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Commentaries

Persuasion in the Courtroom

*William C. Costopoulos**

INTRODUCTION

Persuasion is defined as "an act of influencing the minds of others by arguments or reasons, by appeals to both feeling and intellect; it is the art of leading another man's will to a particular choice, or course of conduct." No one doubts this is what trial lawyers do every day in the courtroom—and that is what this article is about.

Much literature has been written on this subject, a literature which reflects many new insights about human behavior and communication. In experimental social psychology, persuasion is one of the major areas of specialization. Volumes have been written on propaganda and communications, psychological warfare, advertising and industry, scientific mind-changing, religious conversions, confessions and indoctrination, and brain washing. Some of the questions raised in this literature have a profound impact on the art of persuasion in the courtroom. For example, why are some trial lawyers perceived as highly trustworthy by some people, yet, at the same time, untrustworthy by others? When both sides of an argument are presented, will the arguments heard first have any advantage over those heard last? Is persuasion in the guise of an emotional appeal as effective as a rational communication? What characteristics of recipients affect their persuasibility? Though the voice is the most frequently used channel of communication in the courtroom, is it the most effective? If not, what is? Charts? Films? Drama?

This article is an attempt to answer these questions in light of the experiments in social psychology on persuasion, with support from the knowledge other sciences have provided us. Also, these issues will be discussed from the vantage point of the trial lawyer . . . who may have never conducted an experiment in social psychology, but who is, nevertheless, a master of the art.

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Though it is unlikely that a trial lawyer would object to a concentrated study of the art of persuasion, other readers may. They may fear that persuasion is a form of propaganda and that such emphasis will interfere with having legal controversies decided on the merits. Moreover, it may be argued that this study can degenerate into a study of the techniques of shysterism. After all, it can overcome a bad cause, destroy a good one, incarcerate the innocent, and free the guilty. To them I offer an affirmation. Their fear is justified and their argument is tenable. However, there are at least two safeguards which keep the inherent dangers of the art of persuasion in balance.

The very nature of our adversary system is the first one, which in essence can be stated as follows:

Justice is found experimentally to be best promoted by the opposite efforts of practised and ingenious men, presenting to the selection of an impartial judge the best arguments for the establishment and explanation of truth. If he comes then under such an arrangement, the decided duty of an advocate is to use all the arguments in his power to defend the cause he has adopted, and to leave the effect of those arguments to the judgment of others.¹

A typical case arises in our adversary system when the State charges a defendant, and the defendant hires an attorney. The State, as the representative of the people, has probable cause to believe the defendant committed a crime, and the burden of proving it beyond a reasonable doubt. To the defendant, a court trial is serious business. For weeks, perhaps months, possibly years, he has thought of nothing else. The future trial is a millstone around his neck, ever present with him at all his leisure moments, at his work, at his home, in his dreams. He thinks and talks of little else. His attorney is his advocate, his hope, and to some, desperately more. He wants a partisan—one who will represent him and fight for him with all the technique and knowledge humanly possible. It is the advocate's duty to do this, to fight, to argue, to devise the best arguments he can in his client's favor; he must step forward as the client's representative and persuade the judge and jury with the same allowance that would be made were the party himself the pleader. However, and it must be emphasized, this does not mean his role is to save his client at all hazards and costs to others, reckless of all consequence. No system in the world would work if this were the case. Nor is it the advocate's role to consider the guilt or innocence of his client. The

1. F. WELLMAN, *DAY IN COURT* 78 (1931).

determination of what happened, and the determination of guilt or innocence, is the sole province of the jury, and if none, the judge—never is it the consideration of the advocate.

Prosecutor against defense counsel, plaintiff versus defendant—with the determination of guilt or innocence left to an independent arbiter—is the essence of our system. The adversary system is painstaking, slow, expensive, even a nuisance, but if history educates, it is the fairest system known.

The second safeguard to persuasion in the courtroom is the integrity and character of the source—the lawyer. These two qualities are implicit in the definition of effective persuasion, for juries need to be convinced of the honesty of purpose and truthfulness of the advocate. Otherwise, they will look upon him with suspicion and distrust his assertions; however great his ability, and brilliant his oratory, they will listen to him as a mere actor, with feigned emotions, and his argument as an ingenious fallacy. It has often been said that the quality that wins more clients than eloquence is integrity, and that “integrity without genius is better than genius without integrity,” that “honesty is wisdom as well as virtue,” equally in the profession of the law as in all other pursuits.² An established reputation for integrity and character not merely predisposes a jury in an advocate’s favor, but makes them listen since they know that whatever such a man says, he means. They are inclined to follow his arguments carefully, since they are confident that all is fairly, candidly, and truthfully conducted. Juries and judges can certainly be persuaded, but seldom are they deceived.

The format of this article will follow the traditional Smith, Lasswell, and Casey formula:³ “*Who (THE SOURCE) says what (THE MESSAGE) to whom (THE RECIPIENTS) through which medium (THE CHANNEL) with what effect?*” In a courtroom, the source of a communication is the lawyer (and the witnesses); the message is the presentation of the evidence; the recipients are the judge and jury; and the channel is the means of communication.

Section I focuses on “The Source.” It summarizes the literature on prestige suggestion and reviews the effect of both relevant and objectively irrelevant aspects of the communicator’s credibility; the physical characteristics of a communicator are also considered.

In Section II, the order and manner of presenting a message is dis-

2. *Id.* at 53.

3. B. SMITH, H. LASWELL, and R. CASEY, *PROPAGANDA, COMMUNICATION, AND PUBLIC OPINION* (1946).

cussed in detail. The questions raised here relate to the impact of a communication that is heard first vis-à-vis one that is heard last (Which delivery has the advantage?), and to the manner of presenting a meaningful and convincing delivery (How can one presentation be more effective than another?). In this section, the principal findings of experimental research on persuasion are considered. In addition there is a condensed review of what trial lawyers consider fundamental to an effective opening, examination, and closing of a case. And finally, the impact of an emotional appeal as opposed to a rational presentation is analyzed.

Section III examines those factors of persuasibility inherent in recipients, and the differences between judge and jury as a legal audience.⁴ Discussed are both inherent and induced factors related to gullibility.

Section IV evaluates the channels, or means of communication, with emphasis on those used in the courtroom. Some definite conclusions have been arrived at by trial lawyers, and these are examined in light of the findings of experimental social psychologists.

I. THE SOURCE

Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and more readily than others; this is true generally whatever the question is, and absolutely true when exact certainty is impossible and opinions are divided.

It is not true, as some writers assume in their treatises on rhetoric, that the personal goodness revealed by the speaker contributes nothing to his power of persuasion; on the contrary his character may be called the most effective means of persuasion he possesses.

Aristotle⁵

One would predict that the impact of communication attributed to a highly respected source would be greater than one attributed to a lesser source. This would be common sense—the assumption being that of “prestige suggestion.” Prestige suggestion can be defined as follows: a given communication will induce a greater change in the opinions of an

4. Much of the research considered here reflects the influence of Harry Kalven, Jr. and Hans Zeisel, who have done an empirical study of the American Jury. H. KALVEN JR. and H. ZEISEL, *THE AMERICAN JURY* (1966).

5. Aristotle as quoted in STRYKER, *THE ART OF ADVOCACY* 140-41 (1954).

audience if attributed to a source having high credibility rather than to a source having low credibility.⁶

Much of the work on prestige suggestion deals with the characteristics of the communicator and his role in society. Typical of these studies was one by Arnett, Davidson, and Lewis, in which attitude statements were presented to graduate students for their opinions before and after the statements were attributed to a credible source. Their results seem to be dictated by common sense. The student's own positions on each item changed in the direction attributed to the credible source.⁷ A finding by Bowden, Caldwell, and West is like the one of Arnett and his colleagues. Statements proposing solutions to the economic problem of an appropriate monetary standard for the United States were more often approved when the source of the statements was identified as an educator or a businessman, less often when the source was identified as a minister.⁸

The more credible the source, the more persuasive the appeal is a finding which comes as no surprise. But what makes a source credible? What makes a source reliable? Why are some speakers perceived as highly trustworthy by some people, yet, at the same time, untrustworthy by others?

One obvious variable controlling source credibility is physical appearance. In an experiment conducted by Mills and Aronson, it was confirmed that a physically attractive communicator is more influential than one who is unattractive, even when the audience has been made aware of the communicator's persuasive intent.⁹ There is no logic behind such a finding, but it will be frequently found throughout this area that logic is not necessarily the guide. For example, the concept of "charisma", whatever that is, defies any logical explanation. Yet, it exists; it is a cause of influence and admiration; and it is the only explanation in some instances why some people are more influential than others.

Another variable that influences source credibility is implied in the consistency hypothesis. This means that when a speaker is placed in a psychologically inconsistent position—where his public behavior is

6. E. Aronson and B. Golden, *The Effect of Relevant and Irrelevant Aspects of Communicator Credibility on Opinion Change*, 30 J. OF PERSONALITY 135 (1962).

7. C. Arnett, H. Davidson, and H. Lewis, *Prestige as a Factor in Attitude Change*, 16 SOCIAL SOC. RES. 49-55 (1931).

8. A. Bowden, F. Caldwell, and G. West, *A Study in Prestige*, 40 AMER. J. SOCIOLOGY 193-204 (1934).

9. J. Mills and E. Aronson, *Opinion Change as a Function of the Communicator's Attractiveness and Desire to Influence*, 1 PERS. SOC. PSYCHOL. 173-77 (1965).

counter to his private beliefs—he will experience psychological discomfort.¹⁰ Often, the discomfort tends to be manifested in some overt act to which an audience can respond. For example, when an otherwise credibly perceived communicator defends a position not his own, he may stumble over his words “hem” and “haw”, and in general lose his air of authority and his persuasiveness along with it. In an experiment conducted by Greenberg and Tannebaum, a writer was given information which attacked his beliefs; he was then asked to compose something in support of that information. As could be predicted from the “consistency hypothesis,” he took longer to write the article and made more grammatical errors.¹¹

Every time a trial lawyer defends a position inconsistent with his beliefs, he flies right in the face of the consistency hypothesis. Some lawyers have suggested that one should lie to himself—deceive his psyche—to avoid the inconsistency; others insist on dropping the case; and others automatically go forward with an obvious lack of conviction and certainty. The solution to this problem is not easy, if at all possible.

Source credibility has also been found to be directly related to objectively irrelevant factors. The idea that people generally make use of their ability to understand the objective character of a presentation, and thus act in keeping with its rational requirements, has been seriously undermined by Aronson and Golden. They designed an experiment to investigate the relative effectiveness of objectively relevant and objectively irrelevant aspects of communicator credibility. A speech, extolling the virtues of arithmetic was recited to sixth-grade students by one of four communicators:

- a. high relevant and high irrelevant credibility (a white engineer);
- b. high relevant and low irrelevant credibility (a Negro engineer);
- c. low relevant and high irrelevant credibility (a white dishwasher);
- d. low relevant and low irrelevant credibility (a Negro dishwasher).

The results indicated that both relevant and irrelevant aspects of credibility are important determinants of opinion change. There was a strong tendency for the engineers to be more effective than the dishwashers. But, there was also a strong tendency for those students who were prejudiced against Negroes to be underinfluenced by the Negro

10. R. ROSNOW and E. ROBINSON, *EXPERIMENTS IN PERSUASION* 3 (1967).

11. B. Greenberg and P. Tannenbaum, *Communicator Performance under Cognitive Stress*, 39 *JOURNALISM Q.* 169-78 (1962).

communicators, and for those students who were unprejudiced against Negroes to be overinfluenced by the Negro communicators.¹² In light of the experiment by Aronson and Golden, and other experiments like it, they suggested that the following conclusions could be made:

1. In general, a white communicator will be more effective than a Negro communicator of equal relevant credibility. This prediction is based upon the assumption that more members of an audience will have negative attitudes toward Negroes than toward Caucasians, thus diminishing the credibility of the Negro and reducing his overall influence.¹³
2. The more negative an individual's attitude toward Negroes is, the less will he be influenced by the Negro communicator regardless of the objectively relevant credibility of the communicator.¹⁴

The experiment of Aronson and Golden, and the conclusions to be derived from it, are consistent with the independent hypothesis of Sherif, Sherif, and Nebergall who noted that:

[C]redibility and like terms do not represent attributes of communicators; they represent judgments by the listeners . . . There is no such animal as a perfectly credible communicator, although there may be a few persons willing to accept absolutely anything some other special person says.¹⁵

What does it mean to the trial lawyer that objectively irrelevant factors may affect his persuasiveness, or that "credibility represents judgments by the listeners?" It means that the intentional selection of one's listeners is a major step towards establishing credibility, and that the trial lawyer must carefully screen the panel members of a jury if he decides not to waive it. The trial lawyer must determine whether a prospective juror is a member of his, or his client's or his adversary's racial, social, political, or other human encounter group; or whether he is a member of a group that has some attitude or prejudice which would influence their reaction to the evidence and issues in the case. Sometimes, a good trial lawyer will refuse to take the case of a client because the objectively irrelevant aspects of his persuasiveness outweigh the objectively relevant.

Though persuasion should depend on what a speaker says and not on

12. Aronson, *supra* note 6, at 146.

13. *Id.* at 137.

14. *Id.*

15. C. SHERIF, M. SHERIF and R. NEBERGALL, *ATTITUDE AND ATTITUDE CHANGE*, 201-02 (1965).

what people think of his character before he begins to speak, it simply does not in many instances. This is what Emerson meant when he wrote: "What you are speaks so loudly I cannot hear what you say." Fortunately or unfortunately for the passive parties in a lawsuit, social psychologists and lawyers tend to agree.

It is interesting to note that lawyers are not the only source of communication in a trial. Witnesses are always a source who may also, because of what they are, speak so loudly that the jury cannot hear what they say. This proposition is implicit in the forms of impeachment. Why else would prior convictions that do not involve moral turpitude—and most do not—be admissible for impeachment purposes? And how much does a witness's reputation in the community predetermine what he is going to say? Moreover, it is naive to believe that a witness's race or appearance does not reflect on his credibility. For these reasons alone, it is imperative that a lawyer determine before trial what witnesses he is going to call; whether he is going to use cumulative witnesses; and at what point in the order of the witnesses he is going to call his client to testify, if at all. It is further suggested that a lawyer should talk with his witnesses about their dress and appearance in the courtroom. Life style is a sensitive issue, but so are the consequences of a civil or criminal trial.

II. THE MESSAGE

Both sides of a controversy are presented to a jury which has no prior familiarity with the issues involved. This system, designed to resolve controversies in the fairest manner possible, has recently been examined by social psychologists. One experiment was conducted by Chester Insko, who used the prosecution and defense arguments in a summarized law case to determine the normative behavior of an audience under circumstances similar to those of a jury in court. He gave four different combinations of communications and counter communications, much akin to a direct examination, a cross, a redirect, and a recross; Insko concluded that when a one-sided communication was followed by a one-sided counter communication, opinions were no more influenced by the first than by the last.¹⁶ If the communications were equally strong, perhaps the first communication moved the subjects' opinions a given amount in one direction—while the last communication moved their

16. C. Insko, *One-sided Versus Two-sided Communications and Counter-communications*, 65 J. ABNORM. SOC. PSYCHOL. 203-06 (1962).

opinions the same amount in the opposite direction. As a result, their final opinions would have ended up right where they were.¹⁷ Of course, juries never end up right where they were. They are persuaded one way or the other for many reasons, even assuming the communications are equally strong (which is an unrealistic assumption in most cases). But it is interesting to note that the trial procedure is designed to give no unfair advantage to either the first or second party where the order of examination is concerned.

A. *The Order of Presentation*

The more intriguing question is one that was posed by the social psychologist F. H. Lund more than forty-five years ago. He asked: if both sides of a controversial issue are presented successively, which has the advantage—the side presented first, or the side presented last? When the first side has the greater impact, we call this primacy. When the last side is more effective, we call this recency.

In an experiment intended to answer this question, Lund presented mimeographed, counter-balanced communications to groups of college students. Each communication presented the pros and cons of such issues as whether all men should have equal political rights, whether the protective tariff is a wise policy for the United States, and whether monogamous marriage will continue to be the only socially accepted relation between the sexes. The students completed an opinion questionnaire two days before the communications and again immediately after each communication. Lund observed that when the students received both sides of an issue, the side presented first consistently had an advantage over the side presented last. On the basis of this observation he enunciated the controversial principle we know today as the "law of primacy in persuasion."¹⁸ The principle of primacy, briefly stated, is the tendency of humans to develop strong beliefs, highly resistant to change, upon first impression.

Subsequent investigations by H. Cromwell indicated Lund overstated his law. Instead of primacy, Cromwell found that recency—the tendency of humans to remember best that which they have heard last—was the dominating factor.¹⁹ And late in the 1950's, Hovland and his associates

17. ROSNOW, *supra* note 10, at 99.

18. F. Lund, *The Psychology of Belief: A Study of its Emotional and Volitional Determinants*, 20 J. ABNORM. SOC. PSYCHOL. 174-96 (1925).

19. H. Cromwell, *The Relative Effect on Audience Attitude of the First Versus the Second Argumentative Speech of a Series*, 17 SPEECH MONOGR. 105-22 (1950).

published *The Order of Persuasion*, and concluded, in apparent contradiction to Lund:

[W]hen two sides of an issue are presented successively by different communicators, the side presented first does not necessarily have the advantage.²⁰

In recent years, the primacy-recency problem has become the object of increased attention. Instead of a general "law" of primacy, or recency, we have today an assortment of miscellaneous variables, some of which tend to produce primacy ("primacy-bound variables"), others which tend to produce recency ("recency-bound variables"), and others which produce either primacy or recency, depending on their utilization ("free variables").²¹

It has been found that nonsalient,²² controversial topics,²³ interesting subject matter,²⁴ and highly familiar issues,²⁵ tend toward primacy. On the other hand, salient topics,²⁶ uninteresting subject matter,²⁷ and moderately unfamiliar issues²⁸ tend to yield recency. And "strength" is a free variable . . . that is to say, if arguments for one side are perceived stronger than arguments for the other, then the side with the stronger arguments has the advantage whether he goes first or last.²⁹

Because of the importance of the opening and closing arguments in a trial, these experiments on primacy and recency have been examined by trial lawyers. Some cases, to be sure, are inherently "strong" for one side or the other; and assuming equal communications, the "strong" side will have an advantage in the opening whether the opening is given first or last—and the "strong" side will have an advantage in the closing argument whether the closing is given first or last. However, many cases that go to trial do so with equally pressing arguments on each side; otherwise they would have been disposed of or settled. With this as a given, it is then the nature of the case that will determine the impact

20. C. HOVLAND, *THE ORDER OF PRESENTATION IN PERSUASION* 130 (1957).

21. ROSNOW, *supra* note 10, at 101.

22. ROSNOW and J. GOLDSTEIN, *Familiarity, Salience, and the Order of Presentation of Communications*, 173 J. SOC. PSYCHOL. 97 (1967).

23. R. LANA, *Controversy of the Topic and the Order of Presentation in Persuasive Communications*, 12 PSYCHOL. REP. 163-70 (1963).

24. R. LANA, *Interest, Media, and Order Effects in Persuasive Communications*, 56 J. PSYCHOL. 9-13 (1963).

25. R. LANA, *Familiarity and the Order of Presentation of Persuasive Communications*, 162 J. ABNORM. SOC. PSYCHOL. 573-77 (1961).

26. ROSNOW, *supra* note 22.

27. LANA, *supra* note 24.

28. LANA, *supra* note 25.

29. R. ROSNOW, R. HOLZ, and J. LEVIN, *Differential Effects of Complimentary and Competing Variables in Primacy-Recency*, 69 J. SOC. PSYCHOL. 135-47 (1966).

an opening or closing argument will make on the jury. If a case is inherently dramatic, interesting, and not too technical—such as an emotionally contested divorce, a savage murder, or a rape—it will tend toward primacy . . . and the party to open first has a distinct advantage. Cases that are not interesting, lack color, and are dull or highly technical—such as a condemnation proceeding, a tax claim, a dispute over title to real property—tend toward recency . . . and the party to close last in such a case has the advantage.

It is interesting to note that in many jurisdictions the plaintiff in a civil case, and the prosecution in a criminal case, opens first and closes last. If a case should tend toward primacy, the plaintiff or prosecution has the advantage of opening first; and if a case should tend toward recency, the plaintiff or prosecution has the advantage of closing last. It follows that in all cases in those jurisdictions, where there is no free variable, the defendant is at a distinct disadvantage with respect to the order of the opening and closing.

However, the defendant's disadvantage may be offset in some instances. A defendant is entitled to open and close when in his pleadings, he has admitted the cause of action pleaded and sets up an affirmative defense or cross demand.³⁰ Under some provisions he is to be accorded such right when, after the issues of fact are settled and before the trial commences, he admits that the plaintiff has a good cause of action except so far as it may be defeated by the defensive matter.³¹ In criminal cases, in some states by virtue of statute or rule of court, a defendant not introducing testimony is entitled, by himself or by counsel, to open and conclude the argument.³²

Just as jurors are affected by the order of an opening and closing, they are affected by the order in which evidence is presented—whether it be testimonial, documentary, or real. For example, jurors tend to remember evidence which is presented first and that which is presented last; they tend to forget the evidence which is presented in the middle.³³ Almost without exception, leading trial tacticians advise a case should be started with a strong witness and ended with a strong witness.³⁴ Even during the examination of a single witness, the jury's maximum at-

30. 2 AM. JUR. *Admissions* § 70 (1958).

31. *Id.*

32. 21 AM. JUR. *Criminal Cases* § 73 (1958).

33. T. Parker, *Applied Psychology in Trial Practice*, 12 FED. OF INSUR. COUNSEL 6 (1962).

34. *Id.*

tention will be at the beginning of the examination, and at the end.³⁵ As can be seen, the law of primacy and the law of recency affect more than the tendency of humans to develop strong beliefs, highly resistant to change, upon first impressions. The "laws" affect memory as well. The relevance of this is obvious enough: a presentation is useless unless the jury remembers it.

Since final deliberations have a tendency to depend almost exclusively on the memory of the jury, the following "laws of memory" should be noted. Juries tend to remember:

- a. that which has meaning to them;
- b. that which is familiar to them, or at least that which in some way can be associated with something they already know or can easily learn;
- c. those items of evidence they can fit into an overall picture;
- d. that which is vivid; and
- e. that which is repeated.

B. *Emotional Appeal v. Rational Presentation*

Is an emotional appeal as effective as a rational presentation? Social psychologists can not come to an agreement. An experiment conducted by George W. Hartmann indicated that an emotional appeal may be the more effective.³⁶ An experiment conducted by F. H. Knower indicated that a rational presentation may be the more effective.³⁷

Trial lawyers have their own ideas about appealing to the sympathies or intellect of the jury. Some of these are required by law. As a general rule, appeals to sympathy "may not enter the jury box, nor be heard on the witness stand, nor speak too loudly through the voice of counsel."³⁸ It is, therefore, improper for counsel to appeal to the sympathy

35. *Id.*

36. During the election campaign of 1935, the city of Allentown, Pennsylvania, was divided for experimental purposes into three types of wards:

1. an "emotional" area in which all the resident adults received leaflets written in vigorous advertising style urging support of the Socialist ticket; 2. a "rational" region, in which a more academic type of persuasion was used; and 3. a "control" district where nothing was distributed.

The increase in the minority party vote was greatest in the "emotional" wards, next largest in the "rational" wards, and lowest in the "control" wards.

G. Hartmann, *A Field Experiment on the Comparative Effectiveness of Emotional and Rational Political Leaflets in Determining Election Results*, 31 J. ABNORM. SOC. PSYCHOL. 99-114 (1936).

37. F. Knower, *Experimental Studies of Changes in Attitudes: A Study of the Effect of Oral Argument on Changes of Attitudes*, 6 J. SOC. PSYCHOL. 315-47 (1935).

38. *F.W. Woolworth Co. v. Wilson*, 74 F.2d 439 (5th Cir. 1934).

of the jury, either directly or indirectly, as, for example, by asking the jury in a personal injury action to put themselves in the plaintiff's place;³⁹ nor may counsel ask the jury if they would want to go through life in the condition of the injured plaintiff,⁴⁰ or would want members of their family to go through life crippled.⁴¹ In a few cases, lawyers arguing to juries have attempted to invoke sympathy by speaking, without justification in the evidence, either eulogistically or disparagingly of third persons who may have been casually connected with the case or the parties to the controversy. This conduct is always improper.⁴² Likewise, it is generally considered improper for an attorney, in his argument in a personal injury case, to ask the jury what would compensate them for a similar injury.⁴³

Notwithstanding the declared law, and the frequent admonitions of the court, the jury's sympathies are often intentionally aroused—and appellate courts often decline to reverse verdicts resulting from such misconduct.⁴⁴

The impact of a sympathetic appeal is significant. Despite legal and ethical precautions, sympathy is generally on the side of the plaintiff in a civil case, with reason on the side of the defendant. In a criminal case, the converse seems to be true. But the matter cannot be so simple. Just as some criminal defendants are attractive and arouse sympathy, others are unattractive and tend, almost automatically, to alienate the jury. It is understandable that a jury may, on occasion, be moved by sympathy to acquit an otherwise guilty defendant, but the reverse process requires the jury out of antipathy to convict an innocent person. Kalven and Zeisel, in a recent detailed study of the American jury, came to the following conclusions:

1. Defendants evoke sympathy in our trials one out of every five times. Since the sympathetic defendant causes disagreement one out of every five times he is present, and since he is present roughly one out of every five times, the sympathetic defendant caused disagreement in $\frac{1}{5} \times \frac{1}{5} = \frac{1}{25}$, or 4 per cent, of all cases.⁴⁵
2. It is predicted that an *unattractive* defendant would have a converse effect on the jury . . . that is, where the judge acquits,

39. *Id.*

40. *Morrison v. Carpenter*, 179 Mich. 207, 146 N.W. 106 (1914).

41. *Hughes v. City of Detroit*, 161 Mich. 283, 126 N.W. 214 (1910).

42. 53 AM. JUR. *Appeals to Sympathy of Jury* § 496 (1958).

43. *Wells v. Ann Arbor R.R.*, 184 Mich. 1, 150 N.W. 340 (1915).

44. *Hazelrigg Trucking Co. v. Duvall*, 261 P.2d 204 (Okla. 1953).

45. KALVEN, *supra* note 4, at 217.

the presence of this factor will at times induce the jury to disagree with the judge and convict.⁴⁶

It is fair to say that the jury is responsive to the individual defendants in a criminal action, and to the individual plaintiffs in a civil action. To put it another way—sympathy affects jury decisions. The intriguing issue that arises from this is what sort of presentation should an advocate make if his case or his client is sympathy-oriented. Emotional appeal or rational presentation? This question raises ethical issues as well as the problems of one's approach at the message stage. The answer—there is no answer—is determined by one's role conception, by the role one assumes as an advocate.

C. *The Manner of Presentation (In the Courtroom)*

Trial lawyers have written an infinite amount of material on the art of advocacy, or as some social psychologists would have it, the art of persuasion at the message stage. Call it what you will, their authority in this area cannot be doubted. Though it is beyond the scope of this paper to give a systematic and detailed exposition of what trial lawyers consider persuasive advocacy, some discussion is in order. The areas to be covered in brief outline form are those areas trial lawyers consider to be the critical stages of persuasion—the opening, direct examination, cross-examination, and the closing.

It will be assumed throughout the following discussion that an effective presentation of a case is preceded by a vast amount of preparation. Implicit in this assumption is an investigation of law and fact, the selection of witnesses and evidence, planning the order of the witnesses and the examination of each, considering the potential objections, choosing between jury and non-jury trial, and considering the arguments to be urged and the final points to be made; preparation also means interviewing witnesses and clients, taking statements, attending conferences, and examining all papers, contracts, letters, and files.

1. *The Opening*: Even though the purpose of the opening is merely to introduce the nature of the controversy, trial lawyers insist that maximum headway can be made at this stage. Their reasons are founded on the law of primacy—that is, an idea or fact once accepted by the jury in the opening statement of a case has a tendency to become more fixed as

46. *Id.*

time goes by, and the longer it stays, the more difficult it is to dislodge.

As a general rule, the case should be opened in a calm, deliberate, and dignified manner, since this is not an argumentative stage of the proceedings. There is enough opportunity for argumentation in the direct and cross-examination of the witnesses, as well as the closing. However, this is not to say the opening should be made without imagination and conviction, or without the absorbing quality of the storyteller's art.

In opening, the plaintiff should introduce to the judge and jury the parties to the litigation and then proceed with an outline of his case. His manner should be his own, his style sincere, and his attitude, one of fair play. Finally, he should state the law in his own terms if it is necessary to give the jury an understanding of his theory. (Case law indicates an advocate has the right to do this).⁴⁷

Since the plaintiff's counsel has the advantage of making the first opening address to the jury, it follows that the defendant's attorney must be prepared with a strong persuasive argument of his own. He must convince the jury that his client has a meritorious defense, either as to liability or to damages, or both, and that he too is worthy of belief. The content of the defendant's opening statement should include the names of the parties and their background; the form of action; a restatement of facts; and the essence of the defense. The manner of the defendant's opening, like the manner of the plaintiff's, depends on the facts of the case, and of course, the nature of the advocate.

2. *Direct Examination*: After the opening, the advocate must present his case. Direct examination is not an exciting phase of the trial, nor is it one in which the subtle arts and consummate skills of an advocate are made apparent to the jury—however, its importance cannot be overemphasized. Francis Wellman made the following comment about direct:

If the direct examination is properly and skillfully conducted, the impression thus made by an honest witness is more lasting than any argument of counsel. The vivid story of a single witness told in a winning way will leave a first impression upon a juror's mind that no eloquence can efface.⁴⁸

And Robert Keeton, a law professor at Harvard University, is no less convinced of the importance of the examination-in-chief.

47. *Pallas v. Crowley-Milner and Co.*, 334 Mich. 282, 54 N.W.2d 595 (1952); *Cf. Lafrenz v. Stoddard*, 50 Cal. App. 2d 1, 122 P.2d 374 (1942).

48. WELLMAN, *supra* note 1, at 142.

[M]ore cases are won by evidence produced on direct than by that revealed in cross-examination.⁴⁹

The basic purpose of direct examination is to present evidence in its most favorable light and at the same time impress the judge and jury with its accuracy and truthfulness. This is no easy task. What witnesses should you call? In what order? Should you use cumulative witnesses? Should you call the adverse party? At what point in the order of witnesses should you call your client to testify? Should you use leading questions? Should you not? Should you offer harmful evidence on direct examination? Should you purposely offer evidence of doubtful admissibility? To what degree should you prove qualifications of an expert? How should you introduce secondary evidence? Should you react obviously to the testimony as it is given? Should you permit or encourage your witnesses to use gestures to convey their meaning? To what extent should you use demonstrative evidence? Should you call upon the witness to make diagrams, drawings, or computations on a blackboard or paper during his testimony?

No hard and fast rules can be laid down. No two lawyers will present a case in the same way. What is effective for one is ineffective for another. But take it as a given that no good trial lawyer walks into the courtroom with these questions unanswered.

In summation, the following points are considered fundamental, but essential, to the art of direct examination.

- a. A good direct examination requires an understanding of witnesses and human interaction and “games people play.” Some witnesses are clever, wise, and tricky; others are diffident, scared, or ignorant.
- b. As each witness is called to the stand, it should be kept in mind that he is probably in a strange and frightening environment. It is relatively simple to put a witness at ease by asking a few preliminary questions before going into the facts in issue. Questions as to where the witness lives, how long he has lived there, how he is employed, etc., are the type that put a witness at ease because the answers are spontaneous.
- c. Once the witness is relaxed (if possible), and the foundation is laid, narrative questions are generally required since the tendency of people is to adopt the suggestion of the person or side they want to help. However, this general rule does not apply to a witness who is diffident, unresponsive, hostile, or unable to

49. KEETON, TRIAL TACTICS AND METHODS 7 (1954).

communicate—such witnesses should be carefully led through their testimony.

- d. If the evidence of one's own witness is unfavorable because of hostility or surprise, the authorities suggest the following course of action.
 - (1) Do not exhibit the slightest sign of displeasure since this will only add to the bad effect.
 - (2) Never abandon the witness entirely. This intensifies the damage done and gives the impression of complete demoralization.
 - (3) Calmly ignore the adverse statement and quickly inquire into something new, even if unimportant, and attempt to tone down and soften the adverse impressions made.

3. *Cross-Examination*: When cross-examining an adversary's witness, the examiner generally assumes the witness is in error—or is lying. The witness, on the other hand, assumes he is not mistaken, resents an attack upon his testimony, and despises an attack upon his person. It is no wonder that cross-examination is considered the most exciting and colorful phase of a trial.

Cases are won and lost every day at the cross-examination stage, and that which distinguishes a good cross-examination from a bad one is probably experience. Only experience can give an advocate that sixth sense which tells him when he has reached dangerous ground, when he should advance, when he should retreat, and when he can risk his case upon a single question. Even the most gifted require many years of training and careful observation to arrive at anything approaching perfection. But to say that only practice can breed perfection in any art is to deny the value of precepts.

Before an advocate rises to cross-examine a witness, he must ask himself whether the witness has testified to anything that is material against him; whether the testimony has injured his side of the case; and ultimately, whether one should cross-examine the witness at all. When a witness does testify to material facts which injure an advocate's position, it becomes the advocate's duty to break the force of it. His method of doing so will vary with the nature of the testimony and the character of the witness. Whether a witness has made an honest mistake or is intentionally lying, the testimony of the witness may be attacked in any one of the following ways: by showing conviction of crime; by showing hostility, bias, or adverse financial interest; by showing prior inconsistent acts or statements; by showing poor reputation for truthfulness;

by showing lack of knowledge or perceptive capacity; by rebuttal evidence.

As a general rule, cross-examination should be done with quiet dignity and absolute fairness to the witness. The reason for the “gentleman’s approach” is that the jury’s sympathies are invariably on the side of the witness, and juries are quick to resent any discourtesy toward him. Furthermore, the jury is aware that witnesses generally take sides when they come into court and exaggerate if they have to. But to them, this does not equal perjury or lying, and they are generally right. More often than not it is unintentional error and imagination rather than a designed misrepresentation. It is the duty of the cross-examiner to separate imagination from memory, and fact from inference. Any more is a dangerous tactic.

However, suppose a witness is lying under oath and is destroying an advocate’s position because of it. Though there is no effective substitute for experience or ingenuity in this area, the following techniques have proven useful:

- a. Encourage the witness to go in the direction he thinks you do not want him to. Soon nobody will believe what he is saying—“a liar is not to be believed even when he speaks the truth.”
- b. If the witness appears to be speaking from rote memory, jump jump him around and make him repeat the middle, the beginning, and the end. Once you disclose the fact that the witness is not honestly mistaken, no further questions need be asked.

4. *The Closing*: The importance of the closing argument is founded in the law of recency—that is, humans tend to remember best that which they have heard last. It is not enough for the record to sustain the verdict on its face, or for the jury to listen to the testimony presented. The facts of the case on final argument must be connected. This means preparation. Though the final summation cannot be prepared until all of the testimony in a case has been presented, initial preparations must be begun as soon as the case is retained and continued to the trial date.

Like the opening and forms of examination, the closing will depend on the nature of the case and the personality of the advocate. Particular attention should be paid to the closings which are recency-bound, which are salient, uninteresting, or complex. Recency-bound cases must be woven into a consistent and logical pattern to be remembered; the facts

must be re-emphasized, their relation to one another revealed, and their probability affirmed.

The question arises: which of the four stages of a trial is the most important? Some trial lawyers say the opening since it is the opportunity to make a lasting impression on the jury. Others say the direct examination, because it is the first stage for presenting evidence. Some say the cross-examination, for it is here the adversary's case is destroyed. Still others say the closing as it is the final effort and the one to be remembered.

There is no definite answer or general rule in this area.⁵⁰ How can there be? The facts and problems of each case differ; the juries differ; and the lawyers differ.

But trial lawyers do agree that the opening, the examination, and the closing of a case must be handled as an art, not a science.⁵¹ This means that the effective use of language and voice is critical. Language is the medium. And voice—need it be said—is the most persuasive means of communication known. The hardest tears, the gayest laughter, and the deepest logic have been provoked by tone—in openings, direct examinations, cross-examinations, and closings.

III. THE RECIPIENTS

[T]he audience should be in the right frame of mind in lawsuits—when they are feeling friendly and placable, they think one sort of thing; when they are feeling angry or hostile, they think something either totally different or the same thing with a different intensity; when they feel friendly to the man who comes before them for judgment, they regard him as having done little wrong; when they feel hostile, they take the opposite view.

Aristotle⁵²

Indeed how could anything be more important than the selection of the men who are to decide the case? It matters not how thorough one may have been in preparation; it matters not how good a case

50. This conclusion was derived by interviewing one-hundred trial lawyers. The question they were asked, among others, was "Which of the four stages of a trial (and they were mentioned) is the most important?" There was absolutely no consistency, which is consistent with the written works of great advocates.

51. This observation is in no way intended to undercut the importance of understanding the correlation between social scientific findings and effective trial techniques discussed at length in this commentary.

52. Aristotle as quoted in STRYKER, *THE ART OF ADVOCACY* 145 (1954).

one may have—unless he selects the proper kind of men to decide it, he is bound to have a mistrial or a defeat.

Francis L. Wellman⁵³

Can the background characteristics of juries and judges be connected with their decisions? Trial lawyers tend to think so. Their theory is that individual background characteristics can be connected with attitudes and opinions which ultimately influence, and in some instances dictate, the verdict. In selecting a jury, trial lawyers advise to mark their employments, their methods of earning a living, their social positions, and their age.

Many propositions and rules of thumb have resulted from the volumes trial lawyers have written on jury selection. They contend that retired businessmen are usually fair but disinclined to give good verdicts;⁵⁴ railroad men and their wives are excellent jurors;⁵⁵ persons of Irish, Jewish, Latin American and Southern European extraction are more desirable as jurors than people of British, Scandinavian, or German extraction;⁵⁶ women are desirable if the principal witness against the defendant is a woman;⁵⁷ new jurors are more desirable than experienced jurors.⁵⁸

Connecting individual background characteristics with decisions, attitudes, or opinions has been a major achievement of modern social science research. It has often yielded stunning results. I will cite just one example. The classic study of voting,⁵⁹ made during the Willkie-Roosevelt campaign of 1940, produced data which provided a basic insight into the structure of the American electorate. The study linked voting behavior to three background characteristics: religion, economic status, and size of community.

The classic study of voting answered the question: can a correlation be established between background characteristics and decision-making in a national election? The parallel question is: can a correlation be established between jury backgrounds and decision-making in trials? Kalven and Zeisel answered this question with respect to criminal trials. Their answer was a "quick no."⁶⁰ Social psychologists tend to agree with

53. WELLMAN, *supra* note 1, at 111.

54. APPLEMAN, *SUCCESSFUL JURY TRIALS* 122-28 (1952).

55. *Id.*

56. H. ROTHBLATT, *SUCCESSFUL TECHNIQUES IN THE TRIAL OF CRIMINAL CASES* (1961).

57. *Id.*

58. *Id.*

59. LAZARFIELD, BERELSON and GAUDET, *THE PEOPLE'S CHOICE* 16-27 (1944).

60. KALVEN, *supra* note 4, at 465.

Kalven and Zeisel. Many factors have been reported to be correlated with persuasibility, and the interplay of even one factor is infinite. Rosnow and Robinson give this example:

[I]t is as plausible to assert that the factor of intelligence is positively correlated with persuasibility as it is to assert a negative correlation, or even no correlation. On the other hand, the more intelligent a person, the better able he is to comprehend the issues. The less intelligent person, because of his limited comprehension, is less susceptible to persuasion on complex issues. On the other hand, the more intelligent a person, the greater is his critical ability, and the less he is influenced by persuasion.⁶¹

Since the interplay of the factors which affect persuasibility is infinite, it is suggested that any systematic determination of what makes one individual more subject to a persuasive appeal than another is impossible to validate empirically. It seems that the *voir dire*—the institution for sifting out unfavorable jurors—can not be effective for the reason lawyers think it is effective. In other words, it is not effective if it is used to correlate jury backgrounds with decision-making. A lawyer simply can not anticipate the infinite factors in a juror's background which will affect his thinking and persuasibility. Even assuming he could, there are several reasons why many factors in a juror's background could not be elicited. First, most people will not admit, even to themselves, that they may be biased or prejudiced. Second, legal rules preclude many questions from being asked. Third, there is the danger of offending. And fourth, there is always the possibility that a venireman is not telling the truth.

This is not to say that the *voir dire* stage of a trial is not a persuasive stage. The effect of a first impression on jurors is significant. This first impression is made during the *voir dire* of the jurors, not at the time of the opening statement, and certainly not at the time the first witness testifies.⁶² The fact that the opening statement is really the second event in the trial, and that the first witness's testimony is the third or fourth event, is often overlooked. The *voir dire* is the first event and this is the time when the first impression is made. The *voir dire*, of course, can not be a substitute for the opening statement, but when the trial lawyer has completed the *voir dire* examination, the jurors have already developed their first-impression beliefs.

61. ROSNOW, *supra* note 10, at 198.

62. 31 AM. JUR. *Evidence* § 136 (1958).

A trial lawyer may decide he does not want a jury as his legal audience. Then, of course, it will be the judge. Kalven and Zeisel made a concentrated effort to determine the magnitude of the disagreements between judge and jury in criminal and civil cases. In the criminal area, their empirical data indicated the jury is less lenient than the judge in 3 per cent of the cases and more lenient than the judge in 19 per cent of the cases.⁶³ Thus, the jury trials show on balance a net leniency of 16 per cent. In other words the defendant fares better 16 per cent of the time before the jury than he would have in a bench trial.⁶⁴ Another way of stating this is the jury acquits in 33 per cent, and the judge in only 17 per cent, of all trials. However, it was strongly emphasized that this figure must not be made the basis for a general probability calculus by *any* defendant, because the cases to which this 16 per cent applies have been selected for jury trial *because* they are expected to evoke pro-defendant sentiments.⁶⁵

In the civil area, the magnitude of any disagreement between judge and jury was found to be less significant. Kalven and Zeisel concluded that in some 47 per cent of all civil cases, the judge and jury find in favor of the plaintiff on liability, and in some 31 per cent find for the defendant, thus producing the over-all agreement on liability to 78 per cent.⁶⁶ Also, it was established that in 12 per cent of the civil cases it is the jury that will be more favorable to the plaintiff, and in 10 per cent of the cases it is the judge who will be more favorable to the plaintiff.⁶⁷ This finding confirms the popular expectation that the jury in personal injury cases favors the plaintiff, at least if that expectation is taken to mean that the jury is more likely to favor the plaintiff than is the judge.⁶⁸ It is also interesting to note that once liability has been found, the jury's damage award is on the average about twenty per cent higher than that of the judge.⁶⁹

IV. THE CHANNEL

The means of communication in the courtroom may take the form of testimony, and documentary or demonstrative evidence. The question is which channel is the most effective? Is it testimony, or is it real evi-

63. KALVEN, *supra* note 4, at 59.

64. *Id.* at 59.

65. *Id.*

66. *Id.* at 64.

67. *Id.*

68. *Id.*

69. *Id.*

dence which "speaks for itself"? When should photographs be used? Charts? Motion pictures? Spectacular experiments? Social psychologists and psychologists and lawyers, of course, have concerned themselves with these issues.

For years social psychologists attempted to rank the various means of communication in the order of their potency, but finally concluded that it could not be done. To social psychologists, the ultimate answer to the question "Which channel?" can only come after the communicator carefully considers the problem at hand, his desired aims, and the resources available to him. In the end, a subjective kind of optimum "efficiency index" will guide his decision.⁷⁰ In other words, it is for the communicator to decide how he can achieve the greatest impact within the bounds of his available resources.

Psychologists have been more helpful to the trial lawyer in this area. After much experimentation, they have concluded that the following percentages represent the amount of learning accomplished by each of the five senses (This is a general average which applies to the average of all situations):

Sight	85%
Hearing	10%
Touch	2%
Taste	1½%
Smell	1½%

In light of these statistics, the following suggestions have been made: (1) The sense of sight should be used to the maximum in presenting material.⁷¹ (2) Since our juries are made up of individuals who are not segregated in accordance with their ability to learn, the more senses which are stimulated, the better the chances for all of them to learn.⁷² In certain situations, the sense of hearing, touch, taste or smell could be a major channel for stimulation. For instances, a liquor bottle found in a wreck might be exhibited to the jury and smelled by them.⁷³ (3) Material must be presented in a logical, meaningful, striking and stimulating manner, using visual aids, demonstrative evidence, and other interesting experiences to make intense impressions on the jury.⁷⁴ (4) If a lawyer keeps in mind that the maximum attention of the jury is at the beginning and end of a case, and that 85% of what they learn will

70. ROSNOW, *supra* note 10, at 373.

71. Parker, *supra* note 33, at 6.

72. *Id.*

73. *Id.*

74. *Id.*

be through their eyes, he can be sure the jury will learn and remember the facts as he wishes them remembered, and render their verdict accordingly.⁷⁵

Trial lawyers, like social psychologists, are well aware that there is no ultimate answer to the question "Which channel?" However, in light of the experiments by psychologists and from their own years of experience, they have made certain definite conclusions with respect to the several means of communication available to them.

First of all, they have concluded that the persuasibility of real evidence ranks above oral testimony. It is common knowledge that two witnesses standing side by side observing the same event will differ in their statements concerning what happened. It has been suggested that, "in general, when the average man reports events or conversations from memory and conscientiously believes that he is telling the truth, about one-fourth of his statements are incorrect, and this tendency to false memory is the greater the longer the time since the original experience."⁷⁶ Furthermore, it is one thing to have the opportunity of observation, or even the intelligence to observe correctly, but it is still another to be able to describe it intelligibly and accurately.

With the foregoing as a given, law professor Robert Keeton came to the following, generally undisputed, conclusion:

[T]he lawyer who has more of real or demonstrative evidence than his adversary has a distinct advantage in the contest of convincing the jury.⁷⁷

Keeton, in his text on trial tactics and techniques, suggested that all favorable physical or demonstrative evidence that is available be used.⁷⁸ His only caveat was to avoid the use of "spectacular demonstrations that bear only a slight relation to the material issues of the case, or are inconsistent with evidence rules of your jurisdiction."⁷⁹ Keeton added further that it is good practice to call upon the witness to make diagrams, drawings, or computations on a blackboard or paper during his testimony. Not only is this a more accurate presentation, it has the distinct value of preserving an idea, or an expression, so that the jury may turn back to it for study and comparison, and to refresh their own memory of the testimony.⁸⁰

75. *Id.*

76. WELLMAN, *supra* note 1, at 161-62.

77. KEETON, *supra* note 49, at 73.

78. *Id.*

79. *Id.* at 74.

80. *Id.* at 75.

Real evidence is any tangible object presented for inspection to the trier of fact. It includes bullets, knives, guns, blood tests, photographs, x-rays, and tape recordings, as well as diagrams, drawings, and computations. A form of communication which is of special interest at the present time—because of its persuasive impact—is the motion picture. Coupled with a narrative, the film is well adapted to unfold a vivid series of actions, events, or incidents. In depicting situations that have actually occurred, it excites the imagination and emotions through the senses. In some respects the motion picture is even better fitted than testimony to exhibit the time-relation of events. For instance, two events significantly related to one another and happening simultaneously may be brought before the jury with telling effect in almost an instant of time, while in a narrative lengthy successive explanations would be required to make clear their proper relation. Of course, a proper foundation would have to be laid for the admission of a film, just as it would for the admission of any real evidence.

There is one other channel of communication in the courtroom that cannot properly be classified as testimonial or demonstrative evidence. For purposes of this section, the following forms of persuasion will be called "wordless persuasion" and will include physical proximity, position, gestures, facial expressions, and non-linguistic aspects of speech. These forms of persuasion are generally unintended, but if one is aware of them, a skilled performance need not be left to chance. In essence, be aware that physical proximity triggers intimacy; know that a person who is higher up than another is in a somewhat dominating position; consider the fact that gestures, whether voluntary or not, are social techniques intended to communicate definite meanings; control facial expressions since they manifest all emotions; don't overlook the fact that eye movements have an effect quite out of proportion to the physical effort exerted, and that they play an important part in sustaining the flow of interaction; finally, control the pattern and flow of remarks and silences for these cues are revealing to observers.⁸¹ These forms of persuasion are not used in isolation, but are integrated into one's technique and style, which should be a persuasive one.

CONCLUSION

When I was a young man, not skilled, and overmatched by my opponents, I lost many cases that I should have won. But as I be-

81. ARGYLE, *THE PSYCHOLOGY OF INTERPERSONAL BEHAVIOR* 32-37 (1971).

came older and more skilled and my opponents showing up were tyros, I won many cases that I should have lost. So in the end, justice was done.

An Advocate⁸²

The purpose of this article was to present some experiments conducted by social psychologists in one of their major areas of specialization. The importance of correlating these experiments with the methods and theories of trial lawyers should be self-evident. The literature of social science reflects many new insights about human behavior and communication, and influencing attitude and opinion change is what trial work is all about.

As long as the adversary system is with us, those versed in the art of persuasion will win cases they should not have, and tyros will lose cases they should have one. The morality of this is an independent issue and a question for everyone. It is suggested, however, that the adversary system presents no serious problem as long as those who hold themselves out as advocates are in fact advocates. Implicit in this is a knowledge of persuasion.

How much confidence can we have in the generality of the laboratory findings? There is no absolute answer, of course. It would be presumptuous to expect all problems that deal with human interaction to be amenable to an empirical analysis. Nor can all propositions concerning communication and opinion change even be submitted to experimental tests—for example, when a controlled analytical experiment shows a given factor to be significantly related to communication effectiveness, the question still remains as to the generality of the relationship. But to deny the significance of laboratory findings is to deny reality, and in a sense, is to deny the effective assistance of counsel. Why not know those factors which go into credibility? Why not know that certain cases are primacy-bound and others are not? Why not be aware of the impact one makes at the voir dire stage since it is the first encounter with the jury? And why not use every bit of real evidence available if it will help your case? This is not to say that present day juries are not composed of practical people accustomed to think for themselves, experienced in the ways of life, capable of forming estimates and making distinctions. But jurors, and judges, are people—and all people can be persuaded. And it is an advocate's duty to do just that.

82. F.L. BAILEY, *THE DEFENSE NEVER RESTS* 262 (1971).