

From: [Brian Kerzetski](#)
To: [RulesCommittee Secretary](#)
Subject: Suggest Change to Fed. R. Civ. P. 29.1
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Attachments: [Why Should the Prosecutor Get the Last Word .pdf](#)

To whom it may concern,

Through experience and ponderance of views, I have come to realize in order to preserve due process and ensure justice the following changes must be made to rule 29.1:

29.1(b) the defense argues; ~~and~~.
29.1(c) *delete in its entirety*.

I have attached a well-reasoned article which I feel makes a superb case for the rule change.

Please excuse any poor form as this is my first request. I would appreciate any assistance to better relay this request to the Committee.

Sincerely,

Brian Kerzetski
2271 Autumn Fire Ct.
Las Vegas, NV 89117
(702) 491-2521

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Why Should the Prosecutor Get the Last Word?

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Why Should The Prosecutor Get The Last Word?

John B. Mitchell*

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* Clinical Professor of Law, Seattle University School of Law. J.D. 1970, Stanford Law School. The author wishes to thank Gail Stygall, Director of the University of Washington Expository Writing Program, for immersing him in the worlds of social psychology, rhetoric and debate; Lisa Brodoff for her editorial suggestions; Nancy Ammons and Laurie Sleeper for formatting footnotes without end; and, as always, thanks to Kelly Kunsch, librarian extraordinaire.

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It is generally accepted without much question or thought that the prosecution gets the last argument in closing.¹ This is consistent with the general theory² that the party bearing the burden of proof is entitled to the last opportunity to talk to the jury and, thus, get a last chance to convince

1. See HERBERT J. STERN, TRYING CASES TO WIN - SUMMATION 285 (1995) ("[M]ost jurisdictions award the party with the burden of proof two closings: an initial, main summation that is delivered first, and then a brief rebuttal following the closing of the defense."); see also STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 468 (2d ed. 1997) ("The plaintiff or prosecutor, as the burdened party, is generally afforded the opportunity to present the last argument.").

2. These are scattered exceptions. In Florida, a defendant will be given the last argument if he puts on no evidence. See *Preston v. State*, 260 So.2d 501, 503 (Fla. 1972) ("[A] defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury.") (citation omitted). In the penalty phase in California, where "neither side has the burden of proving that one or the other penalty is the proper one....," the defense is given last argument. *People v. Bandhauer*, 426 P.2d 900, 905 (Cal. 1967) ("The prosecution may... argue in rebuttal and the defense close in surrebutal.").

Only in Minnesota did the defendant get the last argument in every instance. "When the evidence shall be concluded upon the trial of any indictment... the plaintiff shall commence and the defendant conclude the argument to the jury." MINN. STAT. § 631.07 (1953). See generally Marilyn Vavra Kunkel & Gilbert Geis, *Order of Final Argument In Minnesota Criminal Trials*, 42 MINN. L. REV. 549 (1958) (describing an exception to the American criminal trial procedure in Minnesota that allows the defendant to conclude jury argument). This was changed by amendment, and currently the "prosecution... [has] the right to reply in rebuttal to the closing argument of the defense." MINN. STAT. § 631.07 (2000).

the panel.³ This is said to be even more justified in criminal cases due to the extremely heavy burden the prosecution must bear.⁴

While this rationale superficially makes sense when narrowly focusing on the traditional analysis of the connection between burden of proof and the order of argument, the analysis becomes suspect⁵ when applied within the framework of our constitutionally circumscribed criminal justice system.⁶ For in that arena, we are dealing with a system where all the formal procedural advantages are given the defendant,⁷ even at the expense of truth.

3. See JAMES W. JEANS, TRIAL ADVOCACY 371 (1975) (“[The] party having the risk of non-persuasion has the opportunity of the last argument.”); see also PETER MURRAY, BASIC TRIAL ADVOCACY 375 (1995) (“In most jurisdictions, the party with the burden of proof has the last word with the factfinders.”); James W. McElhaney, *Trial Notebook – Rules of Final Argument*, 9 LITIG. 45, 46 (1993) [hereinafter “*Rules of Final Argument*”] (“In virtually every state, it is said that the party with the burden of proof ‘has the right to open and close.’”).

4. See Kunkel & Geis, *supra* note 2, at 552 (“[S]ince the state must prove guilt beyond a reasonable doubt, the considerable burden thus placed on the state, and given emphasis by the trial judge’s instructions, should be balanced by allowing the prosecutor the final argument.”) (citations omitted).

Further, in support of the prosecution having the last argument, it has been posited that, if the prosecution goes last, it has an opportunity to blunt any misconduct in the defendant’s closing. See *id.* at 552-53. If the prosecution commits misconduct in its rebuttal, on the other hand, the defense has an appellate remedy. See *id.* However, if the defense goes last, the prosecution has absolutely no remedy against defense misconduct. See *id.*

5. Nonetheless, as early as 1823, an American appellate court summarily, and without any analysis, dismissed the notion that there was any legal problem with permitting the prosecution to argue last. See *United States v. Bates*, 2 Cranch C.C. 405, F. Cas. 14,542 (D.C. Cir. 1823). Those few courts which have subsequently considered the issue have similarly engaged in a summary analysis in concluding that the conventional ordering of arguments raised no due process concerns. See, e.g., *People v. Cory*, 204 Cal. Rptr. 117, 123-24 (Cal. Ct. App. 1984) (“Indeed, the very presence of this constitutionally compelled unequal burden of proof imposed upon the prosecution refutes appellant’s premise that due process requires exact equality among the procedural rights enjoyed by both prosecution and defense.”) (citation omitted); *Preston*, 260 So.2d at 503-05 (rejecting defendant’s due process challenge).

Perhaps, however, I’m being greedy. At least criminal defendants in our system are constitutionally entitled to a closing argument. See *Herring v. New York*, 422 U.S. 853, 864-65 (1975). That is more than they once were entitled to in Olde England. See John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources*, 50 U. CHI. L. REV. 1, 129 (1983) (“Until 1836 counsel was forbidden to ‘address the jury,’ that is, to make opening and closing statements.”) (citation omitted).

6. European commentators view the American criminal justice system as unfair because the prosecution, and not the defense, gets the last word. See Kunkel & Geis, *supra* note 2, at 549 (citing foreign commentators’ criticism of the order of summation in American criminal trials). Their criticism, however, must be placed in institutional perspective. The European inquisitorial system differs greatly from our own adversary system. In practical effect, once an investigative file is completed and the case presented for trial, the defendant is all but presumed guilty. See generally Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 75-80 (1998) (noting that, in a usual case, after gathering evidence, “a preliminary diagnosis [by the police or the prosecution] makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.”); Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three ‘Inquisitorial’ Systems: France, Italy, and Germany*, 87 YALE L. J. 240 (1977). It is little wonder then that European advocates believe that having the last word is so essential to a fair trial.

7. See Kunkel & Geis, *supra* note 2, at 549 (“In the American process of adjudication, the accused is granted procedural advantages and safeguards which serve to enhance his invulnerability to miscarriages of justice.”); John B. Mitchell, *The Ethics of the Criminal Defense Attorney – New Answers to Old Questions*, 32 STAN. L. REV. 295, 300-01 (1980):

Now, don't misunderstand me. We care about truth in the criminal system, at least that vision of truth delineated by existing doctrine.⁸ In fact, the system is laden with procedures that guide the results towards truth: discovery, an oath, testifying in open court surrounded by the dignity of the tribunal, cross-examination, techniques of impeachment, credibility instructions, and the threat of perjury. Yet, in the end, it is not a truth system. The extreme burden of proof of beyond a reasonable doubt skews decisions in a way which continuously risks letting people go who have actually committed crimes. At the same time, the Fifth Amendment keeps the fact finder from access to the most accurate source of evidence on the issue – the defendant. That's simply not how you would construct a system if your primary concern was to arrive at some notion of the truth.⁹

[T]he criminal justice system does not operate primarily as a truth-seeking process in the scientific sense. It is weighted at trial in favor of protecting the innocent, even at the cost of acquitting the guilty. It is weighted on the streets in favor of protecting the individual from intrusion by the state, at the cost of the more efficient methods of crime control that would result if police could stop, question, and search anyone they desired.

(citations omitted).

See also generally U.S. CONST. amend. IV-VI, VIII.

8. The scope of "truth" which may be presented at trial, of course, is not only a matter of truthfulness and untruthfulness, completeness and incompleteness. It is also a property of applicable doctrine and the associated principle of relevance. As has been recognized, the voices of so-called marginalized persons or "outsiders" have been removed from the courtroom in the past through substantive law. See, e.g., Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in Law*, 42 U. MIAMI L. REV. 29 (1987) (discussing the impact of historically excluding certain groups from the legal profession on the "truth" that is "imposed... by a particular class of [male] truth creators and interpreters"); Benita Ramsey, *Symposium: Excluded Voices: Realities in Law and Law Reform – Introduction*, 42 U. MIAMI L. REV. 1 (1987) (discussing unequal access to the legal profession and the resulting impact on the law); Patricia J. Williams, *On Being the Object of Property*, 14 SIGNS 8 (1988).

9. See John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's 'Different Mission'*, 1 GEO. J. LEGAL ETHICS 339, 340-41 (1987):

It is emotionally easy (and perhaps even rhetorically convincing) to proclaim the virtue of 'truth' in the abstract; it is more difficult to extol 'truth's' virtues when analyzing the American criminal justice system. An analysis of the American criminal justice system in actual operation is appropriate at this point.

A system focused on truth would first collect all information relevant to the inquiry. In our system, the defendant is generally the best source of information in the dispute, but he is not available unless he so chooses. The police may not question him. He may not be called to the stand with his own lawyer beside him and with a judge controlling questioning under the rules of evidence. The prosecutor may not even comment to the jury about the defendant's failure to testify, even though fair inferences may be drawn from the refusal to respond to serious accusations.

A system focused on truth would have the factfinder look at all the information and then decide what it believed had occurred. In our system, the inquiry is dramatically skewed against finding guilt. "Beyond a reasonable doubt" expresses the deep cultural value that 'it is better to let ten guilty men go than convict one innocent man.' It is a system where, after rendering a verdict of not guilty, jurors routinely approach defense counsel and say, 'I thought your guy was guilty, but that prosecutor did not prove it to me beyond a reasonable doubt.' What I have

Rather, our criminal justice system is a screening system which protects the defendant against overreaching governmental power.¹⁰ From initial contact with the police, through trial, the system consists of a series of screens which both serve to protect the innocent, and facilitate the defendant's release from the system at the earliest possible juncture. In trial, the ultimate screen, a group of fellow citizens, stands between the defendant and the government. This is a system in which the greatest concern is the protection of the innocent.¹¹ That is why the defendant, not the prosecution,¹² gets all the procedural advantages.¹³

just described is not a 'truth system' in any sense in which one could reasonably understand that term. Truth may play a role, but it is not a dominant role; there is something else afoot.

10. See Mitchell, *supra* note 7, at 299-302:

Our criminal justice system is more appropriately defined as a screening system than as a truth-seeking one. This screening process is directed at accurately sorting out those whose deviancy has gone beyond what society considers tolerable and has passed into the area that substantive law labels criminal. The ultimate objective of this screening is to determine who are the proper subjects of the criminal sanction.

.....

The criminal justice system is itself composed of a series of "screens," of which trial is but one. By keeping innocents out of the process and, at the same time, limiting the intrusion of the state into people's lives, each of these screens functions to protect the values of human dignity and autonomy while enforcing our criminal laws. Further, to ensure that the intrusion of the state into the individual's life will be halted at the soonest possible juncture, our system provides a separate screen at each of the several stages of the criminal process. Thus, at any screen, the individual may be taken out of the criminal process and returned to the society with as little disruption of his or her life as possible.

(citations omitted). See also Freedman, *supra* note 6, at 61-62 ("[D]efense counsel serves to make our criminal procedures consistent with our ideals... to protect individual rights in the criminal process (and to protect those who should not become entangled in the criminal process).") (citations omitted).

11. See Kunkel & Geis, *supra* note 2, at 549 ("It is an American legal truism, only rarely disputed, that it is preferable to lose a score of convictions than to find one innocent person guilty."); Mitchell, *supra* note 7, at 300 ("[T]he criminal justice system... is weighted at trial in favor of protecting the innocent, even at the cost of acquitting the guilty.") (citation omitted); Lawrence Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 388 (1970) ("Since some error is inevitable, the common law adversary system deliberately chose to err on the side of risking acquittal of some who are guilty in order to make near certain that no innocent person will suffer conviction.").

In emphasizing the centrality of protecting the rights of the defendant, I am not unmindful of the concerns for victims and their rights. See, e.g., Walter A. Matthews, *Proposed Victim's Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735 (1988); Anne E. Morgan, *Criminal Law - Victim's Rights: Remembering the "Forgotten Person" in the Criminal Justice System*, 70 MARQ. L. REV. 572 (1987). Nor do I confine this concern to giving victim's a role at the penalty phase, restitution, access to public services, victim's advocates, or to training police and prosecutors how to deal with victims. I recognize that it also includes confronting substantive law when its effect is to victimize the victim. See, e.g., SUSAN ESTRICH, *REAL RAPE* (1987).

That said, I nonetheless hold firm that, as a constitutional matter (that is, a 4th, 5th, and 6th Amendment matter), the central concerns of the criminal justice system must be with the defendant and the protection of the innocent. Some authors express concern about the possible diminution of defendants' rights, and the rule of law itself, through the victim's rights movement. See generally Robert P. Mosteller, Essay, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691 (1997) (arguing that the proposed Victims' Rights Amendment

should not be adopted because it is misguided and unworthy of a constitutional amendment); Ahmed A. White, *Victim's Rights, Rule of Law, and the Threat to Liberal Jurisprudence*, 87 KY. L.J. 357 (1985) (arguing that the victims' rights movement contradicts and undermines the rule of law).

12. Now, before you feel too sorry for the prosecution, it would be mistaken to ignore all the actual advantages which the prosecution has in the process. Far from being at a disadvantage, one might attribute a built-in unfairness in the trial process when the prosecution and police resources are compared to those of the defense. This is particularly so given that the budgets of prosecution offices are generally "three times the budget of public defenders, as well as the use of police, forensic laboratories, and state employed psychiatrists." Stacy Colino, *When Justice Goes Begging - The Crisis in Indigent Defense*, STUDENT LAWYER, Oct. 1988, at 14. "Public Defenders, on the other hand, must pay for these services out of their limited budgets." *Id.* This only compounds the prosecution team's (prosecution and police) "inherent information-gathering advantages...." *Wardius v. Oregon*, 412 U.S. 470, 476 n.9 (1973).

The Court in *Wardius* stated:

Indeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor.

As one commentator has noted:

"Besides greater financial and staff resources with which to investigate and scientifically analyze evidence, the prosecutor has a number of tactical advantages. First, he begins his investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events. Only after the prosecutor has gathered sufficient evidence is the defendant informed of the charges against him; by the time the defendant or his attorney begins any investigation into the facts of the case, the trail is not only cold, but a diligent prosecutor will have removed much of the evidence from the field. In addition to the advantage of timing, the prosecutor may compel people, including the defendant, to cooperate. The defendant may be questioned within limits, and if arrested his person may be searched. He may also be compelled to participate in various nontestimonial identification procedures. The prosecutor may force third persons to cooperate through the use of grand juries and may issue subpoenas requiring appearance before prosecutorial investigatory boards. With probable cause the police may search private areas and seize evidence and may tap telephone conversations. They may use undercover agents and have access to vast amounts of information in government files. Finally, respect for government authority will cause many people to cooperate with the police or prosecutor voluntarily when the[y] might not cooperate with the defendant." Note, *Prosecutorial Discovery under Proposed Rule 16*, 85 Harv. L. Rev. 994, 1018-1019 (1972) (footnotes omitted).

Id.

Once trial actually starts, it is the prosecution who represents "The People" or "The State," the very entities of which the jurors are members, and for whom the prosecutor acts as protector. The defendant, on the other hand, has been arrested by the police and, you know, "where there is smoke there is fire." Even more so are the narrative advantages of having police as your information-gatherers and witnesses. First, information can be constructed during investigation with future testimony in mind. Second, though tarnished somewhat by recent events in the news, police still bring with them to court story elements favorable to the prosecution - that is, protectors of society (the jurors), who are honest, accurate perceivers, and neutral. All this is enhanced by being professionals at testifying as a result of both training and experience. *See generally* Stanley Z. Fisher, "Just the Facts, Ma'am": *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993) (discussing police discretion to disclose exculpatory evidence in their reports).

13. Admittedly, many of these have been weakened a bit in recent years, but the procedural advantages nonetheless consistently rest on the defense side of the scales. As such, though the defendant

So why in a procedural system which so favors the defense does the prosecutor get the final argument in closing? It would seem that if this is a real procedural advantage, then our consistent deference to the procedural rights of criminal defendants should trump the analysis applicable in the civil arena that the burden of proof dictates the order of argument. Arguments of equity to the effect that, since a party already has the burden, we should at least give them the advantage of the last word, do not really play well when transposed to the criminal system. For in the criminal system, we have little reason to look for equitable devices to offset the fact that the prosecution must carry the burden, and a heavy one at that. It is supposed to be difficult to get convictions; that is the whole point. We surely do not want to do anything which lessens the difficulty of meeting that burden and thereby risk diluting its role in protecting the innocent. The question then is whether the rebuttal argument gives any real advantage to the prosecution.

On the surface, it would seem so. The entire rationale for giving the rebuttal to the prosecution is that they get something from going last, that it helps them carry their burden, or at least that it somewhat offsets the task of having to carry such a heavy burden. Moreover, the significance of having or getting in the "last word" is so deeply embedded in our culture that we all assume that some advantage goes to she who speaks last.¹⁴ That being

may no longer be entitled to a unanimous, see *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972), twelve-person, see *Williams v. Florida*, 399 U.S. 78, 86 (1970), jury for conviction, conviction still requires the vast majority of a substantially-sized panel, see *Ballew v. Georgia*, 435 U.S. 223, 245 (1978). Likewise, while the Fifth Amendment may not bar access to alibi witnesses, see *Williams*, 399 U.S. 78, non-testimonial evidence, see *Schmerber v. California*, 384 U.S. 757, 761 (1966), and incriminating evidence in defendant's possession which the government did not make him create, see *Fisher v. United States*, 425 U.S. 391, 400-01 (1976), still the defendant does not have to put on a case, can refuse to take the stand, and will even be assured that the prosecution is barred from commenting on his failure to testify, see *Griffin v. California*, 380 U.S. 609, 612-14 (1965). Similarly, while the standards for reversal for governmental destruction of evidence, see *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988), or prosecutorial failure to produce exculpatory evidence, see *United States v. Bagley*, 473 U.S. 667, 682 (1985), may be stringent, the government is still admonished not to destroy potentially exculpatory evidence, see *Youngblood*, 488 U.S. at 57-8, and the prosecution still has the duty to provide exculpatory evidence without any request by the defense, see *Brady v. Maryland*, 373 U.S. 83, 86-87 (1963). Similarly, while the right to confrontation may not allow the defendant to obtain the address of a rape victim, see *McGrath v. Vinzant*, 528 F.2d 681, 684 (1st Cir. 1976), still, the defense may generally determine a witness's address and community in cross-examination, see *Smith v. Illinois*, 390 U.S. 129, 132 (1968) and *Alford v. United States*, 282 U.S. 687, 694 (1931), and may probe into prior convictions and even juvenile probation, see *Davis v. Alaska*, 415 U.S. 308, 320 (1974).

Finally, although the defendant may not be entitled to a great attorney, see *Strickland v. Washington*, 466 U.S. 668, 689 (1984), he still is entitled to an attorney, see *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963), which is a lot better than the situation felony defendants faced in Merry Olde England. See John H. Langbein, *The Historical Origins of the Privilege Against Selfincrimination at Common Law*, 92 MICH. L. REV. 1047, 1047 (1994) (noting that "[f]rom the middle of the sixteenth century... until late in the eighteenth century,... the most fundamental [attribute in English common law] was the rule that forbade defense counsel."). Interestingly, in contrast to felons, persons accused of misdemeanors were entitled to counsel. See *id.* at 1049 n.7.

14. As Oliver Goldsmith put it: "I always get the better when I argue alone." MICHAEL REGAN & BOB PHILLIPS, *THE ALL AMERICAN QUOTE BOOK* 28 (1995). That, in effect, is the essence of having the

said, I guess I could rest here and conclude that the prosecution should not get the last argument. But, such a leap to judgment based principally on intuitive arguments seems inappropriate for what I believe is a serious issue within criminal practice.

My entire practice career was spent as a criminal defense attorney, and I vividly remember the moments of sheer agony while I had to sit listening to the prosecutor's rebuttal. I wanted to answer, to speak again. I knew that I could counter all that had been said. But I had to sit quietly. Those were, and are, the rules of the game.

With that background, you and I both know how I want this to end; I want the last argument in closing. But I'm also an academic and a realist. Therefore, I'm not going to end the article here. Before I consider rocking the boat by suggesting that we change a procedure so universally accepted, I promise to (try to) put aside my admitted bias in order to explore whether going last gives the prosecution any *really significant* advantage. For if there are not such significant advantages, then it is probably wiser to leave things as they are and look for more important matters with which to be concerned.

In this exploration, I will look to every area of opinion and expertise which would seem to help explicate the nature and power of the rebuttal argument – opinions of practicing attorneys and jurors, wisdom of those in the academic field of legal advocacy, studies of sociologists (ethnographers of closing arguments), social psychologist, (researchers in primacy, recency, and persuasion theory), cognitive psychologists (researches in narrative and schema theory), and the expert knowledge base of those in the fields of rhetoric and debate (experts in the processes of refutation).

In Section II, I look at the question of whether closing arguments are important at all. Section III examines the significance of the fact that in most jurisdictions the prosecution gets the initial, as well as rebuttal closing. The advantages of the rebuttal argument are examined in Section IV, while the tactical steps the defense can take to combat these advantages appear in Section V. My final conclusion then awaits the end of this journey of exploration into the rebuttal argument.

II. How Important are Closing Arguments?

It seems appropriate that I begin with closing arguments themselves. For in looking at the significance of rebuttal arguments, I'm focusing on only a piece of that entire trial performance we call closing arguments. If that entire performance is relatively insignificant, I can pack my proverbial

bags and write on some other topic. How important then is the role of closing argument at a jury trial?

If you judged by the mass of literature devoted to the subject of closing argument, you would think that it was one of the most significant topics in Western thought.¹⁵ There, in the law library, are shelves upon shelves of such volumes.¹⁶ And a great number of attorneys do seem to view the

15. Admittedly, not everyone in the profession believes that the closing is important. Thus, "there has been an increasing tendency in recent years to underestimate its value." ASSOCIATION OF TRIAL LAWYERS OF AMERICA EDUCATION FUND, *THE ANATOMY OF A PERSONAL INJURY LAWSUIT: A HANDBOOK OF BASIC TRIAL ADVOCACY* 387 (1981) [hereinafter "ANATOMY"]. See also Daniel D. Gross, *Winning Narratives in Courtroom Rhetoric: Blending Stories and the "Evidence" in Closing Argument*, 19 TRIAL DIPL. J. 331, 333 (1996) ("A second preliminary consideration involves the presumed unimportance of the closing argument in the final outcome of the trial."). This is hardly, however, the dominant view. In fact, each of the two sources quoted in this footnote immediately go on to reject the notion that closing arguments are not significant in the trial process. See ANATOMY, *supra*, at 387; Gross, *supra*, at 333 ("Recent research has indicated that closing arguments may well play a much larger role than previously argued.").

16. A limited sampling of what can be found in one's law library include: AMERICAN COLLEGE OF TRIAL LAWYERS & ALI/ABA, 2 CIVIL TRIAL MANUAL 646 (1980) [hereinafter "ALI/ABA"]; ANATOMY, *supra* note 15, at 387; ROBERTO ARON ET AL., *Chapter 23. Communication During Closing Argument*, in TRIAL COMMUNICATION SKILLS 23-1 (1996); MELVIN M. BELLI, 5 MODERN TRIALS 68 (2d. ed. 1982); MARILYN J. BERGER ET AL., *Chapter XII. Closing Argument*, in TRIAL ADVOCACY: PLANNING, ANALYSIS AND STRATEGY 469 (1989); PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 57-64 (3d ed. 1997); RICHARD J. CRAWFORD, *THE PERSUASIVE EDGE: WINNING PSYCHOLOGICAL STRATEGIES AND TACTICS FOR LAWYERS* 161 (1989); ROBERT L. CONASON ET AL., BASIC TRIAL STRATEGY Chapter VII (1984); DOUGLAS DANNER & JOHN W. TOOTHMAN, TRIAL PRACTICE CHECKLISTS 492 (1988); RICHARD A. GIVENS, *ADVOCACY: THE ART OF PLEADING A CAUSE* (2d ed. 1985); SONYA HAMLIN, *WHAT MAKES JURIES LISTEN TODAY* 603-85 (1998); ROGER HAYDOCK & JOHN SONSTENG, TRIAL: THEORIES, TACTICS, TECHNIQUES 601-63 (1991); JEANS, *supra* note 3, at 367-94; PETER C. LAGARIAS, *EFFECTIVE CLOSING ARGUMENT* (1989); LUBET, *supra* note 1, at 443-504; THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 273-332 (3d ed. 1992); ALBERT J. MOORE ET AL., TRIAL ADVOCACY: INFERENCES, ARGUMENTS, AND TECHNIQUES 213-42 (1996); MURRAY, *supra* note 3, at 353; NEW YORK STATE ASS'N OF TRIAL LAWYERS, *THE ART OF SUMMATION* (Melvin Block ed., 1964) [hereinafter "ART OF SUMMATION"]; LEONARD PACKEL & DOLORES B. SPINA, TRIAL ADVOCACY: A SYSTEMATIC APPROACH 135-56 (1984); JAMES BORDEN ROSENBLUM, *THE DEFENSE LAWYER'S TRIAL HANDBOOK: SUCCESSFUL COURTROOM STRATEGIES FOR DEFENDING PERSONAL INJURY AND MALPRACTICE CASES* 1001-43 (1984); SYDNEY C. SCHWEITZER, 1 CYCLOPEDIA OF TRIAL PRACTICE 697 (2d ed., 1970); KENT SINCLAIR, TRIAL HANDBOOK, *Chapter 5* (3d. ed., 1985); KENT SINCLAIR, *FEDERAL CIVIL PRACTICE* 867 (2d ed. 1986); JACOB A. STEIN, *CLOSING ARGUMENT: THE ART AND THE LAW* (1982); STERN, *supra* note 1, at 1-443; J. ALEXANDER TANFORD, *THE TRIAL PROCESS: LAW, TACTICS, AND ETHICS* 369-410 (2d ed. 1993) [hereinafter "THE TRIAL PROCESS"]; *THE PRACTICAL LAWYER'S MANUAL OF TRIAL AND APPELLATE PRACTICE* No. 2, at 47 (1979) [hereinafter "THE PRACTICAL LAWYER'S MANUAL"]; *THE TRIAL MASTERS - A HANDBOOK OF STRATEGIES AND TACTICS THAT WIN CASES* 327-400 (Bertram G. Warshaw ed., 1984); LESLIE H. VOGEL, *FINAL ARGUMENT* 1-36 (1954); Scott Baldwin, *Jury Argument: How to Prepare and Present a Winning Closing Argument*, 20 TRIAL 58 (April 1984); James E. Beasley, *Chapter VIII. Closing Arguments*, in TRIAL PRACTICE FOR THE GENERAL PRACTITIONER 98 (Leonard Packel ed., 1980); Robert E. Cartwright, *Winning Psychological Principles in Summation*, 1 TRIAL DIPL. J. 31 (1978); Michael F. Colley, *Friendly Persuasion: Gaining Attention, Comprehension, and Acceptance in Court*, 17 TRIAL 42 (August 1981); Mark Dombroff, *Finishing Big: Closing Arguments That Win Cases*, 25 FOR THE DEFENSE 12 (November 1983); Harry G. English, *Opening and Closing to a Jury*, 9 PRAC. LAW. 69, 74-76 (April 1963); Harry A. Gair, *Summations for the Plaintiff*, 6 AM. JUR. TRIALS § 641 (1967); Gross, *supra* note 15, at 331-38; John Wyne Herron, *The Art of Jury Argument*, Karen E. Holt, *Hard Blows and Foul Ones: The Limited Bounds on Prosecution Summation in Tennessee*, 58 TENN. L. REV. 117 (1990); Brooke Jackson & Richard J. Crawford, *Improving the Damages Appeal - A Few*

moment of closing argument as the pinnacle of their art.¹⁷ For them it is in that moment that they take the tiny, fragmented pieces of evidence from trial and deftly assemble them into a magnificent picture which vividly demands victory for their client.¹⁸

That attorneys should see closing argument as so significant is hardly surprising. The closing is the last thing they do in a case, so it is only natural that they will, and even must, believe that they can make that final difference and tip the scale – at least in a close case. Thus, this belief in the importance of closing argument reinforces the sense that they have control of the outcome, that their skill can make a difference. While this belief undoubtedly adds a great deal of pressure onto the advocate, it is hard to imagine things being otherwise. Trained for three grueling years, working day after day learning their craft, it makes sense that they would come to

Words on Having the Last Word, 32 TRIAL 66-68 (May 1996); James W. Jeans, *Chapter 18. Summation*, 3 LITIG. 1287 (1992); Guy O. Kornblum, *The Voir Dire, Opening Statement, and Closing Argument*, 23 PRAC. LAW. 23-28 (Oct. 1977); Theodore I. Koskoff, *The First Person Summation*, in ATLA MASTERS AT WORK 238 (1984); Fred Lane, *Part VI. Closing Argument*, LANE GOLDSTEIN TRIAL TECHNIQUE 1 (Scott D. Lane ed., 3d ed. 1997); J. D. Lee, *Final Strokes: Painting the Whole Picture at Summation*, 19 TRIAL 63 (June 1983); Henry G. Miller, *Principles of Summation*, 28 AM. JUR. TRIALS § 549 (1981); John P. Miller, *Opening and Closing Statements From the Point of View of the Plaintiff's Attorney*, in THE PRACTICAL LAWYER'S MANUAL, *supra*, at 39; McElhaney, *Rules of Final Argument*, *supra* note 3, at 45; James W. McElhaney, *Trial Notebook – The Final Five*, 12 LITIGATION 41 (1986); Albert H. Parnell, *The Effective Use of Demonstrative Aids in Closing Argument*, 15 FOR THE DEFENSE 15 (December 1983); Earl J. Silbert, *Chapter 16. Closing Argument*, in THE JURY 1984: TECHNIQUES FOR THE TRIAL LAWYER 531-39 (1984); Stuart M. Speiser, *Chapter 14. Closing Argument*, in MASTER ADVOCATE'S HANDBOOK 233 (D. Lake Rumsey ed., 1988) [hereinafter "MASTER ADVOCATE'S HANDBOOK"]; Stuart M. Speiser, *Closing Argument*, 10 THE DOCKET 1 (Fall 1986) [hereinafter "THE DOCKET"]; *Summation: Practice and Procedure – Aspects of Trial Practice*, 1974 DEFENSE RESEARCH INSTITUTE 64 (1974); J. Alexander Tanford, *Closing Argument Procedure*, 10 AM. JUR. *Trial Advocacy* § 47 (1986) [hereinafter "*Closing Argument Procedure*"]; Donald E. Vinson & Phillip K. Anthony, *The Closing Arguments: Application of Attribution Theory*, 7 TR. DIPL. J. 33 (1984).

17. In interviews with trial attorneys by sociologist Bettyruth Walter, the importance of closing argument was consistently emphasized by the participants. See BETTYRUTH WALTER, *THE JURY SUMMATION AS SPEECH GENRE: AN ETHNOGRAPHIC STUDY OF WHAT IT MEANS TO THOSE WHO USE IT* 38-39, 105 (1988). This is consistent with the general tone of the literature. See, e.g., ANATOMY, *supra* note 15, at 387 ("The importance of summation in the trial of a case is very great..."); DICK CAMERON GIBSON, *THE ROLE OF COMMUNICATION IN THE PRACTICE OF LAW*, 114 (1990) ("Clearly, every part of a trial is important... still, the closing argument is especially important, by virtue of its location in the trial process."); RICHARD D. RIEKE & RANDALL K. STUTMAN, *COMMUNICATION IN LEGAL ADVOCACY* 202 (1991) ("Despite the popular belief that jurors have solidified their positions on the case prior to the summation, the opportunity to interpret the facts for the jury has lead many trial lawyers to contend that the closing argument is the performance that most determines the outcome of the case."); Speiser, *THE DOCKET*, *supra* note 16, at 1 ("The importance of the closing argument cannot be overestimated. Since most cases that go all the way through to verdict are by definition close calls, it follows that the strength of the closing argument often can make the difference between victory and defeat.") See also ALI/ABA, *supra* note 16, at 647 ("The importance of closing increases in almost direct ratio with the length of the trial and the amount of controversy over the facts.")

18. See WALTER, *supra* note 17, at 179:

The trial is like a jigsaw puzzle. It has a bunch of little tiny pieces of evidence all coming in at different times, and really meaningless to a jury. And when you put it together in the summation, it becomes a great big painting. A beautiful painting is what you want them to see.

see the outcome of a case affected by their skills. And, I think they are correct to feel that way. But there are also reasons for attorney perceptions about the significance of closing argument which spring from our culture.

Lawyers were once children, too. They grew up and were part of a culture which has routinely found drama within the confines of the courtroom. No doubt, part of their desire even to choose law as a profession was fueled by moments from books, movies, and (now) television. In that cultural image, it is the closing argument which is the great dramatic moment – give or take a few witnesses breaking down on cross-examination or court spectators suddenly jumping up and confessing to the crimes of which the defendant has been accused. In this singular moment, the attorney stands alone, facing those who will decide his or her client's fate.¹⁹ There the attorney stands in the shoes of Clarence Darrow, pleading for the lives of Leopold and Loeb,²⁰ and in those of Atticus Finch,²¹ pleading for racial justice.²²

19. Giving the closing argument is actually very personal; it is very much putting yourself out in front of the jury. "Probably no other phase of trial technique is more personalized than final argument." ANATOMY, *supra* note 15, at 387. And experienced litigators take particular pride in their ability to talk with the jury. *See, e.g.,* WALTER, *supra* note 17, at 115:

Eighty-one percent of the informants [*i.e.*, attorneys] were able to decide their own style.... In answer to the question, "Are you good at it?," half of the lawyers interviewed said, "yes", or "I've heard it said about me." Only twelve percent wouldn't comment, or answered, "no, not yet," or "I'm getting better at it." These last comments came primarily from women lawyers.

20. Darrow's fabled representation of two rich, brilliant young men with families in the upper echelons of Chicago society who killed a teenaged boy just to prove that they could get away with murder has recently surfaced in the popular magazines and fiction. *See, e.g.,* DEAN KOONTZ, *THE FACE OF FEAR* 116-17 (1985); *Playing For Keeps: Teenage child-killers Leopold and Loeb saw murder as a game for superior minds*, PEOPLE WEEKLY, June 14, 1999, at 141.

21. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

22. I admit to a somewhat similar bias towards closing, though for a far less dramatic reason. My entire approach to teaching beginning trial advocacy uses closing argument as the central organizational structure for trial. *See* BERGER ET AL., *supra* note 16, at 469-70 ("[P]lanning closing argument is also the beginning of your trial preparation."). I conceive of the trial as presentation underlain by narrative theory. *See* John B. Mitchell, *Narrative and Client-Centered Representation: What is a True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85, 105-11 (1999). In other words, the jurors will both use the evidence to create stories, and will place subsequent evidence within this story structure. They will then evaluate these stories by comparing them to their own repertoire of stories that they have created from experience, culture, bias, etc.

The advocate, therefore, tries to control this narrative process, have the story be the advocate's story. In this approach to advocacy, the master narrative the attorney seeks to create is embedded in the closing. Within this model of advocacy, direct and cross-examinations are focused upon getting out the information, or its lack, that you need for closing, *See* BERGER ET AL., *supra* note 16, at 277-80, 344-52, 469-70. In closing, the attorney then reasons with the jury in order to guide them to draw from all this information the inferences which support the narrative(s) the advocate desires. *See* MOORE ET AL., *supra* note 16 (providing an excellent exposition on the role of inferences at trial). *See also* W. Lance Bennett, *Rhetorical Transformation of Evidence in Criminal Trials: Creating Grounds for Legal Judgment*, 65 Q. J. SPEECH 311, 318 (1979) ("These diverse connecting tactics [by the prosecution and defense] all share the objective of linking evidence to a specified subset of story elements and providing a basis for drawing an inference from the connection.").

Note also that I said "reason with" the jury. While some might see closing as a moment to move the jury with your rhetoric as you would an audience at a play, I approach it far more as an opportunity

Sociological studies capture this widespread belief among trial attorneys in our profession regarding the significance of closing argument in jury

to persuade by reasoning with the panel. Many other attorneys have the same perspective. *See, e.g., ANATOMY, supra* note 15, at 387 (“Most good lawyers believe that they do not argue to a jury but instead they reason with it.”); *HAMLIN, supra* note 16, at 611 (“To win, you must be able to assuage their doubts with solid answers, to show them logic and objective reasoning that will support their inclinations....”); *Speiser, MASTER ADVOCATE’S HANDBOOK, supra* note 16, at 243 (“Use logic instead of emotion to be persuasive.”).

One might answer my concern by taking the position that even under my teaching methodology, the actual closing is not necessarily important, only that the young advocate have one in mind while planning a trial. As long as the information developed at trial is guided by a closing argument which exists in the back of the mind of the advocate who is conducting the exams, the jurors will draw those underlying inferences and eventually arrive at the narratives you desire on their own. All that matters is that the witness examinations be guided by an underlying theory, best expressed in the organization of a closing argument. Actually giving the argument is redundant.

While I can appreciate the perspective, I believe that it is misguided for a number of reasons. Initially, information at trial often comes in as fragmented, nonlinear data. The jurors’ struggle with pressing this evidence is well expressed in *W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* 8-9 (1981):

First, stories solve the problems of information load in trials by making it possible for individuals continuously to organize and reorganize large amounts of constantly changing information. New pieces of evidence can be fit within the structural categories in an incident.

.....

In trials cases often unfold in a more complex and disjointed fashion than do plots in novels or movies. The juror or spectator in a trial may be confronted with conflicting testimony, disorienting time lapses, the piecemeal reconstruction of a scene from the perspectives of many witnesses and experts, and a confusing array of subplots. Without the aid of an analytical device such as the story, the disjointed presentations of information in trials would be difficult, if not impossible, to assimilate.

The jury, thus, will undoubtedly place all the fragments of trial evidence within a structure, but I am not at all confident that it will be the assembly of information I wish them to make. I want to be their guide. This notion of the attorney as a guide, leading jurors through the issues and evidence in summation, is well-expressed in *ALI/ABA, supra* note 16, at 647:

The importance of the closing argument increases in almost a direct ratio with the length of the trial and the amount of controversy over the facts. Although the importance of certain testimony may be obvious to an attorney, it does not necessarily follow that it will be obvious to the jury. Especially in long and complicated cases, the nuggets of important facts may, to the layman juror, remain buried in the sands of trivial and conflicting testimony. It is the closing argument that must collect the important facts and expose them to the view of the jury in a logical and unified pattern that they will want to accept and believe.

No less important than clarifying the facts of the case is the clarification of the issues. Even though in counsel’s opening statement he may have clearly spelled out the issues in the case, by the time of the closing argument there may be jurors who either misunderstand the issues or simply do not remember the issues at all.

Further, in many criminal cases, the defense does not put on any evidence, relying instead on cross-examination and the concept of reasonable doubt. *See* John B. Mitchell, *supra* note 22, at 106 (“[A] criminal defendant can put on no evidence and raise a purely reasonable doubt defense, attacking the prosecution’s case as one whose narrative ‘does not make sense’ or ‘cannot be trusted....’”). Again, I am unsure that jurors would analyze such a case as I would wish absent an advocate to teach them how to appreciate a picture of reasonable doubt. In short, I’m just another attorney who believes in the importance of closing argument.

trials. In the most thorough ethnographic study²³ ever done of closing arguments, sociologist Bettyruth Walter watched closing arguments in sixty-six actual trials and interviewed thirty-four attorneys, 223 jurors, and thirty-five alternate jurors.²⁴ When interviewed, every attorney felt closing was important, with 75% saying that it was the difference, at least in close cases.²⁵ When asked if they thought the outcome of trials would be different

23. An ethnographic study is a "descriptive work" produced by the "study and systematic recording of human cultures." MERRIAM-WEBSTER COLLEGIATE DICTIONARY 398 (10th ed. 1997).

24. See WALTER, *supra* note 17, at 9-10.

25. See *id.* at 115. In the actual interviews, the responses fell into two categories: "Extremely important" and "Important - but not the most important phase of the trial." *Id.* Their actual responses provide insights beyond the raw statistics:

A. What is the value of the summation to the trial process?

(N = 34)

a) <i>Extremely important</i>	26	.76
b) <i>Important</i>	8	.24
c) <i>Not important</i>	0	.00

a) *Extremely important*

1. "If a case can still be won or lost at the summation stage, then it is clearly the most important part of the trial."

S. Gerald Litvin

2. "I regard the trial as only a divide to enable you to sum up to a jury."

A. Charles Peruto

3. "I think it's probably the single most important factor that determines the guilt or innocence of the defendant. It's that important."

"To me the entire trial is a preface to a summation. It's all leading up to that. The lawyer is gearing the whole trial to that hour he can stand up before the jury and GO! He can do his thing."

Eugene F. Toro

4. "I think it's probably the most important part of the trial because it's the only part of the case that represents pure advocacy. It's the one time in a trial when almost without restraint a lawyer can stand in front of a group of people and literally argue his case. It's the most persuasive part of the case. He tries to explain away some of the calamities and exploit some of the good fortune he's experienced."

"His summation... brings to bear on the litigation all of the lawyer's skills: his imagination, his use of language..."

"Those of us who defend criminal cases are concerned with that perhaps 20% in the middle where the lawyer's skill can make the difference. And in that category of cases, I think the summation is probably the most influential part of the trial."

Herald Price Fahringer

5. "It's the most important thing I can contribute."

Donald J. Goldberg

6. "I think a proper summation can make a difference in a case that's *not* even close."

Raymond A. Brown

7. "From a defense lawyer's standpoint, it's the critical stage of the trial. Particularly in fairly lengthy cases involving complicated factual patterns, where it's not going to be clear to the jury what the case is really about until they hear it summarized and put together and related to one theory or another. I think it's probably, from the defense standpoint, the single most important phase of the trial."

without closing argument, 66% said yes, and 33% said maybe.²⁶ No one said no.

But what did the jurors say? Eighty-eight percent said they thought closing was important,²⁷ and I would comfortably go on to the next topic in this article were it not for two other studies cited in Ms. Walter's book. In these two studies, subjects were asked to rank the aspects of trial they felt were most important. Closing argument made the top of the list in only 4% in one study, and 6% in the other.²⁸ Significantly, Dr. Walter herself drew

Thomas Colas Carroll

8. "It's priceless – if properly used. Communicating is *the* key point. By communicating you persuade."

John Rogers Carroll

9. "It's of real significant value primarily because you have an opportunity for the first time – and actually for the last – to have direct contact with the jury."

Joseph J. McGill

b) *Important – but not the most important phase of the trial*

1. "Summations aren't as valuable a tool as a lot of lawyers think they are. Summations are important, but far too many lawyers think if they make a great speech, and do nothing else, they're going to win the case. I don't think that's true at all."

F. Emmett Fitzpatrick

2. "They are not the crowning glory of the trial [which she believed them to be in law school]. They are not the most significant moment in this magic time. But they are very important."

Holly Maguigan

3. "I like to think that it is the most important part of the case, but I'm not convinced that it is... I think it's only important in certain cases."

Thomas A. Bergstrom

4. "I've heard so many awful summations – by the government, for example – and then they routinely win their cases. So I'm just not convinced that a summation is the end-all and be-all."

Criminal Defense

5. "Closing speeches don't make a damn bit of difference. It's part of the show. But the jurors expect it."

Criminal Defense

6. "It can be everything, or it can be nothing."

Stephen P. Meyer

7. "I think it's important – extremely important. But I think it's only one important phase of a multitude of important phases of the case. I think your opening is just as important. Much, much shorter, but just as important."

Barbara L. Christie

8. "The jury is entitled to it. The jury wants to know how you really feel. They need to know you more. They need to hear from you. They need to know what it is that you think about the case, what you think about the witnesses...."

Richard Haynes

Id. at 38-39.

While hardly constituting a statistically valid sample, it is interesting that the women attorney's in this study generally consider closing argument to be less pivotal than their male counterparts.

26. See WALTER, *supra* note 17, at 115.

27. See *id.* at 197. The most frequent reasons given why they thought the closing argument was important were: refreshes memory; clarifies issues and pulls pieces together; and gives a good summary of the entire trial. See *id.*

28. See *id.* at 205-08. The factors on the list rated higher, not surprisingly, were the law and the facts. See *id.* at 207-08. Where closings got 6%, law received 35%, and facts 59%. See *id.* at 205.

from this, in spite of the 88% number in her own study, that closing arguments are not very important to the juror's verdict decision.²⁹

But do these studies really mean that closing arguments are not that important to jurors? Plainly that is not a conclusion I wish to reach, nor, with all respects to Dr. Walter, is it one that I believe follows from these two studies. Specifically, there are four reasons that diminish what superficially appear in these studies to signal a low significance of closing arguments to jurors.

First, the jurors were motivated on a number of levels to give that type of ranking. They had just been instructed by the court that they were to decide based on the evidence and that "arguments of counsel are not evidence."³⁰ To give too much weight to the arguments of counsel would tend to deny the rules of law just given them by the judge. Also, jurors have a sense of their role. They are the fact finders; they are the decision makers. They are the ones in charge of the outcome, and so they surely are not some pawn to be manipulated by the rhetoric of one or another of the advocates. Diminishing the influence of the attorney's persuasion over them makes good psychological sense. In fact, any advocate who tries to persuade a jury without appreciating their sense of their role does so at their own, and their client's, peril.

Of course, much of this is a function of the general limitations on all ethnographic studies. They are based upon self-reporting and reflecting the subjects' own perceptions – perceptions which may or may not comport with what was really going on.³¹ Anyone who has talked to jurors after a verdict understands this. You want to know why they decided like they did, but after a few minutes, you realize that you will never get the full story. It

Where closings got 4%, law received 41%, and facts 47%. *See id.* at 208.

29. *See id.*:

Once again, we have jurors stating in very strong numbers that they did not change their opinions after hearing the closing speeches, and that these speeches were not very important to their verdict decisions. Even taking into account the comments by judges which admonish jurors not to place too much emphasis on closing speeches, and the possible influence that admonition might have on conscientious jurors when questioned on this same issue, one cannot ignore the consistent and dramatic percentages every study has produced.

I respectfully disagree for the reasons that follow.

30. *See id.* at 205.

31. *See* RAY L. BIRDWHISTELL, *KINESICS AND CONTEXT: ESSAYS ON BODY MOTION COMMUNICATION* 191 (1970):

An informant should be used as a window into a culture. ... [H]is contribution to the research is indispensable. The investigator must constantly remind himself, however, that his informant is an adherent, not an objective interpreter, of his communicational system. The report of an informant about his behavior is itself behavior; such reports are data and not evidence. And the fact that all informants agree does not make their statements true, except insofar as agreement indicates conventional understanding.

See also WALTER, *supra* note 17, at 115.

is not that they are deliberately hiding it from you; it is more that a new, collective “here’s why we reached our verdict” story has been created which obliterates all the prior stories of individual jurors. On the other hand, I note this inevitable limitation on ethnographic studies without pushing the point too hard. After all, I like the fact that 88% of the jurors in the primary study said closing was important.

Second, this ranking does not necessarily account for the influence closing arguments may have had on the juror’s actual deliberations. Arguments, images and evidence may interact in jury deliberation in ways such that it is not easy to separate out any one piece. When I think of giving a closing, I do not imagine sweeping the jury on the wave of my reasoning directly to a verdict. I understand that the rhetorical power of my presentation will diminish as time passes and deliberations continue. My principle goal in closing is not so much to persuade – though surely I try – but rather to give analyses (some might say “ammunition”) to those who support my position that they can use to persuade others, and with which those who are hold-outs can persist. Raw rankings fail to reflect this interconnectedness of the various aspects of trial.

Third, without knowing far more, it is hard to fully evaluate the significance of the 4% and 6% statistics. For example, the 4% and 6% may reflect jurors who had all sat in trials which were “close” cases. Most of the jurors, on the other hand, may not have sat on cases which were at all close. In criminal cases, the fact that a case goes to trial does not mean it is a close case.³² In fact, from my experience, a large percentage of cases which go to trial are not close at all. The prosecution has almost all the bargaining power in the system,³³ and in truly close cases can often make the offer that the defendant cannot refuse. On the other hand, the prosecution may try a clear winner in which the defense has no realistic

32. A very experienced and successful civil attorney once told me that there is no excuse for trying the average civil case; it’s only about money and that’s something which should be worked out beforehand. Now, clearly this was an overstatement which didn’t encompass cases involving personal principles, significant legal precedent, implications in the future for the defendant as to other possible claimants, etc. Yet, it did capture something of the truth, as evidenced by the analogous opinion of master advocate Stuart M. Speiser that “most cases that go all the way through to verdict are by definition close calls....” Speiser, *THE DOCKET*, *supra* note 16, at 1.

33. It is the prosecutor who makes the decision to charge and who is the central figure in the criminal system. See JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT’S PERSPECTIVE* 126 (1972); Jack Kress, *Progress and Prosecution*, 423 *ANNALS* 99 (1976). In charging, the prosecution’s exercise of discretion is all but unreviewable. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file... generally rests entirely in his discretion.”) (citation omitted). In court, the prosecutor has significant “administrative concerns” such as keeping “the calendar moving” Jerome H. Skolnick, *Social Control in the Adversary System*, 11 *CONFLICT RESOL.* 52, 55 (1967). Further “one can argue that the adversary component of the prosecutor’s job is shifted from establishing guilt or innocence to determining the seriousness of the defendant’s guilt and whether he should receive time.” MILTON HEVMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 103 (1978).

possibility of success because, for whatever reasons, she does not want to make any deal.³⁴ The defendant, in turn, may go to trial on a clear loser if the penalty he faces if convicted is not significantly greater than what he will receive under any deal which will be offered. As such, he has little to lose by going to trial. Miracles do happen. The point is that if only 4-6% of the cases were close, and it is jurors from those close trials who gave closing argument a top ranking, the statistics mean that closings are vastly important when there is really something to decide. Of course, we do not know that. We do not know anything about the cases in these two studies. As such, we cannot really assess what the statistics mean.

Fourth, the nature of the question biased the result. Jurors were given a list of items and asked to rank the *most* important factor in their decision.³⁵ But, because something is not the most important, does not mean that it is not important.

Imagine that I ask you to rank among the following list what you think is most important for “the good life:” family, love, health, service to community, friends, economic security. My guess is that service to community will rank very low – it would on my list. Yet service to community is extremely important to me. In reality, it may well interweave with friendship, love (capacity for, opportunity to receive), and health (a full, worthwhile life focused on others as well as myself). But when the question is asked that way, and I’m given the list to rank, there it is at the bottom. It’s all how you ask the question. Interestingly, in a different study where the question was phrased in terms of “what factors most affect *deliberation* [as opposed to your decision]...,” closing argument was ranked second only to questioning of witnesses.³⁶

There is, however, a far more significant statistic buried within Ms. Walter’s ethnography and the two cited studies than the 88% numbers reflecting juror impressions of importance or the 4-6% numbers reflecting rankings. In these studies, jurors were also asked whether their opinion had been changed by the closing. In the ethnographic study, 14% reported their opinions changed by the prosecution argument, 10% by the defense.³⁷ In the cited studies, 5% were changed by the prosecution, 7% by the defense.³⁸

34. From my experience, however, there are “losers” for the state which the prosecutor will consistently try, if the defense will not accept a deal. These are typically either Driving While Intoxicated or Domestic Violence Assault, particularly if the latter case is one where the woman is the alleged victim in an abusive relationship with a man. In those cases, the prosecution will let the jury acquit if it so wishes. Fine. The prosecutor is now not the one blamed the next week in the newspapers if the defendant should kill someone in a car crash while drunk, or beat his girlfriend to death in a rage.

35. See WALTER, *supra* note 17, at 205, 208.

36. RIEKE & STUTMAN, *supra* note 17, at 202 (emphasis added). See also Gross, *supra* note 15, at 333 (“When asked what factors most affect deliberation, jurors ranked the closing statement second only to the questioning of witnesses.”).

37. See WALTER, *supra* note 17, at 207.

38. See *id.*

Think about what that means. Felony juries consist of twelve persons who, in most jurisdictions, must reach a unanimous verdict. Twenty-four percent of the jurors in the ethnographic study, and 12% in the cited studies, changed their opinions because of the closing.³⁹ It only takes one juror to hang a jury – one juror who stands on the line between conviction and mistrial. If you look at the 24% and 12% statistics, that means that between one and three jurors on each felony panel was subject to having their opinions changed by closing argument.⁴⁰ Now, that's important. And although it speaks generally to closing argument, and not specifically to the prosecution's rebuttal argument, it's a start.

III. Is it Significant that the Prosecution Gets to Speak First as Well as Last in Closing?

In exploring the possible advantages the prosecution is given by going last, it seems appropriate, initially, to consider that in almost all jurisdictions the prosecution also goes first, with the defense sandwiched in between prosecution arguments.⁴¹ Before we focus exclusively on the rebuttal, it seems appropriate that we should then first explore the significance, if any, of this one-two punch.

A. *The Legal Profession's Fascination with "Primacy" and "Recency"*

For those who have been reading current advocacy literature,⁴² or who have recently attended a continuing legal education program on advocacy,⁴³

39. Interestingly, jurors' feelings about the respective arguments appeared a function of whether or not they agreed with them. The argument of the attorney they agreed with ("winner") was memorable, interesting and more believable. The side they did not agree with ("loser") spoke too long, was less interesting, and less believable. *See id.* at 194-95. What does this mean, though? Did they perceive those qualities because they agreed or disagreed, or did they come to agree or disagree on account of those qualities? The study does not give us any guidance.

40. I, of course, do not know anything about the quality of the arguments or about the closeness of the case. I also do not know if any of the jurors had some strange proclivity where they could only have their opinion changed if the argument was by, e.g., the prosecution. But I sincerely doubt it.

41. *See* FED. R. CRIM. PRO. 29.1; ARON ET AL., *supra* note 16, at 15-10; DANNER & TOOTHMAN, *supra* note 16, at 493; ALAN E. MORRIL, TRIAL DIPLOMACY – SELECTED TEXT, 87 (1975); STERN, *supra* note 1, at 285. There are a few exceptions to this general ordering of closing arguments. In a few jurisdictions, there are only two arguments, with the defense going first and the prosecution concluding. *See, e.g.*, DANNER & TOOTHMAN, *supra* note 16, at 493 (“[S]ome courts allow only one argument from each, usually with plaintiff going last...”); McElhaney, *Rules of Final Argument*, *supra* note 3, at 46 (1993) (“[I]n New York and Massachusetts... the right to close means giving the last final argument. From this, they conclude that the other party – usually the defendant – gives the second opening statement and the first final argument.”) (emphasis omitted).

42. *See* JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 666-67 (3d ed. 1994) (“Thousands of lawyers know the advantage of primacy and recency. The chances are, if they have heard of one, they have heard of the other.”); *see also* GIVENS, *supra* note 16, at 341 (discussing primacy and recency); RIEKE & STUTMAN, *supra* note 17, at 91 (“[L]egal practitioners have given

the phrase “first and last” will evoke an almost reflexive response. For such persons are unlikely to hear that phrase without immediately drawing to mind the principles from social psychology of *primacy* and *recency*. If you press them as to what these concepts mean, you are unlikely to get a scientific dissertation on the subject. Instead the response will more likely be that these concepts connote that what comes first and what comes last is most important for the jury. So, start and end your exams and arguments on your strong points, bury the weak or problematic matter in the middle.⁴⁴

I admit it. I'd like to stop here. First is great. Last is great. The prosecution gets both. End of argument; it's unfair. But I promised that I would reign in my biases and fairly approach my analysis. When I do that, my glib argument runs into a bit of a problem. The more I research, the less it seems that our profession has really looked too deeply into the scientific underpinning of the concepts of primacy and recency.

Since I began by noting that the prosecution generally gets the first argument in closing, let me look at a common example of our profession's current embrace of the concept of “primacy” in an analogous area of trial. It takes place in the context of opening statements. Widely quoted⁴⁵ is the statistic that 80% of jurors make up their minds on civil liability after opening statement.⁴⁶ Now that's hardly an insignificant datum. The jurors merely hear the attorneys speak, no evidence, no witnesses, and the case is

thought to the relative power of the first message the jury is exposed to in contrast with the last one they hear (primacy v. recency)...”); Michael F. Colby, *Friendly Persuasion: Gaining Attention, Comprehension, and Acceptance in Court*, 17 TRIAL 42, 46 (1981) (“Plaintiffs have the advantage of both primacy and recency because they have the burden of proof. At the start of trial, they speak first, and, in most jurisdictions, they speak first and last in closing argument.”); Kunkel & Geis, *supra* note 2, at 556-58 (discussing psychological studies into the “law of primacy”).

43. See, e.g., Murray Ogborn, *Trial Psychology*, Washington State Trial Lawyers Association, ATLA All-Stars Seminar (November 8, 1991) 234-35 (applying primacy and recency to arguments and examinations); Herbert J. Stern, *Trying Cases to Win*, Washington Law School Foundation Continuing Legal Education (April 28-19, 1995) I-11 (“Do not give a speech on opening statement (the ‘long windup’) explaining how the trial is going to be conducted. The long windup is the destruction of primacy.”).

44. See, e.g., Ogborn, *supra* note 43, at 235 (“End each witness with a high point of testimony. End the day with a strong statement, whether it be through testimony or the introduction of an impactful demonstrative exhibit. By following these guidelines, you will have effected... recency.”).

45. See, e.g., WALTER, *supra* note 17, at 208 (“In another study of juror decisionmaking, Vinson (1985) reports that, ‘80 to 90 percent of all jurors came to a decision during or immediately after the opening statements....’”); Cartwright, *supra* note 16, at 31 (“Studies at the University of Chicago made sometime ago show that 80 percent of the jurors do not change their minds following opening statement, at least on issues of liability.”); Ogborn, *supra* note 43, at 234 (“A Chicago study conducted several years ago indicated 80 percent of jurors irrevocably made up their mind by the time opening statement has been conducted.”); cf. RIEKE & STUTMAN, *supra* note 17, at 92 (“While these studies do not support the conclusion that many cases are truly over after the opening statement, they allow that to be a serious possibility.”).

46. The genesis of this statistic appears to be an article by Vinson. See Donald E. Vinson, *How to Persuade Jurors*, 71 A.B.A. J. 72, 72 (Oct. 1985) (“In all of our work as behavioral scientists involving pretrial group analysis, trial simulations and post-trial interviews, we’ve reached the conclusion that 80 to 90 percent of all jurors come to a decision during or immediately after the opening statements.”).

over.⁴⁷ No wonder our profession took notice. And, since criminal guilt and civil liability appear to have much in common, i.e., the defendant in both did something wrong, this statistic sounds significant for the criminal arena. But is it?

Let's look a bit more carefully at this 80% figure. After all, if our profession is to be seduced by the lure of having its art guided by principles derived from scientific disciplines, we may wish to take a bit of time to assess the underlying assumptions and experimental data which supports these principles we have chosen to follow.

First, we know the 80% figure did not come out of any real trials. You simply cannot stop a trial after opening statement to ask the jurors who they favor, and then repeat the question at various junctures throughout the process. During a trial, jurors are not permitted to discuss the case with anyone, including fellow jurors until deliberation. They receive an instruction to this effect at the beginning of the trial, and the same admonition is generally repeated at each break and adjournment.⁴⁸ I know

47. Assuming the law of primacy imparts strategic significance to the opening statement, it is not obvious how much advantage this bestows upon the prosecution in particular. They do speak first and a powerful opening can sway the panel. I've seen that. But then the defense speaks and has the opportunity to pull the jury back. I've seen that, too. Admittedly, after a strong prosecution opening, the natural human tendency to avoid ambiguity and its resulting tension can provide some powerful psychological friction in the defense effort to drag the jury back:

If the opening argument of the plaintiff appeals to the jurors and they accept it, then there is a tendency to defend its acceptance against contrary logic. Making an important decision is hard work for jurors, who often have nothing more significant to decide than what looks good for dessert on the menu. The average juror is like anyone else; if he can in good conscience go along with the plaintiff after a persuasive argument, he will not want to be brought back to the point of indecision by the defense lawyer. But the defense lawyer must drag him back to again face the struggle of making a correct decision.

MORRILL, *supra* note 41, at 87-88.

Yet, it can be done, and is done in our courts every day. More problematic is the situation where the defense reserves or even waives opening. *See* RIEKE & STUTMAN, *supra* note 17, at 91 (citing studies to the effect that, if defense delays opening, "perceptions of eye witnesses, attorney effectiveness, and the prosecutor's case... benefited the prosecution;" when given immediately after the prosecution opening, those perceptions favored the defense). That, however, is the function of a tactical choice by the defense and not something inherent in the prosecution having the first opening statement. Further, to the extent primacy functions by jurors creating "story" theories, those theories could form at any point during the openings, not necessarily in the first opening given. At most, one could say that primacy makes opening statement important for both sides. *See id.* at 106.

Moreover, while the first position in opening does allow the prosecution to somewhat anticipate and weaken defense attacks on its case, even this cannot be employed to full strategic advantage because of the Fifth Amendment. Thus, the prosecution could anticipate attacks on its evidence which potentially might be brought out on cross-examination of its witnesses (e.g., "True, our key eyewitness was not wearing her glasses, but she only wears those for reading,"), but cannot refer to any potential defense evidence (e.g., "The defense may try to put on a witness who will claim...."). After all, constitutionally the defendant does not have to put on any defense.

48. In this regard, the following portion of a federal pattern "Introductory Instruction" is typical of all federal and state courts:

The attorneys and the parties will not speak with you because I have already instructed them that they must not. It simply does not look appropriate for one

of no exception for social science researchers. Second, whatever the basis for the statistic, it did not factor in the impact of actual jury deliberations. Jurors consistently come into the jury room, vote one way initially, and then change their minds over the course of deliberations.⁴⁹ Third, the 80% figure is alleged to be the result of some study, but the study is never cited. In fact, a leading expert in juries and lawyer argumentation confesses that she has never been able to locate the supposed study.⁵⁰ We therefore have no basis to assess the experiment that yielded this dramatic statistic which has had such influence in our profession.

So again, I return to the question as to what underlies this concept of primacy, and what if anything it tells us about the consequences of the prosecution having the initial closing argument. Thus, I now will move to a discussion which applies the research on primacy to the prosecution's initial closing, postponing a more extensive analysis of recency and so-called "order effects" until discussion of the rebuttal argument.

B. Advantages of Going First and the Scientific Bases of "Primacy"

The scientific research about the power of primacy (and recency) has taken place in two separate contexts. One path of research has focused on memory. The other has involved opinion change. Though these two paths can be perceived as somewhat interrelated, for our purposes they are quite different.

1. *Research on Primacy and Memory.*—Suppose I gave you the following sequence of numbers: 16, 12, 316, 42, 19, 174, 56, 23. I don't think you'd be surprised to learn that the first and last numbers will be recalled most easily, with those numbers in the middle straining our

side or the other to this case to be speaking with any of you no matter how innocent or trivial that conversation might in fact be.

Until this case is submitted to you to begin your deliberations you must not discuss it with anyone at all – even with your fellow jurors. After it is submitted, you must discuss the case only in the jury room with your fellow jurors. It is important that you keep an open mind and not decide any issue in the case until the entire case has been submitted to you and you have received the final instructions of the court regarding the law which you must apply to the evidence.

EDWARD J. DEVITT ET AL., 1 FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL AND CRIMINAL § 10.01 at 253-59 (1992).

49. Vinson would acknowledge this. See Vinson, *supra* note 46, at 72 ("The fact that people come to quick decisions doesn't mean those decisions are immutable. People do change their minds. But they usually would rather not, and if you haven't hooked your jurors early, it may be hard to get them later.")

50. See WALTER, *supra* note 17, at 208 ("Although these figures [i.e., 80%] are startling... I note that I have never found this research referenced, nor do I know that it has ever been published. Yet, these figures are widely quoted in the legal community.")

powers of recall.⁵¹ There you have primacy (and recency) as they relate to the task of recalling sequences of numbers, words, and such. Naturally, there are further complexities. The process one uses to recall a sequence from front to back differs from the one the memory employs when going back to front.⁵² The former relies on a process of conceptually associating items in pairs at the time of study,⁵³ while the latter incorporates, at least partially, a visual-spatial process.⁵⁴ Additionally, much of our memory for sequences is accomplished by what has been termed "chunking."⁵⁵ Using chunking, we simultaneously memorize full sequences and the individual items comprising the sequence.⁵⁶ For example, a word is a chunk from which we can recall the full sequence (i.e., the word) as well as the individual items composing the word (i.e., letters), while a phone number chunks both the full sequence and individual numbers. It is even possible that chunking could apply to propositions.⁵⁷

While I find this interesting, it is not clear what all this says about the significance of the fact that the prosecution gets to give the initial closing argument. If I apply the concept of primacy as applied to memory of sequences, does that mean that the jury will tend to remember the first word? The first argument? The first image?

Also, a closing argument differs in several significant respects from the discrete number or word sequences used in the memory studies. First, the information will not come in clean, discrete, uniform packets like word or numbers.⁵⁸ It will be far messier:

51. Murdock describes this: "In episodic memory, primacy refers to superior performance (greater accuracy, shorter latency) on items at the beginning of the list, whereas recency refers to superior performance on items at the end of the list." Bennet B. Murdock, *Chapter 4. Primacy and Recency in the Chunking Model*, in DISCOURSE COMPREHENSION: ESSAYS IN HONOR OF WALTER KINTSCH 49, 49 (Charles A. Weaver et al. eds., 1995). See also Walter Kintsch & David M. Welsch, *The Construction-Integration Model: A Framework for Studying Memory for Text*, in RELATING THEORY AND DATA: ESSAYS ON HUMAN MEMORY IN HONOR OF BENNET B. MURDOCK 367 (William E. Hockley & Stephan Lewandowsky eds., 1991). Within this framework, serial recall rests heavily on primacy, while item recall tends toward recency. See Murdock, *supra*, at 49.

52. See Shu Chen Li & Stephan Lewandowsky, *Forward and Backward Recall: Different Retrieval Processes*, 21 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 837 (1995). In the experiment underlying these findings, all the information was presented visually, none verbally, and the participants were even discouraged from reading out loud. See *id.* at 846.

53. See *id.* at 837. This process contains an "auditory-verbal associative component." *Id.* at 839.

54. See *id.* at 837, 839. Experienced practitioners recommend the use of demonstrative aids in closing. See, e.g., Parnell, *supra* note 16. To the extent your case requires the jury to see the story in "flashbacks" (i.e., moving from present to past), visuals would seem imperative.

55. See Murdock, *supra* note 49, at 52.

56. See *id.* at 52-53.

57. See *id.* at 61 ("As it has been presented here, the chunking model deals with unrelated item, but, as is well known, propositions are the building blocks in discourse processing... perhaps a proposition is only a special kind of chunk....").

58. Cf., e.g., Jeremy N. Bailenson & Lance J. Rips, *Informal Reasoning and Burden of Proof*, 10 APPLIED COGNITIVE PSYCHOL. S3, S15 (1996) ("These complexities arise because the arguments we have studied have a more differentiated structure than do simple sequences of pro and con

Ed Majors went to work on October 15th like it was a normal day. He opened the shop, unlocked the safe, filled the till, and pulled up the shades. But thanks to the defendant it was anything but normal – it was the last day of his life. Let me go through the evidence with you. [Prosecutor then goes through testimony of two eye-witnesses identifying defendant in the fatal robbery and explains why they are reliable, and then reasons through the incriminating physical evidence.]

Second, even if one could somehow break all of this into some form of discrete information packets, they would not be neutral, unweighted pieces of information like numbers and (non-emotionally charged) words. While we may at times have personal feelings about a particular number, e.g., it's our age, address, etc., generally that will not be the case. In contrast, individual pieces of information at trial carry significant differences in their quality of meaning. Imagine the following sequence of information in a homicide case in which the victim was stabbed:

The killer wore a red outer garment; the killer ran north after the stabbing; the victim died of a stab wound; defendant owns a red windbreaker; a knife dripping blood was found under the defendant's bed; the victim died on the way to the hospital; defendant lives in the direction that the suspect ran; people who saw the defendant shortly after the killing said he seemed upset and distracted; the day after the stabbing defendant gave away his red jacket to Goodwill; defendant immediately went to the mall and bought a blue jacket.

I don't know what portions of this sequence people would remember, but I would be shocked if they did not recall the "knife dripping blood" even though it falls smack in the middle of the sequence. It possesses both significance and a powerful image ("dripping blood"), qualities that the number "576" or the word "ball" are unlikely to possess.

But even if I put aside these objections to transplanting the results of these memory studies to the prosecution's first argument, it is still unclear to me what advantage I'd gain. Some might gasp that it's obvious, and ironic that so close to solidifying a step in my goal of establishing the prosecution's advantage in closing I should so completely miss the point. Obviously, if a jury does not remember, they cannot be persuaded. And, if the defense argument is sandwiched between two prosecution arguments, it will be forgotten. While I'd like to think that the studies lead to that conclusion, I just cannot.

No study has even hinted that an advocate's entire argument could thus disappear into the mental ether because it goes second in a three-argument sequence. At most, primacy-recency advocates in our profession would counsel the defense to put their strongest arguments first and last. This

advice would be consistent with my own experience. Jurors do not hear the closings as a single uninterrupted sequence of information like that in the memory experiments. Rather, they perceive three separate performance moments, each with a beginning, middle, and end.

Further, the time between the end of the initial prosecution closing and the end of the (relatively short) prosecution rebuttal which immediately follows the defense closing, hardly seems sufficient to significantly diminish juror memories of the main points raised by the defense. Granted, by the end of the prosecutor's rebuttal, the jurors are unlikely to be able to repeat verbatim any substantial portions of the defense presentation, but that isn't the point. General comprehension, not precise recall, is the point. The memory experiments sought answers like "1...6...15...47." If the subjects from the memory recall experiments were asked to process the data employing the type of narrative synthesis required at trial, however, the desired answer would be something like, "it was a series of random numbers, all under 50." Again, general comprehension, not precise recall, is the goal.

Moreover, I do not accept the underlying premise. People can be persuaded without recalling all the data which persuaded them.⁵⁹ I recognize that if they have a strong belief (e.g., "guilty"), but cannot recall the basis for it, one may posit that they will have trouble justifying their vote if it is strongly challenged in deliberation. That, however, will not necessarily be the case in practice. What persuaded them is not the same as what they can post hoc come up with as a justification, or what they can take from other jurors who share their sympathies to use as a justification.

Also, even if an individual juror may not recall what has been said, from my experience, collectively a jury sees and hears everything. I recognize that some might say that I have vastly understated the significance of memory in persuasion and have thereby given up potential support for my position. They might go on to say that I seem to have forgotten what I just said about providing jurors with arguments and instead have projected a very simplistic notion of jury persuasion, one in which the jury "is persuaded" and then immediately rushes into the jury room and votes like

59. Among those studying belief change, one current theory analyzes belief change in terms of the adjustment from a current belief state, or "anchor." Within this theory, the existence of a belief anchor does not imply that one recalls the origin of that anchor. "[I]t is assumed that memory is limited to the location of one's current anchor and not how this was reached..." Robin M. Hogarth & Hillel J. Einhorn, *Order Effects in Belief Updating: The Belief-Adjustment Model*, 24 COGNITIVE PSYCHOL. 1, 40 (1995).

Other studies also appear to give some support to my intuition that there is only a vague correlation between retention of information and opinion/persuasion. See, e.g., Warner Wilson & Howard Miller, *Repetition, Order of Presentation, and Timing of Arguments and Measures as Determinants of Opinion Change*, 9 J. PERSONALITY & SOC. PSYCHOL. 184, 188 (1968) [hereinafter "*Repetition*"] ("The correlational analysis agrees with other data in suggesting that learning considerations account for some, but only a modest proportion, of the variance found in opinion measures.").

throwing a lever in an election booth. That, they will go on to say, completely ignores the rich relationship between adversary argument and jury deliberation. Again, closing argument is far more than an argument. It is as importantly a source of arguments – arguments that jurors in your favor (based on their own story constructions) will use to support your position and to persuade others. If they do not remember your arguments they cannot do this, no matter how “persuaded” they are after your closing.

Since I have previously made the same point in this article, I’ll obviously accept all that. I am merely saying that the link between memory and persuasion is not a direct one. As for jurors remembering my arguments so as to have an argumentative arsenal for deliberation, that is a different matter. That is less about them being persuaded than them having the capacity to persuade others while, at the same time, resisting counter persuasion. There I agree memory is important, but I do not believe it affected by any ordering of arguments. Based on my experience, it is my sense that the motivation of the individual juror⁶⁰ is the key to remembering arguments. If you are leaning towards the defense, or on the fence genuinely seeking guidance, you will remember any arguments I make which seem useful, whether I go first, last, or in between. Also, as I have said, it is general comprehension of the advocate’s position that counts, not exact recall of the words and phrases used.

In short, I find little support in the memory research. I am nevertheless ever hopeful for support as I turn to the studies on opinion change.

2. *Research on Primacy and Opinion Change.*—In assessing the importance of the initial information that an audience receives, one cannot deny that an awareness of primacy runs deep into our cultural understanding. All of us know that first impressions are important.⁶¹ As the ad says, “You never get a second chance to make a first impression.” That is why we spend so much time calculating what we will wear on a first date, interview, presentation, and such. And in general, science parallels our beliefs. Unless there are memory constraints, strong contrast (i.e., the second piece of data is completely at odds with the

60. Cf. RALPH L. ROSNOW & EDWARD J. ROBINSON, *Primacy-Recency*, in *SOCIAL PSYCHOLOGY – EXPERIMENTS IN PERSUASION* 102 (Ralph L. Rosnow & Edward J. Robinson eds., 1967) [hereinafter “EXPERIMENTS”] (“For example, if a message containing information relevant to the satisfaction of a need were presented after the need had been aroused, there would be greater acceptance of the position advocated than if need arousal followed presentation of the message.”) (citation omitted).

61. See RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 172 (1980) (“First impressions are important, and the primary effect in impression formation, in which early-presented information has an undue influence on final judgment, is found almost as universally as would be suggested by its predominance in lay psychological theorizing.”). See also HAMLIN, *supra* note 16, at 376-78 (noting, generally, that people usually draw conclusions and develop attitudes toward a stranger within the first several minutes after they meet him).

impression from first), or the object or process involved is known to change over time,⁶² first impressions are powerful.⁶³

The classic experiment on primacy and persuasion consisted of giving a list of adjectives describing an individual to the research subjects.⁶⁴ Imagine the adjectives given were: intelligent, kind, reflective, stingy, angry. If the adjectives were given in this order, the subjects had a favorable impression of the person being described. However, if given in reverse order (i.e., beginning with “angry”), the subjects had a negative impression of the person being described.⁶⁵ Hence, the power of primacy.

Over time, further research has led experts to first one, and then another explanation for the dramatic perceptual differences from this simple manipulation of the ordering of a few adjectives. The first theory was one of “redefinition.”⁶⁶ Interpreting the latter adjectives by their first impressions, this theory had the subjects literally changing the meaning of the subsequent adjectives. Thus, if the sequence started with “intelligent,” the subjects interpreted “angry” in the most positive context to mean, e.g., “so smart she gets frustrated with incompetence.” If it begins with “angry,” the last adjective, “intelligent,” casts a very different meaning. Now we have someone who is very dangerous, violent with the brains to do real harm.

While there remain strong adherents to this redefinition theory,⁶⁷ most in the field discarded it in light of research establishing the “discounting” theory.⁶⁸ Under this theory, once “intelligent” is heard first, the subject can ignore what follows. The subject’s reaction may be characterized as “I don’t need to hear anymore.” No doubt conventions of speech would support such a reaction. When I describe someone, I generally will begin with words reflecting my strongest sense of the individual. It seems to me that others do the same. If the first words out of your mouth are positive, I immediately assume that you think well of the individual. If negative, I will

62. See NISBETT & ROSS, *supra* note 61, at 172.

63. By the same token, going first carries its risks since, if you make a bad impression, it will assist the advocate who follows you. In the words of one litigator, “if the presentation is incomplete or inadequate, such an effort can boomerang.” GIVENS, *supra* note 16, at 340; see also ALI/ABA, *supra* note 16, at 40 (“[B]ut being first is only an advantage if you speak with plan and purpose. If you do not, being first can be a serious handicap.”).

64. See Bailenson & Rips, *supra* note 58, at S5; Hogarth & Einhorn, *supra* note 59, at 7.

65. See *id.*

66. See *id.*; NISBETT & ROSS, *supra* note 61, at 173 (“[E]arly information was processed ‘holistically’ and... the resulting Gestalt colored the *meaning* of later-presented information.”).

67. See NISBETT & ROSS, *supra* note 61, at 173 (“The change-in-meaning hypothesis still has many vociferous adherents....”).

68. See NISBETT & ROSS, *supra* note 61, at 174 (“[L]ater-presented information, if it is inconsistent with the affective implications of early-presented information, is ‘discounted’ or given a lower weight by the subject.”); Hogarth & Einhorn, *supra* note 59, at 7.

assume you at least have reservations. After that, I do not need to hear anymore.⁶⁹

But, like those before, this seemingly sensible theory fell by the wayside. In its place came the “lessening attention” theory.⁷⁰ No complex cognitive process here, people simply ceased paying attention after the first words. They did not even hear the subsequent adjectives, or at least did not think about them. This was the world of channel surfing and minuscule attention spans.

It too did not last. In its place is the most current theory, the “theory” theory. From initial impressions, the listener develops a “theory.” This conceptual construct then biases how they conduct later information gathering.⁷¹ While this theory makes sense, I frankly do not understand

69. Hogarth and Einhorn recognized the same possibility for the results: “An alternative explanation of the same phenomenon follows from the notion that when someone describes another person, there is a natural presumption that order reflects the importance of information provided.” Hogarth & Einhorn, *supra* note 59, at 7.

Put otherwise, this mode for interpreting the adjectives fit into our everyday schema for describing people. Schema can be thought of as follows:

All of us carry socially-constructed conceptions of the world composed of an array of cognitive structures that guide the constant process of interpretation that we call giving meaning to our experience. The influences that create these structures are both a function of our concrete experiences and our cultural knowledge base. Both of those components of course will likely differ with class, ethnicity, gender, and sexual orientation.

John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1310-11 (1994) (citation omitted).

Further elaboration of the basic cognitive processes of making meaning through these interpretive frameworks, generally referred to as “schema theory,” can be found in RICHARD C. ANDERSON, *The Notion of Schemata and the Educational Enterprise: General Discussion of the Conference, in SCHOOLING AND THE ACQUISITION OF KNOWLEDGE* 415 (Richard C. Anderson et al., eds., 1977); DAVID E. RUMELHART, *Schemata: The Building Blocks of Cognition, in THEORETICAL ISSUES IN READING COMPREHENSION* 33-58 (Rand J. Spiro et al., eds., 1980); Robert Glaser, *Education and Thinking the Role of Knowledge*, 39 AM. PSYCHOL. 93 (1984); John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. LEGAL EDUC. 275, 277-87 (1989); *See also*, JEAN PIAGET, *THE LANGUAGE AND THOUGHT OF THE CHILD* (2d ed. 1932) (presenting cognitive, as opposed to behavioral, theory regarding child development).

70. *See* Hogarth & Einhorn, *supra* note 59, at 8; NISBETT & ROSS, *supra* note 61, at 174.

71. *See* NISBETT & ROSS, *supra* note 61, at 175:

Other experiments by Jones and his colleagues shed further doubt on the view that primacy effects are wholly or even partially due to attention decrement. They supported instead the view advocated by Jones and Goethals and the present writers that *primacy effects are due to theories that are formed early* and which are insufficiently sensitive to the implications of subsequent data.

(emphasis added).

This theory is consistent with the hypothesis to explain experimental findings that at some point subjects were no longer swayed by raw information. The hypothesis posited the formation of a “basal” opinion which was resistant to subsequent persuasion:

The following, somewhat speculative, explanation of these discrepancies involves two assumptions one general and one specific. The general assumption states that opinion has two components: a basal component which is relatively little affected by the communications once it is formed, and a superficial

component which is quite labile, and which obeys the original model. The two components act together to produce the observed opinion response.

Now at the beginning of the experiment, the basal opinion is presumably vague, or nonexistent, but begins to form as successive arguments accumulate. The special assumption locates the major portion of this basal opinion formation in the last half of Stage 2 and in the first half of Stage 3.

These two assumptions will account for the discrepancies according to the following argument. In Stage 1, there is as yet little basal opinion. Hence the obtained Stage 1 recency effect is created entirely by the superficial component. Since this component obeys the model, the decay of the Stage 1 recency effect is in accord with the prediction made in the introduction. The opinion at the end of Stage 2 has both superficial and basal components, and both contribute to the recency effect at this stage, the former because it obeys the model, and the latter because it is formed in the second half of the stage. In the succeeding arguments, that portion of the Stage 2 recency effect which is due to the superficial component decays away as seen in Fig. 2. The basal component, however, being resistant to change, is carried along beneath the perambulations of the observed opinion at a fairly constant value thereafter. The formation of the basal component in the first half of Stage 3 would of itself produce a primacy effect in this stage. The observed recency effect presumably arises from the overriding influences of the superficial component. Following Stage 3, the decay of the superficial component reveals the primacy effect caused by the basal component formed in Stage 3.

Norman H. Anderson, *Test of a Model For Opinion Change*, 59 J. ABNORMAL & SOC. PSYCHOL. 371, 379 (1959), reprinted in EXPERIMENTS, *supra* note 60, at 105, 113.

Significantly, this is all consistent with two prominent theories of juror decision-making, the Narrative and the Story Model theories. As discussed, jurors use narratives both to organize the information they receive at trial and to make judgments about that information. See BENNETT & FELDMAN, *supra* note 22. The recent study by Pennington and Hastie confirms the Bennett and Feldman thesis. See Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520 (1991). Jurors decide by what Pennington and Hastie call the "Story Model." *Id.* Like Bennett and Feldman, these researchers conclude that jurors order the information at trial into story representations and then compare their own stories to those offered by the parties in deciding the case outcome. See *id.* at 521. Their central finding was that "the story the juror constructs determines the juror's decision." *Id.* See also *id.* at 525 ("Different jurors will construct different stories, and a central claim of the theory is that the story will determine the decision that a particular juror reaches."). Significantly, any particular set of information could trigger a number of different story constructions or schema. See Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 U.C.L.A. L. REV. 273, 276-77, 292 (1989) (discussing how jurors may react differently to the same story). Here, schema and narrative intersect, since the schemas we use to describe daily life take the form of narratives. See *id.* at 281. Further, the chosen narrative will not only be a function of the perceived relevance, but also of the intensity of the particular schema to the individual such that it can quickly be retrieved and brought to mind. See *id.* at 295-96. Once a schema is chosen, moreover, it biases perception. See *id.* at 277, 303. In a trial context, this means that once jurors construct their story, they will tend to focus on information in the case supporting their particular story, ignoring much other (perhaps highly relevant) information. See *id.*

For other discussions of narrative and story theories, see STEVEN PENROD ET AL., *Chapter 31. The Implications of Social Psychological Research for Trial Practice Attorneys*, in PSYCHOLOGY AND LAW: TOPICS FROM AN INTERNATIONAL CONFERENCE 447-48 (Dave J. Muller et al., eds., 1984); RIEKE & STUTMAN, *supra* note 17, at 94-105; Wayne A. Boach, *Temporal Density in Courtroom Interaction: Constraints on the Recovery of Past Events in Legal Discourse*, 52 COMM. MONOGRAPH 1, 3-4 (1985); Cf. Kunkel & Geis, *supra* note 2, at 557:

Thus, the first time a proposition is presented to us, we tend to form an opinion and we do so according to the influences present to shape it. Later, such an opinion may gain a certain emotional content if it is contradicted. This follows because of its personal reference and because we would not have our ideas appear frail and inconsequential.

why there is not room for the previous theories under its umbrella. For example, the conversational schemata which seem to at least partially underlie the discounting theory, would seem to influence the initial theory choice under the theory.

In any event, regardless of the explanatory theory, all agree that primacy is powerful. Since the prosecution already goes first in closing, it would then seem that all this science helps me begin to establish the extreme advantages given the prosecution in closing argument. The problem is that if I am going to be fair, and I promised I would try, I have to admit that it is far from clear whether the results of any of these experiments apply to jury trials.⁷²

Initially, in many of the experiments, the subjects are repeatedly asked their opinion after they are presented with each new piece of information or argument.⁷³ This is obviously a good way to measure opinion change. It is equally obvious that is nothing like a trial. It may make trials more interesting, giving them the sense of a game show, but as long as we follow our current system no one gets to ask juror's opinion on the evidence until they complete deliberation. In fact, in one respected study, subjects were *specifically* told *not* to act as jurors, and thus not to withhold their opinion until the close of evidence.⁷⁴

Further, the subjects generally are not asked to reach a final decision.⁷⁵ In those studies where the subjects do reach a decision, they merely vote. They never meet with other subjects and deliberate.⁷⁶ In fact, in a study where subjects were told that they would have to justify their decisions, this intervening process nullified all "order effects."⁷⁷ In other words, once they knew that, like a jury, they would have to justify their conclusions, it did not matter whether argument A preceded B, or B preceded A.

Finally, the subjects never see live witnesses, complete with personalities, speech cues, and non-verbal behavior. They read written

(quoting FREDERICK H. LUND, *EMOTIONS OF MAN* 40-41 (1930)); Vinson & Anthony, *supra* note 16, at 34 ("Rather, sometimes people tend to reflect their own psychological needs and motivations as opposed to an objective assessment of available information.").

72. Aron, Fast, and Klein attributed the lack of research in this area to the results researchers were achieving. See ARON ET AL., *supra* note 16, at 15-12 ("During the 1950s and 1960s, research activity into the many facets of persuasion was impressive. Since then, however, theoretical development and empirical interest have waned, primarily because inconsistent data accumulated and the emergence of each new study revealed unanticipated complexity about the topic being studied.") (citation omitted).

73. See, e.g., Anderson, *supra* note 71, at 107.

74. See *id.*

75. See *id.* at 107-08.

76. See, e.g., *id.*; Norman Miller & Donald T. Campbell, *Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements*, 59 J. ABNORMAL & SOC. PSYCHOL. 1, 3-4 (1959), reprinted in EXPERIMENTS, *supra* note 60, at 117, 119-20; Wallace & Wilson, *supra* note 76, at 314 (asking subjects to mark response measure instrument after they hear all arguments.).

77. See Hogarth & Einhorn, *supra* note 59, at 18-19.

hypotheticals in a booklet, turning the page to get new information⁷⁸ and then fill out another line on their score sheet.⁷⁹ This certainly narrows the variables in the experiment. The problem is that real trials are all variables.⁸⁰

Moreover, even if I were to accept that these studies carry over to the trial arena, with primacy holding sway, I would nevertheless have doubts about the extent to which it would have much application to the prosecution's initial closing argument. These are not the first words at trial. The jurors have already gone through voir dire and heard openings and all the evidence. They have already developed their cognitive conceptions and theories.⁸¹ Also, it is logical to expect that primacy will be most powerful when there is a large time gap between the initial message and any counter information.⁸² In criminal trials, however, the defense closing follows immediately after the prosecution's. Now, none of this is to say that

78. See, e.g., Anderson, *supra* note 71, at 107 ("Each [subject] then received a booklet containing the arguments...."); Bailenson & Rips, *supra* note 58, at S12 ("Subjects received a booklet consisting of five pages: an instruction page and four pages of arguments."); Wallace & Wilson, *supra* note 76, at 312-13; Stanley Zdep & Warner Wilson, *Recency Effects in Opinion Formation*, 23 PSYCHOL. REPORTS 195, 197 (1968). But see Wallace & Wilson, *supra* note 76, at 312 ("Fred L. Strodbeck at the University of Chicago arranged to have a real jury trial reenacted and recorded.").

79. See Hogarth & Einhorn, *supra* note 59, at 21 ("After responding to this question, subjects turned the page of their experimental booklets...."); Kunkel & Geis, *supra* note 2, at 557 ("[In his primacy experiments, Lund] employed written rather than oral stimuli."); Miller & Campbell, *supra* note 76, at 119 ("A transcript of an actual trial... was edited for the purposes of the present experiment.") (citation omitted).

80. See ARON ET AL., *supra* note 16, at 15-11:

The problem with these theories and experiments is that they are mostly based on the analysis of one or two parts of the lawyer's court presentations. A trial is a total process. Each case has a different combination of persons sitting in the jury box, or a different judge on the bench. Each case has a different subject and different parties. Each case has its own issues and situations to be resolved. For these reasons, it is not possible to establish a fixed rule saying that the best tactic will always be to apply the primacy or the recency theory, or the climax or the anticlimax theory. It is, however, true that a responsible trial lawyer must know how the different principles work in order to be able to apply them to the particular characteristics and merits of the case at bar.

81. In explaining why primary experiments may not be useful when assessing closing arguments, Kunkel and Geis noted that "closing arguments essentially reiterate previous testimony rather than introduce a fresh subject." Kunkel & Geis, *supra* note 2, at 557. Placing a similar notion within research on cognitive framing, Rieke and Stutman note:

Research on cognitive framing suggests that when jurors are relatively unfamiliar with the events in question, as they are at the start of a trial, they will search for ways of organizing the information presented. Because of this, arguments presented first will provide them with the point of reference necessary to digest the information efficiently. Research focusing on order effects for unfamiliar subjects confirms this primacy effect (Lana 1961). As jurors develop a sense of what a case involves, such as during the summation, more recent arguments will be better remembered and a recency effect should commonly prevail.

RIEKE & STUTMAN, *supra* note 17, at 206-07.

82. Cf. ARON ET AL., *supra* note 16, at 15-11 ("[T]he validity of this theory (primacy) is affected by the passage of time, with first impressions becoming weaker with the lapse of time.").

beginning the closing argument sequence does not bestow advantages upon the prosecution. It is just that, if they are to be found, they will have to reside in the realm of art, not science.

C. Advantages of Going First and the Arts of Advocacy

Going first, the prosecution can set the terms and structure of the final debate.⁸³ Put in terms of argumentation metaphors, they can frame the issues. Using military metaphors, they can choose the terrain for the battle. Employing commercial metaphors, they pick the location on which to do business. In any domain, this is an advantage.

Let's look at an example. Defendant is charged with assaulting a police officer. According to the officer, he pulled defendant over for speeding and determined that the defendant was driving on a revoked license. He ordered the defendant out of the car, told him to place his hands on the hood, and began the process of handcuffing the defendant. To that end, he ordered the defendant to put back his left hand. The defendant did not comply. He ordered him again. Nothing. He moved forward to grab the defendant's left hand at which moment the defendant threw back his elbow, striking the officer in the chest. The defendant spun off and appeared to take a step as if to flee. Before he could take another step, the officer grabbed, then quickly subdued and handcuffed the defendant. The officer claims that he can tell that the elbowing was intentional. Therein lies the assault. The defendant maintains it was an accident which happened as he was complying with the officer's order.

In their initial closing, the prosecution may wish to frame this as a credibility contest between a trained police officer in the field and someone who was speeding and driving without a license. She may also want to provide the jury with a backdrop against which to analyze the credibility issues, e.g., the dangers police officers bravely face while acting alone in the field to protect us all.

By the time the defense speaks, they have a lot of work to do. The jurors have now cognitively gone down a road of analysis created by their adversary. To impose their structure/framework the defense must first spend time tearing down the prosecution's framework, and then rebuild their own. Only then can they finally apply the evidence to their structure for analysis. Here, the defense would initially want to dismantle the "credibility" contest framework established by the prosecution. That will take two steps here. The first is to make clear that the issue is not who you believe. You must believe the prosecution's sole witness beyond a

83. See, e.g., GIVENS, *supra* note 16, at 340 ("The party going first has the opportunity of stating the contentions of both parties....").

reasonable doubt. You only need a reasonable doubt that the defendant is telling the truth. The second is to point out that in this specific case, we're really not talking about whether or not the officer is telling the truth. The question rather is whether that officer's subjective belief as to what was in defendant's mind when he reached back and contacted the officer with his elbow is accurate beyond a reasonable doubt. He's telling the truth about what he saw, experienced, and believes. It's just that there's a reasonable doubt that his subjective belief could be incorrect.

As for the prosecution's backdrop that being a police officer alone on the highway requires bravery in the face of danger, that is completely correct. That explains why the officer would and must interpret all actions in their most negative if he is to stay alive. He must react quickly, just like he did here. His actions were totally correct and reasonable under the circumstances, but now in the calm of the courtroom there exists at least a reasonable doubt that he misperceived the defendant's intentions.

Now, by doing all this the defense may have successfully reframed the issues. But it took a lot of time, a lot of work, and a lot of concentration by the jurors.

In addition to framing the issues, by going first, the prosecution also can anticipate defense arguments.⁸⁴ There is nothing new about this use of the first argument. Since Aristotle, anticipating the opponent's arguments have been a common technique of argumentation.⁸⁵ As such, a party can provide

84. See Cartwright, *supra* note 16, at 36:

I believe that it is very important to take the sting out of your opponent's argument by anticipating it and discussing it in advance. Rob him of his potency by putting it in the light most favorable to your client before opposing counsel has an opportunity to discuss it with the jury.

See also GIVENS, *supra* note 16, at 340 ("The party arguing first has the opportunity of... answering in advance what the opponent will say. If this is done successfully, the opponent is left with no ammunition..."); VOGEL, *supra* note 16, at 13 ("In this way the jury is given a preview of the opponent's argument and the answer to it, before the opponent has the opportunity to speak. The jurors are thus forearmed with skepticism, and the opponent's argument will encounter more resistance with the jurors and may fall flat."); John P. Miller, *Opening and Closing Statements From the Point of View of the Plaintiff's Attorney*, in ALJABA, *supra* note 16, at 44 ("Again, because you speak first, you have the real advantage in being able to mitigate some of the unfavorable aspects of your case and put them in the light you want the jury to see them in."). Cf. BERGMAN, *supra* note 16, at 254 ("Preemption means anticipating and responding to an adversary's argument before the adversary has a chance to make it.").

85. See Mike Allen, *Meta-Analysis Comparing the Persuasiveness of One-Sided and Two-Sided Messages*, 55 WESTERN J. SPEECH COMMUN. 390, 390 (1991) ("Aristotle, in his book *The Rhetoric* (1932), discussed how a speaker should refute the counter-arguments of an opponent."). This anticipatory rebuttal was in fact standard fare in ancient rhetoric: "[M]ost of the writers of antiquity admit that, normally, a legal speech has these minimum divisions: exordium, narration, proof, refutation, conclusion, and epilogue." C. H. PERLEMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 495 (1971) (emphasis added).

Recent scientific research has validated this wisdom. In the recent vernacular, it is termed "two-sided argument with refutation," i.e., you give the audience your side, then their side, and then supply your refutation. See Allen, *supra*, at 396 ("A one-sided message is more persuasive than a two-sided message with no refutation. However, a two-sided message with refutation is more persuasive than a one-sided message."). Cf. RIEKE & STUTMAN, *supra* note 17, at 208 ("The practical implications of this

the jury with actual counter arguments (“The officer did not misperceive. He told you how defendant was looking back at him when he threw the elbow. He also told you about all the training he’s had to insure that he will remain cool under pressure”), as well as raw material with which the jurors can create their own counter arguments to the defense. To an extent, the prosecution thus can inoculate the jury from defense persuasion.⁸⁶

work for the closing argument appear forthright. Attorneys should not only provide arguments in support of their client’s position, but should also raise and refute arguments harmful to that position.”). One small word of caution about the science; the experiments involved single speakers, not an adversary setting. See Allen, *supra*, at 390. Nonetheless, I believe that the science and Aristotle have gotten it right: anticipate and refute.

86. Social psychology, using the biological analogy of inoculating against disease with a weakened dose of the disease, has apparently embraced the notion of persuasive “Inoculation Theory.” See, e.g., Allen, *supra* note 85, at 398. “Inoculation Theory uses the metaphor of disease to represent opinion and attitude change. Inoculation occurs when a speaker includes and then refutes counter arguments to the position advocated. This ‘inoculates’ the message receivers from subsequent counter-persuasion.” *Id.* See also William J. McGuire, Chapter 19. *Attitudes and Attitude Change*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 272 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985):

A rule of thumb in political campaigning is that one should keep on the offensive, ignoring rather than refuting opposition changes, but the current upsurge in comparison advertisements and empirical research reflects doubt about the wisdom of such stonewalling. It is better to acknowledge and refute opposition arguments.... Explicitly refuting opposition arguments is especially important for conferring resistance to subsequent attacks....;

ROSNOW & ROBINSON, *supra* note 60, at 100:

The two-sided communication, subjecting the individual as it does to arguments which both support *and* attack his beliefs, may serve to forewarn him of the kind of arguments he subsequently could encounter. Thus, it would have the effect of reinforcing, or bolstering, his original beliefs, thereby leaving him even more resistant to counterpersuasion than he was initially.

(citation omitted).

The theory explaining why inoculation works is provided as follows:

The social psychological research on forewarning, counterarguing, and ‘innoculation’ has revealed why these strategies work. First, giving people a general warning that they are about to hear a communication designed to make them change their minds about a particular issue causes them to generate counter-arguments *during* the subsequent persuasive appeal (Hass and Grady, 1975). Forewarnings concerning the specific content of an appeal are also effective in motivating subjects to generate counter-arguments if there is a sufficient time delay between the forewarning and the subsequent appeal (Petty and Cacioppo, 1979a,b). Second, if people generate these counter-arguments on their own, or even if they are provided with counter-arguments they have not thought of themselves (Brock, 1967; Petty and Brock, 1976; Petty, Brock, and Brock, 1978) before hearing a persuasive message, they will be less persuaded by the appeal when it comes (Adams and Beatty, 1977; McGuire and Papageorgis, 1961; Pryor and Steinfatt, 1978). Third, a forewarning is *not* effective because it causes the listener to attend selectively to the persuasive appeal (screening out what they do not agree with) or forget what they have heard (Petty and Cacioppo, 1979a). Instead, it is effective because it facilitates more *thought* about the message. Fourth, there are two factors which affect a person’s motivation to counter-argue: who will be delivering the appeal and whether or not the topic of the message is a personally involving one. A message coming from a low credibility speaker will produce more thinking and counter-arguing (Gillig and Greenwald, 1974). A message that is of personal importance to the listener will stimulate more counter-arguments (Petty and Cacioppo, 1979b). Finally, enduring attitude change is most

Of course, no technique is risk free. By anticipating the adversary's argument, the prosecution runs the risk that it will raise arguments which neither the defense nor jurors have conceived.⁸⁷ Thus, though you generally

likely to occur when people have thoroughly processed the information contained in a communication and generated cognitions that are either favourable or unfavourable to the position advocated (Petty, 1977).

PENROD ET AL., *supra* note 71, at 499.

While this all sounds intriguing for legal argumentation, its actual application may be limited to the general notion of anticipating counter-arguments, including making concessions, *see* BERGMAN, *supra* note 16, at 255 ("Inoculation is a technique in which you acknowledge the validity of an argument while pointing out why it should not dictate the outcome of a case."). *Cf.* PERLEMAN & OLBRECHTS-TYTECA, *supra* note 85, at 501 ("Anticipatory refutation can also take the form of a concession.").

First, Inoculation Theory is really concerned with long-term resistance, as in propaganda or advertising, not the few moments between the initial prosecution closing and the defense argument. *See* Allen, *supra* note 85, at 399 ("Inoculation Theory deals with attitude change over time."). *Cf.* CARL I. HOVLAND ET AL., COMMUNICATION AND PERSUASION: PSYCHOLOGICAL STUDIES OF OPINION CHANGE 17 (1953) ("Hence, the long-run effectiveness of a persuasive communication depends not only upon its success in inducing a momentary shift in opinion but also upon the sustained resistance it can create with respect to subsequent competing pressures."). Second, the experimental studies do not at all reflect the nature of a jury trial. The speaker was an authoritative speaker whom the audience accepts, and, as such, is uncritical of the truth, value, or cogency of her arguments. *See* IRVING L. JANIS & ROSALIND L. FEIERABEND, *Effects of Alternative Ways of Ordering Pro and Con Arguments in Persuasive Communications*, in THE ORDER OF PRESENTATION IN PERSUASION 115, 117 (Carl I. Hovland ed., 1957) ("For such communications it is assumed that the favorable attitude of the recipients toward the source predisposes them to be relatively uncritical as to the truth value and cogency of the main arguments."). That, of course, is not always the case when jurors are assessing the two advocates of trial. Third, the counter-arguments to the speaker were non-salient - the audience was not familiar with, or did not spontaneously recall, them. *See id.* In contrast, at trial, the jurors know as a structural matter that each side opposes the main point of the other's. Also, through *voir dire*, opening statement, and direct and cross-examinations the jury should have some decent sense of the arguments and counter-arguments for each side. Third, the position being inoculated against was a clearly-held value, such as "civil defense is good." *See id.* at 119. *See also* William J. McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches*, 1 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 191, 227 (1964), reprinted in EXPERIMENTS, *supra* note 60, at 257, 293 (describing these values as "cultural truisms"). Lawsuits obviously involve controversial propositions. Even values like "police are truthful" may vary depending on the time period, locale, and community.

Finally, the methods that are suggested for achieving inoculation in the social sciences are far more sophisticated than simple trial arguments. These involve long-term, extensive techniques, most of which would not apply to trial (requiring relatively long-term education), and some of which would be forbidden as misconduct (e.g., appeals to bias, prejudice, fear: "If you don't find the defendant guilty, you're responsible for the next officer killed in action by a black man.") *See generally* McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches*, *supra*, at 262-65 (explaining techniques of inducing anxiety, linking to accepted values, ideological preconditioning, inducing aggressiveness), and 269 (explaining sequence of several 50-minute sessions with subject to be inoculated).

87. Similar sentiments were echoed by Givens and Moore. *See* GIVENS, *supra* note 16, at 341 ("On the other hand, there is an exquisite dilemma: whether to anticipate opposing argument that may not otherwise have been made and, perhaps, create opportunity for further rebuttal, or to remain silent as to potential counter-arguments which will have the sting of recency in the mind of the tribunal. Obviously, the sting of this dilemma is reduced if time for rebuttal is available."); Moore, *supra* note 71, at 339 (articulating that, while in anticipatory rebuttal the advocate may raise points favorable to the opposing counsel that had previously "been filtered out by the jurors..." or "suggest to opposing counsel a previously unappreciated argument...", this is less of a problem if the party also possesses the last argument.); *Id.* at 339-40 n.170 ("Since the prosecution (or plaintiff in a civil case) goes both first and last during closing, the prosecution can avoid suggesting a new argument to opposing counsel by saving rebuttal arguments until after the defense has addressed the jury. The defense does not have that

know the opposition's arguments by the time you have analyzed your case through preparation, discovery, and trial, the prosecution must always decide whether it is better to see whether a particular argument is actually raised and then deal with it in rebuttal.⁸⁸ In any event, it will be the prosecution's choice whether or not to anticipate defense arguments in its initial closing.

Further, in the initial closing, the prosecution can bait the defense with questions. If the defense falls for the bait and answers, they will have tracked the prosecution's agenda and sacrificed any coherence to their own argument.⁸⁹

Finally, by having both the initial and rebuttal argument, the prosecution can develop a conjoined strategy. They can set up their basic themes and rationales in their initial closing. Then, in rebuttal, they can reinforce their central position, hitting hard on their basic themes.⁹⁰

So, science aside, there does seem some advantage to the prosecution with going first in the sequence of closings. I do not begrudge them that -- they do have a heavy burden to carry. But how much more do they gain from also having the last word in rebuttal? That, after all, is the primary investigation of this piece.

option.”).

88. Your adversary at trial is not limited to opposing counsel. Individual jurors also may raise arguments in deliberation which, unless you anticipate them, can be very persuasive. Professor Bergman has likewise recognized this strategic reality when he discusses employing the tactic of “[a]ttributing the argument to the factfinder...” when “[y]ou may want to preempt arguments that you think a factfinder may come up with....” BERGMAN, *supra* note 16, at 255.

89. See MCELHANEY, *supra* note 42, at 671, quoting an attorney:

I was taught that in your opening summation you should pose a lot of questions for the other side. All these questions are absolutely designed to trap your opponent into opening up issues that you want opened up on your rebuttal.

If you do this right, either of two things can happen. First, the defense can rise to the bait and discuss your issues. Since they are *your* issues, framed your way, that sets you up to show how they should be answered when you rebut. Second, if the defense ignores your questions, you can show how he was afraid of them, and then you answer the questions you posed -- your way. Either way, you have gained control again, and either way, you answer those questions your way.

While a useful tactic if the adversary takes the bait, the literature warns against falling into such a rhetorical trap.

90. See Miller, *supra* note 84, at 43:

In the opening statement you launch your sales campaign, and in the closing summation you try to close the deal, to get the jury to sign on the dotted line, so to speak.

The closing summation gives you an opportunity once again to focus the jury's attention on the attractive aspects of your case.

See also MAUET, *supra* note 16, at 300 (“Make sure neither [the opening nor the rebuttal] argument steps on the other's toes so that the rebuttal will be fresh for the jury.”)

IV. What are the Advantages of Rebuttal?

A. *Power of Rebuttal as a Result of the Jurors' Psychological Processing*

1. *Lessons from Recency and Order Effects Theory Research.*—

Given that the prosecution has the last argument in closing, I would expect that the principle of recency will add strength to my argument that the prosecution gets a significant procedural advantage from having the last word. Admittedly, I did not get much when I examined the principle of primacy in conjunction with the prosecutions initial closing. But, I have reason to hope for something better by delving into the realm of recency. After all, no action by either advocate is any more recent to the jury than the prosecution's rebuttal argument in closing.

The field, or it is probably more proper to say fields, which deal with opinion change⁹¹ – advertising, propaganda, politics, and such – put great significance in the question of so-called “order effects.” If message A precedes message B, is the persuasive effect different than if B precedes A?⁹² In these realms, the stakes are high as to whether the first or second

91. See Hogarth & Einhorn, *supra* note 59, at 3:

Belief updating is a ubiquitous human activity. It is an essential component in such diverse areas as probabilistic inference (Peterson & Beach, 1967; Edwards, 1958; Slovic & Lichtenstein, 1971; Hogarth, 1975; Schum, 1980; Fischhoff & Beyth-Marom, 1983), decision theory (Raiffa & Schlaifer, 1961; Winkler, 1972), economics (Camerer, 1987), social cognition (Fishbein & Ajzen, 1975; Nisbett & Ross, 1980; Anderson, 1981; Hastie, 1983), jury decision making (Schum & Martin, 1982; Davis, 1984; Pennington & Hastie, 1986), communication and persuasion (Hovland, Janis, & Kelley, 1953), attitude change (Triandis, 1971; Cooper & Croyle, 1984; Petty & Cacioppo, 1986), causal inference (Jones, 1979; Einhorn & Hogarth, 1986; Carlson & Dulany, 1988), and psychophysics (Green & Swets, 1966).

Interestingly, this widespread focus on persuasion has only been replicated in scattered epochs throughout human history.

[P]ersuasion “[has] been the key mode of social control and effort mobilization only in four scattered centuries: the Periclean Hellenic period, the last decade of the Roman Republic, the humanistic Renaissance, and our own mass media century” [While oratory and religious prostelyzing has existed throughout] only in the four centuries mentioned has persuasion played so central an economic, social and political role as to have become not just an art but an essential craft in whose rules of thumb the elite youth were trained and a recognized science with a systemized body of theory developed by savants.

McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches*, *supra* note 86, at 233.

92. Hogarth and Einhorn describe the study of order effects as follows:

This paper presents a descriptive theory of belief updating that can be applied to many substantive domains. The focus is on order effects. In the paradigmatic situation considered here, a person responds to the presentation of several pieces of evidence by expressing an opinion about a specific proposition or hypothesis. However, were the person to process the same information in a different order, would this affect the final judgment? More specifically, under what conditions does information processed early in the sequence have greater influence, *i.e.*,

message has the greatest impact. On the answer to that question rests decisions ranging from whether to encourage AT&T put out their new long distance phone program before MCI (or whether it is better to wait and follow), to whether a particular presidential candidate's position on foreign policy should be presented to the American public before her opponent's, etc.

I cannot even begin to look at the study of order effects, and its possible application to closing arguments, however, without almost immediately finding cause to pause. For, when thinking about the sequence of closing, we are not just talking about manipulating the order of arguments A and B to B and A, and then testing if the sequence alters the persuasive impact of each argument. In that case, A and B remain constant. Only the order in which they are argued is altered. That is not true for closing arguments. If the advocates changed positions, likely the structure, if not some of the content would be altered. I simply would not give precisely the same argument in second position that I would give if I were in the first. Also, here we are considering reversing two totally different types of arguments, i.e., the full defense closing and the shorter prosecution rebuttal.

As I said, all this gives me cause to pause. It does not, however, keep me from moving on after pausing. While literal order reversal is not possible in closing arguments given that position will change the rhetoric and structure of the argument, good attorneys nevertheless will tell their stories their own way, regardless of where the other side speaks in relation to them. I do not need to hear the other side's exact rhetoric in closing to know their main arguments and what I must do to rebut them. I have anticipated all that throughout trial preparation, revising and evolving my understanding at every moment until the last witness finishes testifying. So, though the form of argument and rhetoric may vary depending on my position in the argument sequence, the crux of my argument will not.⁹³ That leads me back to the broader inquiry regarding the extent to which the audience is influenced by the fact that what they have heard has come last.⁹⁴

produce a primacy effect? Under what conditions is later information more important, *i.e.*, a recency effect? Under what conditions is order irrelevant?

.....

In the present work, we consider order effects of the following type: There are two pieces of evidence, A and B. Some subjects express an opinion after seeing the information in the order A-B; others receive information in the order B-A. An order effect occurs when opinions after A-B differ from those after B-A.

Hogarth & Einhorn, *supra* note 59, at 2-3.

93. Others agree with me that, regardless of order, the core of your argument remains constant. "MAXIM: whether you speak first or second does not change the basic points, or the order in which you should present them." STERN, *supra* note 1, at 290 (emphasis omitted).

94. I realize that in a three-argument format, the defense argument is in the recency position relative to the prosecution's initial closing, and primacy relative to rebuttal. I have no idea what this means, and it is not the subject of any study I've found. But when all the dust settles, the prosecution still goes last.

Early experiments actually indicated that the first argument (primacy) was more persuasive than the following (recency).⁹⁵ Later studies came to the opposite conclusion, giving the nod to recency.⁹⁶ Most recently, experts find that whether primacy or recency is the king or queen of order effects varies with the specific context. In short, there is no clear rule, no general law of primacy and recency.⁹⁷

More specifically, some experts believe that instead there are an "assortment of miscellaneous variables."⁹⁸ Some produce primacy effect ("primacy bound variables"), some recency effects ("recency bound variables"), while others are capable of producing either effect, depending on their utilization and placement in a two-sided communication ("free variables").⁹⁹

Primacy bound variables include non-salient arguments (i.e., the audience has not heard or does not immediately recall the argument), controversial topics, interesting subject matter, and highly familiar issues.¹⁰⁰ Recency bound variables include, salient topics, uninteresting subject matter, and moderately unfamiliar issues.¹⁰¹

This makes sense, as a general proposition. If you are familiar with an interesting issue, and/or the speakers are saying new and exciting things, you are going to be highly motivated to respond to the information and begin to construct your own theory, basal opinion,¹⁰² etc. If you do not know much about the issue, it is not very interesting, and you may even

95. See ROSNOW & ROBINSON, *supra* note 60, at 100 (discussing initial experiments by Professor Lund upon which Lund "enunciated the controversial principle we know today as the 'law of primacy in persuasion.')" (citation omitted); Hogarth & Einhorn, *supra* note 59, at 3.

96. See ROSNOW & ROBINSON, *supra* note 60, at 100 ("Subsequent investigation appeared first to confirm but then to refute the primacy principle."); Hogarth & Einhorn, *supra* note 59, at 3 ("This conclusion [as to the dominance of primacy], however, is contradicted by Davis (1984) in a review of studies of jury decision making that indicates greater prevalence of recency effects....").

97. See Anderson, *supra* note 71, at 114 ("With regard to the primacy-recency problem itself, these data make it amply clear that no general law of primacy or recency can exist...."); ROSNOW & ROBINSON, *supra* note 60, at 101 ("Instead of a general 'law' of primacy, or recency, we have today an assortment of miscellaneous variables...."), Miller & Campbell, *supra* note 76, at 117 ("[F]indings seemed to have ruled out any completely general principle of primacy in persuasion...."); Wallace & Wilson, *supra* note 76, at 311-12 (describing "the disarray in the order-effect literature....")

98. For example, one study found that order effects did not take place when a one-sided communication (i.e., only your side of the argument) followed a one-sided communication, or a two-sided communication (i.e., you acknowledge their side as well as your own) followed a two-sided one. Only when a two-sided followed a one-sided, or a one-sided followed a two-sided, were their order effects, always in direction of the two-sided communication. See ROSNOW & ROBINSON, *supra* note 60, at 99. Since all good legal arguments are two-sided, this study would seem to indicate that there are no order effects in legal argumentation. The study, however, did not seem to also include rebuttal in the two-sided format (i.e., attacking as well as just acknowledging the opponents argument). As such, it does not aid our inquiry as to any advantages inherent in giving the prosecution the final argument in closing.

99. See *id.* at 101.

100. See *id.* at 101-02.

101. See *id.*

102. See *supra* note 71 and accompanying text (describing "basal" opinion).

have heard the basic arguments before, you are probably not going to either quickly form a basal opinion, or to pay much attention for that matter. You simply are not likely to care very much. Fine. The challenge is to apply all of this to criminal trials.

In some ways, jurors in a criminal trial have heard the core arguments before. Through books, movies, television, and perhaps prior jury experience, they are familiar with burden of proof, reasonable doubt, the presumption of innocence, that the defendant does not have to testify, and such. So, in some respects, the arguments are salient. On the other hand, they are totally unfamiliar with the issues in this case (unless it is that rare case in the court's calendar which has received media attention). So, in other respects, the arguments are non-salient. In fact, if the case is familiar, the juror will be questioned on voir dire to determine if they should be removed from the panel for cause. On the other hand, while they do not know the particular facts and issues in the case, they often have familiar schemata or scripts about various crimes (murder to get the insurance money, shoplifting to steal food, a drug sale, a conspiracy, house burglary) and about various defenses (alibi, the lying codefendant who is getting a deal, insanity, misidentification, the defendant who was innocently along with the real criminals). So, we're back to salient. Then again, the case may involve totally unfamiliar law (RICO, money laundering, bribing foreign corporations) and completely unfamiliar scenarios (the life of a drug addict in a diminished capacity case, the operation of the import shirt business). So, maybe it is really non-salient.

As for the variables of "interesting" and "controversial," chance principally will determine whether a case is very interesting or controversial. Some will be dramatic (did the wife really have a lover, and then convince her to kill her husband), while others will be less so (does the "net worth" analysis demonstrate that the defendant willfully evaded taxes). It will also depend on the skill, style, and ingenuity of the respective advocates.

In short, I simply do not know how to apply the concepts of primacy and recency bound variables to the general topic of criminal trials. While these concepts may alert me to the crucial moments of juror decision-making in a particular case, they do not give me any overall framework with which to gauge the advantage to the prosecution in having the rebuttal argument.

What about the "free variables?" The clearest example of a free variable is the strength of the argument.¹⁰³ That makes sense. If one

103. See ROSNOW & ROBINSON, *supra* note 60, at 102. An example of another free variable is termed "reinforcement:"

Another free variable is "reinforcement." When incidents that are perceived as rewarding or satisfying are initiated close in time to a persuasive communication,

argument is significantly stronger than another, it is hard to imagine that it would nevertheless face rejection merely because it follows or proceeds a far weaker position. Of course, when discussing a criminal trial, we are not looking at the absolute strength of the arguments. The prosecution may well have the strongest argument, but it still may not merit a conviction under a legal regime demanding proof beyond a reasonable doubt. Strength of argument thus must be translated into “strength within applicable burdens of proof.”

All that, however, is not very helpful. The question still remains whether the very order of the argument can assist the prosecution side in making their argument appear “stronger.” I agree that, within some parameters, there is a somewhat objective aspect to comparing the strength of two arguments.¹⁰⁴ That, however, only goes so far. Once you get to the position that neither side is absurd and both have their points, it gets a bit more unclear. For in a real trial, with all the fur flying, there is a great deal of room for the advocates to influence the juror’s perceptions and for those perceptions to define their reality. So again, does going last significantly aid the prosecution in creating that perceptually-driven reality?

Not surprisingly, the more one looks into the studies on order effects, the more complicated it becomes. Researchers now believe that three sets of variables affect order effects.¹⁰⁵ Complexity is the first. Complexity is a function of the amount of information and the subjects lack of familiarity with the task.¹⁰⁶ Next is the length of the series of information.¹⁰⁷ Finally, is the mode of response.¹⁰⁸ This last variable in turn has two forms: end of sequence [Eos], which is what jurors in real trials are told to do (i.e., don’t decide until all the evidence is in),¹⁰⁹ and item by item, or step by step [Sbs], which is what most of the studies do (i.e., make a new decision after each new piece of information).¹¹⁰

So, how do criminal jury trials rate on these three variables? Let’s begin with complexity. Law cases, even “simple” ones, are extremely complex by this measure, as anyone who has used the most basic, beginner,

opinions tend to change in the direction of the arguments closer to the rewarding incident. When an incident is dissatisfying, or punishing, opinions tend to change in the direction of the arguments farther in time from it.

Id. (citation omitted).

104. For an example of an attempt to develop objective criteria for evaluations the quality of rebuttal in debate, see Don Faules, *Measuring Refutation Skill: An Exploratory Study*, 4 J. AM. FORENSIC ASS’N. 47 (1967).

105. These variables are termed “task variables.” See Hogarth & Einhorn, *supra* note 59, at 4.

106. *See id.*

107. *See id.* at 4, 6. In actual order effect studies, “short” sequences had between 2 and 12 items, “long” over 17 items. *See id.*

108. *See id.* at 4 (“Response mode. Many studies have shown that judgments are sensitive to the manner in which they are elicited....”).

109. *See id.* at 5.

110. *See id.*

no previous experience needed, mock trial case file when teaching trial advocacy. There is a lot of stuff in even this beginners' file. And though jurors have probably watched vast amounts of TV court drama, analyzing the evidence along the way during commercial breaks, the reality of being a juror is simply not something with which they have a great deal of experience. Surely, in daily life they constantly make decisions from information, with many of these being extremely important ones. That is what responsible adult humans do. But trials are different. They have a very peculiar, formal, constrained structure of information circumscribed by evidence rules, procedural rules, and a doctrinal framework. In the trial, the jurors know that they are not getting the whole story (they see the conferences at sidebar and hear references to previous rulings about which they know nothing), and on top of that, they must make their decision by trying to come to consensus through deliberating with a group of people about whom they know very little. All of this makes jury service a unique and unfamiliar task, at least until one has been on several juries.

As to the other variables, jury trials involve long series of information and, in theory, end of series (Eos) decision making. I say, in theory, because although they are instructed over and over again not to form an opinion until they have heard all the evidence, it is not clear that people are capable of doing that. Throughout the trial, they must make sense out of the mass of information bombarding them. They have to continually place it into some story framework so that it not be gibberish.¹¹¹ Also, there is a natural human tendency to avoid the discomfort of ambiguity (i.e., when a friend tells us "I feel like I'm in limbo" we tend not to see that as a positive thing).¹¹² So, jurors probably cannot wait till to the end. My guess is that they go through a series of step by step, item by item (Sbs) modes of responding as they refine their view of the case in a process alternatively termed narrative theory, story theory, or forming a basal opinion.¹¹³ At that point, my guess is that they are ready to move into the Eos mode. And, my guess is as good as the next person's, because no study on order effects has

111. See BENNETT & FELDMAN, *supra* note 22, at 8-9.

112. In the context of studies, the natural motivation to eliminate the stress of ambiguity and conflict as been expressed as: "If acceptance and rejection motives are at approximately equal strengths while the communication is being presented, the longer this state of equality persists, the more strongly motivated the recipient will become to terminate the conflict." JANIS & FEIERABEND, *supra* note 86, at 126.

113. When subjects are asked to use a SbS mode, the SbS mode is always used. See Hogarth & Einhorn, *supra* note 59, at 13. When asked to use the EoS mode, the results are mixed. For short series of cognitively simple items the EoS mode is followed. See *id.* When series gets long and more complex, however, subjects tend to shift to a SbS process. See *id.* "We therefore assume that, when required to provide EoS responses, people are more likely to use an SbS process as the relative complexity and/or length of the series of evidence items increases." *Id.* at 13. See also *id.* at 14.

looked at complex tasks, with long series, and Eos response modes. In other words, none of the studies involve anything like a real jury trial.¹¹⁴

On top of it, the research reveals order effects as even more complex still. Opinion change researchers now think in terms of an “anchoring” and adjustment process in belief change.¹¹⁵ Each belief state is an anchor – strong, weak, or in between.¹¹⁶ Changes in that belief are therefore functions of adjustment from that anchor.¹¹⁷ Advocates implicitly understand this. They know that people already come to jury service with an extensive set of beliefs. In voir dire you try to discover these beliefs (e.g., the police do not make mistakes) and then assess their intensity (i.e., strong, weak, in between). While you may never have heard the term “anchor” used outside a nautical setting or a relay race, you still understand the concept and its significance in your attempts to persuade these individuals who make up your jury.

None of this, however, directly aids our inquiry about the power of rebuttal arguments. The important question is the relationship of this anchor to order effects. That requires exploration of the further concept of task encoding.¹¹⁸ In addition to the three variables already discussed – complexity of the task, length of the series, response mode required (Eos or Sbs) – effects on the anchor will be a function of how the subject encodes (i.e., gives meaning to) each new piece of information. In the vernacular of anchoring theory, there are two methods of encoding, evaluation¹¹⁹ or estimation.¹²⁰ Which applies depends on the type of task you are being asked to perform with the information. Evaluative tasks encode evidence as positive or negative in relationship to some hypothesis.¹²¹ Estimation involves what the researchers call a “moving average.”¹²² For reasons

114. Most existing experiments involved simple tasks for short sequences. See Hogarth & Einhorn, *supra* note 59, at 6. With those studies, primacy effects took place in EoS mode, recency in SbS. See *id.* Simple tasks with long sequences favored primacy, independent of response mode. See *id.* at 7. Recency, on the other hand, is “associated with” more complex tasks, regardless of response mode. See *id.*

115. See Hogarth & Einhorn, *supra* note 59, at 8 (“Our theory assumes that people handle belief-updating tasks by a general, sequential anchoring – and adjustment process in which current opinion, or the anchor, is adjusted by the impact of succeeding pieces of information.”).

116. See *id.* (including the “initial strength of belief” in their model).

117. See *id.* at 40 (“[I]t is assumed that memory is limited to the location of one’s current anchor and not how this was reached....”).

118. See *id.* at 9 (“[I]n recent years there has been a growing awareness on the effects of encoding on outcomes of judgment and choice....”).

119. See *id.*

120. See *id.*

121. See *id.* (“In evaluative tasks, evidence is seen as bipolar... relative to the hypothesis (confirming versus disconfirming)....”).

122. See *id.* (“In Contrast, estimation tasks involve assessing some kind of ‘moving average’ (e.g., impression of ‘likeableness’) that reflects the position of each new piece of evidence relative to current opinion.”).

which will be clear, this latter mode of encoding is extremely sensitive to nuances of new information relative to the existing anchor.¹²³

Let's look at an example. Assessing whether the proposition "X gives to charity" is correct or not is an evaluation task. It is an up or down question (unless you are trained in law and ask questions like "what do you mean by 'charity?'"). When new information comes in, you will "encode" it in terms of whether or not he gives to charity. "X is a very generous person," on the other hand, is a task of estimation. Each new piece of information will be significant for our moving average.

How will order effects play out in these two encoding strategies according to the supporting studies? In short series, there will be no order effects for either form of encoding.¹²⁴ For longer series, no order effects for evaluation, but recency effects for estimation.¹²⁵ Further, if the evidence is weak, it will strengthen the anchor for evaluation, but weaken it for estimation.¹²⁶ This all makes sense.

In a very short sequence, you will be trying to figure out a pattern or theory from the minimal information. Your final theory is not likely to jell until you have put all the scraps together. A longer series will be otherwise. Go back to our example and assume that after ten items your belief system is anchored at the opinion that X gives to charity (evaluation) and that X is a very generous person (estimation). Imagine now I tell you that X has given \$100 to the Red Cross. That will not likely affect either hypotheses. Now I tell you that he gave \$10 to a homeless center. That information will strengthen your belief in the evaluative task, i.e., the binary decision whether or not X gives to charity; but, it will force you to estimate whether this makes X a very generous person. If I then add that X gave \$0.25 to a street person, it again will only strengthen your evaluation ("X just keeps giving everywhere"). This consistent but weak evidence, however, when coded for an estimation task will lower your estimation ("A quarter! How cheap. That's almost insulting...").

Fine. Again I find all this very interesting, but fail when I try to transpose these theories into the arena of juror decision-making. I simply have no idea what form of information encoding is involved by a jury in a criminal trial. You could say that it is obviously evaluation. After all, the juror is deciding up or down on the proposition "defendant is guilty of ____."¹²⁷ But that is not so obvious. Guilt or innocence is not really a

123. *See id.* ("[I]n estimation tasks people are sensitive to the difference between the location of the current anchor ... and the level of opinion suggested by the evidence to be integrated.")

124. *See id.* at 33.

125. *See id.*

126. *See id.* at 10, 33; cf. McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches*, *supra* note 86, at 272 ("Averaging models imply that one should use only one's strongest arguments, while additive models imply that including weak arguments also enhances impact.")

127. Hogarth and Einhorn appear to characterize criminal jury trials as involving jurors in an

true or false type of question.¹²⁸ Did he or didn't he do it is a question for mystery novels. Criminal trials are a test of moral, not mathematical probabilities.¹²⁹ In that process, belief strength and belief content overlap. As my belief in the strength of the prosecution case increases, I move from a belief that the particular defendant is innocent (assuming I really accept the presumption of innocence), to a belief he is guilty. As my belief as to the strength of the government's case weakens, my belief in a reasonable doubt strengthens.¹³⁰

evaluative task: "For example, imagine having to evaluate testimony in a court case that requires a verdict of guilt or innocence. Here the hypothesis is bipolar in nature and evidence must be explicitly interpreted as to whether it incriminates or exonerates the accused." Hogarth & Einborn, *supra* note 59, at 11.

128. One might question whether notions of primacy and recency, born as they are out evaluating list - like evidence, even apply to processing information in a trial-like setting.

We do not doubt that people sometimes evaluate list-like evidence. Judgments out which applicant to accept for a job or for a graduate fellowship may be examples, since the evidence often comes in discrete pieces with little overall structure (e.g., GRE scores, GPAs, institution granting the undergraduate degree). In this context, the search for serial-position effects may serve an important purpose. In conjecture, however, that judgments based on unorganized evidence may be the exception and that most of the critical evaluations we perform we base on evidence deeply embedded in conventional structures. People may even have difficulty distinguishing evidence from other forms of information that these structures convey (Ahrem and Rips, 1995; Kuhn, 1991; Ranney, Shank, Hoadley and Neff, 1994). Evidence in trials, political debates, scientific disputes, negotiations in business, and discussions among family members or friends virtually never take the form of merely sequential detail. Within these disputes the verbal-learning notions of primacy and recency may be out of place.

Bailenson & Rips, *supra* 58, at S15.

129. In the famous case (or at least a case that appears in every evidence text book) *People v. Collins*, the Court reversed a verdict in which the prosecutor had argued guilt based on statistical probability. See *People v. Collins*, 438 P.2d. 33, 41-42 (Cal. 1968). The Court's decision was based as much on the notion that guilt beyond reasonable doubt is not a mathematically calculable proposition as on the flawed statistical presentation by the prosecution. See *id.* at 38-40; see also LAWRENCE TRIBE, TRIAL BY MATHEMATICS: PRECISION AND RITUAL IN THE LEGAL PROCESS 1329, 1370-75 (1971).

130. See, e.g., Mitchell, *supra* note 9, at 342-43:

A different perspective on this inquiry in the nature of our criminal justice system may be obtained by examining Professor Subin's sense of truth and falsity. Professor Subin's "truth" is the true-false truth. In Subin's examples, he knows what is true and false. He would also like the system to sort the truth to one side of the line and false to the other. But for the *factfinder* in the criminal justice system, "truth" does not manifest itself as the static, true-false truth Professor Subin presents. Rather, it exists in relationship to burden of proof and reasonable doubt and is a dynamic zone moving from "false to true" and "true to false." Depending on the probativeness of particular pieces of information (viewed by themselves or in combination), a juror could locate reasonable doubt or lack thereof at various points along this moving zone:

False to True

True to False

I think that is false, but...

It may be true.

I am not sure.

I cannot say it is not true.

I cannot say that it is not true,

I think it is false, but I am not sure.

The evidence is not inconsistent with truth.

It could be false.

So again, what does a jury do? I guess I could characterize it as ultimately a task of evaluation (guilty or not guilty) conducted by estimation. Perhaps this involves double encoding. The jury encodes the evidence for the task of estimation. They then take the results of this initial estimation analysis and encode that for the final evaluation. I don't know. While I can see the possible use of this encoding theory for ordering strong and weak evidence in an exam, and perhaps even for ordering strong and weak arguments within your own closing, I frankly can not draw any conclusions about the possible advantages given the prosecution through the rebuttal argument. At this point one may fairly question whether anything in the scientific literature assists my position.

2. *Research Regarding Magnitude of Opinion Change Sought.*—One set of research findings, interrelating persuasion technique and order effects, did initially seem promising. These studies theorize that the greater opinion change you ask for, the more you get.¹³¹ As a psychological principle, this theory does seem to comport with our everyday experience.

What we ask for sets the framework for what will be considered, what will constitute the audience's range of expectations. It is the ballpark in which we have chosen to play. Anyone who has ever tried to sell a car

It might be true

The evidence is consistent with the truth.

I am fairly confident that it is true.

I am positive it is true.

I would not be surprised if it were false.

The evidence points to a falsity, but it might not be.

I think it is probably true.

I am sure it is false.

The criminal justice system centers not on Subin's line between true and false, but on societally acceptable levels of certainty and doubt within the zones of "true to false" and "false to true." Truth and falsity have a part in this as the organizational constructs upon which the certainties and doubts center in such an analysis. A juror may doubt the truth of one piece of evidence or be uncertain about the falseness of another. But, it is the *level* of certainty and doubt, not the question of "truth" or "falseness," with which the system is concerned.

131. See Anderson, *supra* note 71, at 105 ("Experiments in persuasion generally find that the greater is the advocated change in opinion, the greater is the change produced."). This concept which concerns the magnitude of belief change achieved should not be confused with the idea that it is easier to obtain a smaller than larger change in the audience's belief system. See, e.g., Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 HARV. J.L. & PUB. POL'Y. 195, 207 (1993):

[A]rguments are persuasive only if the changes in audience belief called for by the arguments fall within the audience's latitude for change or acceptance. Thus, an argument that calls for a large change of belief is less likely to be persuasive than an argument that calls for a small change of belief simply because a large change of belief is less likely to be within an audience's latitude for change.

(citations omitted).

through the local paper understands this. Setting the starting price is everything.

I would, however, add two provisos to this psychological theory. First, even if this is correct, it will not mean that you will get all you desire or even need. You will just get more. In a trial setting, you therefore may get more than if you had asked for a lesser modification of a juror's belief anchor, but that more may still not be enough to carry your burden of proof with that individual juror. Second, if you ask for more than you can reasonably support, you risk not merely being limited to getting what is reasonable, but totally discrediting your entire position in the mind of the audience and getting nothing. In other words, if you ask for a ridiculous price for your beaten car, no one even will call. If you ask \$500,000 for a \$5,000 slip and fall, you may get a defense verdict.¹³² Given those two provisos, however, the theory has potential for our purposes.

The relationship between this theory and order effects is best explained using a physical, spatial model. Imagine your belief anchor on a particular subject prior to hearing any arguments as a "basepoint." Now imagine that I ask you to move your opinion to a position to the left of that initial basepoint (i.e., anchor), say 10'. My opponent now asks you to move from where you now are after my argument to a position of 10' to the right of the original basepoint. If you initially moved entirely to the position to which I first tried to persuade you, you now will have to move 20' to get to my opponent's, i.e., ten back to the basepoint, and then ten more to the opponent's position. Even if I moved you only a metaphorical foot or two, my opponent will be asking for more change than I did. Since this second person is asking for more movement, under the theory my opponent will get more change.¹³³

132. Henry Miller echoes this observation:

14. Don't Be Greedy: The liability is weak- but the injuries are substantial. You've been reading about those large verdicts. You want one. It will help with "business." You tell the jury that "justice will only be served" by a verdict of two million dollars. The jurors are deeply troubled. They'd like to award something, but two million dollars is ridiculous. The verdict is for the defendant. Moral: Jurors resent overreaching.

Henry G. Miller, *Chapter VIII. Some Do's and Don'ts for Summation*, in BASIC TRIAL STRATEGY, *supra* note 16, at 141.

133. See ROSNOW & ROBINSON, *supra* note 60, at 103-04:

The model rests on the assumption that the more opinion change asked for, the more received. Hence, if two successive communications produce proportionally the same amount of opinion change, the second communication should always have the advantage. This is because the first communication would move opinions a given amount, thereby increasing the attitudinal distance between the recipient and the second communication. If the second communication were proportionally as effective as the first, then, because it demanded more opinion change, it would have the effect of producing greater change.

(citation omitted).

This looks like the basis for finding an order effects advantage in the prosecution following my closing argument with her rebuttal argument. After all, I have just asked for innocence, based on reasonable doubt. The prosecution must now move all the way back to a guilt beyond a reasonable doubt. Being able to ask for, and therefore get more opinion change merely because of her sequence in closing, the prosecutor would appear to have an advantage. But does any of this really apply to a criminal jury trial? Probably not.

First, in a criminal trial there are three arguments in closing. The prosecution begins asking that the jury move from their basepoint to guilt (i.e., beyond a reasonable doubt). The defense then asks them to move from guilt, back through their basepoint, and all the way to innocence (i.e., reasonable doubt). At this point the defense has asked for the most opinion change under the theory. But now the prosecution stands up and gives a third argument where she asks that the jury change their opinion back all the way from innocence, through the basepoint, back to guilt. Thus, even accepting the theory, by the conclusion of closing each advocate has asked for the same magnitude of opinion change, giving neither side the advantage.

Second, in conception, a jury trial does not begin at a nonaligned basepoint. It begins at not guilty, the presumption of innocence. In its initial opening, the prosecution tries to move the jurors all the way to guilt. The defense then asks for movement all the way back to innocence, with the prosecution concluding by again asking the jurors to trudge back to guilt. Again, each side is asking for the same quantum of opinion change. No advantage to either side.

Third, in reality, by the time closing arguments arrive, most jurors are not resting at some uncommitted basepoint, begging to be persuaded. They have formed their story/narrative theory and they have an opinion on the case. It is subject to change in closing arguments and again during deliberation, but it is nonetheless an opinion. Applying the theory, the greatest change asked for will be a function of this opinion at the outset of argument. So, if at the end of the evidence, a particular juror believes the defendant guilty, the prosecutor in her initial argument is asking for no opinion change. My point is that this theory is probably correct, but there is no way to meaningfully apply it to assessing the relative advantages of the advocates in closing.

3. *The Asymmetric Rebound Effect.*—There is one last experimentally derived theory concerning order effects which could have application to our inquiry, the “Asymmetric Rebound Effect.”¹³⁴ What

134. See Hogarth & Einhorn, *supra* note 59, at 35.

researchers found was that the stronger the anchor of belief, the more vulnerable that anchor was to subsequent negative information.¹³⁵ If the basis of belief underlying this strong anchor was weakened, the effect was to move the anchor beyond the person's initial position. The experimenters characterized this phenomenon as akin to the notion of "the bigger they are, the harder they fall."¹³⁶ Thus, in an experiment utilizing a mock trial, subjects had initially changed their entire belief about the case based on the testimony of a single witness. This subsequently adjusted belief based on that witness's testimony would, in the vernacular, be considered a strong anchor in favor of the party for whom the witness was testifying.¹³⁷ Yet when that same witness's testimony was subsequently discredited, the subjects did not just return to their previous position as if they had never heard the testimony in the first place. Instead, they readjusted their beliefs so that the net effect of that witness's testimony was negative.¹³⁸

The result is hardly surprising. From our own experience, most of us can recall a time when we strongly believed in something or someone, and then subsequently, for whatever reasons, became terribly disillusioned. It is often the case in such a situation, that our disillusionment leads us to overreact in the other direction of the belief. We do not just evaluate and reassess the effect of the new information on our belief, calmly and rationally adjusting the previous anchor. Rather, we emotionally feel betrayed. As an example, imagine you are in junior high school and you have a teacher you think is just wonderful, the greatest, walks on water. Suddenly, one day that teacher is unfairly rude to you, humiliating you in front of the entire class. Undoubtedly, your anchor will begin to move. But you will not likely reassess your belief to something like "he's still an excellent teacher, better than most, but human and imperfect." No, you will more likely to move to "I hate Mr. _____. He's horrible, a total fraud pretending to be...."¹³⁹

From all this, my first thought is that in rebuttal the prosecution can in effect "over persuade" jurors who were strongly committed to my position,

135. *See id.* at 14.

136. *See id.*

137. *See id.* at 36.

138. To a litigator, this would make complete sense. The jury is not only judging the credibility of individual witnesses, but it simultaneously assessing the credibility of a party's entire case. After all, they do not know any of the parties or witnesses, so they must begin trusting that each party will at least try to present an honest case.

139. Of course, this phenomenon is only likely to apply to opinions which are the product of personal (emotional, moral) commitment, as opposed to ones which are purely part of our factual knowledge base. Thus, if I believed that Mt. Everest was the highest mountain in the world and then was confronted with evidence indicating that my belief was wrong, I would probably react something like: "Oh ... I didn't know that; I guess I was wrong...." It is all but unimaginable that I would think: "That Everest is a complete fraud... really more akin to a small hill or a steeply inclined driveway."

i.e., innocence. If she weakens this belief, she has the opportunity to use the Asymmetrical Rebound Effect to slingshot them beyond what the analysis justified in anchor adjustment (i.e., “After the prosecution I don’t believe a word of those defense phonies” vs. “I’m not as certain now after hearing the prosecution, but I still maintain a reasonable doubt.”).

As anyone who has seen his client get caught on the stand in even a minor lie, I have no question as to the validity of the theory of rebound effect when applied to evidence. But when it comes to actual evidence, order effects do not benefit the prosecution; for it is the defense that puts on the final evidence. The question then is whether this can reasonably be expected to happen, not in evidence, but in argument. I do not think so.

True, the prosecutor could undermine the defense by convincing the jurors that defense counsel has lied or intentionally misrepresented the evidence. But that has far more to do with defense misconduct than sequence of arguments. Also, the prosecutor could point out the significance of a piece of evidence that a juror had seen yet not appreciated. This is done all the time on closing. But I doubt that one could miss the significance of evidence that is so powerful as to be able to trigger the rebound effect. When that type of evidence comes out, usually it is pretty clear. I am not saying that it is impossible to trigger this rebound phenomenon with just an argument. I do not know. What I am saying is that while it may be possible in theory to trigger a rebound effect in closing, it seems so unlikely that I can not in good faith use the theory to base a claim for altering the accepted procedure for closing arguments.

4. *Studies of Closing Arguments and Order Effects.*—To this point, we have concentrated upon theoretical approaches to order-effects and recency. In fact, there are social psychology studies which specifically evaluated order-effects in closing arguments.¹⁴⁰ In fact, the two most recent such studies, both done in the late 1960s, found strong recency effects.¹⁴¹

140. See RIEKE & STUTMAN, *supra* note 17, at 207 (noting that “experimental studies [on order effects in trials] have primarily used closing arguments or combinations of arguments....”)

141. See Wallace & Wilson, *supra* note 76, at 314 (“[T]he net order effect was a recency effect 10 times out of 10.”); Zdep & Wilson, *supra* note 78, at 195 (“The current study casts another vote in favor of a recency effect in no interval – no delay conditions.”).

Were all our strolls through the previous theories thus naught but academic indulgence, when the plain and simple facts were always there for the taking, residing in these two studies? Does this then, at last, unequivocally establish the advantage given the prosecution in rebuttal? Sadly, I do not believe so, though the studies surely are instructive.

In these studies, subjects were given a (written) defense and prosecution closing argument. The arguments were equal in both length and strength.¹⁴² The direction in which subjects were persuaded was strongly affected by the order of the two arguments, with whichever side was placed in second position consistently having the advantage.¹⁴³ That is clearly a powerful demonstration of the triumph of recency order effects, but what does it tell us about real closing arguments?

In some ways, the experiment paralleled the initial prosecution summation and the defense closing, which both are (theoretically) equal in length and strength. In other ways, it was not at all like the reality of a closing. The subjects in the study did not know anything about the case except what they read in the arguments. Thus, the "arguments" included the evidence.¹⁴⁴ As such, unlike jurors, the subjects had to accept the written presentation of evidence as both truthful testimony and as an accurate recitation of that testimony. That alone, however, does not matter for purposes of evaluating the study. The variable of witness credibility and accurate recounting of testimony weighs equally in either argument position.

The problem rather lies elsewhere. Because the evidence was simultaneously introduced with the argument,¹⁴⁵ it seems possible that the study establishes the preeminence of recency as to *trial evidence*,¹⁴⁶ but may say little about order-effects as they apply to actual *trial arguments*.

142. See Wallace & Wilson, *supra* note 76, at 313; Zdep & Wilson, *supra* note 78, at 197.

143. See Wallace & Wilson, *supra* note 76, at 313; Zdep & Wilson, *supra* note 78, at 197.

144. Wallace & Wilson, *supra* note 76, at 313; Zdep & Wilson, *supra* note 78, at 197.

145. In fact, virtually all of the experiments on persuasion and recency involved presenting the subjects with evidence. See, e.g., Hogarth & Einborn, *supra* note 59, at 8 (providing description of typical experiments). While debate, rhetoric, and social psychology experiments thus tend to conjoin argument with evidence, the legal world is otherwise. Jurors are specifically told that arguments are not evidence, that they must base their decision on what they heard on the witness stand and what was admitted into evidence. First the evidence, then the arguments.

146. Studies do show recency effects as to evidence which, under our system, favors the defendant who presents last:

Previously noted order effects do indeed persist in group decisions following discussion, but with no evident exaggeration. The procedural aim that requires the defendant's case in a criminal trial to be presented last appears justified by the recency results taken as a whole. Any 'biasing' seems likely to benefit the defendant... an outcome consistent with the philosophical disposition that failure to convict the guilty is a more desirable error than conviction of the innocent.

The evidence to date seems clear; the order in which items of testimony are presented, both fairly gross and more detailed, can have a substantial impact upon individual mock jurors *and* the verdicts of mock juries following deliberation. These are procedural events of a rather mundane sort. The empirical demonstrations serve primarily to confirm both our concern for the order of

Further, the studies juxtaposed two equal arguments, paralleling the first prosecution summation and the defense closing. We, on the other hand, are looking at the import of a third (rebuttal) argument following those two. The studies do not directly deal with this situation when, after both sides' positions have fully been put forth, one of the adversaries returns for a short, second crack at the audience. While the studies may provide some inkling, they simply cannot be directly extrapolated to encompass the rebuttal. In summary, the studies place a few weights in the pan on my side of the scale, just not enough to significantly tip the scale by themselves.

Additionally, whatever advantage to be gained by the recency principle would be short-lived, given the findings as to recency decay. In other words, recency effects tend to weaken somewhat rapidly over time.¹⁴⁷ Thus, though any speech will have short-term effects,¹⁴⁸ the longer deliberation lasts, the less will be the impact of recency.¹⁴⁹ Also, recency is strongest when there is a significant delay between the first and second message.¹⁵⁰ It is weakest if the first message immediately precedes the second.¹⁵¹ That of course sounds just like a criminal jury trial where the prosecution rebuttal closing is immediately preceded by the full defense closing argument.

None of this means that I doubt that there is a true psychological advantage from getting the last word. It is rather that I can not draw

informational input, and in this case, the probable desirability of the order customary in criminal trials.

James M. Davis, *Chapter 19. Order in the Courtroom*, in *PSYCHOLOGY AND LAW: TOPICS FROM AN INTERNATIONAL CONFERENCE 154* (Dave J. Muller et al., eds., 1984).

See also id. at 253-54.

147. *See* WALTER, *supra* note 17, at 198:

This evidence seems to indicate that the response to the closing speech immediately after hearing it is much stronger than after jurors have discussed it as a group, and blended it with the evidence and testimony. It appears that the immediate dramatic effects of closing speeches are mitigated through the process of reasoned discussion. (See Chapter 11 for more discussion of this important finding.)

There is support for this conclusion in Hovland, Janis, and Kelley (1953:30). They reported the findings of a Hovland and Weiss study: 'The effect of the source [speaker] is maximal at the time of the communication but decreases with the passage of time more rapidly than the effects of the content [message].'

See also Miller & Campbell, *supra* note 76, at 117 ("The momentary advantage of the very recent may allow trivial events of this morning to overweigh momentarily more significant learnings of the past, but this momentary advantage will dissipate rapidly...."); Wilson & Miller, *Repetition*, *supra* note 59, at 184; Zdep & Wilson, *supra* note 78, at 186 ("[L]ess recency [is] expected when a delay occurs after a second speech....").

148. *See* Miller & Campbell, *supra* note 76, at 124.

149. *See* WALTER, *supra* note 17, at 198.

150. *See* Miller & Campbell, *supra* note 76, at 123.

151. *See id.* ("[T]he strength of recency being minimal when the two presentations are contiguous...."); Wilson & Miller, *Repetition*, *supra* note 59, at 184 ("[There is] more recency with intervals between arguments...."); Zdep & Wilson, *supra* note 78, at 196 ("[There is] relatively more recency being expected when an interval occurs between the arguments....").

support for this belief from order effects research and the principle of recency.

5. *Other Cognitively Based Theories: Narrative or "Story" Theory, Anti-Primacy, and "Argument Fields."*—There are yet three cognitively-based theories floating about that may shed light on the extent of advantage from having the last argument – narrative (or "story") theory, anti-primacy, and audience expectations within argument fields. Since I believe that narrative theory actually provides a strong framework for evaluating the rebuttal, while the other two theories, though arguably applicable, are far less useful, I begin with narrative, or "story" theory.

As we have already discussed, under these theories jurors make sense of the information at trial by putting it into narrative form.¹⁵² The story they choose to describe the events being presented to them then will be the determining factor in their ultimate decision.¹⁵³ The advocate with the last word therefore has the final opportunity to shape this determinative story.¹⁵⁴ While a closing argument may appear to be a monologue, speaker and silent audience, only inexperienced counsel sees it so. Surely the rules of trial preclude jurors and counsel from speaking with one another in an interactive process. Yet that belies the reality that, juror silence aside, this is a two-way communication between counsel and jury,¹⁵⁵ a subtle negotiation over

152. For a discussion of "Story" Theory and Narrative Theory at trial, see *supra* note 71. In appreciating the role of the advocate in guarding the construction of juror stories, one must understand that trials involve a form of continuous "time-travel," with witnesses alternatively speaking about the present ("Do you recognize Exhibit C?"), the past ("And then what happened?"), the past as seen from the present ("Looking back on that night with hindsight..."), the future as seen as in the present ("How do you intend to raise your children?"), etc. See Wayne A. Beach, *Temporal Density in Courtroom Interaction: Constraints on the Recovery of Past Events in Legal Discourse*, S2 COMMUNITY MONOGRAPHS 1 (1985). At trial, advocates seek to manipulate these time frames for advantage. See *id.* at 14 ("Moreover, especially during cross-examinations and rebuttals, lawyers purposely attempt to create ambiguity by transforming the mere reporting of past event into nothing more than a product of the witness's idiosyncratic biases and perceptions.").

153. See Pennington & Hastie, *supra* note 71, at 521, 525 ("Different jurors will construct different stories, and a central claim of the theory is that the story will determine the decision that a particular juror reaches.").

154. Professor Moore articulated the possibility of affecting these stories in a rebuttal argument as one in which

the prosecutor could develop one or more of these explanatory hypotheses in an attempt to reduce the cognitive dissonance of our hypothetical juror, thus changing her tentative conclusion about the outcome of the case. ... [Thus], because the phenomena underlying belief perseverance may make it very difficult for counsel to change the opinion of a juror during closing, the potential benefit of a rebuttal argument may outweigh the risk [i.e., that counsel will raise negative points not previously perceived by the jury].

Moore, *supra* note 71, at 339-40 (citations omitted).

155. This notion of jury summation as a two-way communication was expressed by Bettyruth Walter: "The summation, traditionally considered to be a monologue, is in fact a two-way communication." WALTER, *supra* note 17, at Abstract viii. Dr. Walter further elaborates on this point:

The Cooperative Principle is of interest because the maxims seem to be operational (although often flouted) even in a discourse which might be

meaning.¹⁵⁶ It is a struggle over definitions,¹⁵⁷ over whether a piece of evidence creates a narrative of guilt or innocence. It is counsel's attempt to reason with the jurors over the appropriate choice of story.

Go back to our young man who is on trial for assaulting a police officer. Imagine the officer's direct examination as the following:

PROSECUTOR: Did defendant ever say anything after you gave him *Miranda* warning?
 OFFICER: Other than that he understood?
 PROSECUTOR: Yes.
 OFFICER: No. Not at that time.
 PROSECUTOR: Did he at any other time?
 OFFICER: Yes. When we were driving to the station in my patrol car.
 PROSECUTOR: What did he say?
 OFFICER: He just suddenly said that he was sorry about what happened....
 PROSECUTOR: Anything else?
 OFFICER: Yes. He wanted to know if there was any way he could not be arrested and taken to jail.

described as a one-way event. The functioning of this principle in summation might lend evidence to maintaining that summation can be conceived of as a two-way interaction, with jurors and lawyers cooperating....

Id. at 21.

156. Cf. Jack Blines, *Proposition and Confrontation in Legal Discourse*, 34 SEMIOTICA 251, 266 (1981):

The participants proceed as if the meaning of their utterances are fixed.... From a theoretical perspective, however, we may suggest that meaning is negotiated – the meaning of an utterance emerge, in part, from a further course of interaction. As a result of their interactional work, an utterance may come to have a meaning, for the speaker as well as the audience, which it did not have at the moment it was produced. [This reflects] [t]he possibility of such renegotiation and transformation of meaning....

157. See W. Lance Bennet, *Rhetorical Transformation of Evidence in Criminal Jury Trials*, 65 Q. J. SPEECH 311, 313-14 (1979):

Most of the action in a trial is centered around the efforts of lawyers to define the evidence in keeping with their story strategies. This generally entails efforts by the prosecution to limit the scope of definitions to terms that fall within the legal categories that make up the alleged crime. The defense usually works against these narrowing tactics in an effort to expand the range of definitions beyond the legal categories that jurors will use to judge the stories.

An interesting example of this pattern occurred in a lengthy exchange between the prosecutor and the defendant in a drunken driving case. The prosecutor sought to establish that the defendant had a number of beers prior to his arrest for running a red light. Each question asked by the prosecutor was designed to restrict the answer to a narrow numerical estimate of the number of beers consumed. The defendant's responses, in contrast, attempted to return to his lawyer's earlier line of questioning, in which the drinking activity was defined in the context of an extended period of time during which the defendant had several beers in different social settings. The time factor and the multiple social contexts that the defense wanted to include in its definition of the number of beers consumed tended to put the defendant's behavior in a more sympathetic light and raise doubts about the probable effects of the quantity of alcohol consumed.

In closing, each advocate will try to influence the story created from this information. The prosecution will try to define this as all but an outright confession. The defense will make a number of narrative moves. First, the defense counsel may try to define this as part of a story of our acculturation. When you know you are in trouble and have no power in the matter, being totally under control of an authority, the first and best thing to do is grovel, say you are "sorry." Next, counsel may try to define the meaning of saying he is "sorry" in a way that is not a confession of assault, but an apology for something else, e.g., he is sorry that it all happened, that he had accidentally struck the officer with his elbow, etc. Finally, the attorney may try to give this seemingly inculpatory statement as appropriately fitting into the story of an innocent mind. After all, if someone was apologizing because he intentionally struck a police officer, could he conceivably imagine asking the officer to then not arrest him? Of course not. Thus, he must have believed it was an accident.

With the final chance at argument, however, the prosecution has the opportunity to make the last attempt at convincing the jurors to come to her definition of the event, her narrative. She will point out that defendant never said it was an accident; that just because you would have to be stupid to think you would not be arrested if you assaulted an officer, so what – no one ever said criminals have to be smart, and hoping you might not be arrested is no more stupid than striking the officer in the first place, etc. Plainly, going last gives some advantage in influencing this struggle over definition and meaning within the broader process of juror creation of the decision-determinative narratives.

A second possible advantage comes out of research exploring so-called "anti-primacy." The initial phase of this research focused upon the consequences of going first in an argument. According to this first research phase,¹⁵⁸ going first apparently carried some drawbacks all well as advantages. Specifically, the person who takes the first substantive stance also is seen by the audience to bear the burden of proof.¹⁵⁹ Now this may not seem to be a big deal when considering the prosecution in a criminal trial. Everyone knows the prosecution has the burden of proof. They learn it in school, in movies, and on television. They were reminded in voir dire, opening statements, and the Judge's Jury Instructions. Yet the fact that research indicates that this procedural demand will be reinforced by juror psychology which is derivative from the very order of the arguments is reassuring.

158. In the experiment, subjects were asked: "Who has the most work to do to prove their case to you?" This formulation was used so as not to confuse the subjects with the legal definition of burden of proof, but the intent was the same. See Bailenson & Rips, *supra* note 58, at S8.

159. See *id.* at S5, S11-S12.

This of course tells us nothing about rebuttal. That comes from the results of the second phase of the experiment. When the speaker who went first was then permitted to give some final words, and those final words included a “challenge” to the opposing position in the form of a rhetorical question (e.g., “what is the evidence to support that?”), the speaker’s burden was decreased and shifted to the opponent.¹⁶⁰ In a legal regime where burden of proof beyond a reasonable doubt is the heart and soul of the entire process, this seems significant. But again, is it?

The subjects may have only meant that they were now convinced that the speaker had satisfied his burden of proof and that unless the opposition came up with something else (which procedurally he could not), then the speaker wins. This would reinforce the notion that having the last word in an argument to a jury is helpful, but adds no more than one would otherwise assume. If, on the other hand, they really lowered or shifted the burden and then evaluated the evidence under this revised burden structure, that would be significant. The problem is that I do not have enough information from this experiment alone to confidently draw the latter conclusion.

Finally, the very “lastness” of the prosecution’s rebuttal argument, unrelated to content, bears some persuasive force. Its power comes from its very existence in the argument structure. Like varying expert domains have different conventions for approaching and answering problems,¹⁶¹ so too are all arguments conducted “within pre-given contexts of interpretive categories, background beliefs and values, standards of proof and authority,

160. *See id.* at S14-S15 (“Moreover, Experiment 2 showed that the last statement decreases a speaker’s burden of proof only when it challenges the evidence on the opposite side of the issue.”). Further, it is plausible that these “late challenges” are effective at shifting the burden because “the second speaker has no opportunity to answer the challenge when it appears in final position. Leaving the challenge hanging in this way may have worked strongly against the second speakers.” *Id.* at S14. *Cf. WALTER, supra* note 17, at 104 (“The rhetorical question is probably the prosecutor’s best friends. Rhetorical questions – that’s the savior.”).

161. *See Mitchell, supra* note 7, at 290-91:

[Experts are aware] that conventions are only conventions, not rules, that principles are only instances of higher principles, and that what is unsaid can be said. Postsocialized individuals [i.e., experts] are able to articulate all this. They have a working knowledge of history within larger history, and of relations of their subject matter to other fields. They are able to sound like insiders but do not feel compelled to do so, because they value communication over style. Finally, they are able to live with uncertainty, multiplicity, and ambiguity, and yet they are confident in their choices.

.....

[Professor Joseph] Williams gives the notion of “conventions” particular attention in his discussion of all three developmental stages. Expert knowledge communities possess tacit conventions that determine the discourse of the community. The conventions, which comprise one aspect of an expert’s schema, determine how evidence can be selected, used, and presented, and generally cover what *counts* as a point, why one point is worth making rather than another, and what can and cannot be said in support of a point.

(citations omitted).

norms of conduct, and so on.”¹⁶² In other words, the whole post-modern stew. These contexts have been termed “argument fields.”¹⁶³ While there are likely aspects of evaluating an argument that apply to any argument, i.e., are “field invariant” (e.g., that you can hear the speaker, that what they are saying is in the same language as the audience, is minimally intelligible, etc.), the core of criteria and expectation for judging the argument will be unique to the particular context, i.e., “field-dependent.”¹⁶⁴

Argumentation at a criminal jury trial is plainly deeply laden with conventions of form (generally no singing), content (no personal assertions of belief, no appeals to prejudice), focus (application of facts to legal principles, challenging and supporting credibility of witnesses), and structural expectations.¹⁶⁵ As to the latter, the prosecution will go first, explaining why it has proved guilt beyond a reasonable doubt, personalizing the victim, and making clear that the defendant is a bad woman. The defense will follow pleading for acquittal, poking holes and probing for reasonable doubts, castigating the prosecution witnesses, and parading the image of the client as a possible victim of coincidence, misperceptions, and outright falsehoods. Then comes the prosecution rebuttal, clearing the air of the defense attempts at confusion and obfuscation, and hammering away at guilt with dramatic clarity. That is all built into the argument field; it constitutes a dramatic order which is aligned with what we all see as the natural, inevitable structure of closing arguments at trial. And therein may lie the advantage of the very position of lastness. For an insight of rhetoric tells us that ordering of an argument that conforms to the specific audience expectations enhances its persuasiveness.¹⁶⁶

162. FRANS H. VAN EEMEREN ET AL., RECONSTRUCTING ARGUMENTATIVE DISCOURSE 143 (1993). See also STEPHEN EDELSTON TOULMIN, THE USES OF ARGUMENT 14 (1965).

163. See TOULMIN, *supra* note 162, at 14:

How far accordingly, when we are assessing the merits of these different arguments, can we rely on the same sort of canons or standards of arguments in criticizing them? Do they have the same sort of merits or different ones, and in what respects are we entitled to look for one and the same sort of merit in arguments of all these different sorts?

For the sake of brevity, it will be convenient to introduce a technical term: let us accordingly talk of a *field* of arguments. Two arguments will be said to belong to the same field when the data and conclusions in each of the two arguments are, respectively, of the same logical type: they will be said to come from different fields when the backing or the conclusions in each of the two arguments are not of the same logical type. The proofs in Euclid's *Elements*, for example, belong to one field, the calculations performed in preparing an issue of the *Nautical Almanac* belong to another.

164. See *id.* at 15 (discussing notion of field-invariant and field-dependant variables); see also Mitchell, *supra* note 7, at 290-91 (discussing presocialized and socialized stages).

165. See Kunkel & Geis, *supra* note 2, at 557 (“[T]he procedure of the jury trial is very likely deeply impressed in the juror's mind: he knows that he will be exposed to two arguments and that he is expected to be receptive to both.”) (citation omitted).

166. C. H. Perleman reflects this notion of the importance of an argumentative structure which matches the needs and expectations of an audience:

All that, however, does not greatly advance our inquiry. Initially, the rhetorical insight may more apply to the structure of the individual arguments themselves, rather than the structure of a field's sequence of the argument format. Further, even if it also applies to the format sequence, which I believe it might, this advantage would not seem of a sufficient magnitude to justify claiming that a change in currently established closing argument sequence must take place. Again, aside from the implications of narrative or story theory, if there are advantages to the rebuttal, the proof at this date must reside in the rhetorical arts, not science.

B. *Advantages from the Advocate's Rhetorical Options*

1. *A View from the Trial Attorney and the Literature of Advocacy.*—

As a general proposition, trial attorneys see rebuttal as an important strategic tool. It gives the advocate with the final say an opportunity to “close the sale” on their case,¹⁶⁷ the chance to rebut the defense case

The guiding consideration in the study of order in a speech should be the needs of adaptation to the audience. This adaptation will operate either directly or through reflections of the hearer on the question of order. What the hearer envisages as the natural order, and the analogies he may see with an organism or a work of art are no more than arguments among others. The speaker will have to take them into account on the same footing as all the factors that are capable of conditioning the audience.

PERLEMAN & OLBRECHTS-TYTECA, *supra* note 85, at 508.

Cf., Dick CAMERON GIBSON, *THE ROLE OF COMMUNICATION IN THE PRACTICE OF LAW* 113 (1990) (“Clearly, every part of trial is important... still, the closing argument is especially important, by virtue of its location in the trial process.”); TOULMIN, *supra* note 162, at 14.

167. *See* Miller, *supra* note 84, at 43 (“[I]n the closing summation you try to close the deal, to get the jury to sign on the dotted line....”). This same sales metaphor is incorporated in the notion of the rebuttal argument by Alan E. Morrill:

The other obvious advantage is that the plaintiff is the last one to analyze the evidence for them and can answer all of the arguments advanced by the defendant. This last opportunity may flop a juror or two into the plaintiff's wigwam who had been struggling with feelings of uncertainty, fully capable of going either way. There are also those jurors who can be sold and unsold easily; this gives the edge to the last one to close. Add this last type of juror to the others in your camp, and it may well be enough to tip the scales.

MORRILL, *supra* note 41, at 88.

See also WALTER, *supra* note 17, at 73 (As one defense attorney put it: “You give me the final word, and you're in big trouble!” Another said, “The last word is always the best word... I don't want a dynamic speaker going last. He'll blow you right out of the water.”); Kunkel & Geis, *supra* note 2, at 555 (“[W]hen all factors such as ability of counsel and the merit of the respective cases are seemingly equal, the order of argument may be decisive.”) (citation omitted); *Id.* at 558 (“[All respondents] generally agree that the right of final argument carries some advantage.”).

While this article focuses on the prosecution rebuttal, it is worth noting that in the multiple defendant cases, the defense attorney who argues last has some of these advantages relative to other codefendants. *See* MORRILL, *supra* note 41, at 88 (“The last defense lawyer to speak has an opportunity not only to meet the arguments of his codefendant, but also to advance some of his own arguments, which his codefendants will have no opportunity to answer.”).

without in turn facing rebuttal by the defense,¹⁶⁸ and a final opportunity to reinforce their theme.¹⁶⁹

But for all that is written on the subject of the closing argument, it is surprising how meager is the treatment of the rebuttal in the literature.¹⁷⁰ What little there is, moreover, is extremely basic. Perhaps this reflects a belief that the rebuttal is so contingent on what the defense does that you cannot really plan.¹⁷¹ So what you generally get is a very brief recitation of "don'ts." Collectively, these seem to boil down to not letting the defense argument dictate your topics, or to frame the issues or organization upon which your rebuttal will be built.¹⁷² Thus, never jump to the bait of any

168. See MURRAY, *supra* note 3, at 376 ("The party with the opportunity for the last word has a slight advantage in being able to rebut the arguments of the other side without having to undergo further rebuttal."); LUBET, *supra* note 1, at 467 ("The plaintiff may comment on, criticize, or even ridicule defendant's argument, but the defendant may not respond. Defense counsel may have perfectly good answers for everything that the plaintiff says on rebuttal, but no matter."); Miller, *supra* note 84, at 46 ("The only time you should ask rhetorical questions of another lawyer is in rebuttal, when you know the defendant can not answer.").

169. See MAUET, *supra* note 16, at 300 ("Use your rebuttal to hit your best points in a fresh way."); Lane, *supra* note 16, at 82 ("I n'en 'wrap-up' the liability aspects by summarizing briefly the evidence and law supporting a favorable verdict."); MCELHANEY, *supra* note 42, at 671 ("Jo Ann Harris sees rebuttal as the final conclusion to what was carefully set up at the beginning of final argument..."); Miller, *supra* note 84 at 44 ("point up the correctness of your position and the error of the defendant's position...").

170. What little I could find included: ANATOMY, *supra* note 15, at 399; BERGER ET. AL, *supra* note 16, at 479; CRAWFORD, *supra* note 16, at 175; HAYDOCK & SONSTENG, *supra* note 16, at 611; JEANS, *supra* note 3, at 1387; LAGARIAS, *supra* note 16, at 143; LUBET, *supra* note 1, at 467-70; MAUET, *supra* note 16, at 299-300; MCELHAEY, *supra* note 42, at 666; PACKEL & SPINA, *supra* note 16, at 150-51; STERN, *supra* note 1, at 285-93; Brook Jackson & Richard J. Crawford, *Improving the Damages Appeal: A Few Words on Having the Last Word*, 12 LITIGATION 41 (Summer 1986); Lane, *supra* note 16, at 82; Miller, *supra* note 84, at 43. The literature does include some examples of rebuttal arguments. See OPENING STATEMENTS AND CLOSING ARGUMENTS 291 et seq. (Grace W. Holmes ed., 1982); LAGARIAS, *supra* note 16, at 447; Lane, *supra* note 16, at 83.

171. See, e.g., ANATOMY, *supra* note 15, at 400 ("Rebuttal cannot be completely planned in advance of the defense argument, but its general nature can be anticipated."); LUBET, *supra* note 1, at 468 ("While the plaintiff's argument in chief can be completely planned in advance, and the defendant's argument in chief can be mostly planned, rebuttal must generally be delivered almost extemporaneously. Preparation for rebuttal typically takes place while plaintiff's counsel listens to the defendant's argument in chief."); JEANS, *supra* note 3, at 1387 ("This is the real test of an advocate's ability to think quickly. It is one thing to devise a well-crafted and well-structured argument while meditating in your home or office. It is quite another to listen to your opponent's argument, make notes of the most telling blows, and generate an effective rebuttal to lessen their impact,").

172. This concept of not letting the defense closing define the plaintiff's rebuttal is strongly stated throughout the literature:

A second principle of rebuttal is to present the plaintiff's case in affirmative light. Even when it is well organized, rebuttal is weakened if it becomes nothing more than a series of retorts. As with all argument it is more effective to present the positive side of your own case, and this is particularly important when you represent the burdened party. Consequently, even in rebuttal, every position should be framed as a constructive statement of the plaintiff's own theory, with the refutation of the defense being used to explain further or elaborate on the plaintiff's case.

LUBET, *supra* note 1, at 469;

It is usually unwise, however, to spend a major portion of your time in trying to refute the opposing case. Your major emphasis should always be on your version

rhetorical questions directed at you in the defense argument.¹⁷³ If you must answer them at all, make certain that the answers come up within the framework of your own structure.¹⁷⁴

of the facts and a discussion of why your version is more probable, the more logical, and the more reasonable explanation. Too often, counsel, particularly defense counsel, will make their entire argument sound like a criticism of the plaintiff's or the prosecution's case rather than a positive presentation. Certainly you should discuss the weaknesses in your opponent's case, but it should be in contrast to the strengths in your own case unless you have none to point to.

PACKEL & SPINA, *supra* note 16, at 150;

You must *never* be euchred out of your position of greatest power and protection.

.....

To be sure, you will answer the points your adversary has made, just as you would have answered the points that he *will* make if you had spoken first, but these answers should be made as they naturally arise during your overall presentation. You must not rush out of your position of greatest power and protection, just because your adversary has landed some solid blows. Freshman lawyers rush to the site of their conflagrations, anxious to immediately douse the flames.

STERN, *supra* note 1, at 289.

See also ANATOMY, *supra* note 15, at 400 ("Plaintiff's counsel should not attempt to answer every argument made by the defense, but should focus on a few telling points."); SILBERT, *supra* note 16, at 539 ("Emphasis on strong points, do not merely respond to or rebut defense's contentions."); WALTER, *supra* note 17, at 93 ("Don't answer tit for tat defense's closing. I don't feel that's a productive thing to do because I think it detracts from the points you are trying to make – and it also appears it's a defensive move... why do that when you have your own points to make?"); English, *supra* note 16, at 75 ("Do not attempt to refute everything your opponent may have discussed").

173. See MAUET, *supra* note 16, 300 ("A clever defense lawyer during his argument will throw out a series of questions and challenge the other side to answer them during the rebuttal. Resist the temptation."); STERN, *supra* note 1, at 289 ("The foolish lawyer writes those questions down on one page and then answers them in a body before going on to his own presentation."); Lane, *supra* note 16, at 82 ("Beware of defendant's tactics of posing many questions. It is not necessary that you respond to all of them.... Your rebuttal outline should be covered first."); Miller, *supra* note 132, at 140:

Don't Answer Their Questions: Mr. Sly looks at the young plaintiff's attorney and tells the jury that before Mary Smith can recover, her attorney must satisfactorily answer the following thirty-nine questions. The young plaintiff's lawyer dutifully records all the questions and proceeds to answer them one by one. After the last answer, his time is up and his case is over. Antidote: Don't answer their questions. Make your own argument. Emphasize your strong points. You should answer only those questions which truly must be answered. you must present your case and not take the bait of a sly opponent.

In fact, some experienced advocates specifically point out to the jury the defense's use of question as an attempt to throw off the plaintiff in rebuttal:

Members of the jury, I don't know whether counsel is deliberately trying to divert me from arguing our case and our evidence or not. He wants me to answer a whole series of questions which he knows would take up much of my allotted time. If I had the time I could answer each and every question as I am sure you can from the testimony that you have heard. For instance, he asked me to answer this question. (*Repeat the question and then answer it* using the evidence favorable to your side....) I could take each and every one of these questions and answer them the same way to your satisfaction. However, first I am going to deal with the real issues and important evidence in this case. And I know you will find the answers to just about all of his questions in my comments.

TANFORD, THE TRIAL PROCESS, *supra* note 16, at 407 (citation omitted) (emphasis added).

To be sure, there are those who counsel that the rebuttal should be planned in advance.¹⁷⁵ Like all advocacy, there are different approaches to this task. One author suggests that you should begin with your main points, then rebut the key points of the defense and end with a set piece recitation of your theme.¹⁷⁶ Another recommends that you organize your rebuttal around the main topics in your position, rebutting the defense's points within the content of the main topic to which it best relates.¹⁷⁷ Others advise to end with damages (in civil cases),¹⁷⁸ close with an affirmative or emotional appeal,¹⁷⁹ or put into place some set piece (e.g., "this is my client's only day

See also ART OF SUMMATION, *supra* note 16, at 11-12:

Mr. Levine: I like to say to the jury, 'Now you have just been exposed to a technique which is quite old. My opponent spent all his time concocting a number of questions he wants me to answer, and, frankly, he doesn't care whether I answer them or not. He'd rather I didn't. He figures I'd spend all my time on this and I wouldn't have any time to talk to you about the important things. I hope this isn't what you want me to do. It's what he wants me to do. I'm not going to do it. Instead of that, let me show you that these questions are ridiculous, really don't exist and have no bearing upon the outcome of the case. Then I'll talk to you about the things concerning which I should talk to you.' You must do something like that.

174. See, e.g., ART OF SUMMATION, *supra* note 16, at 12 ("You see, you can meet the arguments as you go along while you keep your own theme in mind."); MAUET, *supra* note 16, at 300 ("Periodically weave in selected defense contentions you have anticipated when your refutation is strong."); STERN, *supra* note 1, at 287 ("Answers will be given, of course, but only as they naturally arise in the context of one's own argument."); TANFORD, THE TRIAL PROCESS, *supra* note 16, at 407 ("In most cases, the challenge should be ignored. Give your prepared argument. ... The other option is to write down the questions, plug them into your outline, and answer them as they come up naturally in your argument.").

175. See CRAWFORD, *supra* note 16, at 175:

What the defense says in closing argument in a civil or criminal case is rarely a surprise at any level – except maybe stylistically. Thus, plaintiff and prosecution lawyers should compose their rebuttal speeches well in advance of the trial. As a matter of fact, when you put together your closing argument, you should not stop until you have also written your rebuttal speech – you are not finished until that is done.

See also MAUET, *supra* note 16, at 300 ("The rebuttal argument, like all parts of the trial, must be planned in advance."); Jackson & Crawford, *supra* note 16, at 66 ("Prepare the form and substance of your rebuttal early. The most powerful and persuasive damage appeals during rebuttal speeches are those that have been put together well in advance of their delivery.").

176. See MCELHANEY, *supra* note 42, at 668-69 (discussing organizational technique used by attorney Barbara Caufield of San Francisco, California).

177. See LUBET, *supra* note 1, at 469 (suggesting the technique of "matching the defendant's arguments to the major propositions in the plaintiff's case.").

178. See, e.g., Jackson & Crawford, *supra* note 16, at 67 ("Close with an emphasis on damages."); Lane, *supra* note 16, at 82 ("Psychologically it is to the plaintiff's advantage to close her argument on damage note.").

179. See, e.g., Lane, *supra* note 16, at 82 ("Defense counsel will usually provide the motivation for a rebuttal argument that is perhaps more animated and emotional than the opening argument. However, plaintiff's counsel will have to take her cue from the defendant. Sometimes a loud, emotional argument by the defendant may call for a calm, unemotional rebuttal."); MCELHANEY, *supra* note 42, at 670:

And I find that the defense almost always says or does something outrageous during final argument. Then, if I react to that in my rebuttal, the jury will be impressed. They will see that I really must have a good reason for getting indignant, because I have been so calm during the rest of trial.

in court”; “what you decide, my client will have to live with the rest of....”; “the defense has claimed _____, but the defense can’t deny _____, and the defense can’t deny _____, and....”).¹⁸⁰

This is all to the good. Better to have some plan based on some theory rather than none. Yet, there is a whole world of sophisticated rebuttal techniques – both fair and unfair – from the disciplines of rhetoric and debate which are also at the disposal of the prosecution, or any civil plaintiff for that matter, in their rebuttal argument.¹⁸¹

See also Miller, *supra* note 84, at 46 (“You can use your rebuttal to become emotional or righteously indignant, if the defendant, in his closing remarks, has given you a springboard from which to launch into a more emotional appeal.”).

180. There are a range of “set pieces” suggested as endings for rebuttal. *See* MCELHENY, *supra* note 42, at 670-71. For example, there is the “Indelible Pencil:” “What you decide in this case can not be changed if you later discover you made a mistake. You are writing with an indelible pencil, and you must write carefully.” *Id.* And, there is the “One Day in Court:”

This is Mike Arnold’s one day in court... when that money is gone and Mike Arnold still can’t work, he comes back to court and says, Judge McMonagele, the jury didn’t award enough, and I don’t know what to do. The judge will have to tell him that he has had his one chance for justice, and that he can not come back a second time.

Id.

See also Jackson & Crawford, *supra* note 16, at 67 (“*Emphasize that this is the plaintiff’s only opportunity for compensation.*”); Miller, *supra* note 84, at 46:

It is essential that, sometime during the argument, you very clearly and emphatically let the jury know that this is the one and only day defendant will have in court, and that their decision will be the final decision for all time. This is usually a good note on which to end the summation, since it tends to convey to the jury their serious responsibility and the far-reaching effects of their decision.

Still others offer set piece strategies that only require fill in the blanks. The “No Denial” gambit provides a good example:

This special technique will work wonders in just the right short rebuttal circumstance. Try this ‘no denial’ approach when the time is right and when you have a case in which you can group together several factual items your opponent cannot deny:

This whole case simply boils down to some factual questions never denied anywhere during this trial:

They have never denied that the design of their auger was chosen primarily because it saved them money.

They never denied that the exposed auger bolts were extremely hazardous.

They never denied that technology was available to permanently cover the bolts and thereby protect workers.

They never denied that industry voluntary safety guidelines were violated when they distributed this auger.

And they cannot deny their responsibility to Jim Gardner....

CRAWFORD, *supra* note 16, at 176.

181. *See generally* DOUGLAS EHNIGER, *INFLUENCE, BELIEF, AND ARGUMENT: AN INTRODUCTION TO RESPONSIBLE PERSUASION* (1974); AUSTIN J. FREELEY, *ARGUMENTATION AND DEBATE: CRITICAL THINKING FOR REASONED DECISION MAKING* (9th ed. 1996); STEVEN E. TOULMIN ET AL., *AN INTRODUCTION TO REASONING* (2d ed. 1984).

2. *The Availability of Forensic Techniques from Rhetoric and Debate*

a. *"Sham" Arguments.*—To begin with, the world of rhetoric recognizes that the persuasive speaker has available an arsenal of techniques, not all of which are fair. This latter category is composed of a wide range of sham or pseudo arguments which reflect fallacies in reasoning.¹⁸² These have been categorized by some as stratagems of language, stratagems of thought, and stratagems of tone or manner.¹⁸³ Others have divided these fallacies into missing grounds, irrelevant grounds, defective grounds, unwarranted grounds, and ambiguity.¹⁸⁴ The point of all of these are the same. The form of argument leads the audience away from the path of clear thinking, reason, and logic.

(1) *Arguments Rising to the Level of Prosecutorial Misconduct.*—Plainly, some categories of sham arguments are forbidden prosecutorial misconduct (e.g., arguments based on an appeal to

182. See EHNIGER, *supra* note 181, at 113:

Some claims, however, which to the uncritical observer may seem sound, actually rest on sham or counterfeit proofs in the form of vague, unfair, or irrelevant appeals... Pseudoproofs of this sort, known technically as *stratagems*, are many, and they have over the centuries been classified in a variety of ways.

(emphasis added).

183. See, e.g., EHNIGER, *supra* note 181, at 113 ("They [the stratagem] are arranged in terms of the major constituents of oral and written discourse: language, thought, and the tone or manner of presentation."). See also FREELEY, *supra* note 181, at 188, 190, 192 (dividing in terms of "Fallacies" of Evidence, Reasoning, Language, and Pseudoarguments).

184. See, e.g., TOULMIN ET AL., *supra* note 181, at 132-33:

Fallacies are arguments that can seem persuasive despite being unsound. Their power of persuasion arises from their superficial resemblance to sound forms of reasoning.

.....

Fallacies divide into five broad types according to our model:

1. Fallacies that result from missing grounds;
2. Fallacies that result from irrelevant grounds;
3. Fallacies that result from defective grounds;
4. Fallacies that result from unwarranted assumptions; and
5. Fallacies that result from ambiguities in our arguments.

Fallacies that result from missing grounds are pseudo-arguments, for no real evidence is presented on behalf of the claim. Fallacies that result from defective grounds present evidence for a claim of the right sort of establishing the claim in question but which are insufficient for establishing the claim in question. These fallacies involve relevant but inadequate grounds. Fallacies resulting from irrelevant grounds simply offer the wrong type of evidence. The data in question do not pertain to the claim being pressed. Fallacies resulting from unwarranted assumptions involve the presumption that you can move from grounds to claim when you really cannot. They usually involve an assumption that there is widespread consensus concerning the applicability of a warrant, when in fact there is not. Fallacies resulting from ambiguity occur when some term in our argument can be construed in more than one way. This fifth class of fallacies differs from the first four in that fallacies of ambiguity concern the meaning of terms or assertions within our arguments rather than structural problems in our inferences.

(emphasis omitted).

prejudice), and thereby carry the risk of appellate reversal.¹⁸⁵ The efficacy of such an appellate threat, however, is somewhat limited. In the first place, it is unclear how willing appellate courts are to reverse on this grounds, there appearing to be some disagreement on the point.¹⁸⁶ Further, the issue of prosecutorial misconduct in closing argument is subject to being obviated by a range of procedural grounds¹⁸⁷ – failure to object, failure to request a cautionary instruction, invited error, harmless error.¹⁸⁸

In reality, however, I do not believe that true misconduct is the greatest problem. Misconduct lets you get up and scream bloody murder, ask for a mistrial, and get some response from the Judge. Most reasoning fallacies, on the other hand, are not misconduct. You have to just sit there and hope the jury is not misled.

(2) *Arguments Violating the Standards of Rhetoric, Debate, and Argumentation.*—Every attorney who has had to sit quietly through rebuttal by the adversary has undoubtedly thought, e.g., “that doesn’t follow”, “that’s really misleading”, or such.¹⁸⁹ This is not surprising,

185. For a list of typical categories of misconduct in closing argument, see ALI/ABA, *supra* note 16, at 648-49. *See also generally* Holt, *supra* note 16; Peter B. Hong, *Summation at the Border: Serious Misconduct in Final Argument in Criminal Trials*, 20 HAMLINE L. REV. 43 (1996) (providing examples and an appendix of serious misconduct in final argument during criminal trials in Minnesota); J. Thomas Sullivan, *Prosecutorial Misconduct in Closing Argument in Arkansas Criminal Trials*, 20 U. ARK., LITTLE ROCK L. J. 213 (1998); Tanford, *Closing Argument Procedure*, *supra* note 16, at 47.

186. The debate over the efficacy of appellate remedies for prosecutorial misconduct in closing argument is characterized by the following two polar-opposite positions:

[O]ne of the most striking features of the law governing arguments is the infrequency with which appellate courts reverse a conviction on the grounds of argument error.

David Crump, *The Functions and Limits of Prosecution Jury Argument*, 28 SW. L.J. 505, 537 (1974).

This author also found no evidence to support the related claim by some writers that appellate courts take violations of the rules of closing argument less seriously than other kinds of legal errors. To the contrary, appeals based on closing argument law errors proved just as likely to result in reversal as appeals based on other claims.

Tanford, *Closing Argument Procedure*, *supra* note 16, at 137 (citations omitted).

187. *See, e.g.*, Holt, *supra* note 16, at 129 (noting procedural bars for responding “to remarks made in the defense attorneys’ closing,” such as invited error and harmless error); Hong, *supra* note 185, at 247-58 (discussing “contemporaneous objection” rule and other procedural bars); Tanford, *Closing Argument Procedure*, *supra* note 16, at 138 (noting the range of procedural bars, including “cured error,” such as cautionary instruction and invited errors).

188. *See* WALTER, *supra* note 17, at 47, quoting a prosecutor:

During the rebuttal more is forgiven us on appeal. And for that matter, we are more likely to have the jury with us if we engage in passion. So, if the defense lawyer has, God forgive him, engaged in some sort of unfair tactic in closing argument himself, then the [jurors] expect and relish a certain amount of righteous indignation.

189. *See* LUBET, *supra* note 1, at 467:

The greatest difficulty for defense counsel is knowing that she cannot speak again following the plaintiff’s rebuttal. The plaintiff may comment on, criticize,

nor is it by any means necessarily deliberate. People do not always reason clearly. Further, in the heat of argument we can all lose perspective. Within this reality, it is striking what an incredible range of fallacious and pseudo arguments are available.¹⁹⁰ A typical list includes using incorrect examples¹⁹¹ (“he had a beeper and cell phone, now what sixteen year old carries those around except a drug runner”), poor analogies¹⁹² (“pushing the officer was like attacking all the nation’s law enforcement”), loaded language¹⁹³ (“and what does this racist do then....”), irrelevant point¹⁹⁴ (“this is a person who didn’t even call his mother that evening to tell her he’d be out late”), circular arguments/begging the question¹⁹⁵ (“how do you know the witness’s identification was accurate – well she told you so”), ad hominem attacks¹⁹⁶ (“but my adversary has treated this panel, in fact this whole process with contempt”), and appeal to authority¹⁹⁷ (“this was not just any witness, this was a police officer who spoke”).

This list also includes ignoring the issue,¹⁹⁸ baiting the opponent,¹⁹⁹ repeating assertions,²⁰⁰ misattributing cause or assuming cause only because X precedes Y (post hoc fallacy),²⁰¹ ambiguity,²⁰² misinterpreting signs,²⁰³

or even ridicule defendant’s argument, but the defendant may not respond. Defense counsel may have perfectly good answers for everything that the plaintiff says on rebuttal, but no matter. The rule is that the defense may argue only once.

190. For a detailed compilation and description of the range of reasoning fallacies, see EHNIGER, *supra* note 181, at 113-25; FREELEY, *supra* note 181, at 188-98; TOULMIN ET AL., *supra* note 181, at 131-75.

191. See FREELEY, *supra* note 181, at 188.

192. See *id.* at 189; TOULMIN ET AL., *supra* note 181, at 161-63.

193. See EHNIGER, *supra* note 181, at 115; FREELEY, *supra* note 181, at 191.

194. See FREELEY, *supra* note 181, at 192.

195. See EHNIGER, *supra* note 181, at 121; FREELEY, *supra* note 181, at 192; TOULMIN ET AL., *supra* note 181, at 135.

196. See EHNIGER, *supra* note 181, at 121., *supra* note 181, at 117; FREELEY, *supra* note 181 at 194; TOULMIN ET AL., *supra* note 181, at 144-45.

197. See EHNIGER, *supra* note 181, at 120; FREELEY, *supra* note 181, at 188, and “poisoning the well” (unsupported assertion used to support other claims); TOULMIN ET AL., *supra* note 181, at 142-44. Fallacies which depend on the speaker’s claim of authority include “unsupported assertions” (i.e., audience to believe without any supporting evidence simply because speaker says so).

198. See FREELEY, *supra* note 181, at 192. This fallacy can also encompass “shifting grounds” (i.e., moving debate to different, easier to deal with issues), see EHNIGER, *supra* note 181, at 119, and “evading the issue,” see TOULMIN ET AL., *supra* note 181, at 139-42.

199. See FREELEY, *supra* note 181, at 192.

200. See FREELEY, *supra* note 181, at 192 (discussing repeating an argument “with the repetition treated as proof.”)

201. See FREELEY, *supra* note 181, at 189 (discussing partial cause treated as sole cause in multiple factor situation), and at 198 (discussing Post Hoc fallacy; i.e., because follows A, B causes by A); TOULMIN ET AL., *supra* note 181, at 158-61 (discussing “false cause”).

202. See EHNIGER, *supra* note 181, at 114; FREELEY, *supra* note 181, at 190; TOULMIN ET AL., *supra* note 181, at 167-75 (discussing variety of oral and written ambiguity, including “equivocation.”).

203. See FREELEY, *supra* note 181, at 190 (discussing, e.g., when a doctor misinterprets symptoms).

verbalism,²⁰⁴ bombast,²⁰⁵ denying the inevitable conclusion,²⁰⁶ appeal to what is popular,²⁰⁷ appeal to tradition,²⁰⁸ appeal to ignorance (i.e., if you can't prove it, it's not true),²⁰⁹ the "straw man" argument,²¹⁰ pseudo questions ("are you still cheating on your boyfriend?"),²¹¹ non sequiturs,²¹² overstatement,²¹³ transfers (from parts to whole, whole to parts, from a discredited proof to an undiscredited claim),²¹⁴ appeal to pity,²¹⁵ appeal to fear,²¹⁶ use of technical language,²¹⁷ fastening upon a trivial point,²¹⁸ use of ridicule,²¹⁹ and (in some circumstances) humor.²²⁰ I think you get the point. There are more than enough sham arguments to go around.

b. Arguments Employing Legitimate Techniques from Rhetoric, Argumentation, and Debate.—Even discounting sham or pseudo arguments, the advocate has available a range of legitimate techniques with which to attack their adversary's position. There is nothing new about attacking the premises of the adversary or building the negative case, as it is called in rhetoric and debate.²²¹ In fact, rhetoric and law

204. *See id.* ("The abundant use of words without conveying much meaning.")

205. *See id.* at 194; *see also* EHNIGER, *supra* note 181, 124.

206. *See* FREELEY, *supra* note 181, at 195 (discussing, i.e., admits premises, but denies conclusion which logically follows.).

207. *See id.* at 195; *see also* EHNIGER, *supra* note 181, at 123 (discussing joining the "bandwagon"); TOULMIN ET AL., *supra* note 181, at 146-47 ("The appeal to the people.").

208. *See* FREELEY, *supra* note 181, at 197; EHNIGER, *supra* note 181, at 120 (discussing, i.e., that's how he dealt with issue in past, always dealt with the issue, etc.).

209. *See* EHNIGER, *supra* note 181, at 121; FREELEY, *supra* note 181, at 196; TOULMIN ET AL., *supra* note 181, at 145-46.

210. *See* FREELEY, *supra* note 181, at 196.

211. *See id.* at 197.

212. *See id.* (discussing, i.e., conclusion not following from premises.).

213. *See* EHNIGER, *supra* note 181, at 116-17 (discussing "reductio ad absurdum" as specific form of overstatement.).

214. *See* TOULMIN ET AL., *supra* note 181, at 151-54. *See also* EHNIGER, *supra* note 181, at 116 (regarding the related concept of "hasty generalization" (i.e., drawing conclusion from either too few instances or atypical instances)).

215. *See* EHNIGER, *supra* note 181, at 119.

216. *See id.*

217. *See id.* at 120.

218. *See id.* at 122.

219. *See id.* at 124.

220. *See id.*

221. *See, e.g.,* FREELEY, *supra* note 181, at 247-80; LAGARIAS, *supra* note 16, at 143 ("The best response will commonly employ the classic format of refutation, outlined above, within a reiteration of one's own affirmative case.").

An interesting study into the notion of "highly argumentative individuals" correlate individual level trait of argumentativeness with actual argument activity. The researchers found that (not surprisingly) "highly argumentative individuals engaged in more total advocacy and refutation across issues than did moderate and low argumentatives" (although when the topics required little knowledge or research – e.g., sports, entertainment, family – lows and moderates were as argumentative as highs). Dominic A. Infante & Andrew S. Rancer, *Relations Between Argumentative Motivation and Advocacy and Refutation on Controversial Issues*, 41 COMM. Q. 415, 423, 424 (1993). The researchers also found that

[a]cross all levels of advocacy [the existence of] more advocacy than refutation behavior.... Refutation, attacking an opponent's position, may have been

have had a continuous, though at times uneven, relationship throughout much of Western Civilization's history.²²²

perceived as a more difficult dimension of argumentative activity. Refutation, the attack on the adversary's argument, evidence, and reasoning may require more preparation, more skill, and more competence to accomplish successfully.... Another speculation offered for this finding suggests that refutation may be perceived as a more aggressive dimension of argumentative behavior than is advocacy. When we refute, we are attacking another person's position on an issue. Previous research... suggests that some individuals have trouble distinguishing attacks on issues and attacks on self. If a person believes that attacking an adversary's position will be seen by that individual as an attack on self, this may serve to deepen refutative behavior.

Id. at 423.

Perhaps practicing trial advocates are immune to such qualms or, more likely, feel shielded from the personal by the mantle of their professional roles.

222. Even in ancient Rome, rhetoric was not universally embraced. Aristotle believed that only logic could produce truth, and rhetoric distorted truth. Isocrates, on the other hand, thought absolute rules of science impossible. For Isocrates, like the Sophists, "conjecture and belief were more practically reliable than any absolutes." Frederic G. Gale, *Logic, Rhetoric, and Legal Writing*, 10 J. BUS. & TECH. COMM. 203, 204 (1996). "The Sophists were the first law faculty, and like their modern counterparts, they understood that their students were less interested in absolute truth than in winning cases... [and] that the simple, unadorned prose then being taught did not persuade...." *Id.* Aristotle represented a middle ground. Logic for the pure sciences. But in the human sciences, politics, and ethics, rhetoric permits the deliberation necessary to "change some aspects of our lives." *Id.* at 205.

In Rome, the great lawyer Cicero, whose oratory format set a pattern upon which our own trials are organized, see RIEKE & STUTMAN, *supra* note 17, at 88, used those skills of rhetoric to lead an extensive legal community:

Lawyers flourished in ancient Rome. One of the most noteworthy was Cierco, an outstanding teacher, orator, and statesman (Hendrickson, Hubbell). Cicero wrote a formulary rhetoric where he discussed everything from the stock issues in a legal case (particulars of the crime or *factum*, reason for the accused to commit the crime or *causa*, and personal circumstances of the accused or *persona*) to specific techniques for persuading in the courtroom. Quintilian, a famous pleader in the courts before becoming a teacher, emphasized in his *Institutes of Oratory* that an effective litigator is "a good man speaking well" (Butler). Rhetoric became a central factor in Roman legal education; the techniques and strategies of persuasion became vehicles for teaching legal concepts to students of law.

Ronald J. Malton, *Legal Communication: An Introduction*, 30 ARGUMENT & ADVOC. 187-88 (1994).

In the sixteenth century, however, law and rhetoric abandoned their natural alliance, a trend that has carried over to modern legal education:

But in the sixteenth century, rhetoric was to travel a path separate from the analytical dimension of forensic or legal speaking. Later, as great legal thinkers and philosophers such as Locke, Hobbes, Coke, and Blackstone were educated in England, they became attracted to dialectic, but not to rhetoric. Legal and rhetorical theory took separate paths, with the latter subject focusing on the art of amplifying and beautifying one's thoughts. As law developed in England, neither the solicitors (those who do legal research) nor the barristers (those who engage in trial appearances) knew much rhetoric.

American legal education was patterned after the case method developed by Christopher Columbus Langdell at Harvard Law School. This method was designed to systematically teach legal (logical) thinking and reasoning. Langdell was a logical positivist who maintained that juridic decisions are found by examining rules, laws, and logic. Thus, justice was a means of arriving at an absolute and universal truth Langdell believed that rhetoric only confused and distorted the search for truth (Frank, "Why Not," 907-908). Law students at

Through this extensive history, and with the evolution of debate, a set of classic moves have developed for use in rebutting the adversary's case.²²³ These disciplines have developed clear, categorized approaches for probing the weaknesses in various types of evidence – e.g., factual evidence,²²⁴ statistics,²²⁵ exhibits,²²⁶ presumptions,²²⁷ and opinions²²⁸ – as well as for systematically approaching the credibility of evidence²²⁹ in general.²³⁰

Harvard and most of the law schools elsewhere (except for Yale) got no training in the techniques of persuasion (Rieke, 76-77, 81).

Id.

223. *See generally* FREELEY, *supra* note 181, at 247;-80 *see also* Faules, *supra* note 104, at 48 (“[A] number of factors are involved in effective communication – adaptation, selection of arguments to be refuted, application of the methods of refutation, organization and language... quality arguments were those that examined causal relationships, basic assumptions, and the relationship of evidence to arguments.”) (citations omitted.)

224. *See* EHNIGER, *supra* note 181, at 62-63:

A. Tests of factual evidence

1. Tests of reports of specific occurrences or states of affairs
 - a. Was the person making the observation qualified to do so physically and mentally?
 - b. Was the person making the observation qualified to do so by training and experience?
 - c. Under what conditions was the observation made?
 - d. Is the situation still essentially the same as it was when the observation was made?
 - e. May the observer's attitude toward the event or situation have colored his perception?
 - f. May the observer's attitude toward the person or persons receiving the report have influenced his description or account?
 - g. Were the actions, events, or conditions described in the report actually witnessed by the observer, or did he infer them from other actions, events, or conditions he did witness?
 - h. Was the report made orally or in writing?
 - i. If the occurrence or condition was witnessed by someone other than the reporter, did that person transmit to the reporter a full and accurate account of what he saw?

See also id. at 55-58.

225. *See id.* at 63:

2. Tests of statistical evidence
 - a. Do the statistics come from a reliable source?
 - b. Do the statistics cover a sufficiently long period of time?
 - c. Are the units comparable?
 - d. Does the method of reporting the data hide significant variations within them?

See also id. at 58-59.

226. *See id.* at 63:

3. Tests of exhibits
 - a. Is the exhibit genuine?
 - b. Is the item offered in evidence typical of the class of phenomena it is alleged to represent?

See also id. at 59.

227. *See id.* at 63:

4. Tests of presumptions
 - a. Are there any reasons to believe that in the case at hand things will turn out differently than they have in the past?

See also id. at 59.

They also have reduced to a checklist the process of refutation (e.g., overthrowing the opposition's evidence by demonstrating that it is invalid, erroneous, or irrelevant; overthrowing the opponent's evidence by introducing other evidence that contradicts it, casts doubt on it, minimizes its effect, or shows that it fails to meet the tests of evidence; and so forth).²³¹ Those in

228. *See id.* at 63:

B. Tests of opinion evidence

1. Does the person offering the opinion possess the background of knowledge and information upon which a sound judgment must rest?
2. Is the person offering the opinion reasonably unbiased?
3. Was the person offering the opinion in a position to observe at firsthand the facts on which his judgment bears?

See also id. at 60.

229. *See, e.g., id.* at 61-62; *see also id.* at 63:

General tests of evidence are:

1. Is the evidence consistent with other evidence?
2. Is the evidence consistent with itself?
3. Is the evidence consistent with human nature?
4. Is the evidence clearly and objectively presented?

See also FREELEY, supra note 181, at 127:

In general, affirmative answers to these questions imply that the evidence is credible; negative answers imply a weakness in the evidence.

Is there enough evidence? (See II-A.)

Is the evidence clear? (See II-B.)

Is the evidence consistent with other known evidence? (See II-C.)

Is the evidence consistent within itself? (See II-D.)

Is the evidence verifiable? (See II-E.)

Is the source of the evidence competent? (See II-F.)

Is the source of the evidence unprejudiced? (See II-G.)

Is the source of the evidence reliable? (See II-H.)

Is the evidence relevant? (See II-I.)

Is the evidence statistically sound? (See II-J.)

Is the evidence the most recent available? (See II-K.)

Is the evidence cumulative? (See II-L.)

Is the evidence critical? (See II-M.)

230. By dividing rhetoric from science, I did not mean to convey the impression that the art and discipline of rhetoric has nothing to gain from scientific inquiry. Thus, a study in public debate revealed that the choice between emphasizing your own position or revealing the fallacies in a weak opponent's case should in part be guided by the audience's personal reaction to the proponent's position. Thus, if they hold a position consistent with weaker opponents, they will hold it against you if you point out fallacies in her position, thereby humiliating her. *See* Vernon E. Cronen, *Responding to Weaker Opponent: A Study of Likeability and Refutation in Public Debate*, 1974 *WESTERN SPEECH* 108, 115 (1974).

231. *See, e.g., FREELEY, supra* note 181, at 287:

The Process of Refutation

Overthrowing the opposition's evidence by demonstrating that it is invalid, erroneous, or irrelevant.

Overthrowing the opposition's evidence by introducing the other evidence that contradicts it, casts doubt on it, minimizes its effect, or shows that it fails to meet the tests of evidence.

Overthrowing the opposition's reasoning by demonstrating that it is faulty.

Overthrowing the opposition's reasoning by introducing other reasoning that turns it to the opposition's disadvantage, contradicts it, casts doubt on it, minimizes its effect, or shows that it fails to meet the test of reasoning.

Rebuilding evidence by introducing new and additional evidence to further substantiate it.

debate even have developed a list of regular areas to attack in an opponent's case (e.g., hasty generalizations, definitions, criteria, and significance).²³²

Now, not all of these checklists from the fields of argument and debate will apply directly to criminal jury trials, though many of them will. Remember, debate deals with issues such as "Resolved that the United States should withdraw from the United Nations", or that "All public school teachers should be retested every three years in their subject area...."²³³ Plainly, this is not precisely the same type of analysis as is involved in deciding whether the defendant should be found guilty. But that is not the point.

What debaters and rhetoricians have perceived, trial attorneys have also intuitively understood and applied. We are constantly probing for weaknesses in the adversaries arguments, developing our own patterns and checklists. While this particular knowledge does not widely appear in our literature as it does in that of rhetoric and debate, it nevertheless exists throughout our profession.²³⁴ That all of the processes and points of attack in debate will not directly apply to trial law thus does not matter. It only means that each skillful trial attorney will develop an analogous and no less extensive repertoire of methods of rebuttal which will be tied to what is unique about criminal trials. In short, a good prosecutor has a great deal to work with in rebuttal.

V. What Can the Defense do to Protect their Position from the Rebuttal?

Defendant's only argument follows the prosecution's initial closing. In this initial closing, however, the prosecution has likely presented the core of its case.²³⁵ As such, defendant's argument melds a positive argument in

Rebuilding reasoning by introducing new and additional reasoning to further substantiate it.

Presenting exploratory refutation preliminary refutation offered for the purpose of probing the opponent's position and designed to clarify the opponent's position or to force them to take a more definite position.

232. See, e.g., FREELEY, *supra* note 181, at 249-53 (noting that attacks in debate include hasty generalizations, topicality, definitions, criteria, significance, inherency, application, solvency, value objections, topicality). Looked at from the perspective of a legal advocate, most of these grounds for attack appear to involve the familiar topics of appropriate standards, relevance, and appropriate inferences. See *id.*

233. For example, one proposition Freeley used in his examples was "Resolved: that the United States is justified in providing military support to nondemocratic governments." *Id.* at 250.

234. For such a list compiling a wide range of stock attacks on the defense argument the prosecution can take in rebuttal, see Ray Moses, *Refutation and Reply*, in JURY ARGUMENT IN CRIMINAL CASES – A TRIAL LAWYER'S GUIDE § 5.12, 5-338 (1985).

235. See BELLI, *supra* note 16, at 447:

The opportunity to rebut prosecution arguments of course depends on the prosecutor presenting its full argument in the initial rebuttal. To blunt the defendant's ability to rebut, some attorneys attempt a tactic known as "sandbagging." Employing this tactic [a] prosecutor may offer a brief opening

favor of its position, with a rebuttal of the one put forth by the prosecution. In practice, these two facets may be indistinguishable in content, particularly when the defense has not put on any evidence and is thus presenting a pure reasonable doubt case.²³⁶ In any event, the defense has available all the

argument or waive it so that the defense may be 'sandbagged' in a lengthy final argument.

This tactic, however, is both legally and tactically risky. Legally, "the scope of rebuttal argument is limited by the scope of defendant's argument – new matters should not be raised on rebuttal...." DANNER & TOOTHMAN, *supra* note 16, at 493. In other words, if you don't say it in initial opening, you may not be allowed to raise a topic (unless broached by the defense) in rebuttal. *See also* JEANS, *supra* note 3, at 371 ("The content of the concluding portion must be confined to rebuttal argument; (thus new topics cannot be introduced at such stage and if the subject of damages or amount has not been argued before it cannot be introduced in this concluding rebuttal portion)."); LAGARIAS, *supra* note 16, at 144 ("[I]n some jurisdictions, a plaintiff is limited to replying to the defendant's closing argument. Thus, a plaintiff who withholds a portion of his argument for reply may be denied this argument if the topic is not raised in the defense closing argument.") (citation omitted.); MORRIL, *supra* note 41, at 96 ("If, on rebuttal, the plaintiff commits the sin of bringing up a new argument that can not be classified as a reply to the defendant's argument, then an immediate objection should be made...."); VOGEL, *supra* note 16, at 13 ("In this way the jury is given a preview of the opponent's argument and the answer to it, before the opponent has the opportunity to speak. The jurors are thus forearmed with skepticism, and the opponent's argument will encounter more resistance with the jurors and may fall flat."); Dombroff, *supra* note 16, at 17 ("if you are plaintiff, you will be limited on your rebuttal to only those things raised by the defendant and not things forgotten by you that should be part of your argument.").

Of course, in practice the interpretation of this rule will vary with the court, with many tending toward the liberal side:

Courts tend to be liberal in their findings of what constitutes proper rebuttal. As long as no completely new issues are raised, you may bring up new lines of argument, new illustrations and exhibits, and additional details.

The final argument is not limited strictly to a rebuttal of the defendant's arguments. The fact that an issue is ignored by the defense does not foreclose the plaintiff from raising it in rebuttal. If the plaintiff raised the matter in his first argument, he may expand it or reiterate it during final argument.

Tanford, *Closing Argument Procedure*, *supra* note 16, at 142.

See also LUBET, *supra* note 1, at 470:

The rule requiring rebuttal to be within the scope of the defendant's argument is enforced with varying degrees of strictness from court to court. It is generally safe to assume, however, that the rule will be applied more rigidly to topics (such as damages) than to lines of argument (such as elaboration on a theme). Consequently, it is usually not risky to withhold the use of an analogy or story until rebuttal, thereby preventing the defendant from "reversing" it.

Tactically, there are also problems with sandbagging. If you hold back for rebuttal, the defendant now is given the advantages of setting the structure and agenda for the argument. *See, e.g.*, STERN, *supra* note 1, at 286:

As you observe trials... you will see lawyers who merely touch the high spots in the first argument and wait until the defendant has argued before developing their argument in full. They even reserve points upon which to hammer at the end. ... I favor a full presentation of the plaintiff's case in the first instance. The jury is fresh and should be interested in argument when you start. You should so fully convince them of the merits of your case that the other side is handicapped.

(citation omitted).

Also, the jurors can see what is going on, may think it unfair, and hold it against the party who is sandbagging.

236. For a discussion of a "reasonable doubt" case, see Mitchell, *supra* note 22, at 106-07.

rebuttal and negative case techniques available to the prosecution in its final argument.²³⁷

In this second position, with its full opportunities for rebuttal, the defense has both advantages and disadvantages in relation to the prosecution's position in final rebuttal. On the plus side for the defense, it will have much more time in rebuttal than will the prosecution. The defense argument is a full presentation, matching or exceeding the prosecution's initial opening in length. In contrast, the prosecutor generally "reserves time" for rebuttal, generally allocating a relatively short time (often five to seven minutes, or less) to the presentation.²³⁸ The defense thus has the advantage of having available a significant amount of time with which to thoroughly reason through the weaknesses of the prosecution's position. No such opportunity for careful, detailed analysis exists in the time frame of the prosecution rebuttal.

On the negative side of the ledger is the obvious. The prosecution can answer the defense rebuttal. The defense cannot answer the prosecution's. So, what is the defense to do? Several tactics are put forth throughout the advocacy literature.

One can try to anticipate the arguments and counter arguments the prosecution will raise in rebuttal.²³⁹ This type of two-sided argument with

237. See, e.g., Moses, *supra* note 234 (listing stock rebuttals to variety of prosecution attacks: response to prosecution statement that defense witness is lying; reply to prosecution argument that jury accept officer's testimony over accused; reply to prosecutor argument that defense is trying to put prosecution witnesses on trial).

238. See, e.g., DANNER & TOOTHMAN, *supra* note 16, at 493 (referring to rebuttal as "brief"); GIVENS, *supra* note 16, at 340 ("Sometimes a fixed period of time may be allotted to the party, some of which can be saved for reply. In such instances, if it extremely wise to reserve reply time and not to use up all of the allotted time in initial argument."); Lane, *supra* note 16, at 85 (suggesting that out of one hour allotted to closing, one should allocate one-quarter of the total time to rebuttal).

239. See WALTER, *supra* note 17, at 65, 89, quoting defense counsel:

I try, in closing argument, to anticipate the closing argument of the prosecutor
 – because they're gonna have the last word – and I wanna take some sting from
 what I can anticipate they're gonna say.

.....

You've gotta anticipate what the prosecutor's gonna say, and then be ready for
 it, and knock 'em down.

See also LUBET, *supra* note 1, at 476 ("Under these circumstances [i.e., when the prosecution gets the rebuttal] it is extremely important that counsel do whatever is possible to blunt the rebuttal in advance. One approach is to anticipate and reply specifically to plaintiff's possible rebuttal arguments...."); ALI/ABA, *supra* note 16, at 658:

If counsel is in the poorer position of having to speak before his opponent
 makes his final argument, the task is more difficult if for no other reason than that
 he must not only anticipate the questions the jury would ask but also those points
 opposing counsel will attempt to either avoid or gloss over.

Cf. HAMLIN, *supra* note 16, at 614 ("You do not profit from presenting only half of the case. *You must answer your opponent's allegations and theories.* [Since that's the basic fight the jury must decide on,] [y]ou must give the jurors reasons why opposing counsel is *wrong as well as why you are right.*").

Anticipating counter arguments is, in fact, deeply imbedded in the argumentation theories of informal logician Stephen Toulmin. See generally TOULMIN, *supra* note 162, at 101-02 (explaining the conditions of "rebuttal"). For Toulmin, arguments are composed of claims and the data from which you

rebuttal is the same “inoculation” strategy the prosecution has available in its initial opening. This is certainly feasible, as far as it goes. By this point in the trial you better know your case and know that of your adversary. You better know all the arguments, counter arguments, and replies to these counter arguments. You better understand your jury, and understand the issues around which their decision will pivot. Understanding all this, you can anticipate and counter much of what your adversary will do in rebuttal.²⁴⁰

draw the claim. As an example, assume for data that “Sally wants to be healthy” and the claim “she should eat plenty of green vegetables.” Something, however, is missing. We need a principle to get from our real world data to the claim. This principle, or what Toulmin terms a warrant, would then be something like “green vegetables are good for people.” Toulmin also recognizes that there will be conditions when the warrant will not hold. These counter arguments he terms rebuttals. In this case, rebuttals to the warrant would include the case where Sally is allergic to green vegetables, where the vegetables are covered with pesticides, etc. *See also TOULMIN ET AL., supra* note 181, at 95-102; Kurt M. Saunder, *Law as Rhetoric, Rhetorics as Argument*, 44 J. LEGAL EDUC. 566, 569 (1994); Paul T. Waggener, *A Multidisciplinary Analysis of the Structure of Persuasive Argument*, 16 HARV. J. L. & PUB. POL’Y 195, 220-22 (1993) (applying literature of cognitive psychology and computer science to Toulmin’s model for argumentation).

Professors Moore, Bergman, and Binder bring Toulmin’s concept of “rebuttal” down to earth in the form of “except whens.” *See MOORE ET AL., supra* note 16, at 35. *See id.* at 41-42:

Take the proposition that “Police will take care before firing a gun.” This can be strengthened with a few “especially whens” (for example, in public, large crowd, many children around). The “except whens” then become the counter argument to the initial proposition (for example, it goes off accidentally, the officer panics, the suspect is extraordinarily dangerous and about to get away, the particular officer is mentally unbalanced).

Using this model you can anticipate two general types of prosecution attacks on your argument. In the first, you put forth some general principle in your respective arguments then anticipate that they will attack your principle with some “except whens.” You can then either argue that their “except whens” are not accurate, or come up with your own further “except whens.” In the second, it’s the prosecutor who you anticipate will put forth the general principle and you come up with the except whens.

There are cases where superficially it appears that the prosecution and defense cases are not meeting each other’s (e.g., the prosecution claims the defendant robbed a store; the defense does not deny the robbery, but claims duress). *See id.* at 42-43. If you look at what’s being contested, however, you will find plenty of “especially whens,” e.g., by the defense (defendant had reason to fear co-defendant, especially when only co-defendant has a weapon and defendant knew that the co-defendant had been in prison for murder) and “except whens,” e.g., by the prosecution (co-defendant was defendant’s brother; the defendant walked into store two minutes after the co-defendant, so he had plenty of time to call the police, or runaway; etc.). *See id.*

240. While some might be seduced by the movie image of trial attorneys, shooting form the hip in brilliant spontaneity, the key to being a competent trial attorney is preparation. *See BERGER ET AL., supra* note 16, at 8-14; (explaining approach to, and rationales for, focusing approach on planning and preparation; also articulating categories of preparation, i.e., pre-planning, organization, content planning, and performance planning). *See also* Marilyn J. Berger & John B. Mitchell, *Rethinking Advocacy Training*, 16 AM. J. TRIAL ADVOC. 821, 830-31 (1998):

First, experienced lawyers often win cases before they walk into the courtroom by virtue of thorough preparation. The perception that lawyers are commonly viewed as individuals who are remarkably adroit at the spontaneous skill of thinking on your feet is mistaken. Undoubtedly, the courtroom performances of good advocates offer some tangible demonstration of this skill. Yet, the absolute key to the success of every lawyer is extensive planning and preparation. Often, this extensive preparation is characterized by the attorney’s bold disclosure that she knows her opponent’s argument better than her own.

But as hard as I try, as much as I prepare, I am never able to anticipate, not only what comes out of the prosecution's mouth, but precisely how it will be framed. There are simply "surprises" I can not anticipate. That, after all, is the quality that makes them surprises. I particularly cannot anticipate the "sham" arguments. What is particularly disturbing is that these sham arguments are the ones that at the same time are both so readily rebuttable if given the opportunity, yet so misleading and potentially persuasive if not answered.²⁴¹

The literature also suggests blunting the power of the rebuttal by giving variants of a stock speech to the effect that "I cannot answer the prosecution, so you will have to answer for me."²⁴² Who knows, maybe

A good example of how preparation ties to the specific performance of summation is provided in ALI/ABA, *supra* note 16, at 649-50.

241. Jurors are not stupid and, as I've said, collectively see everything. They may well see through a particular sham or fallacious prosecution argument. But these are not always easy to catch. More than intelligence is involved – experience in seeing argument patterns in legal case (which an expert trial attorney possess) is most useful, and it is just what jurors will lack.

242. The literature is filled with examples of set pieces meant to offset that the prosecution has the last word and the defense therefore cannot respond to those final arguments. The following are typical examples:

If the other side is to have the last word, it may be helpful to point out the disadvantage to the tribunal, and ask it to compensate:

I ask you to remember that this is the last opportunity I will have to speak to you. The other side will speak, but I will not be permitted to reply. This means that I must rely on you to judge the validity of whatever my opponent will say, and examine it very closely. You will have to come up with the answers to any erroneous arguments that are made, because I can no longer do so. It is your responsibility, as the members of this jury, to do that so that an innocent person will not be convicted because of anything I have failed to say.

GIVENS, *supra* note 16, at 340-41.

Meet the arguments in advance. Do not just respond to your opponent's first argument, look forward to his rebuttal. If you do it right, you can even get the jury to start thinking of themselves on your side:

This is the last time I will be able to talk to you about this case, and there is so much more that I would like to say. The plaintiff's lawyer, Mr. Rawlings, is going to get to talk to you one more time. The rules of court let him get the last word, and I don't get a chance to answer what he says. So, there is something important that I want you to do. You know that there will be things he will say that I would answer if I could. And you know what all the evidence is in this case. So please listen carefully to everything he says, and whenever he makes an argument, make the response I would make if I could. And if you do that, I know that you will be fair.

MCELHANEY, *supra* note 42, at 673.

For similar advice and examples, see HAYDOCK & SONSTENG, *supra* note 16, at 645 (providing an example); LAGARIAS, *supra* note 16, at 144; LUBET, *supra* note 1, at 468 (providing an example); MURRAY, *supra* note 3, at 376 (providing an example); VOGEL, *supra* note 16, at 14 (providing advice); WALTER, *supra* note 17, at 64 (noting that among topics most mentioned in defense closing was "Defenders remind jurors that prosecution has the last word (speech)."); Frank Cicero, *Nondefensive Final Argument for the Defense*, 8 LITIGATION 45 (Spring 1982); Kornblum, *supra* note 16, at 28 (providing advice); Moses, *supra* note 234, at 5-359. An interesting variant on the stock rap appears in

this really works, like some kind of magical incantation. Surely far brighter and more talented trial attorneys than I have suggested this tack. Yet, in the end I cannot help but doubt if this has any effect other than making the attorney feel they did their best.

Finally, comes the suggestion that you pepper your adversary with rhetorical questions, challenging them to use up their spare rebuttal time in answering your queries. The theory is that if they do, they have devoted their rebuttal to your agenda. If they do not, the jury will see.²⁴³ The problem is two-fold. The prosecutor probably can give some plausible answer to your question. After all, they understand the case, too. And when they answer your dramatic challenge, then what?²⁴⁴ Further, while as we have seen there is scant attention to rebuttal in legal literature, the one bit of wisdom which is uniformly mentioned is do not answer the adversary's rhetorical questions to your rebuttal, or at least weave your answers into your own structure. Falling for this ploy thus would be the equivalent of falling for the hidden ball trick in professional baseball.

Not to dismiss this notion totally, however, there is a variant of this rhetorical question tactic that I do believe can help blunt some aspects of rebuttal. It focuses on evidence which is lacking from the prosecution's case and is coupled with what I call blocking the "shifting of the burden of proof."²⁴⁵

From my experience, criminal cases are often lost to the defense because valid reasonable doubts are simply discounted as if they never existed. They disappear because jurors find the particular piece of evidence consistent with guilt through a process of literally making up explanations or excuses that have no evidentiary basis.

Imagine the defendant is charged with armed robbery. No weapon or money is found on the defendant when he is detained and subsequently arrested two blocks from the scene. Sounds like reasonable doubt to me.

WALTER, *supra* note 17, at 171: "He's got the last speech - but you've got the last word [Pause] But better than that, you've got the last two words."

243. This tactic is strictly a trap laid for novices. See STERN, *supra* note 1, at 289 ("Experienced lawyers know this. They try to goad the less experienced by posing questions to them, in the hope that he adversary will be foolish enough to respond to those questions in a body.").

244. See STERN, *supra* note 1, at 292:

Indeed, the raised question can pose its own destruction for the one who raised it. If the question is successfully answered, whether in the immediate moment by the subliminal responses of unfavorable jurors rushing to protect staked-out positions, or later in the adversary's response, the questioner has hurt only himself. ... Moreover, *most* questions *can* be answered - at least well enough for appearances.

See also, ALI/ABA, *supra* note 16, at 698 ("It is an extremely dangerous practice to ask an 'open-end' question in the summation when opposing counsel is in a position to answer or appear to answer it in his own closing argument.").

245. For an extensive discussion of blocking the "shifting of the burden," see BERGER ET AL., *supra* note 16, at 479-80.

The robber would have had the weapon and money a mere two blocks away. This must be the wrong guy, or at least it raises a reasonable doubt. But no, once in the jury room – and I am as concerned with some juror’s “rebuttal” as I am with the prosecution’s²⁴⁶ – the reasonable doubt disappears: “He probably ditched the gun and hid the money; that’s why he didn’t have it on him.” Poof! Now you see reasonable doubt, now you don’t. What happened? Simple, they shifted the burden of proof. In other words, if we presume the defendant guilty, he must have ditched the gun and money.²⁴⁷ But if we presume him innocent as our jurisprudence requires, you need evidence that he ditched the gun and money, or the reasonable doubt stands – e.g., the gun was found in a trash can in a direction consistent with where the defendant was stopped; police saw him tossing something in the water; police were chasing him through back yards and over fences, and lost sight of him for a couple of minutes, etc.

To illustrate blocking this burden shifting, let us go back to the case of the young man accused of assaulting the officer. Imagine that in part of the closing the defense says:

Why would he do that? He was in the middle of nowhere. Where was he going? He could not get to his car. He was facing a minor offense, driving with a revoked license. No one would commit a clearly serious offense, risking getting beaten up or shot in the process, to avoid arrest for this minor driving offense. It simply does not make sense....

In rebuttal, the prosecution will likely respond, shifting the burden along the way:

People do crazy things. People do stupid things. Everyday people do things which make absolutely no sense. But as prosecutor it is not part of my burden to prove to you why the defendant did this thing—I do not have to explain or prove his motive. All I have to prove is that he deliberately stuck the officer – and you heard that officer take the stand and tell you under oath that there was absolutely no doubt in his mind that the defendant acted intentionally, deliberately striking the officer....

The defense could have instead structured this portion of the closing to make it at least more difficult to shift the burden and to make these reasonable doubts disappear in the process:

Why would my client deliberately hit an officer? It makes absolutely no sense. And if it does not make sense, it cannot be proof beyond a reasonable doubt. Now if for just a minute we presume my client guilty, then we know that there must have

246. See MOORE ET AL., *supra* note 16, at 233 (“Regardless of what you adversary says, factfinders may come up with arguments of their own. And you should consider responding to such arguments, just as you might if an adversary was making them.”).

247. In effect, what the jurors have done is created fictitious (i.e., not based on any evidence) “except whens” to my reasonable doubts. See MOORE ET AL., *supra* note 239 and accompanying text.

been an explanation, and you and I can probably imagine several – he was crazy, drunk, on drugs, being arrested for a serious crime, wanted for a serious crime, was an escaped prisoner, became violently angry and lost his temper. That’s not a bad list.

But of course we do not presume Mr. _____ guilty, we presume him innocent. If there was no reason for him to do something – like deliberately hit a police officer – than there is a reasonable doubt that he did, a reason to believe it might have been an accident. And this doubt does not disappear just because the prosecution says, “Oh, people do stupid things.” She wants to make these reasonable doubts disappear by making up explanations and excuses. You can always do that if you presume someone guilty, and shift the burden of proof. But those reasonable doubts stay unless there is *evidence* – so it would be different if my client were screaming at the cop, crazy, drunk, wanted, on drugs. That’s evidence.

But the prosecution has no such evidence, so all she will give you in rebuttal is explanation and excuses. And do not be fooled. I am not saying that the prosecutor must prove motive, she does not. What I am saying is that if my client had no reason to deliberately strike the officer, then there is reasonable doubt that he did.

One last thing, I challenge the prosecutor to give *evidence* as to why my client would do this – not excuses or explanations – but evidence. And if she or one of your fellow jurors tries to make doubts disappear by merely making up explanations and excuses, you answer for me because I do not have the last argument and I surely will not be in the juror room, you tell them – “Hey. You are shifting the burden of proof.”

How effective is all this at blocking rebuttal? Better than nothing, particularly when dealing with this notion of burden shifting. I certainly feel it more effective than some stock incantation to the effect that “you jurors will have to answer for me.” But with all the rhetorical techniques available on rebuttal, both fair and unfair, there is only so much you can do when you have no chance to answer.

VI. Conclusion: What Process is Due?

I began this journey with a simple objective – to determine whether allowing the prosecutor to have the last argument in closing was a sufficient enough procedural advantage that it was worth rocking the boat, and thereby altering a procedure that almost the entire profession takes as a given. As I reach the end, having traveled through so many different worlds of expertise, I have come to what I believe is a reasonable perspective.

To have any impact on our criminal justice system, however, any conclusion I reach must carry the force of more than what I believe reasonable or generally good policy. It must be constitutionally mandated. Thus the briefest of digressions into the standard for determining what process is due as a matter of constitutional due process is in order. The test from the United States Supreme Court case of *Mathews v. Eldridge*²⁴⁸ is therefore our guide:

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors. First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁴⁹

Factors one and three are easy. The private interest involved is the highest, i.e., liberty (and even literally life in some circumstances).²⁵⁰ The administrative burden is nothing, change the order of argumentation or eliminate the prosecution's rebuttal. The real issue is the second factor – “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards” – the very inquiry to which this entire article is addressed. Thus, *Mathews v. Eldridge* brings us back full circle.

Does the prosecution gain enough of an advantage from having the rebuttal to justify any change in the order of closing arguments and, if so,

248. 424 U.S. 319 (1976).

249. *Id.* at 335. For a criticism of the Mathews test as permitting total flexibility in result without any foundational constitutional values context, see Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process* 95 YALE L. J. 455, 472 (1986):

The development of the Mathews balancing test gave rise to a structure within which an individual can possess an undisputed property interest... and thus, a clear right to due process... but have no right to any procedures at all. In other words, balancing can lead to the anomalous result that an individual will have a clear due process right to no process. Such a result is surely problematic in light of the explicit constitutional requirement that no life, liberty, or property be taken without due process of law.

See also Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENTARY 339 (1987) (providing a historical approach to the procedural aspect of the due process clause).

250. The protection of physical liberty is “the oldest and most widely recognized part of the [due process] guarantee.” JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 459 (3d ed. 1986); see also Stephen F. Williams, *Liberty in the Due Process Clause of the Fifth and Fourteenth Amendments*, 53 COLO. L. REV. 117, 136 (1981) (positing that Framers of Fifth Amendment due process clause only thought of “life, liberty, and property” in “the sense a criminal trial typically puts those values at risk.”).

what change? We know closing arguments can change juror's opinions. That is an important start. What else do we know?

Plainly, as interesting as all the current notions on opinion change -- primacy, recency, inoculation, asymmetrical rebound effect, anti-primacy -- none really lead to a clear answer. They give us some useful general principles, but nothing so specifically attuned to the nuance of trial that they can guide us in this inquiry. Rhetoric offers us more. Within this field exists a world of rebuttal techniques, fair and unfair, logical and logically fallacious, which are available in the arsenal of the advocate in rebuttal, and which can even be strategically conjoined with the prosecutor's initial closing. Cognitive psychology also provides useful insights. From this last position in argument, the prosecution has some opportunity to effect the final narrative or story the jurors will rely upon to reach their final decision.

This chance for the last words, words to which the defense attorney can not respond, would thus seem to have the capacity of altering juror opinions between a verdict of guilty and not guilty, in at least some cases. That is enough for me. Permitting a citizen's fate to possibly be determined by the order of arguments is not a risk our legal system should willingly take, particularly not with its unwavering, though at times more or less diluted, ideological commitment to the protection of the innocent. Whether one sees that giving the rebuttal to the prosecution affords an advantage to the State or that it denies an advantage that should be given the defense is of no matter to me. Either way it comes out the same. The prosecution should not get rebuttal. What to do about it?

I would not reverse arguments, giving the defense first and last. After all, the prosecution does have the burden, and the first position reflects that. I would just end with the defense closing. Simple. Two arguments. No prosecution rebuttal, and the citizen whose liberty, and perhaps life, is at stake gets the last word. That is my unbiased opinion.