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Order of Presentation as a Factor in Jury Persuasion

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Order of Presentation As A Factor In Jury Persuasion

By ROBERT G. LAWSON*

INTRODUCTION

*Where the advocates of both sides of a controversial issue seek to present their views as forcefully as possible, is there any advantage to either advocate as a consequence of the order in which the two communications are presented?*¹ An effort to provide a scientifically reliable answer to this question was first made nearly fifty years ago in a psychology laboratory.² In this initial study, two communications of equal length and of equal persuasive quality were prepared for each of three controversial issues: (a) "Should all men have equal political rights?"; (b) "Is the protective tariff a wise policy for the United States?"; and, (c) "will monogamous marriage continue to be the only socially accepted relation between the sexes?" The content of one of the two communications on each of these issues advocated a strong affirmative position, the content of the other an equally strong negative position. For each issue, the individuals who were to hear the opposing communications and then express their opinions were divided into two groups. To one of the groups the communications were presented in an affirmative-negative sequence; to the other, the order of presentation was reversed.³ Audience opinion was measured before and after the communications were presented. Since the two communications on each issue were equally persuasive in content, and

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¹ Order of presentation, as developed in psychological studies of thought and judgment, refers to at least two different problems. First of all, it refers to the problem of whether an argument is more effective with the strong points preceding the weak points or with a reverse order. Secondly, it refers to the problem of whether the first of two opposing communications is more effective than the second, or vice versa. It is this latter problem that constitutes the subject of this article.

² See Lund, *The Psychology of Belief*, 20 J. ABNORM. & SOC. PSYCHOL. 174, 183-91 (1925).

³ These two controls, division of the audience and reversal of the order of presentation, were used as an additional precaution against the influence of possible differences in persuasive quality of the opposing communications.

should have counterbalanced each other, these measurements should have shown no change in audience opinion, unless order of presentation is a significant factor in persuasion.

Under the conditions of this experiment, the communication received first by the audience, whether affirmative or negative, was more effective in changing opinion than the communication received second. For example, it was discovered that the individuals receiving the "political rights" communications in an *affirmative-negative* order shifted their original attitude on that issue toward the position advocated by the *affirmative* communication. And the individuals receiving those same communications in a *negative-affirmative* order shifted their original attitude toward the position advocated by the *negative* communication. The manner in which this occurred can best be explained by use of the following diagrams:

In Figure 1 and 2 an assumption is made that the audience used in this experiment, prior to receipt of either communication, had no opinion on the issue (designated on the diagrams as "neutral opinion"). When the first communication was presented, there was a strong shift in original opinion toward the position advocated by that communication. This shift is represented in each diagram by the "dark" block. But when the second communication was presented, there was a shift back toward the original opinion, this

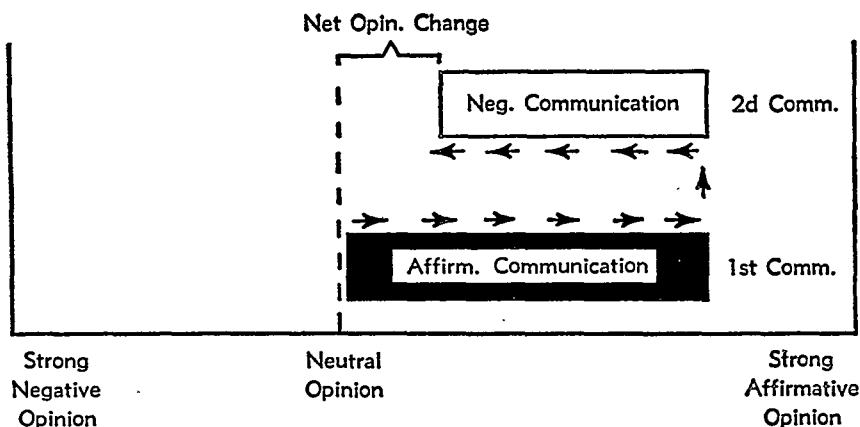


FIGURE 1: Diagram showing the Unbalanced Effect of the Affirmative Communication when the Two Communications were Presented in an Affirmative-Negative Order.

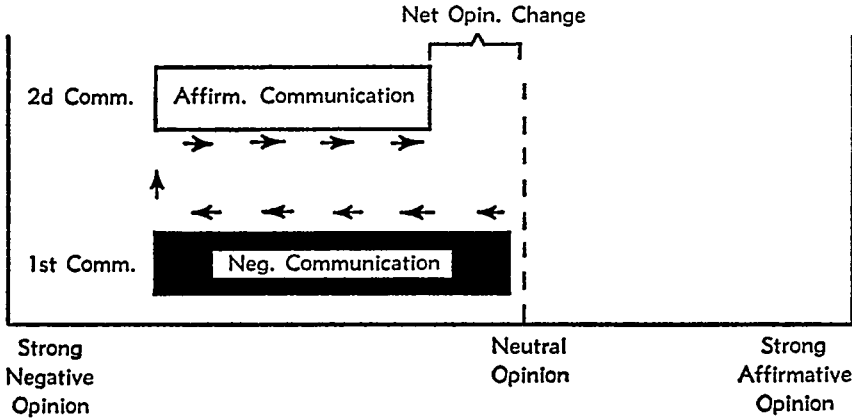


FIGURE 2: Diagram showing the Unbalanced Effect of the Negative Communication when the Two Communications were Presented in a Negative-Affirmative Order.

shift being represented by the “light” block. Without regard to whether the first communication was negative or affirmative, the second communication did not succeed in shifting audience opinion all the way back to its original position. Thus, there was a “net opinion change” in favor of the position advocated by the first communication.

From this early experiment evolved the communications concept that is the subject of discussion in this article. Known as the “law of primacy in persuasion,”⁴ it has been formulated as follows: *The side of a controversial issue having the advantage of first position in the order of presentation is more effective in changing opinion than the side presented last, all other factors being equal.* In the formulation of this “law,” reference was made to its practical importance to the administration of justice:

Our form of jury trial, just as our procedure in debates, assumes that both sides are given an equal opportunity. But the existence of such equality is based on logical considerations, and assumes that logical factors will control the decision of the judges or jurymen as the case might be. But our beliefs are rarely if ever fashioned through such dispassionate weighing of pros and cons. While the lawyer of the plaintiff is reviewing his case and making his appeal, the belief of the

⁴ Lund, *supra* note 2, at 189.

jurors is already in the process of formation, and they are not to be dissuaded from their position by an equal amount of evidence or persuasive appeal on the part of the defendant's lawyer, according to the law of primacy, which appears as an indubitable factor in persuasion.⁵

Recently, concern has been expressed as to the significance of "primacy" to the judicial process in criminal cases:

In the presentation of court cases it is generally the rule that the prosecution presents its case and the defense follows. If the law of primacy is operative, we would find a constant bias in favor of the prosecution's position, since it always has the advantage of first position.⁶

These expressions of concern, both made by psychologists, imply that order of presentation has never been considered an important factor in the judicial process. In this respect, both statements are misleading. For many years, the law has recognized the possibility that an advantage may be derived from the sequence in which communications are presented to a jury.⁷ The problem is that the law's conception of "order effects" has been antithetical to the "law of primacy." In regulating the order of trial proceedings, lawmakers have always assumed that the last communication to a decision maker is more effective than the first,⁸ an "order effect" known to psychologists as "recency."⁹ While difficult to ascertain, there are apparently two reasons for this assumption. First, the content of a final communication is thought to be more irrefutable than a preceding one, since the first advocate is silenced once his communication has been presented.¹⁰ (This overlooks the possibility that prospective refutation may be just as effective as retrospective refutation.¹¹) Secondly, the last of two opposing com-

⁵ *Id.* at 191.

⁶ Hovland, *Introduction*, in *THE ORDER OF PRESENTATION IN PERSUASION* 1 (Hovland ed. 1957).

⁷ See, e.g., R. KEETON, *TRIAL TACTICS AND METHODS* 264 (1954); W. LORRY, *A CIVIL ACTION: THE TRIAL* 126 (1955); S. WEISS, *HOW TO TRY A CASE* 173-74 (1930).

⁸ See, e.g., I. GOLDSTEIN, *TRIAL TECHNIQUE* 631 (1935); L. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 447 (1947); E. PUTTKAMMER, *ADMINISTRATION OF CRIMINAL LAW* 198 (1953).

⁹ See, e.g., Lana, *Three Theoretical Interpretations of Order Effects in Persuasive Communications*, 61 *PSYCHOL. BULL.* 314 (1964); Schultz, *Primacy-Recency Within a Sensory Variation Framework*, 13 *PSYCHOL. REC.* 129 (1963).

¹⁰ See I. GOLDSTEIN, *supra* note 8, at 629; S. WEISS, *supra* note 7.

¹¹ See McGuire, *Persistence of the Resistance to Persuasion Induced by Various Types of Prior Belief Defenses*, 64 *J. OF ABNORM. & SOC. PSYCHOL.* 241 (1962).

munications is thought to derive an advantage from the opportunity to leave a final impression upon the jury prior to deliberation.¹² This idea assumes that a juror's judgment is a net result of all his past experiences, with the most recent experiences making a heavier contribution.¹³ With these reasons as a foundation, "recency" effects have been assumed to exist, and trial proceedings were regulated accordingly.

Thus, if "primacy" does, in fact, constitute a factor in courtroom persuasion, its significance to the judicial process is considerably greater than indicated in the above quotations. Whether it constitutes such a factor, however, is not nearly as decisive as indicated. Recent experimentation has revealed that "primacy" is not "an indubitable factor in persuasion," but occurs only under certain conditions.¹⁴ In this article, an effort has been made to evaluate the experimentation conducted in this area of communications research, and to determine if the conditions of the courtroom are such that order of presentation could be expected to influence the judgment of decision makers. This effort begins with a discussion of the theoretical explanations of "primacy" efforts. Why is it that the first of two equal, persuasive communications, under most conditions is more effective in persuasion than the second?

¹² See R. KEETON, *supra* note 7.

¹³ In Miller & Campbell, *Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements*, 59 J. ABNORM. & SOC. PSYCHOL. 1 (1959), it is stated:

Our judgments, our responses, our social perceptions, are a function of some net resultant of the past experiences both recent and remote. To the net resultant of the moment not all past experiences contribute equally: the casual experiences of this morning weigh more heavily than the comparably casual experiences of any single morning one year ago, one month ago, or even yesterday, all other things being equal. Were it not so, unlearning and new learning could hardly take place. But the advantage that this morning's experience now has will dissipate rapidly. By next month, its advantage over yesterday's contribution will be scarcely noticeable. . . .

Recent experimentation has indicated that the advantage which the more recent experience has over the remote experience depends upon the time interval between the two experiences. If the time interval is great, the advantage would be great; if the time interval is slight, the advantage would be slight. See Schultz, *Time, Awareness and Order of Presentation in Opinion Change*, 47 J. APPL. PSYCHOL. 280 (1963). In the courtroom, since the persuasive communications are close in point of time, it is doubtful that "final impression" has a substantial advantage.

¹⁴ See, e.g., Cromwell, *The Relative Effect on Audience Attitude of the First Versus the Second Argumentative Speech of a Series*, 17 SPEECH MONOGR. 105

(Continued on next page)

I. THEORETICAL INTERPRETATION OF THE LAW OF PRIMACY

For the purpose of providing a theoretical framework within which to explain "primacy" effects, it is useful to discuss briefly the types of psychological processes involved in successful persuasion. Generally, these processes have been categorized into three aspects of audience responsiveness to verbal communications. The first is audience *attention*.¹⁵ In most persuasive situations, like that of the courtroom, the effectiveness of a communication depends initially upon the extent to which it can arouse attention to its verbal content. Variations in alertness and interest on the part of an audience, and nothing more, may determine which of two communications on an issue will be more effective. After attention has been aroused, a successful communication must cause the audience to understand and assimilate its ideas and conclusions. To do this, that communication must succeed in conveying to the recipients its essential points in such a way as to "be correctly grasped and retained."¹⁶ To the psychologist, this aspect of audience responsiveness is known as comprehension, and it includes "concept formation and the perceptual processes that determine the meaning the message will have for the respondent."¹⁷ The combined operation of these two responses (attention and comprehension) determines the degree to which the content of a communication will be learned.¹⁸ Moreover, the capacity of that communication to procure a momentary acceptance of its contents and to create resistance to pressure from an opposing communication is dependent, in part, upon the extent of that learning. Its capacity to achieve these two objectives is also dependent upon a third type of audience response, most commonly referred to as *acceptance*. This concept includes all the expectations related to an audience's motivation to accept or reject the conclusions offered by the advocates.¹⁹ Quite frequently, these expectations are totally unrelated to the content of the communications. For example, an audience's

(Footnote continued from preceding page)

(1950); Hovland & Mandell, *Is There a "Law of Primacy in Persuasion"?*, in *THE ORDER OF PRESENTATION IN PERSUASION* 13 (Hovland ed. 1957).

¹⁵ See C. HOVLAND, I. JANIS & H. KELLEY, *COMMUNICATION AND PERSUASION* 290 (1953) [Hereinafter cited as HOVLAND, JANIS & KELLEY].

¹⁶ *Id.*

¹⁷ Janis & Hovland, *An Overview of Persuasibility Research*, in *PERSONALITY AND PERSUASIBILITY* 5 (Hovland & Janis eds. 1959).

¹⁸ *Id.*

¹⁹ See HOVLAND & KELLEY 292.

expectation of being partially advised or manipulated by a communicator has nothing to do with the persuasive content of a communication, but unquestionably it constitutes a determinant of the communication's influence.²⁰ Every audience possesses a multitude of such expectations which, together with the *attention* and *comprehension* responses, are responsible for differences in effectiveness of opposing communications. Thus, any difference in the effectiveness of two communications resulting from the order in which they are presented must be interpreted in terms of these three aspects of audience responsiveness.

One of the more recent, and perhaps more widely recognized, interpretations of "primacy" is based upon the *attention* response. It is known as the "sensory-variation" interpretation,²¹ and can be explained adequately only after first stating the manner in which attention to any type of sensory stimulation is controlled. Consider the situation where a child is confronted for the first time with an opportunity to learn and write a letter of the alphabet. As the teacher displays this letter and explains the proper way to write it, impulses (auditory and visual) from these stimuli are transmitted by the sensory nerves to the central nervous system.²² Upon arrival at the nerve center, these impulses serve to produce "both specific and non-specific effects on [the child's] behavioral organization."²³ The specific effects consist of the child's overt efforts to write the letter displayed by the teacher. The non-specific effects consist of alertness to and arousal of interest in the external stimuli. Production of the non-specific effects is essential to the maintenance of attention and to the performance of the overt task. However, if the teacher displays the same letter and presents the same explanation repeatedly, the child rather quickly loses interest and begins to focus, at least partially, on some other aspect of his environment. This loss of attention occurs because the sensory impulses from the external stimuli lose their non-specific

²⁰ See Schultz, *supra* note 13. See generally Hovland & Weiss, *The Influence of Source Credibility on Communication Effectiveness*, 15 PUBL. OPIN. QUART. 635 (1951).

²¹ Schultz, *Primacy-Recency Within a Sensory Variation Framework*, 13 PSYCHOL. REC. 129 (1963).

²² See Hebb, *Drives and the CNS (Conceptual Nervous System)*, 62 PSYCHOL. REV. 243 (1955); Malmo, *Activation: A Neuropsychological Dimension*, 66 PSYCHOL. REV. 367 (1959); Samuels, *Reticular Mechanisms and Behavior*, 56 PSYCHOL. BULL. 1 (1959).

²³ Schultz, *supra* note 21, at 130.

effect.²⁴ Simply stated, human beings are incapable of giving sustained attention to any type of stimulus for an indefinite period of time. Instead, they are disposed to seek a stimulation which is different from that to which they have been previously exposed. If this variation of stimulation does not exist, adaptation to the external stimuli develops and alertness declines. As a result, attention is no longer focused on the stimuli, learning decreases, and "we would expect performance, i.e., overt response to the continuing stimuli, to deteriorate."²⁵

The manner in which this psychological process is used to account for "primacy" is as follows. The first of two successive, persuasive communications, being the initial exposure of the audience to the topic, is perceived by members of that audience as a novel stimulus. This leads to a high level of attention and assures maximum learning of the content of that communication. When the second communication is presented, it is perceived as something less than a novel stimulus and provides little variation in the stimulation level. This is especially true if the first communicator has incorporated into his communication refutative arguments which anticipate with some precision the position to be taken on the issue by the second communicator. But, with or without the anticipatory refutation, interest in the second communication can be expected to decline, with a resultant degeneration of the respondents' attention level. As a consequence of the difference in attention given the two communications, the audience could be expected to learn the first communication better, to "retain focus on [the] first stimulus and respond accordingly, i.e., in the direction advocated by the first communication, thereby producing a primacy effect."²⁶ This interpretation of the "law of primacy" would seem to be not totally unknown to the practitioners of the "art" of persuasion. Experienced trial lawyers are instinctively aware of the necessity of acquiring and maintaining audience attention to their communications. What may be unknown to them is that their ability to satisfy this necessity is obstructed somewhat by the psychological deficiencies of their respondents.

A second interpretation of the advantage which the first com-

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 132.

munication has over the second is based on a psychological concept known as "set."²⁷ This is an attempt to explain "primacy" in terms of the *comprehension* aspect of audience responsiveness. Its fundamental idea is that the first communication creates a directional tendency in the audience which structures learning of the second communication. The initial communication creates this tendency by serving as a frame of reference within which the second communication is construed. A better understanding of this interpretation can be acquired by reference to one of the early experiments from which the "set" concept was derived.²⁸ The purpose of this experiment was to determine if the order in which information about a person is received influences the impression formed of that person. With this experimental objective, two groups of individuals were presented a series of words describing a fictitious person. Both groups were told in advance that after receiving the communication they would be expected to state their impressions of the individual described. The descriptive words were presented to the two groups in the following orders, with a short pause interposed after each word:

GROUP 1: intelligent — industrious — impulsive — critical — stubborn — envious.

GROUP 2: envious — stubborn — critical — impulsive — industrious—intelligent.

The only difference between the communications received by the two groups was the order in which the descriptive words were presented. Yet, the individuals comprising the two groups formed substantially different impressions of the fictitious person. Members of Group 1 reported that he was "an able person who [possessed] certain shortcomings which [did] not . . . overshadow his merits."²⁹ On the basis of the same overall description, but in a different sequence, the members of Group 2 reported that the fictitious person was a "problem, whose abilities [were] hampered

²⁷ See Lana, *supra* note 9; Luchins, *Primacy-Recency in Impression Formation*, in *THE ORDER OF PRESENTATION IN PERSUASION* 33 (Hovland ed. 1957); Luchins, *Definitiveness of Impression and Primacy-Recency in Communications*, 48 J. Soc. PSYCHOL. 275 (1958).

²⁸ See Asch, *Forming Impressions of Personality*, 41 J. ABNORM. & SOC. PSYCHOL. 258 (1946).

²⁹ *Id.* at 270.

by his serious difficulties.”³⁰ As indicated by these impressions, each group was more influenced by the first words of the series than by the last. This result was explained as follows:

The first terms set up in most subjects a direction which then exerts a continuous effect on the latter terms. When the subject hears the first term, a broad uncrystallized but directed impression is born. The next characteristic comes not as a separate item, but is related to the established direction. Quickly the view formed acquires a certain stability so that later characteristics are fitted . . . to the given direction.³¹

Application of the “set” concept to the persuasion situation, *i.e.*, a controversial issue with two opposing communications, is made with the same fundamental idea that originated in this experiment.³² With the presentation of the first communication, an “uncrystallized but directed impression” is formed.³³ As a result of this “directedness,” reaction to the second communication is “in terms of the initial material rather than in terms of different material presented after it.”³⁴ Stated in a slightly more unimaginative way, the first communication is received by members of the audience with more open minds and fewer interfering influences than the second. As a result, the first communication is better learned and exerts a greater influence on opinion. Thus, even if the two communications are equally persuasive in content, they will not be equally effective in persuasion.

As indicated above, both the “sensory-variation” interpretation and the “set” interpretation attribute primacy effects to an advantage that the first communication has of being more readily learned than the second. Two other interpretations have been offered, both of which assume that the contents of the two communications are equally understood and assimilated by the audience. With this assumption, the greater effectiveness of the first communication is attributed to a difference in the degree of *acceptance* of the two communications. In other words, audience motivation to accept or reject the conclusions of the opposing advocates favors the advocate having the advantage of first position.

³⁰ *Id.*

³¹ *Id.* at 271-72.

³² See Luchins, *supra* note 27; Luchins, *Definitiveness of Impression and Primacy-Recency in Communications*, 48 J. SOC. PSYCHOL. 275 (1958).

³³ See Lana, *supra* note 9.

³⁴ *Id.* at 314.

Naturally, this difference in degree of acceptance refers to a difference in motivation attributable not to the content of the communications but rather to the sequence in which they are presented. For purposes of discussion, these two interpretations are entitled *interfering expectation of wrongness* and *commitment and self-consistency*.

As demonstrated by Figures 1 and 2, when opposing communications on a controversial issue are presented, the audience first learns one response (that favorable to the first communicator) and then learns an inconsistent contrary response (that favorable to the second communicator). If these are equally well-learned, the motivation of the respondents to accept or reject one of the responses determines the relative effectiveness of the two communications. One motivational factor that has emerged from empirical studies as especially relevant to decision making situations is the expectation of a decision maker of being wrong. The manner in which this expectation influences the acceptance or rejection of a communication has been described as follows:

Even in the case of the most impressive persuasive communications, *people are apt to display at least some minimal degree of resistance if they anticipate that the issue is one which cannot be settled in any definite way or that there are grounds for adopting a position different from the one being advocated by the communicator*. Any cue to the fact that the communication deals with a controversial issue would prevent a person from regarding the conclusions as incontrovertible, and would create some degree of hesitancy and caution. (Emphasis added.)³⁵

In the courtroom atmosphere, a "cue" to controversiality is built into the system. From the very outset of a trial, the decision makers are aware of the existence of conflicting viewpoints. This awareness serves to engender expectations of wrongness which serve to motivate the decision makers to exercise caution before accepting the conclusions of the advocates. This type of expectation probably has the greatest significance in criminal litigation. When a criminal trial juror's awareness of controversiality is appended to his awareness that absolute certainty is beyond human reach, the net result is a substantial fear of injustice through the conviction of an in-

³⁵ HOVLAND, JANIS & KELLEY 293.

nocent person. Even without any type of importunity by the trial judge or the advocates, this juror could be expected to proceed with caution in making a judgment that would affect the rights of an accused.

The criminal law, however, has not been satisfied with the safeguards provided by this instinctive tendency to caution. Instead, the decision makers have been provided with an additional interfering expectation of wrongness through an instruction that conviction of an accused is inappropriate unless the prosecution has excluded all reasonable doubt of innocence.³⁶ Efforts to define this standard of measurement have taken many forms, but the most widely used definition has been that adopted by the Supreme Court of the United States.³⁷ It is conveyed to jurors in the following manner: If, after hearing the evidence and arguments, you possess a state of mind which would cause you to *pause and hesitate* before acting if the issue was one involving a serious and important personal affair, then you have reasonable doubt.³⁸ With this instruction, and its innate fears of injustice, a jury is strongly motivated to maintain a position different from that advocated by the state's attorney. Because of this motivation, the communications of defense counsel have a higher degree of acceptability than the communications of the prosecutor. The difference in persuasive potential resulting from this acceptance differential is attributable to the adversary nature of the proceedings and the content of the communications. It is not attributable in any way to order effects.

Our present concern is whether this same type of expectation operates to a litigant's advantage as a consequence of the order in which communications are presented. Various discussions of the "law of primacy" have indicated that it does so operate:

At the time of exposure to a given communication, interfering expectations of potential error would presumably be

³⁶ See generally James, *Burdens of Proof*, 47 VA. L. REV. 51 (1961); McBaine, *Burden of Belief*, 32 CALIF. L. REV. 242 (1944); Reaugh, *Presumptions and the Burden of Proof*, 36 ILL. L. REV. 703 (1942).

³⁷ *Wilson v. United States*, 232 U.S. 563 (1913).

³⁸ See, e.g., *United States v. Wright*, 365 F.2d 135 (7th Cir. 1966); *McGill v. United States*, 348 F.2d 791 (D.C. Cir. 1965); *Scurry v. United States*, 347 F.2d 468 (D.C. Cir. 1965); *United States v. Harris*, 346 F.2d 182 (4th Cir. 1965); *United States v. Heap*, 345 F.2d 170 (2d Cir. 1965); *Jones v. United States*, 338 F.2d 553 (D.C. Cir. 1964).

increased if the recipients had recently been exposed to other communications which had advocated a different position. Even when a highly impressive communication is presented, members of an audience would be more cautious and less likely to adopt the new conclusion if they had previously learned that there are grounds for maintaining a different position. . . . In general, persons who have previously received antithetical information and arguments would be least likely to regard the views suggested by the new communication as incontrovertible and would be most highly motivated to be cautious and critical.³⁹ (Emphasis added.)

Application of this interpretation of "primacy" to the judicial process is relatively simple. In civil litigation, where expectations of wrongness from non-order effects are minimal, the first persuasive communications could be expected to create such an expectation. As a result, jurors would be more critical of the second communication, and would exercise greater caution in evaluating its conclusions. In criminal litigation, where this type of interfering expectation exists without regard to order of presentation, if an accused is afforded the first persuasive communication (as he is in some courts), the motivation of jurors to reject the position of the state would be increased. In both situations, a primacy effect could be expected to result.

A second acceptance factor which has been used to explain the advantage of first position is the psychological tendency of individuals toward *commitment and self-consistency*.⁴⁰ Underlying this explanation of primacy is the idea that after the first communication is presented, the audience forms an opinion on the issue from information then available (the content of that first communication). This opinion constitutes the commitment. The unbalanced effectiveness of the first communication is then attributed to the "tendency of individuals to maintain a position to which they have committed themselves."⁴¹ As a result of this tendency to be consistent, it is theorized that individuals who have formed an initial opinion cannot be dissuaded by an equal amount of persuasive appeal on the other side of the issue.

³⁹ HOVLAND, JANIS & KELLY 294-95. *Accord*, Thomas, Webb & Tweedie, *Effects of Familiarity with a Controversial Issue on Acceptance of Successive Persuasive Communications*, 63 J. ABNORM. & SOC. PSYCHOL. 656 (1961).

⁴⁰ See Lund, *supra* note 2, at 189.

⁴¹ HOVLAND, JANIS & KELLEY 127.

Whether or not these two factors (commitment and self-consistency) could generate primacy in the courtroom is questionable. In the experimental studies from which this interpretation of "primacy" has been derived, the commitment of the audience after the first communication resulted from an open expression of opinion.⁴² A commitment of this kind could be expected to create in most individuals resistance to a counter-communication simply because of their belief that "close daily associates expect [them] to behave in a consistent and reliable manner."⁴³ In the courtroom, where the commitment of jurors prior to receipt of all communications is private, the need to maintain consistency would not seem to be as great. However, it might still be enough to create a primacy effect:

[T]he consistency principle as determined by open commitment is not the only or perhaps even the primary factor. . . . *A belief may gain a personal connotation though it has never been expressed.* To have formed an opinion and inwardly to have yielded to its persuasive influence is sufficient to make it seem *ours* and something to which we owe our allegiance.⁴⁴ (Emphasis added.)

As indicated by this statement, the tendency of individuals to be consistent is believed to exist even with a private commitment. A recent experiment, however, has indicated that this tendency is not strong, and probably does not constitute a significant factor in persuasion.⁴⁵ In this experimentation, two groups of subjects were presented opposing communications on a controversial issue. Members of one group were required to express only one opinion on the issue, that after both communications had been presented. Members of the other group were required to express two opinions, one after receiving the first communication, the other after receiving both communications. To assure that the commitment of

⁴² Lund, *supra* note 2; Hovland, Campbell & Brock, *The Effects of "Commitment" on Opinion Change Following Communication*, in *THE ORDER OF PRESENTATION IN PERSUASION* 23 (Hovland ed. 1957). But see Bennett, *Discussion, Decision, Commitment, and Consensus in "Group Decision,"* 8 *HUM. REL.* 251 (1955).

⁴³ Hovland, Campbell & Brock, *supra* note 42, at 32.

⁴⁴ Lund, *supra* note 2, at 190.

⁴⁵ Hovland & Mandell, *supra* note 14; Deutsch & Gerard, *A Study of Normative and Informational Social Influences Upon Individual Judgment*, 51 *J. ABNORM. & SOC. PSYCHOL.* 629 (1955).

the second group of subjects would be private, the opinion which they expressed after the first communication was anonymous. Under the conditions of this experiment, commitment was found to have an indecisive effect on audience persuasion. The group required to make a commitment was influenced as much by the second communication as was the control group. It appears unlikely, therefore, that "merely expressing one's opinion privately . . . will significantly influence one's subsequent position on the issue."⁴⁶

This inquiry into the theoretical interpretations of "primacy" was designed to answer the following question: Is the persuasive situation of the courtroom such that order of presentation is a significant determinant of persuasion? Some contribution toward an answer to this question has been made. With the possible exception of "commitment and self-consistency," any one or more of the psychological factors used in the foregoing interpretations *could* serve to generate primacy effects in courtroom communications. For example, the first persuasive communication might possibly have an advantage of being more fully attended to, or of being received by the jury with less interference. Or, the perception of the first communication by the jury might possibly serve to structure interpretation of the second communication. Should any of these things occur, one of the litigants would have an advantage totally unrelated to the merits of his case. However, an unequivocal assertion, based solely on the theoretical interpretations of "primacy," that such an advantage now exists in jury trials, would be subject to valid criticism. All theories used to account for primacy effects have been derived from studies conducted under the artificial and controlled conditions of psychology laboratories, which are decidedly different from the naturalistic conditions of the courtroom. Consequently, application of these theories to the persuasive communications of jury trials is made more difficult. For this reason, a more decisive and perhaps more reliable analysis of the importance of "order effects" to the judicial process can be achieved by a careful comparison of the conditions of the primacy-recency experiments with the conditions under which communications are presented to juries.

⁴⁶ Hovland & Mandell, *supra* note 14, at 21.

II. APPLICATION OF PRIMACY-RECENCY STUDIES TO COURTROOM COMMUNICATIONS

A. Experimentally Induced Primacy Experiments

Since the "law of primacy" was first postulated, and particularly in recent years, a great deal of experimentation has been conducted in an effort to determine the extent to which primacy effects operate in persuasion. Much of this experimentation, in design, has been similar to the experiment from which the "law" was derived. Generally, two communications on opposite sides of a controversial issue have been used. In every instance, an effort has been made to see that these communications have been equal in persuasive content. However, as an additional control against hidden differences in persuasiveness, the opposing communications have always been presented to one audience in a pro-con order and then to a second audience in a con-pro order. With this type of experimental design, it has been possible to measure the extent to which the relative effectiveness of two communications is dependent upon the order in which they are presented.

For purposes of analysis, psychologists have grouped the primacy-recency experiments into two categories, the "experimentally induced primacy" studies and the "true primacy" studies.⁴⁷ This categorization is based on methodological differences in the experiments, differences made apparent by the following discussion, beginning with the "experimentally induced primacy" studies. The characteristic of these studies that is most significant to a discussion of "primacy" in the courtroom becomes apparent upon examination of their subject matter. In addition to the topics used in the original primacy study ("should all men have equal political rights?"; "Is the protective tariff a wise policy for the United States?"; "Will monogamous marriage continue to be the only socially accepted relation between the sexes?"), the "experimentally induced studies" have involved subjects such as the following: "Antihistamines should be sold without a prescription?";⁴⁸ "An atomic submarine is feasible at the present time?";⁴⁹ "The reduction of the legal voting age to 18 years—the current draft

⁴⁷ Lana, *supra* note 9; Schultz, *supra* note 9.

⁴⁸ Hovland & Mandell, *supra* note 14.

⁴⁹ *Id.*

age.”;⁵⁰ “The federal government should provide medical care available to all people.”;⁵¹ “The federal government should require arbitration of labor disputes.”⁵² With such topics, it is highly probable that the individuals who received the persuasive communications had been exposed to pre-experiment communications on the issues involved and, in all likelihood, had formulated some opinion on those issues.

As indicated in the first part of this article, primacy effects are dependent in some way upon the first communication creating a “first impression.” And whether “sensory-variation,” “set,” “interfering expectation of wrongness,” or “commitment” theory be used to account for primacy, pre-experiment exposure and opinion on the issue would tend to offset the advantage which emanates from that “first impression.” Whether it would be totally offset would depend upon the amount of prior exposure and the flexibility of the prior opinion. If prior exposure has been substantial enough to create a relatively fixed opinion, the first communication would have no chance to create a “first impression.” On the other hand, if prior exposure has been only slight and the prior opinion flexible, the first communication would still be expected to have some advantage over the second. These conclusions are bolstered by the findings of the experimentally induced studies. In some situations, primacy effects were found to exist;⁵³ in others, recency effects resulted.⁵⁴ Only rarely were order effects found to be non-existent.⁵⁵

⁵⁰ Hovland, Campbell & Brock, *supra* note 42.

⁵¹ Cromwell, *supra* note 14.

⁵² *Id.*

⁵³ E.g., Knowler, *Experimental Studies of Changes in Attitude*, 30 J. ABNORM. & SOC. PSYCHOL. 522 (1936); Lund, *supra* note 2.

⁵⁴ Cromwell, *supra* note 14; Hovland & Mandell, *supra* note 14.

⁵⁵ Some of the experiments that have been categorized under the “experimentally induced primacy” label were the earliest attempts to investigate the significance of order effects in persuasion. Because of this, and because there was an unknown number of variables in the experiments totally independent of order of presentation, the investigations did not yield a consistent pattern of results. Some of the later experiments investigated order effects in conjunction with other independent variables. See, e.g., the studies reported in Lana, *Controversy of the Topic and the Order of Presentation of Persuasive Communications*, 12 PSYCHOL. REP. 163 (1963); Lana, *Interest, Media and Order Effects in Persuasive Communications*, 56 J. PSYCHOL. 9 (1963); Lana & Rosnow, *Subject Awareness and Order Effects in Persuasive Communications*, 12 PSYCHOL. REP. 523 (1963); Schultz, *supra* note 13. With these later studies, results emerged which were capable of theoretical interpretation. On the basis of these later studies, it is possible to attribute the inconsistent results of the “experimentally induced studies” to the difficulty of measuring and controlling audience exposure to the subject matter used in the experiments.

Although the conditions under which these studies have been conducted have some similarity to the conditions under which persuasive communications are presented in a courtroom, that similarity is overshadowed by a very important dissimilarity. In the process of selecting the decision makers in a jury trial, the court seeks to eliminate all individuals with any knowledge of the disputed incident. No person having an opinion on the issue would ever knowingly be permitted to serve as a juror.⁵⁶ But, as stated, these factors—prior knowledge and prior opinion—are prominent features of the “experimentally induced studies.” The importance of this distinguishing characteristic has been acknowledged by several psychologists:

In most of the experiments herein reported, [referring to experimentally induced primacy experiments] . . . it is probable that some prior knowledge existed on the topic under discussion. As we have seen, under these conditions a law of primacy does not seem to be a valid principle. *But it may be that when no prior knowledge of the topic is involved, a law of primacy does operate.* . . . “Propositions upon which one has already had ample opportunity to form an opinion should be much less subject to persuasive influence.”⁵⁷ (Emphasis added.)

Because of the existence of prior opinion on the issues involved, the “experimentally induced primacy” studies offer little help in determining whether order of presentation influences jurors’ decisions. Nevertheless, the studies are still important to the present discussion for two reasons. First, they serve to demonstrate that order of presentation is a factor in persuasion. Secondly, they verify that the “law of primacy” is not a principle of universal application, but, instead, is applicable only to certain communicative conditions.

B. True Primacy Experiments

A more positive prediction as to the influence of order effects on judicial decision-making can be made by analyzing results of experiments which have controlled pre-experiment exposure to the subject matter of the persuasive communications. The “true

⁵⁶ See Lorry, *supra* note 7, at 24.

⁵⁷ Hovland, *Summary and Implications*, in *THE ORDER OF PRESENTATION IN PERSUASION*, 129 (Hovland ed. 1957). *Accord*, Thomas, Webb & Tweedie, *supra* note 39.

primacy" studies have achieved this control. The experimentation grouped under this category supports the hypothesis that a law of primacy may operate where the issue being debated is one upon which the audience has received no prior exposure. Typical of these studies are those involving impression formation.⁵⁸ The conditions under which these experiments have been conducted are much like those of the "experimentally induced primacy" studies, except for a difference in subject matter. Generally, the experimenter has prepared two different blocks of information about a fictitious individual. One block has described the individual as having an introverted personality, while the other block described his personality as extroverted. Following is an example of the type of information used:

Extroverted Block: Jim left the house to get some stationery. He walked out into the sun-filled street with two of his friends, basking in the sun as he walked. Jim entered the stationery store which was full of people. Jim talked with an acquaintance while he waited for the clerk to catch his eye. On his way out, he stopped to chat with a school friend who was just coming into the store. Leaving the store, he walked toward school. On his way out he met the girl to whom he had been introduced the night before. They talked for a short while, and then Jim left for school.

Introverted Block: After school Jim left the classroom alone. Leaving the school, he started on his long walk home. The street was brilliantly filled with sunshine. Jim walked down the street on the shady side. Coming down the street toward him, he saw the pretty girl whom he had met on the previous evening. Jim crossed the street and entered a candy store. The store was crowded with students, and he noticed a few familiar faces. Jim waited quietly until the counterman caught his eye and then gave his order. Taking his drink, he sat down at a side table. When he had finished his drink he went home.⁵⁹

Usually two audiences have been used in each experiment, with one of the two receiving the above information in an introverted-extroverted order and the other receiving it in a reverse order.

⁵⁸ See Asch, *supra* note 28; Anderson & Barrios, *Primacy Effects in Personality Impression Formation*, 63 J. ABNORM. & SOC. PSYCHOL. 346 (1961); Luchins, *Primacy-Recency in Impression Formation*, in *THE ORDER OF PRESENTATION IN PERSUASION* 33 (Hovland ed. 1957).

⁵⁹ Luchins, *Definitiveness of Impression and Primacy-Recency in Communications*, 48 J. SOC. PSYCHOL. 275, 276-77 (1958).

Lack of pre-experiment familiarity with the subject matter and lack of pre-experiment opinion have been assured by use of a fictitious character.

The results of these experiments clearly "suggest that the nearer one comes to achieving primacy in the sense of the first presentation of unfamiliar material, the more apt one is to obtain primacy effects."⁶⁰ In every instance, the first information received by the audience was more influential in the formation of impressions of the fictitious person. To the groups receiving the communications in an introvertive-extrovertive order, the fictitious individual was an introvert. To the groups receiving the very same information in an extrovertive-introvertive order, he was an extrovert. Under the conditions of these experiments, it was impossible to attribute this difference of impressions to anything except the order in which the information was presented.

The conditions of the "true primacy" studies are unquestionably more like those of the courtroom than are the conditions of the experimentally induced primacy studies. The most important similarity, of course, is the absence of pre-existing opinion on the issue to be decided. Only with this condition does the first communication have an opportunity to create that "first impression." There are, however, some important distinctions. For example, although the audiences used in the impression-formation experiments received two separate communications about the fictitious individual, they were not aware of the separation. (Both blocks of information were presented by the same communicator.) Nor were they aware that the questions which they were deciding were "controversial." Had these factors been known, as they are in jury trials, it is possible that the first communications would not have had the unbalanced influence. Perhaps an even more important distinction between the true primacy studies and jury trials is the relative amounts of information which the two audiences (the experiment audience and the jury) have at the time the communications are presented. An appreciation of this distinction can best be acquired by considering the order of proceedings used in most jury cases.

After the jury has been selected, each of the litigants is per-

⁶⁰ Hovland, *supra* note 57, at 139.

mitted, through counsel, to communicate to the jury a generalized characterization of the factual incident involved in the controversy. The party instituting the action (the plaintiff or the prosecution) has the first communication.⁶¹ These initial communications are known as *opening statements*, and generally consist of a preview of the evidence which the litigants intend to present through witnesses.⁶² It is significant, in so far as order effects are concerned, that an effort is made by the trial judge to limit the content of these communications to purely factual information. Neither of the litigants may attempt to persuade the jury to accept his characterization of the incident.⁶³

After the opening statements have been made, the parties begin the process of presenting evidence through the testimony of witnesses. As with the opening statements, the party initiating the action has the right to present his witnesses first. However, any advantage which he might have as a result of getting his view to the jury first is offset, at least partially, by the opposing party's right of cross-examination. This right provides an opportunity to cross-examine each witness immediately after that witness has testified on direct examination. The scope of this right is controlled by the law of the jurisdiction in which the case is being tried.⁶⁴ Some jurisdictions attempt to limit cross-examination to matters which were testified to on direct;⁶⁵ others place no limitation on the right, except that the testimony elicited, like that

⁶¹ It is possible in some cases for the defendant to delay the presentation of his opening statement until the other side has presented its evidence. This is regarded, however, as extremely dangerous strategy and probably occurs very infrequently. See generally L. STRYKER, *THE ART OF ADVOCACY* 47-48 (1954).

⁶² See W. FRYER & H. ORENTLICHER, *CASES ON LEGAL METHOD AND LEGAL SYSTEM* 188 (1967); 4 S. SCHWEITZER, *CYCLOPEDIA OF TRIAL PRACTICE* 2032 (1954). See also F. BUSCH, *LAW AND TACTICS IN JURY TRIALS* 319 (1949), where it is stated:

The purpose of an opening statement, as declared by the American courts, is to inform the jury of the facts relied upon to establish the asserted charge, right of action or defense; to apprise it of the nature of the questions involved; and to enable it at the outset of the case to understand in a general way what the claim is in the case about to be tried.

⁶³ F. BUSCH, *supra* note 62; E. LOW, *HOW TO PREPARE AND TRY A NEGLIGENCE CASE* 122 (1957); L. STRYKER, *supra* note 61, at 52.

⁶⁴ M. LADD, *CASES ON THE LAW OF EVIDENCE* 73 (1955); C. MCCORMICK, *LAW OF EVIDENCE* 43 (1954).

⁶⁵ E.g., *State v. Guilfoyle*, 109 Conn. 125, 145 A. 761 (1929); *Wheeler & Wilson Mfg. Co. v. Barrett*, 172 Ill. 610, 50 N.E. 325 (1898); *McNeely v. Conlon*, 216 Iowa 796, 248 N.W. 17 (1933); *State v. Bagley*, 339 Mo. 215, 96 S.W.2d 331 (1936); *Nadeau v. Texas Co.*, 104 Mont. 558, 69 P.2d 586 (1937).

introduced on direct, must be relevant to some issue in the case.⁶⁶ Still others take a middle course, permitting cross-examination on any matter that is relevant to the issues, except those facts relating only to the affirmative case of the cross-examiner.⁶⁷ Under any of these rules, and especially that which permits cross-examination on any relevant matter, the party conducting the cross-examination may well have the opportunity to present his version of an event before the party who is then introducing his evidence in chief. Because of this order of presentation, *i.e.*, direct and cross-examination of each witness as called, it is doubtful that either party has a substantial advantage of position. Moreover, even if such an advantage does exist, its effect is severely restricted by the limitation imposed by courts upon the content of these communications. Once again, courts carefully and consciously attempt to confine the information received by the jury at this stage of the proceedings to purely factual data; neither side is permitted in any manner to engage in persuasive communications.

After both litigants have presented all of their factual information, each side is provided with at least one final communication to the jury. These are the *closing arguments*, and they are vastly different from any prior communications received by the jury. No longer are the communications factual and informative. Instead, they are argumentative and persuasive since the advocates are permitted to draw all "reasonable inferences" from the facts and present their views as forcefully as possible in an effort to persuade the jury to accept their conclusions.⁶⁸ It is at this stage of the trial, and probably only at this stage, that the order in which communications are presented has significance.

The dissimilarity between courtroom conditions and the conditions of the true primacy experiments should now be apparent. At the time the persuasive communications are presented

⁶⁶ *E.g.*, *Carter v. State*, 191 Ala. 3, 67 So. 981 (1915); *Podol v. Jacobs*, 65 Ariz. 50, 173 P.2d 758 (1946); *Ficken v. Atlanta*, 114 Ga. 970, 41 S.E. 58 (1902); *Falmouth v. Windham*, 63 Me. 44 (1873); *State v. Huskins*, 209 N.C. 727, 184 S.E. 480 (1936); *Sands v. Southern Ry.*, 108 Tenn. 1, 64 S.W. 478 (1901).

⁶⁷ *E.g.*, *Detroit Nat'l Bank v. Union Trust Co.*, 145 Mich. 656, 108 N.W. 1092 (1906); *Thompson v. Richards*, 14 Mich. 172 (1866); *Dietsch v. Mayberry*, 70 Ohio App. 527, 47 N.E.2d 404 (1942).

⁶⁸ See generally J. BAER & S. BALICER, *CROSS-EXAMINATION AND SUMMATION* 265 (1948); C. FRICKE, *PLANNING AND TRYING CASES* 554 (1957); 2 W. HYATT, *TREATISES ON THE TRIAL OF CIVIL AND CRIMINAL CASES IN STATE AND FEDERAL COURTS* 1550-51 (1924); E. LOW, *supra* note 63, at 197.

in a jury trial, the audience possesses a substantial amount of factual information about the issue. The audiences used in the true primacy studies had no information prior to the presentation of the communication. And since primacy effects appear to depend to some extent upon first exposure to the issue, this dissimilarity raises an important question. Could the information possessed by jurors at the time of the persuasive communications prevent the first closing argument from making that important "first impression"? Experimentation that is directly applicable to this question is limited. But the two studies that have been made do seem to provide a reliable answer.⁶⁹

One of these studies involved experimental conditions that are strikingly similar to those under which persuasive communications are presented to juries. Its purpose was to determine "the effect of the order of presentation of a pro and con communication on adult subjects who have been differentially familiarized with the topic of the communications."⁷⁰ To make this determination, it was necessary to select a subject matter with which the audience had had no prior exposure. Vivisection of animals for research purposes was selected. Pre-experiment testing established that the "subjects used in [the] experiment knew very little about the topic . . . and hence probably had formed, at most, only mild opinions about the matter."⁷¹ With the selection of this topic, the experiment was designed as follows: Two communications of equal persuasiveness were prepared. One strongly advocated approval of the practice of vivisection; the other strongly advocated disapproval of the practice. The audience that was to receive the opposing communications was divided into three groups. Prior to the presentation of the persuasive communications, each group was provided with a different amount of factual information about vivisection. Group 1 was given an informational standardized lecture of slightly more than two hundred words in length. This was followed by a discussion about vivisection which lasted several minutes. No direct positive or negative statements about the practice of vivisection were made in the lecture or during the

⁶⁹ See Lana, *Familiarity and the Order of Presentation in Persuasion*, 62 J. ABNORM. & SOC. PSYCHOL. 573 (1961); Rosnow, *Opinion Change and Order of Presentation in Experimentally Manipulated Anxiety and in Natural Familiarity with a Topic* (1962) (Unpublished doctoral dissertation, American University).

⁷⁰ Lana, *supra* note 69.

⁷¹ *Id.* at 575.

discussion. Group 2 was given a similar lecture with only about one-half as much information as was given the first group. There was no discussion by this group and, as before, no affirmative or negative statements on the issue were provided. Group 3 was given no information about the subject matter. Each group was then divided into two subgroups. One of the two subgroups of each group was presented the pro communication first, followed by the con communication. The other subgroup received the communications in reverse order. Immediately after the presentation of the last communications, the individuals comprising the groups were asked to express approval or disapproval of vivisection.

The influence of order effects on the response of Group 1 is most relevant to the present discussion. The conditions under which the opposing communications were presented to this group closely resemble the conditions under which the jury receives closing arguments. For example, the audience had prior notice of a controversial issue, as well as prior notice that two opposing communications would be presented. There was an absence of pre-experiment opinion on the issue. At the time the persuasive communications were presented, the audience already possessed a substantial amount of factual information about the subject matter, and the contents of the two communications were presented as forcefully as possible. Response to the communications was made by the audience immediately after the last communication. Under these conditions, all of which exist in jury trials at the time of closing arguments, a significant primacy effect was found to exist, leading the experimenter to conclude that "a communication presented first, whether pro or con, is more effective the more familiar the subject is with the topic."⁷² (Familiarity, as used here, refers to informational familiarity, and must be distinguished from pre-experiment opinion.) This conclusion is supported by the results of the experiment. To the subgroup of Group 1, which received the communications in a pro-con order, vivisection was an acceptable practice. To the subgroup of Group 1 which received the same communications in a con-pro order, vivisection was an unacceptable practice. Similar order effects were found to exist in the responses of the Group 2 audience, but to a lesser degree.

⁷² *Id.*

This experiment, along with a similar one that verifies the findings,⁷³ strongly suggests that the "law of primacy" plays a part in judicial decision-making. However, a prediction to this effect, without some degree of uncertainty, is not presently possible. The design for all of the experiments that have been conducted so far varies in many respects from the situation that exists at the time closing arguments are presented to a jury. What is needed for a more certain prediction is a study that more exactly duplicates the conditions existing in a typical jury trial. Absent such a study, analysis must be based upon the research that has been done and the theoretical interpretations derived from that research. On the basis of these two sources of material, however, it is possible to predict with a reasonably high degree of confidence that "primacy effects" do influence the decisions of jurors.

III. COUNTERBALANCING ORDER EFFECTS IN JURY TRIALS

Since "primacy" appears to be a likely factor in courtroom persuasion, the order in which closing arguments are presented to the jury becomes a major consideration. This is not intended to suggest that order of argument has never been considered to be important. Indeed, courts have always regulated trial proceedings in accordance with an assumption that the "last" word to the jury prior to deliberation is the "best" word. The manner in which this assumption controls the order of presentation of closing arguments can be seen from an examination of the rules of procedure outlining that order. In some jurisdictions, an order such as the following is provided for: "The parties may submit or argue the case to the jury. In the argument, the attorney for the Commonwealth shall have the conclusion and the defendant or his attorney the opening."⁷⁴ In civil cases, the rule is stated in much the same manner: "The parties may submit or argue the case to the jury. In the argument, the party having the burden of proof shall have the conclusion and the adverse party the opening."⁷⁵ The reason for this sequence, and the part played in that reason by the above described assumption, can be most appreciated if considered in the framework of a criminal case.

⁷³ Rosnow, *supra* note 69.

⁷⁴ Ky. R. CRIM. P. 9.42(6).

⁷⁵ Ky. R. CIV. P. 43.02(5).

It is basic to the administration of criminal justice that an accused is presumed innocent of the charges. Among other things, this presumption requires that the prosecution bear the responsibility of persuading the jury that the proposition in issue (guilt of the accused) possesses the required degree of probability.⁷⁶ This responsibility is part of the burden of proof concept, defined as "proof beyond a reasonable doubt." With this definition, a very heavy burden of persuasion is imposed upon the prosecution. Having this heavy burden of proof, the prosecution is granted the final communication to the jury prior to their deliberation, the reason for which is reflected in the following statement:

In every state but Minnesota the final word of counsel to the jury is given to the prosecution. This rule is based on the logic of the situation. The party having the burden of proof is granted the final argument. Particularly should this be true in criminal cases in which the state must prove its case beyond a reasonable doubt.⁷⁷

Since "final impression" is conceived to be better than "first impression," the law, in providing the prosecution with the final argument, attempts to offset to some extent the advantage resulting to the defense from the burden of persuasion requirement. In jurisdictions having this order of argument, a similar attempt to equalize persuasive potential is made in civil litigation.⁷⁸ The plaintiff is required to bear the burden of persuasion (defined as a "preponderance of the evidence"), and is granted the right to have the final communication to the jury. In jurisdictions having this order of presentation, the significance of the "law of primacy" is obvious. If primacy effects exist at the closing argument stage, efforts to equalize the persuasive potentiality of the two sides are frustrated, and an unbalanced situation is made even more unbalanced.

At first glance, it might appear that primacy effects could be counterbalanced in jurisdictions having this order of presentation

⁷⁶ See C. McCORMICK, *supra* note 64, at 647. See generally 9 J. WIGMORE, EVIDENCE §§ 2485-98 (3d ed. 1940).

⁷⁷ L. ORFIELD, *supra* note 8.

⁷⁸ In W. LORRY, *supra* note 7, at 126, it is stated:

The attorney having the rebuttal or final presentation has a very favorable position. This advantage is further evidence of the effort to equate the outbalance arising from the requirement of proof by preponderance of the evidence in a case of several years' earlier origin. . . .

simply by reversing the sequence of closing arguments. The plaintiff or prosecution would have the first closing argument and the defendant would have the last. However, "primacy" would not be eliminated by this order, but would simply be offset against the advantage provided the defense through the imposition of the burden of proof. This would be consistent with what these jurisdictions now attempt to do in providing the plaintiff or prosecution with the final argument. But, in providing for this "apparent" advantage, it is doubtful that these jurisdictions realize that order effects are as influential or consistent as scientific studies indicate them to be. Nothing in the rules or the legal literature indicates that the last communication is thought to have as much advantage as the experimental studies have attributed to the first communication. In any event, the decision-making environment would not be substantially improved by reversing the order of presentation of closing arguments to offset "primacy" against the burden of persuasion requirement. Additional support for this conclusion can be acquired from a consideration of the functions intended to be performed by the burden of persuasion requirement.

Fundamental to the operation of the burden of proof concept is the idea "that the opportunity to decide finally upon the evidential material that may be offered does not fall to the jury as a matter of course."⁷⁹ Before a jury may be permitted to pass upon an issue of fact, the trial judge must be persuaded that the evidence presented for judgment is worthy of consideration. The responsibility of so persuading the judge is a part of the burden of proof concept and is commonly referred to as the "burden of going forward with the evidence."⁸⁰ Once this responsibility has been satisfied, a second responsibility embodied in the burden of proof concept comes into operation. It is known as the "risk of non-persuasion,"⁸¹ and serves to impose upon one of the litigants the burden of persuading the jury that the proposition in issue possesses the required degree of probability. It is burden of proof in the sense of a "risk of non-persuasion" that determines which

⁷⁹ 9 J. WIGMORE, *supra* note 76, at § 2487.

⁸⁰ *Id.* See generally James, *supra* note 36; Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953); McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A. L. REV. 13 (1954).

⁸¹ 9 J. WIGMORE, *supra* note 76, § 2485.

of the litigants shall have the right to the final closing argument. But this is merely an incidental function of the burden of proof concept, as used in this second sense. In civil litigation, its principal function is to provide jurors with a rule of law from which to decide the dispute if they find their minds in a state of equipoise after considering the evidence.⁸² It is defined in these cases not as a "very high probability" or even a "high probability" of proof, but simply that the existence of the fact in issue be more probable than its non-existence.⁸³ To transfer the advantage of primacy effects from the defendant to the plaintiff to offset the responsibility imposed by this rule would not improve the decision-making process in the slightest. It would simply take an unfair advantage away from the defendant and give it to the plaintiff.

In criminal litigation, the risk of non-persuasion (defined as proof beyond a reasonable doubt) performs a more important function. It seeks to protect against the conviction of an innocent person by requiring that the prosecution establish guilt by a "very high degree of probability."⁸⁴ To give the advantage of primacy effects to the prosecution by reversing the sequence of argument could serve to penetrate this protection. This would seem to indicate that efforts to counterbalance order effects in jurisdictions having this order of presentation must be directed not toward re-allocation of the advantage of first position, but toward minimizing the impact of first impression. Before discussing the manner in which this might be achieved, it is necessary to briefly direct attention to a second order of presentation of closing arguments.

In a substantial number of jurisdictions, the rules of procedure provide for an order of presentation different from that described above. The following rule is representative of the order used in these jurisdictions:

Unless both parties shall waive argument and agree that the cause be submitted to the jury without argument, the prosecuting attorney shall make the opening argument and the

⁸² See James, *supra* note 36.

⁸³ See Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933); McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944).

⁸⁴ See McBaine, *supra* note 80; McBaine, *supra* note 83.

counsel for defendant shall follow and the prosecuting attorney shall conclude the argument. . . .⁸⁵

By providing the prosecution with both the first and last argument, with the defendant's argument thrust between the two, this rule gives the prosecution an opportunity to make the "first impression" and the "last impression." As a result, the order of presentation which it provides is more unfair to the defendant than the previously described order is to the plaintiff or prosecution. This unfairness can be demonstrated by use of a diagram:

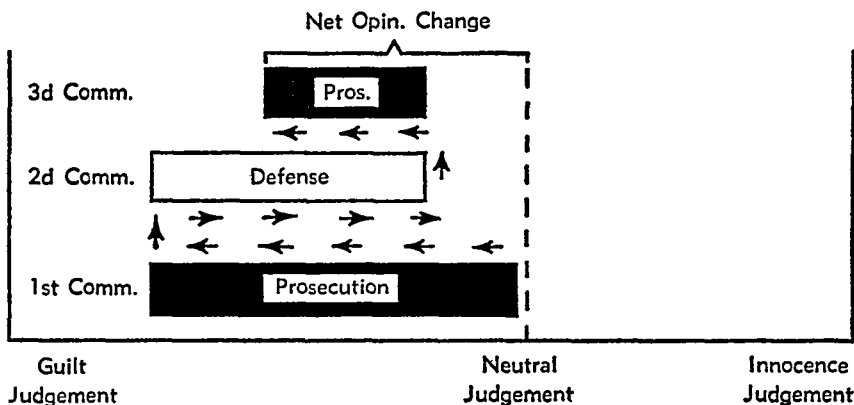


Figure 3: Diagram Showing Order Effects Where Prosecution Is Given Right To Both First and Last Closing Argument.

For purpose of demonstration, two assumptions are made: (a) that the audience has a neutral opinion prior to the presentation of the first communication (represented on the diagram as "neutral judgment"); and, (b) that the content of the defendant's communication is equal in persuasiveness to the combined contents of the prosecution's two communications. Although exaggerated for

⁸⁵ MO. R. CRIM. P. 26.02(7). *Accord, e.g.,* ILL. ANN. STAT. ch. 38, § 115-4 (Smith-Hurd 1964), *as amended*; S.D. CODE OF 1939 § 34.3627; UTAH CODE ANN. § 77-31-1 (1953); WYO. STAT. ANN. § 7-228 (1957). In jurisdictions having this order of argument, a similar rule exists for civil litigation, with the plaintiff having the first and third closing argument. *See, e.g.,* S.D. CODE OF 1939 § 33.1307; WIS. STAT. ANN. § 270.205 (1957). Although the textual discussion of this order of presentation concerns criminal litigation, it would be equally applicable to civil cases.

purposes of depiction, Figure 3 shows the effect of giving the prosecution the opportunity to initiate and conclude the persuasive communications. With the presentation of the first communication, there would be a strong shift in opinion toward the position advocated by that communication. Then when the second communication is presented, there would be a shift back toward the original position. Because of "primacy," however, this shift would not be all the way back. Upon presentation of the third communication, once again that of the prosecution, there would be a slight reshifting of opinion back toward the position of the first communication. The net result would be a greater change in opinion toward the position of the first communication, than if there were only two communications. Thus, the need to counterbalance order effects is greater in jurisdictions having this order of presentation than in those having only two communications at the argument stage. And once again, it is believed that the only way to effectively counterbalance these effects is to minimize the impact of first impression.

Since "primacy" could owe its existence to any one or more of several psychological factors, the development of a successful antidote is a difficult task. However, efforts to so develop one have been made in psychology laboratories. For the most part, these efforts have been directed toward making the recipients of communications aware of the danger of first impressions, by issuing at some point an explicit warning against primacy efforts. Although this experimentation has involved personality impression formation, its findings should have equal application to persuasive situations involving controversial issues, such as exist in a courtroom.

The experimental design selected for this experimentation is not different in many respects from all of the other order effect studies. The experiment most relevant to this discussion was structured as follows:⁸⁰ Two communications of equal persuasive content, describing a fictitious individual, were prepared by the experimenter. One described him as an introvert, the other as an extrovert. The audience was selected and divided into three

⁸⁰ See Luchins, *Experimental Attempts to Minimize the Impact of First Impressions*, in *THE ORDER OF PRESENTATION IN PERSUASION* 62 (Hovland ed. 1957).

groups. The opposing communications were presented to the first group in the usual manner, with half receiving them in one order and half in reverse order. This group received no admonition against primacy effects. The second group received the same communications in exactly the same way as the first group but, in an attempt to minimize the impact of first impression, the second group was instructed to suspend judgment until all information had been received and considered. In addition, members of the second group were warned that impressions acquired from a first communication often carry over and influence subsequent perceptions of a second communication. Both the instruction and the warning were imparted to this group prior to the presentation of the first communication. The experimental procedure for the third group was the same as that for group two, except that the instruction to suspend judgment and the warning against first impressions were given after the first communication had already been presented.

The findings of this experimentation have demonstrated clearly that order effects can be affected by creating in the audience an awareness of the danger of first impressions. As was anticipated, strong primacy effects were found to exist in the group receiving no warning. The part of this group which received the communications in an introvertive-extrovertive order described the fictitious individual as an introvert. The part which received them in an extrovertive-introvertive order described him as an extrovert. Somewhat surprisingly, primacy effects were also found to exist in the second group, which had received a warning against first impressions before the presentation of the first communication. It is significant, however, that the primacy effects for this second group were weaker than for the group receiving no warning. (A smaller percentage of the group two audience was over-influenced by the first communication.) The effect of interpolating the warning against first impressions between the two communications, as with the third group, was more pronounced. A recency effect was created. The part of this group which received the communications in an introvertive-extrovertive order conceived the, fictitious individual to be extrovertive, while the part which received the communications in a reverse order conceived him to be introvertive. Apparently, the warning given this group,

immediately preceding the last communication, caused them to over-emphasize that communication.

The importance of this experiment is not in the particular results produced by the warning, but rather in the indication that order effects can be controlled to some extent by making the audience aware of their existence. Perhaps the best possible solution to order effects in persuasion is suggested by the following statement: "One wonders what would happen to the totality of primacy and recency effects if subjects were warned, either prior to the combined communication or between the . . . [communications] against both primacy and recency."⁸⁷

Applied to courtroom circumstances, this suggestion would require that at some point the jury be warned not only against the danger of first impression, but also against the danger of last impression. It is doubtful that such a warning would serve to eliminate all order effects, for some degree of primacy or recency may be inevitable in a situation where both sides present their views as forcefully as possible. However, a warning of this kind should function to minimize, to some extent, the impact of the first communication, and to develop some "interest and responsibility on the part of the [jury] to insure objectivity and a genuine desire to reach the heart of the issue."⁸⁸

IV. CONCLUSION

Stripped of its technicalities and most of its endless detail, the judicial process in jury trials has a relatively simple theoretical basis. Prior to the time that a dispute is submitted for decision, a trial is nothing more than a demonstration of competing characterizations of the factual incident involved in the controversy. The atmosphere in which this demonstration takes place is one of contention. Consequently, both litigants are maximally motivated to impose upon the decision makers their version of the dispute. The litigant seeking to move the court (either the plaintiff or the prosecution) is expected to do whatever is necessary, within established constraints administered by the judge, to maximize the probability that the jury will find the existence of the disputed

⁸⁷ *Id.* at 71.

⁸⁸ Hovland, *supra* note 57, at 155.

fact. The other litigant is expected to do whatever is necessary, within the same constraints, to maximize the probability that the jury will find the non-existence of the disputed fact. After both sides have completed their demonstration, the problem is left for solution with the decision makers, who then engage in a variety of intellectual exercises which, hopefully, consist "of processing data through opposite logics and somehow arriving at a judgment on the basis of these processes."⁸⁰ The judgment that is finally selected through these processes, no matter how sophisticated and rational the intellectual activity, can never be more than a "better" answer to the problem, or one that is more probably correct than incorrect.⁹⁰

Underlying this system of problem-solving is the idea that "the logic of the individual processor [the jury,] is improved if it is enlarged to include a maximal logic for pro and a maximal logic for con."⁹¹ Thus far our efforts to create a decision-making environment consistent with this idea have been expended mostly in controlling input into the system. There are literally millions of printed pages dealing with the admissibility or inadmissibility of evidence. At the same time, almost no effort has been made to discern the processes by which decision makers use this input to arrive at judgment. The process of deliberation is an unknown and uncontrolled ingredient in the response finally selected by the decision makers. The purpose of this writing was to consider a narrow, but possibly important, aspect of this process. Hopefully, what has been written serves to pose for further consideration the following question: Is the deliberation process of jurors, as it is presently conceived, frustrated as a consequence of the unbalanced effectiveness of persuasive communications resulting from the order in which they are presented? To contend that the question has been answered would be presumptuous. Judgment as to whether or not it should be answered is left for the reader.

⁸⁰ Churchman & Eisenberg, *Deliberation and Judgment*, in HUMAN JUDGMENT AND OPTIMALITY 51 (Shelly and Bryan eds. 1964).

⁹⁰ The "atmosphere of the courtroom is not normally such that one can expect to find there the truth of a situation; at best one finds only a rough approximation." J. MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 5 (1966).

⁹¹ Churchman & Eisenberg, *supra* note 89.