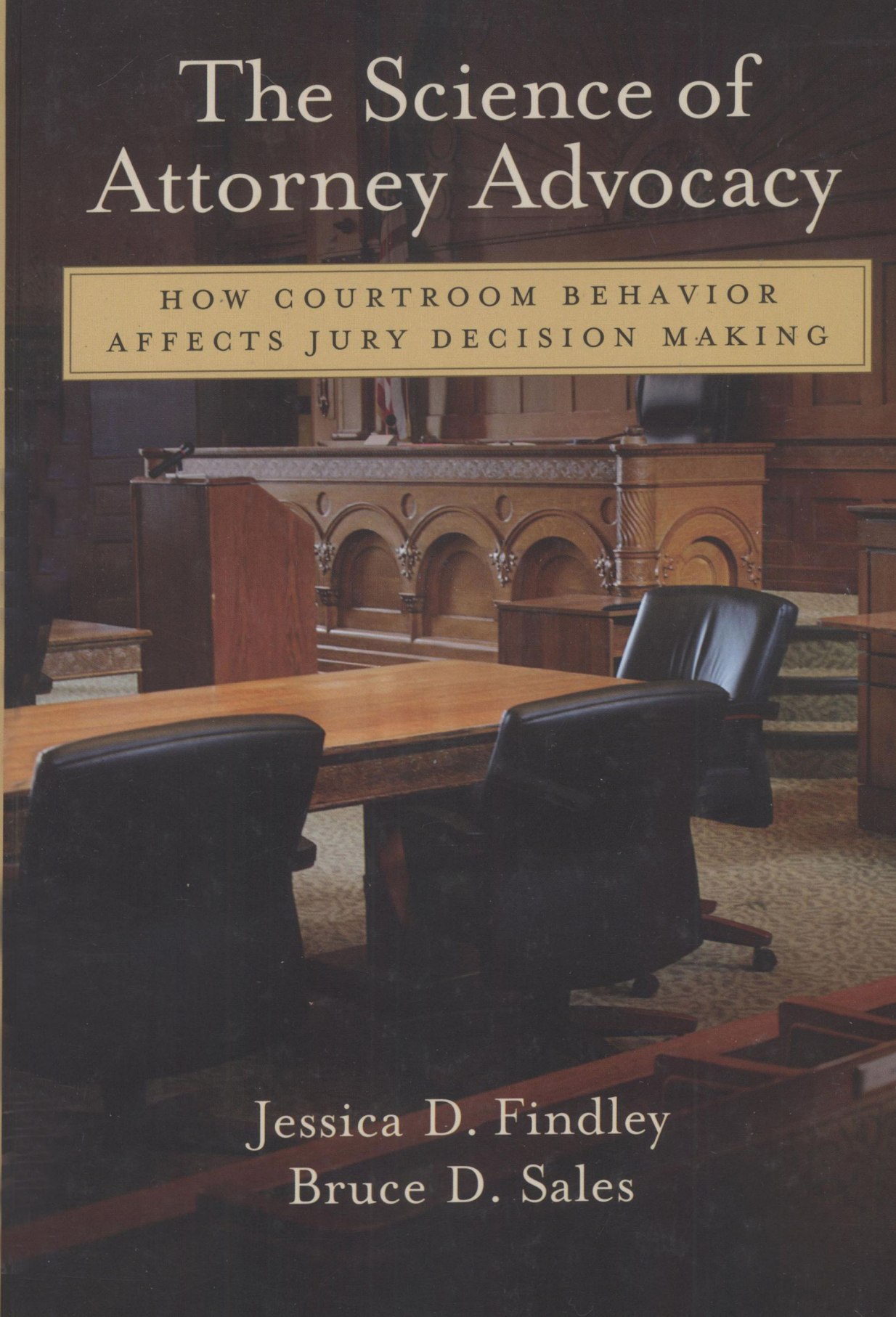
The Science of Attorney Advocacy

HOW COURTROOM BEHAVIOR AFFECTS JURY DECISION MAKING



Jessica D. Findley
Bruce D. Sales

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To my parents
—*Jessica D. Findley*

To Betsy
—*Bruce D. Sales*

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INTRODUCTION

Texas multimillionaire and oil heir T. Cullen Davis and his estranged wife, Priscilla, were in the process of a bitter, public divorce trial in August 1976. Reports indicated that Davis was livid on August 2 when the judge awarded Priscilla $5,000 per month in spousal maintenance (Gribben, n.d.; Rosenthal & Cochran, 1977). The night of the divorce proceeding, Priscilla and her boyfriend, Stan Farr, went out to celebrate the victory, leaving her 12-year-old daughter, Andrea, home alone in the $6 million Fort Worth mansion, where Priscilla was living ("The Law: Murder," 1977).

When Priscilla and Farr arrived home, she discovered the alarm had been deactivated and a bloody handprint was on the wall leading down to the basement (Gribben, n.d.; Rosenthal & Cochran, 1977). As Priscilla called for Farr, an intruder dressed in black with a woman's black wig on his head emerged from the laundry room and said "hi" before shooting Priscilla in the chest. Farr and the intruder struggled, and Farr was shot four times. Priscilla fled, screaming "Cullen shot me!" (Cochran, 1977a). The shooter caught up with Priscilla when she fell outside and was trying to drag her back into the mansion when another couple approached the mansion. The intruder then shot the young man, allowing Priscilla and the other woman enough time to

escape, one to flag down a passing car and one to run to a neighbor's house and call the police (Rosenthal & Cochran, 1977).

When the police arrived, Farr was dead in the kitchen (Rosenthal & Cochran, 1977), and Andrea, also dead, was found in the basement with a gunshot wound to her chest (Gorney, 1978). The other people who were injured survived, but they were about to be subjected to the lengthy and difficult trial of T. Cullen Davis for the murder of his estranged wife's 12-year-old daughter. (No trial was ever held for the murder of Farr because of concerns that a Texas jury would not convict because of "Texas Victorianism," or as one prosecutor indicated, "Killing a wife's lover is no big deal here." [Steele & Kasindorf, 1977, p. 30]).

Davis arguably hired the best defense money could buy (e.g., Rosenthal & Cochran, 1977). Richard "Racehorse" Haynes served as Davis's lead defense counsel, and at the time, Haynes had the reputation of being one of the best criminal lawyers in America (Rosenthal & Cochran, 1977). Haynes quickly began implementing strategies that undoubtedly helped him earn his accolades as a top defense lawyer. First, he successfully achieved a change of venue to Amarillo, Texas, which had a reputation as a conservative community that frowned upon women who cheated on their husbands (Gorney, 1978; Gribben, n.d.). The new venue was likely to work against the prosecution, whose main witness was Priscilla—a busty, platinum blonde who frequently wore revealing outfits and a necklace that spelled out "Rich Bitch" in diamonds (Rosenthal & Cochran, 1977).

Next, Haynes went to work establishing his case that Davis had an alibi for the time of the murder (Gorney, 1978). As part of his strategy to boost the believability of the alibi, Haynes planned to provide alternative scenarios that someone else committed the crime. Haynes later explained his strategy to the American Bar Association (ABA): "Say you sue me because you say my dog bit you. Well, now this is my defense: my dog doesn't bite. And second, in the alternative, my dog was tied up that night. And third, I don't believe you really got bit. And fourth, I don't have a dog" (Curriden, 2009).

Haynes waited until his cross-examination of Priscilla to fully explore alternative scenarios for the murders that contradicted the prosecution's theory that Davis committed the crime. Chief prosecutor Joe Shannon described the strategy as, "It's a defense of ABC—Anybody But Cullen" (Rosenthal & Cochran, 1977). During the 13-day cross-examination of Priscilla, Haynes explored the possibilities that (a) Priscilla had masterminded the murders to get Davis's money (Rosenthal & Cochran, 1977), (b) Farr was the primary target of the murders (Cochran, 1977b), (c) Priscilla wanted Farr dead in order to end her relationship with him (Gorney, 1978), and (d) unknown drug dealers may have been involved in the murders (Steele & Kasindorf, 1977).

In addition, Haynes supplemented his strategy by attacking the prosecution's chief witness. He described Priscilla as a "Machiavellian influence" and a "Dr. Jeckyll and Mr. Hyde," who associated with "scuzzies, scallawage, rogues, and brigands" (Gorney, 1978). In support of his portrayal of Priscilla, Haynes used a photograph of a former drug-dealing boyfriend and Priscilla in which the boyfriend only wore a sock on his genitals, elicited information from her about several former lovers (Cochran, 1977b), presented testimony that she participated in orgies (Gorney, 1978), accused her of being addicted to Percodan and marijuana (Rosenthal & Cochran, 1977), and alleged that she corrupted the morals of the young people in her care on a trip to College Station, Texas, during which sex and drug use occurred (Gorney, 1978).

Haynes's strategy to discredit Priscilla appeared to have worked. When her testimony was over and she left the courtroom, some of the women in the audience hissed at her (Hollandsworth, 2001). One reporter claimed that Haynes had successfully painted Priscilla as the "biggest slut in the state" (Gribben, n.d.). Another report claimed that "when Haynes finished with her, the jury had practically forgotten that her own daughter had been murdered" (Hollandsworth, 2001, p. 30). Haynes's success at putting Priscilla on trial instead of Davis was further documented by reports that a courtroom observer said, "I can tell she's guilty, just by looking" (Clemons, 1979, p. 70). However, the ultimate support for the success of Haynes' trial strategy was the verdict: not guilty (Rosenthal & Cochran, 1977).

THE IMPORTANCE OF TRIAL ADVOCACY

Attorney representation is basic to the concept of a fair trial. The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This right was expanded to state courts through the Fourteenth Amendment. In *Powell v. Alabama* (1932), a case that overturned the convictions of African American defendants for capital offenses because they did not have a lawyer's assistance in their defense, Justice Sutherland explained the importance of legal representation:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both

> the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. (pp. 68–69)

There is no right to an attorney in most civil trials; for an exception see laws relating to involuntary civil commitment where an actual loss of liberty can occur. This poses a considerable risk to one's personal and financial interests because arguably legal representation is vital for civil litigation. In response, many attorneys will take certain civil cases on a contingent fee basis (Lind et al., 1990), while nonprofit legal aid organizations will represent some clients whose incomes fall below a certain threshold and whose case is not prohibited by the rules of their organization (Houseman & Perle, 2003).

In American courts, legal representation is defined by the adversarial system of justice, which is founded on the idea that truth will emerge victorious from pitting each side's arguments and evidence against the other. The courtroom becomes a metaphorical arena, in which the attorneys must act as gladiators, prepared to battle for their clients. Instead of using weapons, however, the lawyers' arsenal comprises their intellect—their ability to outwit and outstrategize the opposing attorney to win the trier of fact's (i.e., the jury, or the judge in a bench trial) favor.

The perception of lawyers as aggressive warriors for their clients also stems from their ethical guidelines, which require them to zealously advocate for their clients: "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law" (ABA, 1980, Canon 7). "A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf" (ABA, 2009, Rule 1.3, comment).

As the T. Cullen Davis trial illustrates, lawyers do not dispassionately apply the law to the facts like a judge or jury should or try to balance the various interests of all involved like a legislator should (Markovits, 2003). Instead, they are responsible for molding the facts and the law in a way that is likely to benefit their clients, sometimes in a way that appears unsavory to a layperson or scientist (Markovits, 2003). For example, Racehorse Haynes was known for strenuously advocating for his clients by confusing issues with many alternative scenarios, even though this strategy meant badgering and discrediting opposing witnesses. One prosecutor complained: "Haynes's technique is to go on and on. He gets time on his side and gets the jury thinking about everything but the facts in the case" (Axthelm, 1978, p. 83). In response to the criticism, Haynes retorted:

> I've been accused a thousand times of using red herrings and wasting time, but I owe it to my client to make sure that law-enforcement people

> have dotted all their i's and crossed their t's. I like that red-her-ring talk anyway. Many times, that's what the prosecutor says when he really means, "Oh damn it, this guy just showed that his client didn't do it." (Axthelm, 1978, p. 83)

Not all trial advocates approach their role in same way as Haynes. For example, in Harper Lee's Pulitzer Prize winning novel *To Kill a Mockingbird*, attorney Atticus Finch relied on logic and the evidence to defend his client. Finch was representing a black man who had been charged with raping and beating a white woman. In his closing argument, Finch logically argues that it was impossible for the defendant, who did not have use of his left hand because it had been mangled in an accident, to have assaulted the woman because the evidence indicated that the perpetrator was left-handed. Finch argued that the woman's father, who was left-handed, was likely to have been the one who manufactured the assault:

> Her father saw it, and the defendant has testified as to his remarks. What did her father do? We don't know, but there is circumstantial evidence to indicate that Mayella Ewell was beaten savagely by someone who led almost exclusively with his left. We do know in part what Mr. Ewell did: he did what any God-fearing, persevering, respectable white man would do under the circumstances—he swore out a warrant, no doubt signing it with his left hand, and Tom Robinson now sits before you, having taken the oath with the only good hand he possesses—his right hand. (Lee, 1960, pp. 272–273)

Although Haynes and the fictional Atticus Finch used different approaches to advocate on behalf of their clients, finding successful advocacy approaches and techniques is essential for the practicing bar. Indeed, its importance is exemplified by the writings of legal practitioners and academics who offer recommendations to attorneys for maximizing success in court. In addition, their commentary has been put into trial practice handbooks and is frequently taught in law schools as part of the trial advocacy curriculum (e.g., Mauet, 2005). These strategies are often derived from past personal experience or from studying strategies employed by other successful attorneys. Occasionally, the trial manuals even claim insight into "courtroom psychology," but typically the trial commentators are relying on "pop" psychology (i.e., popular assumptions or intuition about how people respond socially and behaviorally in areas such as communication, comprehension, and persuasion), seldom using social and behavioral scientific research as the basis for their proposed strategies.

It is troubling that the strategies many attorneys are being taught and rely on to advocate for their clients may be unsubstantiated or even contradicted by social scientific research. In the event of a trial, at a minimum, one is likely