case, the majority of comments (52%) related to a substantive point brought out by the attorney through one of the witnesses or during argument.<sup>21</sup>

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<sup>20</sup> Thirty comments were coded by two coders to evaluate reliability. A check on the reliability of the coding revealed 100% agreement on the attorney to which the comment referred, 90% agreement on the content of the comment, and 80% on the valence of the comment. In all of the valence disagreements when one coder rated a comment as positively or negatively valenced, the other rated it as neutral.

<sup>21</sup> Because the opening and closing statements tended to track the evidence in these



It is of course possible that the particular actors used in the research did not stimulate the kind of personal reactions from jurors that real attorneys would evoke. We have, however, one piece of evidence that suggests the low frequency of attorney comments and the dearth of personal references is not simply an artifact of our selection of attorney/actors. We staged a version of the antitrust hearing before a meeting of the Antitrust Section of the American Bar Association. For this staging, experienced antitrust attorneys prepared for and conducted the hearing before a large audience of fellow attorneys. A group of jury-eligible citizens watched the live hearing, complete with experienced expert witnesses who had been prepared for "trial" by their attorneys. The jury then retired to an adjoining room to deliberate and the deliberation was shown to the audience over a monitor. The attorneys watched with interest, dismayed only that the jurors barely mentioned them in the course of their discussion.

TABLE I  
COMMENTS ABOUT ATTORNEYS

	Antitrust Case		Death Penalty Case
	Total Comments (%)	Excluding Comments About Fees (%)	Total Comments (%)
Type of Comment:			
General	15	23	6
Substantive	35	51	52
Personal	7	10	6
Attorneys In General	11	16	15
Fees	32	—	NA
Strategy	NA	NA	21
	100% (N=248)	100% (N=168)	100% (N=131)

As indicated earlier, it is possible that the attorneys in each of these cases influenced jurors who gave no verbal indication of that influence. Much research indicates that jurors, like all decision makers, may be affected by factors they do not mention or even perceive to have influenced them.<sup>22</sup> To provide an unconfounded assessment of the effect of attorney behavior or personality apart from the content of the evidence and an attorney's opening and closing statements would require an experimental study that varied only the identity of

cases, some of these comments may have stemmed from the attorney statements rather than from the testimony.

<sup>22</sup> See generally RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980); Diamond & Casper, *supra* note 8, at 247-67.

the lawyer or the method of the lawyer's delivery, holding everything else constant.<sup>23</sup>

Based on assessments offered by judges, Kalven and Zeisel concluded that the quality of counsel is balanced in most cases.<sup>24</sup> Our trial tapes were prepared to present cases in which the opposing sides and their attorneys were reasonably balanced.<sup>25</sup> The jurors rated all four of the attorneys on a series of seven-point scales.<sup>26</sup> On each dimension, the attorney was rated somewhat above four, the mid-point of the scale (range of means = 4.03 to 5.65). Yet discussion during deliberations about all of the attorneys was generally more unfavorable than favorable. About half of the comments that jurors made about the attorneys or the side they represented were valenced; that is, they indicated support for one side or the other (59% of the comments in the antitrust case and 48% in the death penalty case). As Table 2 indicates, if we exclude the references to attorneys' fees in the antitrust case, the valenced comments about three of the four attorneys disproportionately favored the side the attorney was opposing. Thus, comments about an attorney were frequently employed by jurors as occasions to oppose the side the lawyer was representing (e.g., "despite what the defense attorney said. . ."; "the plaintiff's attorney didn't succeed in making the expert budge from his position").

In sum, our data suggest that during deliberations jurors do not spend very much time discussing the attorneys who argued the case. Moreover, when they do talk about the attorneys their comments tend to deal with substantive points rather than personal attributes of or juror reactions to the attorneys themselves. Finally, the attorneys in

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<sup>23</sup> A modest version of this type of research, using student jurors, was carried out by Gibbs, Sigal, Adams, and Grossman, who varied the style (hostile or non-hostile) and form of questioning (leading or non-leading) of the cross-examination of an expert by a defense attorney in a personal injury case. Gibbs et al., *supra* note 4, at 277. They found that attorneys were judged most effective when they used a non-hostile/leading or a hostile/non-leading method of questioning, although neither style nor form of questioning affected verdicts. *Id.*

<sup>24</sup> HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 353-55 (1966). Judges reported that the attorneys were evenly matched in 76% of the trials. *Id.* at 353-55. In a more recent interview study of jurors in civil cases in which the defendant was a corporation, jurors expressed preferences for one attorney over the other in 68% of the trials. Hans & Swigart, *supra* note 6, at 1317. It is unclear whether the difference is attributable to a difference in the evaluator (judge versus juror) or in attorney behavior (due, for example, to differences in the type of case studied or to changes over time).

<sup>25</sup> In both cases, however, the defense attorneys tended to be rated lower than the opposing attorneys, interesting in itself because the same actor played the plaintiff's attorney in the antitrust case and the defense attorney in the death penalty case.

<sup>26</sup> In the antitrust trial, non-deliberators rated the attorneys on six dimensions: not at all competent-competent; poorly prepared-well-prepared; unconvincing-convincing; unbelievable-believable; confusing-clear; and unfair-fair. In the death penalty trial, all jurors rated the attorneys on the first three of these dimensions.

TABLE 2  
COMMENTS ABOUT ATTORNEYS BY TYPE OF ATTORNEY

Refers to:	Antitrust Trial				Total (%)
	Plaintiff's Attorney (all) (%)	Plaintiff's Attorney (w/o fees) (%)	Defense Attorney (%)	Can't Tell/Both (%)	
Side Comment					
Favors (Valence):					
Plaintiff	40	25	42	10	34
Defense	32	51	26	7	25
Neutral	27	24	32	83	42
	99% (124)	100% (51)	100% (66)	100% (58)	101% (248)
100% =	50%		27%	23%	
Refers To:	Death Penalty Trial				Total (%)
	Prosecuting Attorney (%)	Defense Attorney (%)		Can't Tell/Both (%)	
Side Comment					
Favors (Valence):					
Prosecution	21	35		7	28
Defense	37	21		4	20
Neutral	42	44		89	53
	100% (19)	100% (85)		100% (27)	101% (131)
100% =	14%	65%		21%	

both cases were generally viewed favorably by the jurors, yet most comments made about them tended to favor the opposing side rather than the side represented by that attorney. Putting all of these pieces together, our evidence contradicts the common assumption that lawyer behavior is always a central focus of juror attention.

### III. THE ROLE OF ATTORNEY OPENING AND CLOSING STATEMENTS

#### A. HOW DO ATTORNEYS AFFECT WHEN JURORS MAKE UP THEIR MINDS?

Both lawyer lore and social science theory anticipate an influential role for opening statements.<sup>27</sup> The trial advocacy literature tends to give great weight to the behavior of lawyers in general and to their

<sup>27</sup> Lind & Ke, *supra* note 3, at 229.

opening remarks. For example, consider the following quote from one trial advocacy manual:

In fact, research on the impact of the opening statement consistently reveals that as many as 80 to 90 percent of all jurors have reached their ultimate verdict during or immediately after opening statements. Everything in the trial which follows will be selectively perceived to reinforce decisions which have already been made.<sup>28</sup>

No citation to any research is offered to support this conclusion, but similar suggestions are common in the trial advocacy literature.<sup>29</sup> But more than just lawyer intuition supports the view that opening statements may be very influential. Although some scholars have taken issue with this claim,<sup>30</sup> a long history of research reveals the crucial role played by first impressions in organizing and influencing later information-processing and judgments.<sup>31</sup> The well-documented primacy effect suggests that information presented early may be particularly important.<sup>32</sup> Opening statements may create thematic frameworks, or schemata, that guide jurors during the trial and deliberations in their observation, organization, and retrieval of evidence.<sup>33</sup>

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<sup>28</sup> DONALD VINSON, *THE PSYCHOLOGY OF WINNING STRATEGY* 171 (1986).

<sup>29</sup> See, e.g., Paul R. Connolly, *Persuasion in the Closing Argument: The Defendant's Approach*, in *OPENING STATEMENTS AND CLOSING ARGUMENTS* 159 (Grace W. Holmes ed., 1982) ("I try lawsuits on the theory that the place to win a case is in the opening statement."); ALFRED S. JULIEN, *OPENING STATEMENTS* 2 (1980) ("An opening statement can win the trial of a lawsuit . . . Jurymen, in cases tried by effectual advocates, have been prone to say that once the opening statements were made there was nothing left to the case."); Murray Sams, Jr., *My Approach to Opening Statements for the Plaintiff*, in *OPENING STATEMENTS AND CLOSING ARGUMENTS* 22 (Grace W. Holmes ed., 1982) ("You cannot avoid leaving an impression in the minds of the jurors when you make your opening statement. They will begin to lean one way or the other, even before the evidence is presented.") None of these authors provides, as Vinson does, a precise indication of how many jurors make up their minds by the completion of opening arguments, although all seem to agree that a large majority of jurors do so.

<sup>30</sup> See, e.g., GUNTHER, *supra* note 5, at 60-61 (impact of opening statement has only been cursorily analyzed in prior research, and present study indicates gradual process of opinion formation); Hans Zeisel, *A Jury Hoax: The Superpower of the Opening Statement*, *LITIG.*, Summer 1988, at 17 (conception that author's studies have shown that jury trials are decided immediately after the opening statements is mistaken).

<sup>31</sup> See S.E. Asch, *Forming Impressions of Personality*, 41 *J. ABNORMAL SOC. PSYCHOL.* 258 (1946) (initial impressions have continuing impact on perceptions of people, but motivation and time influence impressions' stability and resistance to change); Mark Snyder & William Swann, *Hypothesis Testing Processes in Social Interaction*, 36 *J. PERSONALITY & SOC. PSYCHOL.* 1202 (1978) (individuals charged with hypothesis testing preferred to search for hypothesis-confirming behavioral evidence).

<sup>32</sup> For a discussion, see Daniel Linz et al., *Attorney Communication and Impression Making in the Courtroom*, 10 *LAW & HUM. BEHAV.* 281 (1986).

<sup>33</sup> See, e.g., John Lingle & Thomas Ostrom, *Principles of Memory and Cognition in Attitude Formation*, in *COGNITIVE RESPONSES IN PERSUASION* 399 (Timothy Brock et al., eds. 1981); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *CARDOZO L. REV.* 519 (1991); Pyszczynski et al., *supra* note 3.

Two studies do provide some support for the claim that opening statements can powerfully influence ultimate jury verdicts, but each suggests important qualifications about the conditions under which that claim may be justified.<sup>34</sup> One study suggests that opening statements *inconsistent* with the evidence may influence verdicts by causing jurors to recall the evidence inaccurately.<sup>35</sup> In that study, the defense attorney either promised or did not promise an alibi witness who never appeared.<sup>36</sup> The unfulfilled promise reduced guilt preferences.<sup>37</sup>

A second study by Pyszczynski and Wrightsman demonstrates that the power of a strong opening statement may or may not endure.<sup>38</sup> The researchers varied the content of the prosecutor's and the defense attorney's opening statements to provide either an extensive or brief preview of their evidence.<sup>39</sup> When the prosecutor gave a detailed preview of the evidence, jurors generally favored the prosecution early on in the trial and maintained that position.<sup>40</sup> When the prosecutor gave only a brief opening statement (introduction of parties and promise that the evidence would be convincing), jurors generally favored the defense at the outset, but that position persisted only when the defense attorney had given a brief as opposed to an extensive opening statement.<sup>41</sup>

On the other hand, both theory and evidence suggest that the persuasive power of opening statements may not be as strong as suggested above. In an interview study of jurors who had sat in civil trials, Hans and Sweigart found that 63% said they remained neutral after the opening statements.<sup>42</sup> Moreover, in ten of the fourteen cases on which they sat, a majority of jurors interviewed said they had not been drawn to either side after opening statements.<sup>43</sup> The jurors attributed the fact that they were not drawn to one side or another to several factors: judicial instructions to remain neutral until all the evidence had been presented; the jurors' own recognition that they had not heard the evidence at the time opening arguments were completed; their desire to resist the impulse to be swayed by their emotions; and

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<sup>34</sup> See Pyszczynski et al., *supra* note 3, at 435; Pyszczynski & Wrightsman, *supra* note 3, at 310-11.

<sup>35</sup> Pyszczynski et al., *supra* note 3, at 442-43.

<sup>36</sup> *Id.* at 437-38.

<sup>37</sup> *Id.* at 439-41. Guilt preferences were measured on a scale that combined the dichotomous verdict choice (guilty-not guilty) with a confidence rating.

<sup>38</sup> Pyszczynski & Wrightsman, *supra* note 3.

<sup>39</sup> *Id.* at 304-5.

<sup>40</sup> *Id.* at 306.

<sup>41</sup> *Id.* at 306-7.

<sup>42</sup> See, e.g., Hans & Sweigart, *supra* note 6, at 1310.

<sup>43</sup> *Id.*

the fact that they were truly undecided at that point in the trial.<sup>44</sup> In their study of juror reactions to arguments and evidence, Hughes and Hsiao report tracking data from simulated trials which suggest substantial change in juror verdict preferences during the course of evidence presentation.<sup>45</sup> In three of the four cases they studied, jurors were more likely to change their verdict preferences as evidence was presented than they were to retain their post-opening statement verdict.

There are also theoretical reasons for caution about assertions that the opening statement is a pivotal event in juror decisionmaking. For example, framing effects may be tempered in an adversary setting.<sup>46</sup> A clear intent to persuade tends to reduce the influence of a communicator on a highly involved audience.<sup>47</sup> Thus, in the study of the effects of promises made in opening statements discussed above, the advantage the defense gained by promising a defense alibi witness disappeared when the prosecutor drew attention to the unfulfilled promise.<sup>48</sup> In general, one might expect the influence of claims substantially inconsistent with the evidence to be tempered in a real trial where opposing counsel will be eager to point them out.

Our evidence suggests that there is more instability in juror preferences than the trial advocacy literature seems to suggest. Although there is no objective way to characterize any level of stability as high or low, the data from our death penalty tracking study suggest that the 80-90% figure may be inflated, or at least misleading. First, the 80-90% figure portrays a picture of jurors unmoved by the evidence that follows opening statements. If, however, the opening statement accurately summarizes much of the information that the testimony and evidence will reveal, jurors may have no reason to change their opinions after opening statements. The absence of change after the opening statement may simply reflect the accuracy of the preview.

The claim of 80-90% stability may be misleading for another reason as well. Should a juror whose verdict preference changes a number of times as a trial progresses but who ultimately returns to the verdict initially preferred, be counted as part of the 80-90% figure? It is unclear whether Vinson would include such a juror in the 80-90% who do not change after opening statements, or in the 10-20% who

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<sup>44</sup> *Id.* at 1310-11.

<sup>45</sup> G. David Hughes & Henry S. Hsiao, *Does The Opening Determine The Verdict? Not In Most Cases It Appears*, 22 TRIAL 66 (1986).

<sup>46</sup> Richard Petty & John Cacioppo, *Effects of Forewarning of Persuasive Intent and Involvement on Cognitive Responses and Persuasion*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 173 (1979).

<sup>47</sup> *Id.* at 177.

<sup>48</sup> See Pyszczynski et al., *supra* note 3.

change. Although the juror's early and final votes do not differ, the juror has clearly, albeit temporarily, changed in response to the evidence. An 80-90% stability figure that includes jurors whose votes fluctuate in the course of the trial presents a misleading picture of early and unmovable verdict choice.

In our death penalty tracking study, we examined juror verdict preferences at various points in the trial.<sup>49</sup> The jurors in the tracking study gave their first verdicts after the prosecutor's opening statement, which presented an accurate and quite complete picture of the evidence his witnesses would later provide. At that point, approximately two-thirds of the jurors reached a verdict which remained constant for the rest of the trial.<sup>50</sup> An additional 4% changed following the defense opening and thereafter remained constant. Thus, 30% of the jurors changed their verdict as a result of new information provided after the opening statements.<sup>51</sup> Eighteen percent ended up giving a different verdict than they had favored at the end of opening statements; 12% returned to the verdict they had favored after opening statements. Put another way, two out of five of the jurors who actually *did* shift their verdict preferences after opening arguments would have been misclassified under a definition of stability which looked only at verdict preference after opening statements and at final verdict. Thus, the data indicate one way in which claims of early influence by attorneys may be overstated.

In our study, the 30% change rate represents a conservative estimate of the potential influence of the evidence for another reason. Our first measure of juror verdict preferences followed the prosecutor's very complete foreshadowing of his evidence. If his opening statement had been less accurate or less complete, the effect of the evidence might have been greater. Moreover, because the tracking study did not include deliberations, the 30% does not include any changes in position brought about by discussing the evidence during deliberations.

The rate of change measure is incomplete in another way as well. Jurors in the course of the trial changed not only their verdicts but also their confidence in their verdicts. Kuhn, Weinstock, and Flaton suggest that up to one-third of jurors are poor decision-makers who, unlike more "rational" jurors, swiftly and confidently adopt a single story and maintain it without considering and evaluating the fit of the

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<sup>49</sup> See *supra* notes 17-18 and accompanying text.

<sup>50</sup> See *infra* Table 3.

<sup>51</sup> Although most verdict instability is probably due to evidence and argument, some portion of it may also be the result of measurement error.

evidence with possible alternative stories.<sup>52</sup> The jurors in our tracking study were far less confident about their initial decisions. As Table 3 indicates, 94% of the jurors changed their verdict and/or their confidence ratings in the course of the trial, suggesting they were open and responsive to the evidence, whether or not it was enough to make them change their vote.<sup>53</sup>

TABLE 3  
STABILITY OF JUROR VERDICTS (DEATH PENALTY TRACKING STUDY)

	Verdict		Combined Verdict And Confidence <sup>54</sup>	
	N	Cumulative %	N	Cumulative %
Never Changed After Prosecutor's Opening <sup>55</sup>	82	66	5	4
Never Changed After Openings	5	70	2	6
Never Changed After Prosecutor's Case	18	84	7	11
Never Changed After Defendant's Case	11	93	10	19
Never Changed After Closings	4	96	55	63
Last Change After Judicial Instructions	5	100%	46	100%
Total	125 <sup>56</sup>		125	

Finally, the rate of verdict change only partially reveals the overall effect of the verdict change in shifting the overall distribution of juror preferences. Although 39% of the jurors were prepared to vote for death following the opening arguments, that percentage fluctuated throughout the trial. It rose to a high of 54% after the prosecution expert's direct examination, fell to 43% after the defendant's direct examination, and ended at 48% after the judge's instructions.<sup>57</sup> Thus,

<sup>52</sup> Deanna Kuhn et al., *How Well Do Jurors Reason? Competence Dimensions of Individual Variation in a Juror Reasoning Task*, *PSYCHOL. SCI.*, Sept. 1994, at 289-96.

<sup>53</sup> It is hard to know whether this level of fluctuation would occur in other kinds of cases. One might argue that fluctuation should be *least* likely to occur when the decision implicates a strong value position like the juror's view of the death penalty. Alternatively, the tension between strong values and high stakes in a capital case may encourage fluctuation. Tracking studies with other cases are required to test whether the pattern observed here is case-specific.

<sup>54</sup> This measure reflects any change in verdict preference or in confidence in that preference.

<sup>55</sup> Verdict preference was assessed for the first time after the prosecutor's opening statement. Two of these jurors never changed their verdict preference, but did fail to answer at one of the fifteen points at which their verdicts were assessed.

<sup>56</sup> One juror was dropped because the juror failed to respond at five points in the assessment process.

<sup>57</sup> At the end of opening statements, 39% favored death; after the prosecution's witnesses testified, 51% favored death; at the end of the defense testimony, 47% favored



although opening statements may play a crucial role in channeling and molding juror verdicts, the claim that “the lawyer who hasn’t ‘hooked them by [the end of opening statement]’ might as well forget about winning”<sup>58</sup> is clearly overstated.

#### IV. EFFECTS OF WITNESSES AND CROSS-EXAMINATION

##### A. HOW DO SELECTION AND PRESENTATION OF A WITNESS AFFECT PERCEPTIONS OF THE ATTORNEY?

Although attorneys are sometimes limited in their choice of witness type (e.g., the complaining witness, the criminal defendant, the single eyewitness), they can often choose among possible witnesses (e.g., which officer in the corporation will testify on the corporation’s behalf). In selecting an expert as opposed to a fact witness, the attorney has a particularly wide range of choices. Indeed, as Gross points out, shopping for the desired expert is a common but relatively invisible preface to the presentation of expert testimony.<sup>59</sup>

In our antitrust trial, we examined the effect of the testimony of two expert witnesses.<sup>60</sup> Each expert employed a different approach to estimating the damage to the plaintiff resulting from the price-fixing agreement. In deciding on an award in a price-fixing case, the trier of fact must determine the extent to which the price paid by the plaintiff would have been higher had there been competitive rather than collusive pricing. Two common approaches employed by parties in such cases are the “yardstick” and regression models. *Yardstick models* employ comparative data from similar firms that conducted their business in competitive markets at the time of the defendant’s anticompetitive activity. Such models are based on the premise that the difference in prices paid by the benchmark firms and the plaintiff will index the excess costs imposed on the plaintiff company.<sup>61</sup>

Another common approach involves the use of *regression models*, typically employing time-series analyses of pricing patterns before, during, and sometimes after the price-fixing agreement was in effect. These models attempt to predict what prices would have been during the period of price-fixing had there been no illegal agreement. Such an approach is more abstract and technically complex than the yardstick method.

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death.

<sup>58</sup> GUNTHER, *supra* note 5, at 60 (quoting Donald F. Vinson, *How to Persuade Jurors*, A.B.A. J., Oct. 1985, at 73).

<sup>59</sup> See Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1133.

<sup>60</sup> See generally Diamond & Casper, *supra* note 8, at 521-42.

<sup>61</sup> *Id.* (noting *Zenith Corp. v. Hazeltine*, 395 U.S. 100 (1969); *Moore v. Matthews & Co.*, 682 F.2d 820 (7th Cir. 1982)).

We constructed two versions of the price-fixing case to test the effects of the different expert models. In one version of the case, the plaintiff's attorney put the statistical expert on the stand and the defense attorney countered with the yardstick expert. In the second version, the yardstick expert testified for the plaintiff and the statistical expert testified for the defense. The content of the expert testimony and the actor portraying the expert remained the same when the expert shifted sides, except that the damage calculations favored the plaintiff when the expert testified for the plaintiff and favored the defendant when the expert testified for the defense.

The yardstick model employed by one expert in this case was based on the actual experience of another road-building company operating in a different state and thus not a victim of the price-fixing agreement that allegedly injured the plaintiff. The primary issue in the testimony about the yardstick model—which was the focus of the cross-examination by the other side's attorney—was the similarity of the yardstick firm to the plaintiff's company. The cross-examination focused on whether the marketing environments of the two firms were similar enough to draw the inference that the prices they paid, which had been similar in the past, would have been similar during the conspiracy period if not for the price-fixing agreement. In contrast, the statistical expert built a regression model of the past pricing behavior of the defendant companies and, based on that earlier performance, projected what their prices would have been in the absence of the price-fixing agreement. The adequacy of the statistical model as a basis for projecting prices hinged in large measure on the completeness of the model in including and properly measuring all relevant variables; this was the focus of the cross-examination by the opposing attorney.<sup>62</sup>

The two experts were perceived quite differently. The statistical expert was rated higher in expertise (5.26 versus 4.84 on a seven-point scale) and was perceived as less clear than the yardstick expert (3.69 versus 4.89).<sup>63</sup> These countervailing forces neutralized each other, so that the two experts did not differ in their impact on juror damage awards,<sup>64</sup> the jurors' willingness to award what they perceived as high damages,<sup>65</sup> the jurors' rating of the strength of the plaintiff's case,<sup>66</sup> or

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<sup>62</sup> The two types of expert testimony are described in more detail in Diamond & Casper, *supra* note 8.

<sup>63</sup> *Id.* at 542.

<sup>64</sup> *Id.* at 540.

<sup>65</sup> *See id.* In addition to awarding a dollar amount in damages, non-deliberating jurors were asked to indicate what the plaintiff's damage award should be on a nine-point scale, where one was no damages and nine was maximum damages ( $t_{(598)}=1.06$ ,  $p=.29$ ).

<sup>66</sup> *See id.* On a seven-point scale, where 1 = not at all strong and 7 = extremely strong,

their rating of the strength of the defendants' case.<sup>67</sup> It *did* affect juror reactions to the attorney. We tested the effect of the witness on attorney ratings by conducting a series of repeated-measures ANOVAs in which the between-subjects variable witness order (1 = yardstick expert for plaintiff and statistical expert for defendants; 2 = statistical expert for plaintiff and yardstick expert for defendants) was crossed with the within-subjects variable attorney (difference between plaintiff's attorney and defense attorney rating). The effect of the witness on attorney ratings appears in these analyses as an interaction between witness order and attorney.

If an attorney presented the statistical expert, he<sup>68</sup> was perceived as better prepared than if he presented the yardstick expert (see Figure 1a -  $F(\text{WITNESS ORDER} * \text{ATTORNEY}) = 17.99, p < .001$ ); if the attorney presented the more homely yardstick model he was perceived as clearer than if he presented the statistical expert (see Figure 1b -  $F(\text{WITNESS ORDER} * \text{ATTORNEY}) = 7.95, p < .01$ ). In contrast, the type of expert the attorney presented did not influence attorney ratings on convincingness, competence, believability, or fairness. Thus, the pattern of results for attorneys tracked only part of the pattern produced by the experts: the statistical expert was rated higher on convincingness and competence, but the attorney who put him on the stand did not improve his own rating on those dimensions as a result.<sup>69</sup>

On all six dimensions, jurors rated the plaintiff's attorney more favorably than the defense attorney. This difference, unlike the witness effects, may have been produced by a difference in the overall strength of the plaintiff's case, or by the fact that the plaintiff's attorney always presented his case first. The jurors' average rating of the strength of the plaintiff's case (on a seven-point scale) was 4.52; the defendants' case was rated 3.63 (correlated  $t_{(df=590)} = 7.80, p < .001$ ). In order to separate the effects of order and case characteristics from the influence of the particular attorney, a different experimental design would have been required. In that hypothetical experiment, we would have varied the identity of the plaintiff's attorney just as we varied the side the expert testified for in this experiment. Similarly, we could have examined the effects of order by allowing the defense to go first half the time. Because order, case characteristics, and attorney identification with a particular side are completely confounded in this experiment, our analysis of attorney effects is limited to the effect of

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$t_{(df=594)} < 1$ .

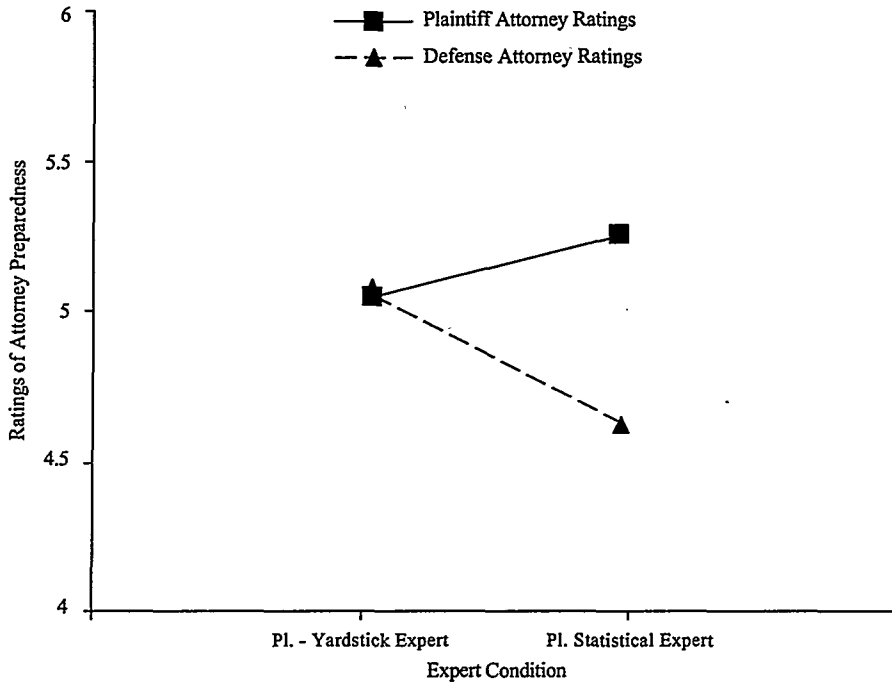
<sup>67</sup> See *id.*  $t_{(df=598)} = 1.11, p = .27$ .

<sup>68</sup> The attorneys were both male.

<sup>69</sup> The experts were not rated for fairness.

FIGURE 1a

Effects of Expert Witnesses on Attorney Preparedness Ratings



witness identity, which we varied experimentally, on perceptions of the attorneys and outcome of the case.

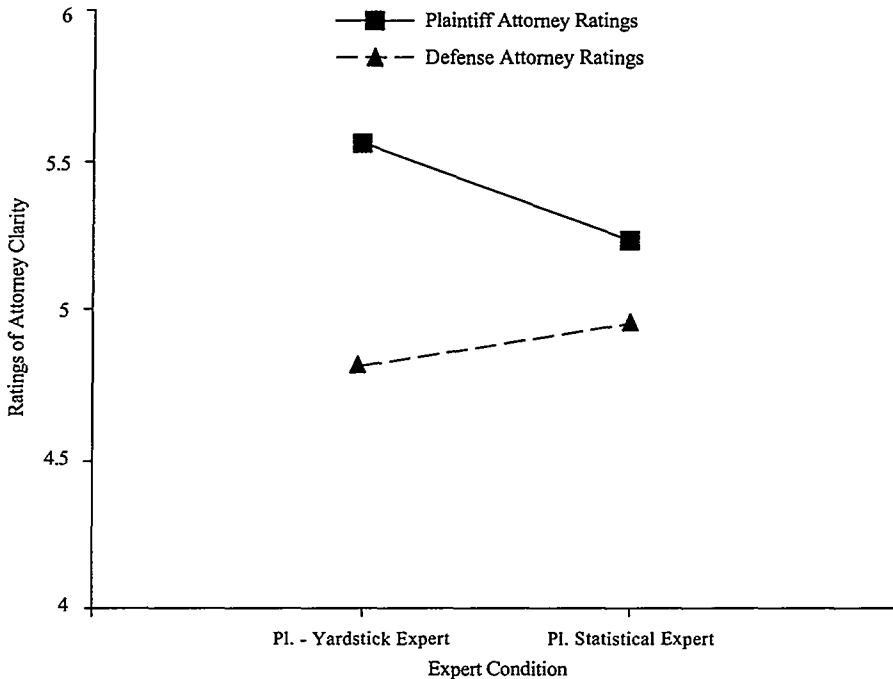
Thus, we learn from this research that the attorney's choice of an expert can influence juror reactions to the attorney. The performance of the witness, whether because of what the witness actually says or because of the questions the attorney asks, aligns the attorney with the witness. As a result, complex witness testimony can bolster the impression that the attorney is both better prepared and less clear than when the attorney's expert presents testimony that is more straightforward.

#### B. HOW DOES A VIGOROUS CROSS-EXAMINATION AFFECT PERCEPTIONS OF THE CROSS-EXAMINING ATTORNEY?

An important decision for attorneys faced with an opposing expert witness is whether to engage in an extensive cross-examination. Unless the attorney doing the questioning is extremely well-prepared, a skilled expert can often further impress the trier of fact during cross-

FIGURE 1b

Effects of Expert Witnesses on Attorney Clarity Ratings



examination. The United States Supreme Court has expressed great confidence in the ability of a skilled cross-examination to counteract expert testimony that might otherwise lead the trier of fact astray.<sup>70</sup> The Court in *Barefoot* considered the defendant's claim that his constitutional rights had been violated when the trial court permitted testimony by a psychiatrist about his future dangerousness. The critical witness was a Dr. James Grigson, a psychiatrist who regularly testified for the prosecution in death penalty cases (and continues to do so today). Known as "Dr. Death," Dr. Grigson responded during the penalty hearing to a hypothetical question<sup>71</sup> by asserting that he could with reasonable certainty diagnose the defendant as a person with "a

<sup>70</sup> *Barefoot v. Estelle*, 463 U.S. 880 (1983).

<sup>71</sup> Grigson had not actually examined the defendant Barefoot or requested to do so, see *id.* at 917 (Marshall, J., dissenting). For a discussion of Dr. Grigson and his testimony written at the time of the *Barefoot* decision, see Charles P. Ewing, "Dr. Death" and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings, 8 AM. J. L. & MED. 407 (1983); for an account of Dr. Grigson's more recent activities, see Ron Rosenbaum, *Travels With Dr. Death*, VANITY FAIR, May 1990, at 141.

fairly classical, typical, sociopathic personality disorder.”<sup>72</sup> He went on to characterize the defendant as being within the “most severe category” of sociopaths (“above ten” on a ten point scale) and indicated that there was no effective cure for the condition of sociopathy.<sup>73</sup> Dr. Grigson stated, finally, that regardless of whether Barefoot was kept in prison or released in the future, there was a “one-hundred percent and absolute chance” that he would commit future crimes of violence that would constitute a threat to society.<sup>74</sup>

The American Psychiatric Association (APA) filed an *amicus curiae* brief in the case<sup>75</sup> asserting that “the unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession”<sup>76</sup> and indicating that in its view, the best estimate was that two out of three such predictions of long-term violence made by psychiatrists were wrong.

The majority opinion by Justice White rejected the defense contention that admission of such unreliable testimony was unconstitutional. The majority did not seriously dispute the assertion by the APA that such predictions were typically wrong and therefore that Dr. Grigson’s claim of absolute certainty flew in the face of well-established evidence in the scientific literature. Rather, the majority opinion placed great faith in the adversary process:

We are not persuaded that such testimony is almost entirely unreliable and that the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings. . . We are unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case.<sup>77</sup>

Thus, despite some weak and perfunctory demurrals,<sup>78</sup> the majority appeared to acknowledge the general force of the argument that such predictions were inconsistent with generally-held views in the scientific community, but concluded that the adversary process would produce appropriate discounting of such non-credible testimony. To test whether a strong cross-examination would have this effect, we varied the defense cross-examination of the prosecution’s psychiatric ex-

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<sup>72</sup> *Barefoot*, 463 U.S. at 919.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> As it had earlier in a similar case, *Estelle v. Smith*, 451 U.S. 454 (1981).

<sup>76</sup> *Barefoot*, 463 U.S. at 920 (Blackmun, J., dissenting) (citing Brief for the American Psychiatric Association as *Amicus Curiae* 12).

<sup>77</sup> *Barefoot*, 463 U.S. at 899, 901.

<sup>78</sup> For example, the majority noted that the fact that psychiatrists like Grigson regularly offer testimony predicting certain future dangerousness suggested at least *some* division in the psychiatric community. *Id.* at 899.

pert on dangerousness, modeled on Dr. Grigson, in our death penalty trial.

In all conditions, prosecution evidence included testimony by a co-participant in the crime who provided basic facts about what had happened and defense testimony by the defendant's sister (who said that the defendant sometimes became violent after drinking heavily but otherwise was not violent). Defense evidence also included testimony by the defendant's former employer (who testified that the defendant had worked for him shortly before the crime and had been a responsible employee) and by the defendant himself (who expressed remorse in his testimony but stated that he remembered nothing about the crime itself). With these elements held constant across conditions, we varied the defense's cross-examination of the prosecution expert (weak or strong) and, in a third condition, had a strong cross-examination of the prosecution expert along with an opposing expert for the defense.

In all three conditions, jurors heard the prosecution expert state that he diagnosed the defendant as a sociopath, that is to say, a person with no motivation to follow rules, who lies regularly, is manipulative, and lacks empathy, guilt, or remorse. He based his diagnosis on examination of records from prior court proceedings, pre-sentence reports, and prison records. These records revealed that the defendant had a long criminal history beginning when he was a juvenile, that he had seven arrests as an adult, including two for armed robbery which involved harm to the victim, that he was dependent on alcohol and had a long history of dishonesty. The expert testified that in his opinion the defendant was "certain to kill again" if he was not executed. The prosecution expert also testified that he had extensive prior experience in making such predictions and that he was generally very accurate in his judgments.<sup>79</sup>

In the weak cross-examination condition, the defense attorney elicited the admission that the prosecution expert had in the past testified for the prosecution three-quarters of the time and the defense only one-quarter of the time, but did not challenge the prediction of certain future dangerousness. In the strong cross-examination condition, the defense attorney began by impeaching the prosecution expert witness, just as he did in the weak cross-examination condition,

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<sup>79</sup> In an additional condition, not discussed here, the content of the prosecution expert's direct testimony changed. Rather than claiming that the defendant was sure to kill again, he reported that, in his view, there was about a one-in-three chance that the defendant would commit another serious violent act in the future. The data from jurors who heard this testimony were included in Tables 1-3, but are used in the analyses in Tables 4 and 5 only to increase the accuracy of the within-cell error variance.

on the grounds that he generally testified for the prosecution. The cross-examination then proceeded to point out at length that the expert's prediction of certain future killing was inconsistent with a variety of prior studies and that the expert had not employed the standard methods for diagnosis of future dangerousness. The defense attorney got the prosecution expert to agree that the best scientific literature indicates that two of three predictions of dangerousness prove to be incorrect, and brought out the fact that the expert had never published his findings in peer-reviewed journals. The expert responded that his focus was on clinical diagnosis rather than publication, and that his predictions were regularly tested in court testimony. He claimed that regardless of the state of the general literature he was confident his predictions were correct.

In the third condition in addition to the strong cross-examination of the prosecution expert, a defense expert, also a psychiatrist, testified that the defendant suffered from a personality disorder involving relationships with authority figures as well as a moderate dependence on alcohol. He testified that the defendant generally coped reasonably well, but that on rare occasions excessive drinking interacted with his personality disorder to produce violence. He stated that predictions about future violence could not be made with any certainty, but that in his view the likelihood of future similar violence was not great and that the defendant was a good candidate for alcohol abuse programs.

We examined the effects of a strong cross-examination in both the tracking study and in the main study. In the tracking study, jurors rated the attorneys each time they examined or cross-examined a major witness. They also rated the witness. Thus, the tracking study permitted us to gauge jurors' immediate reactions to variations in the cross-examination. As Table 4 indicates, a strong cross-examination by the defense attorney of the major expert witness for the prosecution produced significantly higher ratings for the defense attorney at the end of the expert's cross-examination than did a weak cross-examination ( $p < .001$ ).<sup>80</sup> This result seems consistent with the view of the majority in *Barefoot*, for it appears to suggest that jurors pay attention to and are influenced by a cross-examination that raises serious questions about the testimony of an expert who makes indefensible claims about future dangerousness.

Nonetheless, this pattern would offer small solace to the defendant. The influence of the strong cross-examination on ratings of the prosecution expert achieved only borderline significance ( $p = .052$ ).

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<sup>80</sup> See *infra* Table 4.



More importantly, although the expert was the chief witness for the prosecution in this case—providing evidence about the defendant's future dangerousness and predicting 100% likelihood of a further killing if he was not sentenced to die—the strong cross-examination did not affect the verdict preferences of the jurors. Fifty-two percent favored a verdict of death following a weak cross-examination and 52% favored death following a strong cross-examination.

TABLE 4  
EFFECTS OF CROSS-EXAMINATION (TRACKING STUDY)<sup>81</sup>

	(1) Weak Cross	(2) Strong Cross <sup>82</sup>
Defense Attorney <sup>83</sup>	4.05 (47)	5.28 (86)
Prosecution Expert <sup>84</sup>	5.12 (48)	4.54 (86)
% Favoring Death After Defense Cross-Examination	52.1 (48)	52.3 (88)

The main study shows, in addition, that the effect of the strong cross-examination was relatively ephemeral even on impressions of the defense attorney and the prosecution expert. In the main study, the attorney and witness evaluation measures as well as the verdict were taken after jurors heard all of the evidence and attorneys' arguments as well as the judge's instructions. Thus, in the main study we can assess the ultimate effect of the variations in the cross-examination at the end of the trial. As Table 5 indicates, the immediate effects of the strong cross-examination that appeared in the tracking study were substantially reduced or eliminated in the main study. The substantial advantage in the rating of the defense attorney doing the strong cross-examination in the tracking study was reduced from 1.23 points<sup>85</sup> to between .33 and .51 points<sup>86</sup> in the end-of-trial ratings of the main

<sup>81</sup> The averages in this table are based on the 109 jurors from Table 3 who heard the prosecution expert give the same direct testimony, plus the 29 jurors whose evaluations were excluded from Table 3 because they were not asked to assess each defense witness.

<sup>82</sup> There were two strong cross-examination conditions; one in which there was an opposing expert and another in which there was no opposing expert. At the point that these ratings were made, the opposing expert had not yet been presented, so ratings for the two conditions are combined in this analysis.

<sup>83</sup> Defense attorney ratings were the average of responses to three 7-point scales (how convincing, how competent, and how well-prepared) which comprised one factor; higher values indicate more favorable ratings.

<sup>84</sup> Prosecution expert ratings were the average of two 7-point scales (how convincing and how believable) which comprised one factor.

<sup>85</sup> 5.28 - 4.05 (see Table 4).

<sup>86</sup> The .33 estimate compares the jurors who saw the weak cross-examination with ju-

study. The borderline significant impact of the strong cross-examination on the ratings of the prosecution expert in the tracking study disappeared in the main study, and the percentage of jurors favoring a death sentence at the end of the case was not affected by the strength of the cross-examination. Moreover, as Table 5 indicates, the verdict-confidence index, a potentially more sensitive measure of verdict preference that combined verdict preference and degree of confidence in that preference, also showed no evidence that the strong cross-examination had any effect on verdict preferences ( $F < 1$ ).<sup>87</sup>

These results highlight the potential difficulties that attorneys face in influencing juror reactions to evidence through skillful cross-examination of an expert. Although juror perceptions of the attorney appear susceptible to influence by the attorney's efforts during cross-examination, the strong cross-examination had no effect on the verdict. Thus, the findings call into question the Supreme Court's confidence in *Barefoot v. Estelle* that defense attorneys can use cross-examination to reduce the impact of a prosecution expert who makes unwarranted claims about a defendant's future dangerousness.

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rors who saw a strong cross-examination ( $5.18 - 4.85 = .33$ , see Table 5) within the same instruction condition. The .51 estimate is the largest difference between cross-examination conditions and compares the jurors who saw the weak cross-examination with jurors who saw both a strong cross-examination and an opposing defense expert ( $5.36 - 4.85 = .51$ , see Table 5) within the same instruction condition.

<sup>87</sup> It is important to note that juror verdict preferences *were* susceptible to influence by the expert's testimony. Table 5 shows the three conditions in which the expert gave the same testimony and the case varied only by whether a strong cross-examination occurred or an opposing expert appeared. In the larger study, a fourth condition was included in which the prosecution expert presented a more realistic assessment about the likelihood of future violence. In that condition, the percent of jurors favoring death dropped to 38.7% (versus conditions (1) + (3) in Table 5: Wald = 4.85,  $p = .028$ ) and the more sensitive verdict-confidence index dropped to 6.44 (versus conditions (1) + (3) in Table 5:  $F_{(1,680)} = 6.37$ ,  $p = .012$ ).

TABLE 5  
EFFECTS OF CROSS EXAMINATION<sup>88</sup> (MAIN STUDY)

	Weak Cross	Strong Cross	
	(1) W/O Opposing Expert	(2) W/O Opposing Expert	(3) W/ Opposing Expert
Defense Attorney Ratings <sup>89</sup>			
Prison	4.93 (43)	—	5.27 (51)
Life in Prison w/o Poss. of Parole	4.85 (64)	5.18 (49)	5.36 (29)
	(1) v. (3): $F_{(1,309)} = 68.29, p = .024^{90}$		
Prosecution Expert Ratings <sup>91</sup>			
Prison	4.81 (44)	—	4.57 (51)
Life In Prison w/o Poss. of Parole	5.27 (62)	4.81 (49)	4.79 (29)
	(1) v. (3): $F_{(1,306)} = 5.57, p = .126^{92}$		
% Favoring Death At End of Case			
Prison	47.2 (89)	—	50.0 (108)
Life in Prison w/o Poss. of Parole	47.1 (121)	51.4 (109)	49.4 (81)
Verdict-Confidence Index <sup>93</sup>			
Prison	7.64 (87)	—	7.74 (104)
Life In Prison w/o Poss. of Parole	7.53 (120)	7.88 (109)	7.72 (81)

## V. CONCLUSION

We began by noting the widespread belief in the legal community that juror reactions to lawyers are critical aspects of most trials. These beliefs are promoted in the trial advocacy literature, are passed along

<sup>88</sup> Only non-deliberators were used in this table for defense attorney and prosecution expert ratings in order to equate the responses with the individual juror responses from the tracking survey because deliberators in the main study made these ratings *after* deliberating. Deliberators are included in the verdict measures because individual verdict preferences were taken *before* deliberations.

<sup>89</sup> Attorney ratings were the average of the responses to three 7-point scales (how convincing, how competent, and how well-prepared) which comprised one factor; higher values indicate more favorable ratings.

<sup>90</sup> The other contrast which tested the effect of the opposing expert within the strong cross-examination/life in prison without possibility of parole conditions [(2) v. (3)], was not significant,  $F < 1.0$ .

<sup>91</sup> Prosecution expert ratings were the average of two 7-point scales (how convincing and how believable) which comprised one factor; higher values indicate more favorable ratings.

<sup>92</sup> The other contrast which tested the effect of the opposing expert within the strong cross-examination/life in prison without possibility of parole condition [(2) v. (3)], was not significant,  $F < 1.0$ .

<sup>93</sup> 1 = totally confident that verdict should not be death, 14 = totally confident that verdict should be death.

from experienced attorneys to newcomers to the profession, and seem to be quite persistent. There is not a large body of research against which to measure the accuracy of these beliefs about the importance of lawyering in trials, but the existing empirical literature, including our work, does call into question the assumption that reactions to lawyers are pivotal.

Jurors in our study did not spend a great deal of time talking about lawyers. When they did, they focused on substantive aspects of the attorneys' behavior rather than on their personal qualities. Juror assessments of lawyer performance *were* affected by the attorney's choice of what witnesses to present and by the strength and effectiveness of cross-examination. Finally, our study suggests greater instability in juror verdict choices as the trial unfolds than many lawyers assume. Thus, one theme in these findings is that individual attributes like style or personality do not seem to matter as much as is suggested in the trial advocacy literature. A second theme is that jurors pay more attention to substantive aspects of the trial—the nature of testimony by witnesses and how they withstand cross-examination. The importance of substantive aspects of the testimony, combined with the greater observed willingness to respond to evidence, suggests the possibility of substantial influence by attorneys. But it suggests that such influence will not flow from rhetorical flourishes or pleasing appearance or attractive personality, but rather from the skill of the attorney in making substantive choices about what types of witnesses and evidence to present, and her or his skill in implementing these choices.

Most empirical work on the effects of attorneys fails to find a strong relationship between perceptions of attorneys or witnesses and juror verdict choices. Here, we find that evaluations of the lawyers were related to the type of witness presented and that an attorney's perceived level of performance was positively affected by the strength of his cross-examination of an opposing expert. Yet none of these favorable evaluations translated into greater success as measured by juror verdicts. This lack of a clear connection between the jurors' assessments of the attorneys and their verdict choices suggests that influence by the attorneys is complex, and cannot easily be captured either in a research setting or the world outside the laboratory.

The attorney is but one of many factors influencing juror and jury decisions. Predisposing beliefs and strongly-held values brought to the trial condition the effect of the evidence and its presentation. Construction of a plausible story is a critical task for jurors and perhaps the central challenge for attorneys, but it is an enterprise in which the contributions of the attorneys are necessarily affected by

how their witnesses behave when testifying, what case is presented by the other side, and the characteristics of the particular jurors and jury hearing the case. As we have noted at various points, empirical work employing the experimental paradigm can make a substantial contribution to disentangling the effects of lawyer performance from the many other factors which affect juror and jury verdicts.

The legal community's belief that juror reactions to lawyers make a great difference in the outcome of cases may be a myth; but if so, it is a very persistent one. Its persistence may come from the natural human inclination to overestimate one's own importance and the absence of a strong and deep empirically-based research literature which contradicts this view. In addition, the limited availability of effective feedback mechanisms by which lawyers learn to assess their own performance more accurately may also perpetuate the belief in lawyer influence. In their field study of opening statements in criminal cases, Linz, Penrod, and McDonald found that prosecutor self-ratings of their performance were relatively close to those of jurors, while defense attorneys systematically rated themselves higher than jurors did.<sup>94</sup> Prosecutors were not only more realistic in their self-ratings, but in addition their opening statements were judged by independent observers as substantially better organized and more informative than those delivered by defense attorneys. Linz, Penrod, and McDonald suggest that prosecutors behave as though they receive and respond to more accurate feedback about their performance than defense attorneys.<sup>95</sup> They examine some of the possible reasons for this prosecutorial advantage, including the nature of their practice as members of an ongoing organization. However, their data do not permit development of a clear account for the difference between prosecutors and defense attorneys.<sup>96</sup> To the extent, though, that many attorneys do not receive accurate feedback about their performance, they are likely to cleave to unrealistic estimates both of juror reactions to their presentations and of their influence on outcomes.

Finally, we note that in the Linz, Penrod, and McDonald study neither the quality of the opening statement (as judged by outside observers) nor the relative advantage enjoyed by prosecutors over defense attorneys in juror ratings on dimensions like enthusiasm, arrogance, nervousness, friendliness, and likableness had a significant

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<sup>94</sup> See Daniel G. Linz et al., *Attorney Communication and Impression Making in the Courtroom*, 10 LAW & HUM. BEHAV. 281, 293-94 (1986).

<sup>95</sup> *Id.* at 291.

<sup>96</sup> If organizational setting were the explanation, one would expect public defenders to have more realistic assessments than private attorneys, but this does not turn out to be the case.

relationship to case outcomes.<sup>97</sup> This highlights the fact that lawyer performance may have only modest effects on juror and jury decisions, or that if it is influential, its influence operates more on a substantive than personal level.

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<sup>97</sup> Linz et al., *supra* note 94, at 295.

## APPENDIX A

The three dimensions of juror comments are described below, along with examples (AT=From antitrust case; DP=From death penalty case):

*Content*

1 = general (pertains generally to the case)

e.g.: 1. Now everybody has explained, the lawyer has discussed and now we have to decide what kind of punishment, death or life imprisonment. (DP)

2. What was the — what was the defendant's lawyer asking for? He was asking for the — to pay \$35,000, right? (AT)

2 = substantive (pertains specifically to a substantive matter)

e.g.: 1. That's where the other lawyer seemed to, the defendant lawyer seemed to be going, that he could be rehabilitated. (DP)

2. It was pointed out by the one lawyer his statistical interpretation only took in 80% of the factors, not 100% of the factors. (AT)

3 = personal (pertains to personal attributes of the attorney or refers to attorney without tying the reference to anything in the testimony or arguments)

e.g.: 1. And the one thing I noticed about the defendants' attorney? . . . He'd say, and I think my clients — then he would kind of curl up his hands like he wasn't quite telling the truth there. (AT)

2. The lawyers were just childish. (DP)

3. His lawyer I wasn't impressed with at all. (DP)

4 = fees (attorneys' fees; all 80 of the comments were from AT)

e.g.: It's gonna cost them a lot of money in just attorneys' fees.

5 = lawyers (comments about lawyers in general)

e.g.: 1. We can tell lawyers wrote this [referring to jury instructions]. (DP)

2. What I would do is I would try to get a lawyer and I'd say that mine was \$5 to \$7 a ton. (AT)

6 = strategy (comments about strategic choices by the lawyer)

e.g.: My question is why did Smith's lawyer block the psychiatrist from interviewing [him] if he thought it would be in his favor? (DP)

*Attorney*

1 = prosecutor/plaintiff's attorney

e.g.: I do agree with what the prosecutor said. An eye for an eye. (DP)

2 = defense attorney

e.g.: That's where the other lawyer seemed to, the defendant lawyer, seemed to be going, that he could be rehabilitated. (DP)

3 = both attorneys or unclear which one

e.g.: 1. None of the attorneys ever asked that question, why did you bring a gun with you? (DP)

2. It seemed that the lawyers could have investigated that a little better, even though the contracts were tied up. (AT)

*Valence*

Party or Side of the Case that the Comment Favored (note that a comment about an attorney may favor the opposing side, as in the first 5 examples below):

1 = prosecution/plaintiff's side

e.g.: 1. And the other thing that was a little bit puzzling to me was. . .the other lawyer did say that they did have some kind of agreement. (defense attorney in AT)

2. But I don't think he was accurate in saying that, that defense lawyer. (defense attorney in AT)

3. [Y]ou believe this is going to be the [prison term] that's going to turn him around, like the attorney said because I finally killed somebody? I don't think so. (defense attorney in DP)

2 = defense side

e.g.: 1. It seems to me that if the plaintiff's attorney had some real quarrel with that \$105,000 figures, I mean . . . he would have asked enough questions to establish that it was really pretty weak. (plaintiff's attorney in AT)

2. I would completely agree with what you said earlier. . .[B]ut I thought the plaintiff attorney did a very poor job of giving us something that we could hang our hat on. (plaintiff's attorney in AT)

3. But I think to some extent what the defense attorney said at the end is persuasive. I mean how can — without ever talking to somebody, how can you say with a 100% certainty how they're going to perform in a month? (defense attorney in DP)

3 = neutral or unclear which side favored by comment

e.g.: 1. And there were great fluctuations [in price] they kept stressing a number of times, both attorneys, about the fluctuations that had occurred. (AT)

2. The defense attorney's statement is never evidence (DP).