Nebraska Law Review

Volume 66 | Issue 3 Article 11

1987

Psychological Manipulation in the Courtroom

Victor Gold
Loyola Law School, victor.gold@lls.edu

Commentary

Victor Gold*

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Trial lawyers have for centuries exploited psychological principles derived from intuition and experience. But amateur courtroom psychology is now giving way to science. For a price, professional psychol-

* Professor of Law, Loyola Law School, Los Angeles, California.

This commentary is drawn from a recent article by Professor Gold. *See* Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C.L. REV. 481 (1987).

ogists are available to advise lawyers on all aspects of trial advocacy including what to say, where to stand, how to select a jury, when to object and what suit to wear. In the words of one expert, "all in all, we help lawyers position their cases to juries in much the same way you would sell a bar of soap . . . ."[1]

Historically, lawyers have employed these experts when the economic or political issues at stake warranted the expense. Now, however, lawyers are developing the capacity to systematically employ psychological courtroom techniques on their own. Continuing legal education programs are currently offered on these subjects. Recently published books on trial advocacy are devoted in whole or in part to psychology. In the last decade, scientists have published dozens of articles in journals for trial lawyers describing various psychology-based advocacy techniques. These articles reflect an even larger and still growing body of academic literature concerning jury cognitive processes. As psychologists refine this research and as the advocacy techniques based upon it become more effective, increasing numbers of lawyers will likely use those techniques. Like executives in other growth industries, trial lawyers are eager to employ the latest scientific or technical advance to gain a competitive advantage.

Little concern has been expressed about this use of psychology as an advocacy tool. Perhaps lawyers are too eager, embracing psychology as the long awaited means of controlling the uncertainties of jury trial, to worry about its broader implications. Some behavioral scientists may be too overcome with the prospects of economic or academic rewards to care much about what they may be doing to another profession. Judges seem largely unaware of the development.

Yet there is reason for concern. Many of the psychology-based advocacy techniques being taught to lawyers can be used to induce juries to employ legally irrelevant or improper considerations in decisionmaking. These considerations include seemingly innocuous matters such as attorney language, dress, and other elements of what one might call courtroom style. But some techniques also involve unabashed efforts to induce jury reliance on bias. Lawyers can use other techniques to induce juries to evaluate evidence illogically. Lawyers can produce this illogic by confusing the meaning of evidence or distorting the jury's perception of it. All these techniques seek to influence subconsciously: the jury is unaware of what is influencing its decisionmaking or how that influence works.

I argue in this essay that subconscious persuasion, which I call covert advocacy, threatens to deprive the jury of its capacity to critically evaluate evidence and reliably reflect community values in its verdict. As a consequence, I contend that covert advocacy threatens the legiti-

1. Dancoff, *Hidden Persuaders of the Courtroom*, BARRISTERS, winter 1982, at 8, 17.

macy of both the jury and adversary systems in a way and to a degree never before threatened by conventional advocacy methods. After examining the techniques of covert advocacy and the dangers created by their use, I conclude that expanding the powers of the jury is the most effective way of dealing with this threat.

I. THE TECHNIQUES OF COVERT ADVOCACY

A. Techniques to Induce the Use of Extra-Legal Basis for Decisionmaking

Trial practitioner journals make frequent reference to psychological techniques aimed at inducing the jury to employ an extra-legal basis for its decision. A decisionmaking input is extra-legal when it is either irrelevant to the legal or factual issues of a case or is considered by the law to be an otherwise improper basis for decisionmaking. This group of techniques is itself classifiable into two subgroups: courtroom style techniques and techniques aimed at inducing the use of bias.

1. Courtroom Style as an Extra-Legal Basis for Decisionmaking

Courtroom style refers to how a lawyer and the witnesses tell their stories in the courtroom. Courtroom style techniques involve body movement, physical appearance, demeanor toward the jury, and use of language. Courtroom style is an extra-legal basis for decisionmaking because lawyer or witness demeanor usually has no connection to the legal or factual issues which should be the basis for the jury's verdict.

Language and voice are important elements of courtroom style. For example, several articles recently written for trial lawyers by behavioral scientists focus on a series of studies concerning the use of various verbal strategies in the courtroom. In one experiment, scientists found that lawyers can induce jurors to make judgments about the credibility of a speaker by manipulation of the "powerfulness" of the speaker's language. Powerless speakers use hedge words (sort of, kind of, around), intensifiers (very, really), meaningless filler words (you know), and terms of personal reference (my good friend, Mrs. Smith). Another element of powerless speech is the use of an inquisitive intonation at the end of a declarative sentence, suggesting the speaker seeks the listener's approval for the declaration. Powerful speech avoids the features of powerless speech. In experiments, jurors consistently evaluated powerful speakers as more credible than powerless speakers and gave plaintiffs with powerful speech witnesses substantially larger damage awards than plaintiffs with powerless speech witnesses. However, linking credibility with speech style proved to be a mistake. The experimenters found that the "power" component of linguistic style was not correlated with witness credibil-

ity. Instead, it was correlated only with witness social status. Witnesses who were poor, uneducated or unemployed had a tendency to use powerless speech while witnesses with business or professional backgrounds tended toward powerful speech. Nonetheless, the psychological correlation between speech style and credibility is strong; jurors persisted in linking credibility with the power component of speech even when the judge's instructions cautioned against it.

These results encourage lawyers to train their own witnesses to use powerful speech and to use that linguistic style themselves. These results further encourage lawyers to induce powerless speech in opposing witnesses to the extent possible. But since the distinction between powerful and powerless witness speech is not probative of witness credibility or any other relevant matter, efforts to exploit that distinction support an extra-legal basis for jury decisionmaking. If the jury believes the distinction is probative of witness credibility, it has been misled. Further, when counsel uses powerful speech to enhance his or her credibility, he or she seeks to focus the jury's attention on another extra-legal matter. The credibility of counsel is neither relevant nor evidence.

The manner in which this extra-legal consideration shapes jury decisionmaking makes it particularly dangerous. Most jurors would reject an overt suggestion to evaluate witness credibility based on social status. When an attorney makes the suggestion covertly through manipulation of linguistic style, the jury may be unable to detect and reject the subtle thrust of the attorney's efforts. Similarly, a verdict overtly based on considerations of social status would raise serious moral and constitutional questions that any trial or appellate judge could identify. When damage awards decrease with a decrease in the apparent social status of plaintiff and those witnesses associated with the plaintiff, the law improperly values individual rights and life differently for the powerful than it does for the powerless. These issues are no less pertinent when counsel subtly influences a verdict by exploiting the psychological divisions between the linguistic patterns of poor people and inaccurate stereotypes of supposedly more credible speakers. But the likelihood that any judge could detect the use of this technique and, thus, the presence of these issues, seems slim.

Many other courtroom style techniques seek to capitalize on this psychological correlations between credibility and social status. Recommendations concerning dress, physical positioning of counsel relative to the witnesses and the jury, and other aspects of attorney courtroom demeanor are aimed at psychologically enhancing the credibility of counsel by manipulating his or her social image. By seeking to create the impression of power, these techniques focus the jury's attention on extra-legal bases for decisionmaking: the social status and credibility of counsel are not relevant. These techniques always

affect jury decisionmaking through subtle means since an overt request to consider the attorney's social status would probably be ineffective, if not offensive.

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

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

However, the opportunity for lawyers to indirectly assert facts through manipulating the form of questions is not limited to rape cases and the use of this technique is often not so obvious. Research suggests that jurors enter the courtroom in all cases with a tendency to draw inferences from the manner in which questions are phrased in accordance with rules of speech commonly followed in society.

Research also has indicated that attorneys can use their knowledge of such everyday conversational and psychological rules to formulate non-leading questions that indirectly communicate information to the jury. Jurors who accept the premises embedded in the questions resist rejecting those premises even when the responsive testimony or other evidence suggests the premises are invalid. In this way counsel can subconsciously communicate theories and arguments to the jury that he or she never overtly stated by simply asking questions during witness examination. Since an attorney's questions are not themselves

evidence, when a lawyer exploits this knowledge he or she again seeks to induce the jury to employ an extra-legal basis for decisionmaking.

2. Bias as an Extra-Legal Basis for Decisionmaking

Lack of bias by the trier of fact is a fundamental aspect of fairness. The jury should decide a case solely on the evidence presented in open court, not on knowledge or beliefs the jurors bring with them to court. Bias, then, is an extra-legal basis for decisionmaking. However, some researchers suggest that in controversial trials or in trials where the evidence is not clear cut, extra-legal bias may influence the result in as many as half the cases.

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

To psychologists, however, the unbiased juror does not exist. Jurors, like other human decisionmakers, cannot evaluate evidence as if it were *sui generis* but must always relate it to past experiences and preconceived beliefs about the world. Based on this premise, some psychologists have concluded that the purpose of jury selection cannot be the selection of an impartial jury but, rather, the selection of the most favorably biased jury.

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

The use of this data to select the most favorably biased jury is just the first step. After attempting to select a jury susceptible to bias, the attorney then tailors the presentation of evidence to induce the jury to apply its biases in decisionmaking. Such efforts to induce jury reliance on bias work covertly. Obviously, the jurors do not know they have been selected because of bias. In fact, it is likely counsel tells them before, during, and after voir dire that the purpose of jury selection procedures is to find an impartial jury. Similarly, the appeal to bias by counsel during trial is covert. The need to conceal the thrust of counsel's efforts is vital. Jurors who realize that a lawyer is attempting to arouse their biases might not only take offense, but might also conclude that the lawyer does not believe his case sound. Hence, one goal

of covert advocacy is to induce the jury to employ bias while concealing from the jury the fact of their reliance on bias. Empirical studies suggest that this goal is well within reach. Juries often apply bias unconsciously while operating under the misapprehension that data is being evaluated objectively. When the jury is unaware of its use of bias, it cannot critically evaluate the appropriateness of that use in the same way the jury would evaluate an overt appeal to bias. Recall that a similar result is produced by covert advocacy techniques that focus on courtroom style. As described in section II of this essay, this effect of covert advocacy compromises the legitimacy of the jury system and the adversary process.

B. Techniques to Induce Illogical Evaluation of Evidence

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

1. Meaning Manipulators

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

> [a]s a defense tactic, an attorney can load the courtroom with spectators, presenting a variety of new contextual stimuli which might succeed in drowning out the stimuli presented by the opposing lawyers. . . . [A] particularly damaging witness for the opposing side can be made through various techniques to blend into the background stream, so that it is difficult for the jurors to remember what he or she said.[2]

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

2. Vinson, *Juries: Perception and the Decision-Making Process*, 18 TRIAL 52 (March 1982).

Lawyers can also manipulate the meaning attributed to evidence by the jury by following some simple psychological principles in ordering the presentation of evidence. For instance, several articles suggest that attorneys should present the most favorable evidence first because it will then have its greatest possible impact. This so called "primacy effect" is a product of the fact that people are "theorists" in their approach to information. The jury uses early encountered evidence to form initial theories about the issues in the case. These theories bias the interpretation of all later encountered evidence. Thus, later received evidence inconsistent with theories built upon the initial evidence tends to be either disregarded or misinterpreted. The jury tends to accord more weight to later received consistent evidence than logic permits. The jurors tend to sustain belief in the validity of their initial theories long after logic suggests those theories have been discredited. This process proceeds without the juror's conscious awareness of it, misleading the juror into believing that he or she is evaluating evidence objectively. Thus, the lawyer can manipulate the meaning attributed by the jury to the evidence by carefully choosing what evidence the jury first hears.

2. Weight Manipulators

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

Again, manipulating the order of evidence can affect the weight accorded to it. The first and last bits of evidence heard by the jury tend to have a disproportionately large influence over jury decisionmaking because they tend to be especially memorable. Similarly, the jury is more likely to perceive, store in memory and retrieve for use in decisionmaking, that evidence which is repeated or portrayed in vivid form. Counsel can covertly manipulate these factors to induce the jury to overestimate the importance of the evidence. But the order in which lawyers offer items of evidence, the frequency of their appearance, and the vividness of their form or content have no logical connection to probative value. Counsel can also manipulate the presentation of evidence to induce the jury to underestimate its probative value. For example, one psychologist has suggested that defense counsel could undermine the force of plaintiff's evidence by simply lengthening the presentation of defendant's case, thereby causing the jury's memory of plaintiff's evidence to fade.

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

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

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

A. Roles of the Jury and the Adversary Process

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

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

Still, the jury and the adversary process are justifiable on the grounds they serve a set of values even more deeply planted in the American psyche. Both institutions serve to fragment decisionmaking power in the courtroom, thereby depriving the state, in the form of the judge, of the opportunity to use the justice system as a tool of gov-

ernmental oppression. The power is taken from the government and given to the people: litigants, their attorneys, and most importantly, the jury.

The jury is the most obvious courtroom symbol of democratic ideals. The common meaning of democracy is government or rule by the people, either directly or through elected representatives. The jury is, in theory, composed of individuals reflecting a representative cross-section of the people living in the community in which the case arises. The resemblance to representative democracy does not end there. The definition of democracy refers to a method of governing which specifies who rules, or, in other words, who decides what values will control the resolution of disputes. The jury is imbued with the power to select these controlling values through the doctrine of jury nullification. Under that doctrine, the jury is expected to inject the values of the community into its verdict even in derogation of the law created by the legislature and described by the judge in instructions. This power controls abuses by the trial judge who, as a member of the governing elite, may be prone to neglect the values of the people in favor of a morality of the elite. This view of nullification prevailed at the time of the adoption of the United States Constitution. The founding fathers knew that, without jury nullification, judicial tyranny was not only a possibility but was, in fact, a reality in the colonial experience. While scholars debate the historical and policy justifications for jury nullification, there can be no doubt that American juries exercise that power. Many established trial procedures insulate from judicial review all but a few of the most egregious examples of jury law-making.

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

The adversary process is also justifiable as a means of diffusing power in the courtroom, thereby preventing an over-concentration of power in the hands of the judge. In nonadversarial systems the judge actively participates in the investigation of facts or directly receives the reports of the principle fact gatherers. The judge, therefore, enters the courtroom with an intimate knowledge of this investigation and with all the biases that information produces. The judge may then control most, if not all of the presentation of evidence. He or she may decide who will be called as a witness, what questions will be asked and in what order the evidence will be presented. By giving these powers to the advocates, our adversarial system significantly diminishes the power of the judiciary, thereby complementing the role of the jury in preventing governmental oppression.

While this diffusion of power in the courtroom advances certain political values it also presents dangers. The principle danger is that

certain characteristics of the jury and the adversary process will undermine the reliability of jury factfinding and, accordingly, the justness of verdicts. The problem with juries is that, while they control the biases of the government reflected by the judiciary, jurors bring their own biases into the courtroom. As in the case of any democratic institution, majority rule can itself produce oppression when the majority uses its values to demean the rights of minorities. Moreover, jurors are frequently not as well educated as judges, arguably making them more susceptible to errors of logic because they may be less capable of understanding the evidence. The problems posed by the adversary process compound these weaknesses of the jury. Ethical considerations aside, advocates are not concerned with the truth so much as they are with winning. Thus, when it advances their cause, advocates may not hesitate to exploit biases of the jury or induce the jury to commit errors of logic. Since a rational theory of due process gives one the right to present one's case to a factfinder capable of understanding the facts, when lawyers use the adversary process to erode the jury's ability to accurately evaluate the evidence, the legitimacy of the entire justice system is jeopardized.

The dangers of the jury and the adversary process are considered tolerable because of a vital assumption we make about the abilities of the jury to resist bias and avoid logical errors. We assume that the jury can in good faith put aside its biases and logically choose which evidence and arguments to accredit and which to reject. This assumption is analogous to assumptions underlying democratic political theory—given the opportunity to freely choose between competing thoughts, parties or candidates—the people can exercise sufficient judgment to justify a system of self-government.

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

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

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

B. Covert Advocacy and Jury Independence

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

Subconscious persuasion interferes with the ability of the jury to accurately express its values in a verdict. Only when an individual is consciously aware of the influences on his or her mental activity is personal autonomy and the expression of personal values possible. Absent that conscious awareness, an individual is incapable of distinguishing between personal values and values that have been suggested by some external source. Absent the conscious awareness that a value has been presented by some external source, an individual may not scrutinize that value for consistency with one's own values. The individual may then simply mistake the value as his or her own. Thus, when an attorney subconsciously influences the jury to employ a bias in its decisionmaking, the autonomy of jury decisionmaking is eroded. Courtroom style techniques which enhance the apparent credibility of counsel facilitate the effectiveness of such efforts to subconsciously induce the use of bias by the jury. When a person hears a statement or argument from a supposed credible source, a psychological process called "internalization" may take place. When a person internalizes a statement or argument, he or she subconsciously integrates it into his or her own set of beliefs and values. The values expressed in the jury's verdict, then, may more accurately reflect those of counsel and client than those of the jury and the community it should represent.

Covert advocacy similarly interferes with the jury's independent

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

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

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

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

In defense of covert advocacy one could argue that the problems it

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

One could also support courtroom use of psychological techniques and principles on the grounds they can have a desirable effect on jury decisionmaking. Counsel can use some of these techniques to enhance communication between counsel and the jury by helping identify and eliminate extra-legal distractions such as dress, linguistic style, and other aspects of courtroom demeanor. For example, many articles describe how lawyers can avoid distracting or counterproductive courtroom styles. Similarly, several articles describe jury selection techniques that can be used to detect unfavorable bias in prospective jurors. Other techniques have been identified that can actually assist the jury in better understanding and critically evaluating the evidence.

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

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

It is admittedly true that the cognitive processes of jurors are enormously complex and that generalizations about them are risky. But it is also true that the law already relies on many such generalizations. The courts constantly make broad and unproven assumptions about how juries think. For example, courts commonly assume instructions to the jury to avoid bias or ignore evidence they have heard will be scrupulously followed. Some courts assume that a jury can rationally digest the evidence and decide the issues even in enormously complex and lengthy litigation. In fact, the very entrusting of ultimate decisionmaking power to the untrained citizens that compose juries is not only the embodiment of a democratic ideal, it is also the product of an assumption that juries have the cognitive ability to evaluate evidence logically and without undue bias. Courts have engaged in many other efforts at amateur psychology, usually with no data or analysis supporting their assumptions.

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

A more sophisticated argument is that covert advocacy has not been shown to work so well that we need be terribly concerned about it now. First, an empirical study only reveals the frequency of occurrence of a given response from the subjects studied. The results of the study, then, permit a conclusion concerning the probability of the response in a similar group of subjects. There are never guarantees that the response will occur—only statements of probabilities. Thus, notwithstanding the optimistic promises of those experts selling their services in this field, the studies which form the basis for the principles and techniques of covert advocacy do not guarantee results in the courtroom. Most importantly, even the results that might be expected may not be overly dramatic. The techniques described in Section I of

this Article seem to merely chip away at the cognitive independence of the jury rather than undermine it in any fundamental sense. Empirical research suggests that the amount and strength of evidence in a case is far more important in determining a jury's verdict than the juror pretrial biases that might be the focus of covert advocacy. Further, one should not exaggerate the susceptibility of a jury to illogic or bias. Evidence suggests that, in general, the problem solving efficiency of a group of individuals, such as a jury, is actually superior to that of individuals. Finally, the results of covert advocacy, even if some occur, may not be controllable. Counsel may attempt to induce the jury to employ a certain bias but might induce a very different and unintended bias in the process. For example, offering evidence of defendant's prior conviction might produce the intended negative bias, but might also induce sympathy on the part of some jurors who conclude defendant has paid his debt to society. Counsel might be reluctant to employ an advocacy tool that is so unpredictable. Given all these uncertainties, the costs of implementing covert advocacy may be too high for the vast majority of cases.

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

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

Finally, it is a mistake to defend covert advocacy as simply business as usual. Admittedly, attorneys have for centuries used techniques that persuade subconsciously. Even before the first Ph.D. set foot in a courtroom, trial lawyers were using psychology principles derived from intuition and experience to persuade juries. But a history of covert advocacy does not make it a virtue or even mitigate the problems it now raises. When covert advocacy was based on intuition rather than

scientific study, the advocates posed relatively little threat to the justice system. Armed even with a formidable amount of experience and intelligence, the lawyer was still just one person, not formally schooled in the psychological principles he or she sought to exploit, pitted against twelve jurors, a skeptical judge, and a hostile opponent. The risk that the lawyer could overcome these odds to significantly affect the jurors' subconscious was, arguably, slim. One can conclude that the benefit to be derived from the adversary system, diffusing the powers of the judge, is worth the risk presented by amateur psychology.

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

The development of covert advocacy comes at an especially sensitive time for the legal profession and for legal institutions in America. Public perceptions concerning prevailing ethical standards in the legal profession are anything but favorable. Respect for our courts and the rule of law is also in decline. Our justice system must have respect in the eyes of the people in order to obtain obedience to its decisions. Participation by the people on juries has been a way to gain that respect. In a democracy, the legitimacy of governmental institutions is enhanced when the people participate in the formation and application of the law. Preservation of the power of juries to independently make the value judgments that decide cases, is, thus, fundamental to maintaining respect for our justice system. Any part played by lawyers in the erosion of this power can only further tarnish the prestige of the legal profession and undermine the force of law.

III. CONTROLLING COVERT ADVOCACY

A. The Dangers of Controls

The purpose of controls on covert advocacy should be to enable the jury to perform its proper role in the courtroom. Thus, controls should be aimed at preserving the jury's opportunity to independently choose what community values to express in its verdict and what evidence and arguments to accredit.

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

However, if the effectiveness of covert advocacy continues to increase, a shift to an inquisitorial system with all its attendant dangers might be inevitable. If the jury becomes the unwitting puppet of the advocates, little purpose would be served by retaining the jury system. At least an inquisitorial system presents the possibility of producing an unbiased decision which reflects the truth.

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

B. Judicial Control of Covert Advocacy

Judges already have broad discretion to exclude evidence which threatens to mislead, confuse the issues or work unfair prejudice. Thus, evidence which threatens to induce the jury to employ an extralegal basis for decisionmaking or act illogically can be controlled by

the traditional power of the court to exclude such evidence. Short of excluding evidence, judges also already have the power to control what takes place in the courtroom during trial in order to ensure the trial is fair and the jury understands the evidence that is introduced. Courts have invoked this power to reorder evidence, prohibit confusing questions, ask clarifying questions, separate issues for trial, cut off irrelevant questioning and force counsel to ask a question. Many courtroom style techniques and techniques to manipulate the meaning or weight of evidence could be controlled by the use of this authority.

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

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

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

There is no question that giving the judge the power to compel such a disclosure in a sense increases the power of the judge and decreases the power of the advocates. Under current trial practice, judges do not commonly inquire into litigation strategy or the substance of pre-trial expert consultations that will not be the subject of expert testimony. But the extent to which power would be shifted by such a proposal is not overly dramatic. The proposal does not suggest that opposing counsel could discover this information. The information is merely revealed to the judge for the purpose of facilitating rul-

ings on the admissibility of evidence and the appropriateness of other influences on jury decisionmaking. Similar procedures are now sometimes employed in connection with deciding claims to evidentiary privileges. Thus, there should be no concern that opposing counsel could profit from the work product embodied in such a disclosure. Disclosure would simply enable the judge to intelligently and effectively apply his or her traditional powers over the admission of evidence and the conduct of the trial.

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

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

C. Jury Control of Covert Advocacy

The jury traditionally plays a passive role during trial. Judges and lawyers share only between themselves the power to control what takes place in the courtroom. In fact, much of the law that has developed concerning trial procedure, including almost all of the law of evidence, can be seen as a means of keeping the jury in its place. It is somewhat novel, then, to consider the jury a means of controlling the excesses of lawyers. But the role is a logical one here in view of the interests threatened. Since covert advocacy undermines the independence and reliability of the jury's cognitive processes, it only makes sense to combat covert advocacy by giving the jury the means to protect those processes.

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

1. Expanding the Jury's Powers

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

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

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

A second, less radical, type of reform involves providing the jury with certain information early in the trial which might assist the jury in resisting some covert advocacy techniques. For example, instructing the jury on the law before the presentation of evidence begins rather than waiting, as is customary, for the close of evidence might help the jury better focus on the issues during trial and resist appeals to extra-legal matters. A more intriguing example would involve instructing the jury as to the nature and object of covert advocacy itself. Thus, the jury could be instructed as follows: Ladies and Gentlemen of the jury, in considering the testimony of the witnesses and the arguments of the lawyers, please keep in mind that the lawyers may have selected you to serve on the jury because they believe

you have certain prejudices that will favor their clients. They may have presented evidence to ignite those prejudices. They may have tried to confuse the meaning of their opponent's evidence and may have argued their own evidence is more important than it really is. When they did these things they tried to appear as attractive and friendly toward you as they could in order to convince you that they were being honest.

While such an instruction understood on a conscious level may not reduce the jury's susceptibility, its utterance might dissuade many attorneys from utilizing at least the most obvious covert advocacy techniques.

3. Improving the Jury

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

IV. CONCLUSION

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