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Response

SPONSORSHIP STRATEGY: A REPLY TO FLOYD ABRAMS AND PROFESSOR SAKS

PAUL L. COLBY*

ROBERT H. KLONOFF**

In our book *Sponsorship Strategy*,¹ we presented an overarching theory of trial advocacy that challenged entrenched conventional wisdom. Most notably, contrary to the widely held view that "there is no 'right way' to try cases,"² we announced a series of tactical rules to govern virtually every decision a trial lawyer must make.³ At the same time, we criticized existing trial advocacy treatises for their erroneous advice, overemphasis on style rather than tactics, and their lack of any overarching theory.⁴ In preparing our work, we expected to receive harsh criticism. Such criticism is commonplace for a book that challenges the foundations of long-accepted views.⁵

A recent issue of the *Yale Law Journal* included two critical reviews of our book—one by Floyd Abrams,⁶ a well-known practi-

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1. ROBERT H. KLONOFF & PAUL L. COLBY, *SPONSORSHIP STRATEGY: EVIDENTIARY TACTICS FOR WINNING JURY TRIALS* (1990).

2. THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* xix (2d ed. 1988).

3. See KLONOFF & COLBY, *supra* note 1, at 152-53 (summarizing the process of evidence selection advocated by *Sponsorship Strategy*).

4. See KLONOFF & COLBY, *supra* note 1, at 12-13. First, we noted that most trial manuals "treat each phase of the trial as *sui generis*," providing rules, observations and anecdotes that apply only to the phase of the trial under discussion rather than providing "overarching principles." *Id.* at 12. Secondly, we suggested that advising attorneys to bring out the weaknesses in their own cases—rather than letting their opponents do so—is "counterproductive." *Id.* Thirdly, we observed that many manuals "devote more attention to matters of etiquette and personal style than to tactical issues." *Id.* at 13.

5. See, e.g., Bernard Barber, *Resistance by Scientists to Scientific Discovery*, 134 *SCIENCE* 596 (1961) (discussing the "constant phenomenon" of resistance by scientists to scientific discovery).

6. Floyd Abrams, *Trial Tactics: Sponsorship Costs of the Adversary System*, 101 *YALE L.J.* 1159 (1992).

tioner, the other by Professor Michael Saks,⁷ an academic in the field of jury studies. Both reviewers devoted large portions of their reviews to considering whether evidence exists to disprove the book's theory.

Abrams called attention to a case he personally defended⁸ in order to demonstrate how the plaintiff's counsel erred in applying a tactic our theory endorses.⁹ What Abrams did not highlight, however, is that the multimillion dollar jury verdict *against* Abrams's client was historic in magnitude.¹⁰ Professor Saks discussed various empirical studies but admitted that they do not disprove the theory.¹¹ Relying instead on supposed canons of "behavioral science,"¹² he undertook to expose the theory as methodologically flawed.¹³ Surprisingly, however, Saks invoked methodological principles discredited in the scientific community more than a century ago.

Both reviewers, therefore, did nothing to advance their criticism of our theory. As we show in this Response, Abrams and Saks—despite their sweeping denouncements—demonstrated only that they feel threatened by any effort to lift trial advocacy out of its primitive state.

I.

According to Abrams, the "unpersuasiveness" of *Sponsorship Strategy's* basic premises is "best seen" by examining the approach advanced by our book that challenges the conventional wisdom: rather than highlighting weaknesses in one's own case, force the other side to elicit the potentially damaging facts and assume the burden of convincing the jury that those facts are material.¹⁴ Abrams selected three cases to "test" that aspect of the book.¹⁵

A libel case involving Wayne Newton¹⁶ was the only one of these examples drawn from Abrams's own jury trial experience

7. Michael J. Saks, *Flying Blind in the Courtroom: Trying Cases Without Knowing What Works or Why*, 101 YALE L.J. 1177 (1992).

8. *Newton v. NBC*, 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 192 (1991).

9. See Abrams, *supra* note 6, at 1172-74; *infra* notes 16-28 and accompanying text.

10. See *infra* notes 24, 43.

11. See Saks, *supra* note 7, at 1190 n.65 ("On the other hand, there is no evidence that conventional wisdom provides better results [than sponsorship theory] in trials.").

12. Saks, *supra* note 7, at 1182.

13. *Id.*

14. Abrams, *supra* note 6, at 1163.

15. *Id.* at 1165-74.

16. *Id.* at 1172-74; *Newton v. NBC*, 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 192 (1991).

(which is apparently quite limited).¹⁷ In that case, Newton sued NBC over a broadcast that linked him to two organized-crime figures. Abrams, who defended NBC, criticized Newton's lawyer for omitting a damaging piece of evidence on direct examination of his client:¹⁸ in response to questions from an NBC journalist, Newton had denied speaking to a particular organized-crime figure within the past year when in fact he had done so on several occasions.¹⁹ Abrams faulted Newton's counsel for omitting this harmful fact on direct examination, thus allowing Abrams to raise it on cross-examination.²⁰ In so doing, Newton's lawyer had acted exactly as sponsorship theory recommends.²¹ Abrams is therefore correct in advancing the case as a test of our theory. Indeed, the case is particularly useful because it raises this tactical dilemma in the context of the key witness—the plaintiff himself. If ever the conventional wisdom in favor of volunteering weaknesses were to govern, this would be a classic occasion.

Abrams presumably selected the *Newton* trial because it was the best example from his personal experience to support his attack on sponsorship theory and its proponents.²² Notably, however, Abrams actually *lost* the *Newton* trial, although he was said to have had "a very strong case."²³ In fact, the jury award to Newton of \$19.2 million was reportedly the largest in the history of libel law.²⁴

17. See John A. Jenkins, *Newton's Law: How Mort Galane Fought NBC and Won*, A.B.A. J., Apr. 1989, at 71 (noting that Abrams was "inexperienced with juries").

18. Abrams, *supra* note 6, at 1172.

19. "In response to questions from [the NBC journalist], Newton falsely stated that he had last spoken with Penosi [an alleged organized-crime figure] 'maybe a year ago' and that Penosi had made no phone calls to him." *Newton*, 930 F.2d at 677.

20. Abrams, *supra* note 6, at 1174.

21. Consistent with sponsorship theory, Newton's lawyer chose not to introduce harmful evidence. *Sponsorship Strategy* argues that an advocate's introduction of such evidence normally only magnifies its harmful impact. KLONOFF & COLBY, *supra* note 1, at 86. The jury will assume that such an advocate is conceding the materiality of such evidence. *Id.*

22. It should be noted that one of the proponents faulted by Abrams for "evident confusion" was the late Robert Hanley. Abrams, *supra* note 6, at 1159 & n.3, 1160. Hanley was the winner of "one of the largest [jury] awards ever recorded"—a \$1.8 billion verdict in MCI's antitrust action against AT&T. Bruce Lambert, *Robert Hanley*, 67, *Trial Lawyer: AT&T Antitrust Lawsuit*, N.Y. TIMES, Sept. 15, 1991, at A38. See *MCI Communications v. AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

23. Jenkins, *supra* note 17, at 71.

24. See, e.g., *Court Hears Appeal of \$5.3 Million Libel Award to Wayne Newton*, N.Y. TIMES, Apr. 15, 1990, at 17 (reporting that the \$19.2 million jury award—reduced by remittitur to a \$5.3 million judgment—was believed to be the largest libel award in history); see also Jenkins, *supra* note 17, at 76 (noting that the libel verdict was "the largest ever rendered against a news organization"). Abrams's explanation that an appellate court later over-

Undoubtedly, the proponents of conventional wisdom would argue that the decision by Newton's lawyer not to disclose the harmful matter himself might have harmed him in the jury's eyes,²⁵ thereby preventing an even larger recovery. Post-trial interviews of the jurors, however, revealed that Newton's lawyer, far from having alienated the jury, made a very favorable impression. As noted in *The American Lawyer*, "In the matchup between lawyers, the jurors favored [Newton's counsel Morton] Galane hands down. 'Galane was like dynamite,' says [one juror]." ²⁶ The jurors' remarks are consistent with a central teaching of *Sponsorship Strategy*: that "the jury does not expect an advocate to go out of his way to present evidence harmful to his case . . . [and] will not view him as unfair if he fails to do so."²⁷ Far from undermining sponsorship theory, the *Newton* case is an attestation to its effectiveness.²⁸

A second case example advanced by Abrams to "test" sponsorship theory's teaching on harmful evidence was the *Jean Harris* case, which arose from the murder of Dr. Herman Tarnower, the "Scarsdale Diet Doctor."²⁹ Abrams recounted how, on direct examination, Harris's counsel chose not to elicit the contents of a damaging letter sent by Harris to the victim, although he did introduce a number of other letters that Harris had written to Dr. Tarnower.³⁰

turned the verdict, Abrams, *supra* note 6, at 1174 n.44, is irrelevant to the issue here—whether the tactics of Newton's lawyer were effective in persuading the jury.

25. See, e.g., LEONARD DECOF, ART OF ADVOCACY: OPENING STATEMENT § 1.18, at 1-43 (1987) ("[Y]ou must not . . . leav[e] out some critical weakness you know [your opponent] will raise, lest you dispel the notion of fairness you have worked so hard to establish.").

26. Diane Goldner, *How Wayne Newton's Theme Song Came True in His Record \$19.2 Million Libel Verdict Against NBC: "Danke Shoen," Las Vegas*, THE AMERICAN LAWYER, Mar. 1987, at 76.

27. KLONOFF & COLBY, *supra* note 1, at 101.

28. We also note that Abrams assumed that the wisdom of volunteering weaknesses may be proved by pointing to the damage inflicted on Newton when the negative information came to light during cross-examination. Abrams, *supra* note 6, at 1179. Abrams, however, never considered the alternative damage that would have been caused had the same negative fact been elicited during direct examination.

29. See *People v. Harris*, 445 N.Y.S.2d 520 (N.Y. App. Div. 1981), *aff'd*, 442 N.E.2d 1205 (N.Y. 1982), *cert. denied*, 460 U.S. 1047 (1983). Jean Harris, the headmistress of the Madeira School in McLean, Virginia, was convicted of murdering her paramour, Dr. Herman Tarnower, the author of a best-selling diet book. *Id.* at 523.

30. Abrams, *supra* note 6, at 1169-70.

[T]he defense introduced several letters [Harris] had written to Tarnower in 1978 and 1979 to show her state of mind—that she had accepted Tarnower's affairs with other women, yet remained devoted to him One key letter, however, the defense expressly chose not to introduce. In fact, the defense not only declined to introduce the letter (which came to be known as the "Scarsdale letter"), but went to great lengths to exclude it from the trial, and only pro-

Abrams criticized this decision—and sponsorship theory's supposed endorsement of it—claiming that introduction of the damaging letter by Harris's counsel on direct would have lessened its adverse impact.³¹

Abrams's use of this example, however, is inherently flawed. He implicitly assumes that Harris's counsel was correct in introducing the earlier letters to show the defendant's state of mind.³² By introducing letters written as many as two years prior to the date of the murder, however, the defense counsel conceded the materiality of the harmful letter, which was posted by the defendant on the day of the killing.³³ This last letter was plainly more probative of her mental state on the day in question. One who practices according to sponsorship theory would most likely not have introduced any of the letters. Thus, the particular dilemma presented by *Harris*—whether to introduce the harmful letter, having already introduced others—is not one that an advocate using sponsorship theory would face.

In addition, *Sponsorship Strategy* nowhere advises that an advocate should *always* refrain from volunteering a negative piece of evidence. Indeed, the book explains at length various situations in which an advocate could be harmed by omitting such a fact.³⁴ The book instructs that “[w]here items of evidence fall naturally into a series or other grouping, omitting one item from the series because it is harmful may result in very high costs of apparent efforts to omit.”³⁵ For example, if in a rape case, the police take four semen tests, three of which are helpful and one of which is not, an attorney should *not* introduce only the three and omit the damaging one. While Abrams wrote that “ignoring the letter on direct . . . is pre-

duced it when forced to comply with an order of the Chief Justice of Westchester County.

Id.

31. *Id.* at 1172 (“The defense’s failure even to seek to lessen [the letter’s] impact in advance—by giving Harris the opportunity on direct to explain the pain she felt when she wrote the letter—was a gross miscalculation. Yet, th[is] . . . is precisely the approach counseled by Klonoff and Colby.”).

32. *See id.* at 1169-72.

33. *See Harris*, 445 N.Y.S.2d at 530; KLONOFF & COLBY, *supra* note 1, at 28-30. We suggest that “where the advocate goes to the effort of introducing evidence that is inferior to other evidence that he has introduced, the jury is apt to assume that he views the inferior evidence as materially favoring his case.” *Id.* at 30.

34. Such situations may occur when it is necessary to fill a “conspicuous gap,” when a witness has a particular relationship to a party and when “a witness would almost certainly include a harmful fact when candidly describing an incident in everyday conversation” *See KLONOFF & COLBY, supra* note 1, at 91-94.

35. *Id.* at 91.

cisely the approach counseled by Klonoff and Colby,"³⁶ *Sponsorship Strategy* actually counsels that, if the helpful letters are introduced, the damaging one might have to be introduced as well.³⁷ Abrams's use of the *Harris* example to discredit sponsorship theory is unavailing for this reason as well.

A third example advanced by Abrams was the *Alger Hiss* perjury prosecution.³⁸ In that case, the government's first effort at trial ended in a hung jury.³⁹ Abrams presents the first trial as an example of an instance where a prosecutor suffered because he failed to expose the prior perjuries before Congress and a grand jury of his own star witness, Whittaker Chambers.⁴⁰ Basically, Abrams would have had the attorney impeach his own witness. In fact, however, the prosecuting attorney did elicit these matters himself, albeit not at the length Abrams would have liked.⁴¹ Because the prosecutor did so, the defense attorney was able to capitalize on the prosecutor's sponsorship of the prior false statements by reminding the jury during cross-examination that his opponent—the attorney whose goal was to put forward the government's strongest case—had raised those damaging statements.⁴² This example is therefore no test of sponsorship theory, which generally counsels against the impeachment of one's own witnesses altogether.⁴³

36. Abrams, *supra* note 6, at 1172.

37. KLONOFF & COLBY, *supra* note 1, at 91-92. We warned that when a potentially damaging item fits naturally within evidence already being offered, "omission of the item . . . will attract greater attention to the item than it would otherwise have merited." *Id.* at 92 (noting also that in these circumstances "[t]he jury's perception that the advocate took pains to conceal the fact might only highlight its significance").

38. Abrams, *supra* note 6, at 1165-69. See *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951).

39. Alger Hiss, a respected Washington lawyer, was accused of being a member of an underground cell of the Communist Party. Hiss denied the allegation before both the House Committee on Un-American Activities and a federal grand jury. *Hiss*, 185 F.2d at 824, 828. In his first trial on perjury charges, the jury deadlocked. *Id.* at 824.

40. Abrams, *supra* note 6, at 1166, 1168.

41. As Abrams noted, the prosecutor himself asked Chambers if he had disclosed his possession of damaging documents during his testimony before Congress and the grand jury. Chambers responded by stating that, though he could not remember whether he had been asked at these hearings about the documents, he would have lied about them. *Id.* at 1166.

42. See *id.* at 1167 ("Mr. Chambers, I think two days ago you told us that you had committed perjury before the grand jury in October of last year, is that right?" (quoting the *Hiss* trial transcript)).

43. See KLONOFF & COLBY, *supra* note 1, at 86-87. Abrams encourages lawyers to bury harmful facts when eliciting them on direct examination. See Abrams, *supra* note 6, at 1163 (citing MAUET, *supra* note 2, at 86). Ironically, Abrams himself tried to bury in a footnote the fact that he lost the *Newton* trial. See *id.* at 1174 n.44.

A final point to be made with respect to the first *Hiss* trial is that the prosecutor questioned his witness in detail about other harmful matters in an effort to have the witness "admit the worst about his checkered history, thereby preempting the defense from exposing [the witness's] defective past."⁴⁴ This, too, is the conventional wisdom's approach.⁴⁵ Thus, if the hung jury in the first trial proves anything, it is that the conventional wisdom falls short of its own goals. As Abrams himself acknowledged, the prosecutor did not employ the sponsorship tactic of avoiding impeachment of one's own witness altogether.⁴⁶

With respect to the retrial of Alger Hiss, Abrams suggested that a conviction was secured because the prosecutor elicited the facts relating to the perjuries in greater detail.⁴⁷ Yet this is not a sound basis for assessing the verdict because, in that trial, neither side focused on the credibility of the prosecution's witness.⁴⁸ While the prosecutor in the first trial had conceded in his opening statement that the government would have "no case" unless the jury believed Chambers,⁴⁹ no such concession was made in the retrial. To the contrary, in the second case the prosecutor emphasized that the defendant's crime would be proved by "the immutable documents themselves, documents that just can't change."⁵⁰ Likewise, the defense "did not stress Chambers' credibility, [but] instead . . . called the documents the central issue in the case."⁵¹ Accordingly, if the verdict in the *Hiss* retrial tests anything, it is the quality of the documentary evidence rather than the credibility of the government's witness when he was more comprehensively impeached by his own lawyer.⁵² Perhaps this is why Abrams ended his lengthy discussion

44. Abrams, *supra* note 6, at 1166.

45. See MARK A. DOMBROFF, DOMBROFF ON DIRECT AND CROSS EXAMINATION 7 (1985) ("The obvious advantage [of impeaching one's own witness] . . . is that new matters are not raised out of the mouths of your witnesses under questioning by your opponent.").

46. See Abrams, *supra* note 6, at 1169 n.30 (admitting that the prosecutor's tactic in the first trial "involved more disclosure to the jury than Klonoff and Colby favor").

47. *Id.* at 1169 n.31 ("Most importantly, [the prosecutor] addressed the issue of Chambers' acknowledged perjuries, and disclosed the details of Chambers' inconsistent testimony.").

48. See *id.*

49. *Id.* at 1166 ("Assistant U.S. Attorney Thomas Murphy conceded in his opening, '[I]f you don't believe Chambers then [the government] has no case' " (citing the first *Hiss* trial transcript)).

50. *Id.* at 1169 n.31 (quoting the second *Hiss* trial transcript).

51. *Id.*

52. In fact, reliance on a comparison of the retrial verdict to the first one for any purpose relating to selection of evidence is unwarranted, due to the tactical error committed by the prosecutor in the first case of explicitly conceding that he had "no case"

of the case by curiously conceding that it is "impossible to know" whether the prosecutor's tactics in the first case were correct.⁵³

In sum, all three cases marshalled by Abrams fail to cast doubt upon sponsorship theory. Ultimately, Abrams found that he must also come to this conclusion.⁵⁴ His reliance on cases that were at best inconclusive is truly mystifying. His analysis certainly did not justify his angry denunciation of our theory.

The problems with Abrams's review go well beyond his puzzling reliance on these cases. In mounting his attack on our theory, Abrams overlooked major portions of the book. For example, with respect to the selection of witnesses, Abrams maintained that the book "goes too far" by "providing false comfort to litigators" regarding the risks associated with not calling a witness.⁵⁵ He criticized the book for supposedly asserting that "there is *no* risk that opposing counsel will use a counsel's failure to call a somewhat weak but still supportive witness to suggest that the witness was not called because her testimony would have been harmful."⁵⁶ *Sponsorship Strategy*, however, provides a detailed analysis of precisely this risk; the greater part of Chapter Five is devoted to the selection of evidence in light of this risk.⁵⁷ The concept designed to account for this risk—"party-associated evidence"—is referred to throughout the book.⁵⁸

Specifically, the book states that there *is* such a risk when the witness in question is "party-associated."⁵⁹ A witness is party-asso-

unless the jury believed his star witness. In *Sponsorship Strategy*, we warn against conveying the impression that one is "relying on any particular piece of evidence to win." See KLONOFF & COLBY, *supra* note 1, at 257.

53. Abrams, *supra* note 6, at 1169.

54. See *id.* at 1174 ("It is difficult, based on the *Hiss*, *Harris*, and *Newton* cases, to offer any broad conclusions about the tactical desirability of counsel bringing out unfavorable information about his witness on direct examination.").

55. *Id.* at 1161.

56. *Id.*

57. See KLONOFF & COLBY, *supra* note 1, at 121-37. Chapter Five is entitled: "Selection of Evidence: Undisputed Issues and Party-Associated Evidence."

58. See, e.g., *id.* at vii-viii, 14, 66 n.5, 78 n.26, 80 n.30, 85 n.33, 111-12, 119, 121-37, 140, 144, 146-47, 152-53.

59. *Id.* at 126. There we explain:

[W]e [previously] discussed a risk that may arise when an advocate omits evidence from his presentation . . . , [namely], that the jury . . . will speculate that such evidence would have harmed the advocate's case. This risk does not arise where the evidence is also available for the opponent's use

This is not true in the case of party-associated evidence. Here, the jury has no logical basis for inferring from the opponent's omission of the evidence that it would have failed to benefit his case.

Id.

ciated if she is perceived by the jury "to be in [one] advocate's 'camp.'"⁶⁰ Often, such a witness is biased in favor of one side and not likely to cooperate with the opponent's lawyer.⁶¹ Alternatively, information concerning the witness's whereabouts could be in one party's exclusive custody.⁶² For either reason, the other party is not expected to call the witness.⁶³ Therefore, the book points out that a lawyer may damage her case by omitting a party-associated witness. Such an omission carries with it the risk that the jury will penalize the party identified with the witness for not producing her.⁶⁴ Abrams overlooked the fact that we *do* give substantial consideration to this risk.

Abrams provides an example to support his criticism, but that example itself only underscores how he overlooked *Sponsorship Strategy's* treatment of the foregoing risk. In particular, Abrams described a situation in which counsel for a defendant-employer in an employment discrimination case must decide whether to call a former employee as a witness.⁶⁵ He charged that our book is "misleading" for not acknowledging that, in such a case, failure to call the witness entails serious risks.⁶⁶ A number of factors, however, could render such a witness "party-associated." These factors would alert the lawyer who properly applies sponsorship theory to analyze precisely the risk that Abrams claims we ignore. Sponsorship theory would advise the lawyer to ask herself various questions: Does the former employee still receive a pension or other company benefits, thus rendering him reluctant to testify against the company? Is the employee a former high-level official who is still perceived as loyal

60. *Id.* at 121.

61. *Id.* at 122 ("[A] party-associated witness . . . would, in the jury's mind, be likely to go out of his way to help that side. The jury is apt to assume that such a witness is not likely to have submitted to pretrial interviews with the opponent's investigators. It is further apt to believe that, even if the witness were to have granted such an interview, he probably would have been uncooperative.").

62. *Id.* (referring to the situation "where the jury preconceives that information concerning the witness is in one party's exclusive custody").

63. *Id.* at 121 ("The key characteristic of party-associated evidence is the jury's preconception that it is not fully available to the opponent despite the opponent's physical access to it.").

64. *Id.* ("[A]n advocate's usual insurance policy in refraining from introducing evidence is the argument that the *opponent* could have introduced the evidence [F]or evidence that is party-associated, such an argument will not be apt to satisfy the jury."). See also *id.* at 126 ("[B]ecause the jury preconceives that party-associated evidence is not equally available, the rule of evidence selection must take into account the risk of adverse jury speculation that arises when an advocate omits such evidence.").

65. See Abrams, *supra* note 6, at 1161.

66. See *id.*

to her former employer? Are there enduring friendships between the former employee and current company personnel? Affirmative answers to questions such as these could trigger the special considerations that are applicable to party-associated evidence and explicitly designed to account for the risk from nonproduction.⁶⁷ Because Abrams ignored this lesson taught in *Sponsorship Strategy* and thereby misapplied the theory, his criticism that the book "goes too far" and "provides false comfort to litigators"⁶⁸ has no credibility.

In concluding his review, Abrams also found our book's advice "troubling" on ethical grounds.⁶⁹ Specifically, he deemed it "disturbing" that application of its tactics might result in "a jury [being] deprived of relevant information," and charged that "[z]ealous advocacy is the only name of [the authors'] game."⁷⁰ But such advocacy is an integral part of the adversary system, as reflected in a lawyer's ethical obligation to "represent his client *zealously* within the bounds of the law."⁷¹ And nowhere did Abrams propose to replace the adversary system with its alternative, the inquisitorial system.⁷² Ironically, Abrams's own loss in the *Newton* case shows the dangers of straying from zealous advocacy. At least one juror in the *Newton* case "interpreted Abrams's low-key delivery to mean 'Abrams didn't believe in his clients enough.'"⁷³ By contrast, our theory instructs that arguments "must never be delivered half-heartedly" because

67. See KLONOFF & COLBY, *supra* note 1, at 121-27.

68. Abrams, *supra* note 6, at 1161.

69. *Id.* at 1175-76.

70. *Id.* At the same time, he acknowledged that a lawyer is under no obligation to disclose to the jury evidence harming his case. *Id.* at 1176 n.49. Even the rule demanding that prosecutors disclose exculpatory evidence merely requires them to reveal such evidence to *opposing counsel*, not to the trier of fact. *Id.*

71. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1971) (emphasis added). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1992) ("A lawyer should act . . . with zeal in advocacy upon the client's behalf."). The lawyer's duty of zealous representation guarantees the litigant's "right to present his case in the best light possible," a right inherited from ancient Greek justice. See GEORGE KENNEDY, *THE ART OF PERSUASION IN GREECE* 23 (1963). This right is a cornerstone of the adversary system. See EDMUND M. MORGAN, *SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION* 3 (1956) ("The theory of our adversary system of litigation is that each litigant is most interested and will be most effective in seeking, discovering, and presenting the materials which will reveal the strength of his own case and the weakness of his adversary's case.").

72. In contrast to the adversary system, the inquisitorial system emphasizes the system's interests and not those of individual litigants. See generally STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 49-50 (1984).

73. Goldner, *supra* note 26, at 76. See also Jenkins, *supra* note 17, at 76 ("[A]t least one of the jurors thought Abrams' placidity was an indication that he didn't believe in his clients.").

that approach "communicat[es] a lack of belief" in one's case.⁷⁴ In the end, if Abrams's comments raise any concerns, they are his own condemnation of zealous advocacy and his apparent reluctance to practice it.

II.

The second reviewer, Professor Michael Saks, has written extensively on empirical testing of jury behavior.⁷⁵ Although his review of *Sponsorship Strategy* canvassed the literature on such empirical studies,⁷⁶ that literature is as inconclusive against sponsorship theory as were Abrams's three case examples. Indeed, Saks himself declared that sponsorship "might turn out to be a valid and powerful theory."⁷⁷ After exhaustively analyzing the empirical literature, he concluded that "there is no evidence that conventional wisdom provides better results in trials."⁷⁸ Saks thus made the far more esoteric claim that, whatever merit sponsorship theory might have on a practical level, as a theory of "behavioral science" it is methodologically flawed.⁷⁹

Saks's first methodological criticism was that sponsorship theory is "upside-down" because "it is deductive when it should be inductive."⁸⁰ In particular, Saks observed, the theory "begins with general principles from which it derives assertions about specific phenomena, instead of beginning with well-established phenomena of persuasion and then developing an abstract theory to explain them."⁸¹ In essence, Saks charged that the theory asserts more

74. KLONOFF & COLBY, *supra* note 1, at 247.

75. See, e.g., Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992) (reviewing "the existing empirical evidence on the behavior of the tort litigation system" and demonstrating "the inadequacy of that evidence for drawing trustworthy conclusions"); Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, LAW & CONTEMP. PROBS., Autumn 1988, at 243 (analyzing social-psychological empirical data on juries); Michael J. Saks, *Blaming the Jury*, 75 GEO. L.J. 693 (1986) (Book Review of VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986)).

76. See Saks, *supra* note 7, at 1187-90.

77. *Id.* at 1186.

78. *Id.* at 1190 n.65.

79. *Id.* at 1182.

80. *Id.* at 1181. See also *id.* at 1182 & n.23 (criticizing sponsorship theory for "appear[ing] on the scene" at the deductive "stage" and for "exempt[ing] itself" from the earlier stage of "induction"); *id.* at 1186 n.42 (faulting sponsorship theory for being "deductive before it is inductive").

81. *Id.* at 1181. See also *id.* at 1190 (acknowledging the absence of theoretical principles in the study of trial practice and insisting that "the more fundamental element lacking . . . is systematic evidence about what works and what does not").

than could possibly be justified by the empirical data used to construct it.⁸²

While Saks chastised us for supposedly lacking the "tools" of science,⁸³ he is the one who is out of touch with accepted scientific methodology. As philosopher Stephen Toulmin observed: "It is natural for a logician to suppose that, in order to justify a theoretical conclusion, one must collect sufficient experimental material to entail it; and that, if one does anything less, the theoretical conclusion will assert something more than the experimental data warrant."⁸⁴ As Toulmin also observed, however, following that position is "mistaken."⁸⁵ Professor Saks is guilty of this error. In particular, to be correct, a theory need not have been created by generalizing from pre-existing empirical data,⁸⁶ and Saks's criticism on this point is therefore unfounded.

More generally, Saks fails to appreciate the role of deductive theorizing in the scientific discovery process. The method based on such theorizing, known as the "hypothetico-deductive method,"⁸⁷ proceeds from the premise that meaningful data cannot normally be collected in the absence of a theory.⁸⁸ For that reason, not only is

82. See *id.* at 1178 n.4 ("Rigorous inferences can be drawn only from a far more systematic . . . gathering of data than goes on in the conventional practice of law."); *id.* at 1182 ("[T]heorizing . . . cannot begin in earnest until some empirical data have been collected."); *id.* at 1186 ("A positive theory built without an empirical foundation is [not] likely to provide useful guidance . . .").

83. Our "mistakes," Saks explained, "are perfectly natural for lawyers to make." *Id.* at 1181. The reason is that lawyers are trained in "normative" matters but not in "positive" ones. *Id.* at 1181-82. According to Saks, while *Sponsorship Strategy* embarked on "a task . . . of basic and applied behavioral science, the authors work with the only tools they know, and those are the wrong ones for the job." *Id.* at 1182.

84. STEPHEN E. TOULMIN, *THE PHILOSOPHY OF SCIENCE* 42 (1953).

85. *Id.*

86. *Id.* ("For . . . our theoretical statements . . . neither could be nor need to be entailed by [the data], being neither generalizations from them nor other logical constructs out of them, but rather principles in accordance with which we can make inferences about phenomena.").

87. See, e.g., PETER MEDAWAR, *INDUCTION AND INTUITION IN SCIENTIFIC THOUGHT* 45 (1969).

88. See, e.g., Karl Popper, *The Myth of Inductive Hypothesis Generation*, in *ON SCIENTIFIC THINKING* 72 (Ryan D. Tweeney et al. eds., 1981) ("[T]he belief that we can start with pure observations alone, without anything in the nature of a theory, is absurd . . . [T]hough beetles may profitably be collected, observations may not."); THOMAS KUHN, *STRUCTURE OF SCIENTIFIC REVOLUTIONS* 15 (Otto Neurath et al. eds., 2d ed. 1970) (noting that in the absence of a theoretical framework, "all facts . . . seem equally relevant, . . . [making] early fact-gathering . . . [a] nearly random activity"); *id.* at 135 (noting that measurements undertaken without a theoretical framework "seldom lead to any conclusions at all"); IRVING COPI, *INTRODUCTION TO LOGIC* 389 (3d ed. 1968) ("[I]t is strictly impossible to make any serious attempt to collect evidence unless one *has* theorized beforehand.").

the deductive method permissible, but also the alternative urged by Saks—the inductive method—is widely considered ineffective in generating scientific discoveries when it is unassisted by deductive theory.⁸⁹

To be sure, as a means of arriving at scientific theory, the inductive method is superficially appealing. Scientific textbooks often take the following deductive form:⁹⁰ “lawlike” statements and hypothetical “initial conditions” are fed into a hopper on a machine; a crank is turned, causing the appropriate logical and mathematical operations to be internally performed; and numerical predictions then emerge from the machine.⁹¹ These predictions are set forth in a column and compared with the results of empirical measurements.⁹² This manner of presentation makes it tempting to believe that one could merely collect the data first, then—purely by means of induction—work in reverse to establish the laws. However, because one first needs a theory to know exactly what phenomena to measure,⁹³ it is considered an “outworn belief” to hold that a theory’s laws can be derived by “running the machine backwards.”⁹⁴

Viewed in the most charitable light, Saks’s methodological conceptions are anchored in what has been called “the second period” of the history of modern science.⁹⁵ This period was one of “militant empiricism” where “hypotheses [were] frowned upon [and] experimentation and derivation from observational results [were] regarded as the only legitimate manner of obtaining knowledge.”⁹⁶

89. See, e.g., CARL G. HEMPEL, *FUNDAMENTALS OF CONCEPT FORMATION IN EMPIRICAL SCIENCE* 36 (Otto Neurath et al. eds., 1952) (“The entire history of scientific endeavor appears to show that . . . comprehensive, simple, and dependable principles for the explanation and prediction of observable phenomena cannot be obtained by merely summarizing and inductively generalizing observational findings.”).

90. The deductive mode of presentation has been the norm in science at least since publication of Newton’s *Principia*. See, e.g., ADAM SMITH, *LECTURES ON RHETORIC AND BELLES LETTRES* 140 (John M. Lothian ed., 1963) (observing that the deductive method of theory presentation was pioneered in the natural sciences by Descartes and perfected by Newton); A.C. Crombie, *From Rationalism to Experimentalism*, in *ROOTS OF SCIENTIFIC THOUGHT* 131 (Philip P. Wiener & Aaron Nolan eds., 1957) (“[G]eometrical demonstration . . . was the basis not only of [the ancient Greeks’] considerable contributions to mathematics itself and to physical sciences like astronomy and geometrical optics, but also much of their biology and medicine.”).

91. THOMAS S. KUHN, *THE ESSENTIAL TENSION* 182 (1977).

92. See *id.* at 181-82.

93. See *supra* note 88.

94. KUHN, *supra* note 91, at 183.

95. See Paul Feyerabend, *Problems of Microphysics*, in *PHILOSOPHY OF SCIENCE TODAY* 138 (Sidney Morgenbesser ed., 1967) (providing a short account of the history of science since 1600).

96. *Id.* at 138-39.

Whatever vitality this view might have had at the close of the 19th century, it was dealt a death blow by Einstein's announcement of the theory of relativity.⁹⁷ Because that theory explained the same empirical facts as Newton's mechanics while using a radically different conceptual foundation, it demonstrated the "fictitious" character of fundamental principles and the fact that they are "free inventions of the human mind."⁹⁸ In addition, it exposed the error of assuming that a single correct theory will inexorably result from mechanistic induction.⁹⁹

Saks's criticism of our theory for being "deductive when it should be inductive"¹⁰⁰ at best rests, therefore, on overthrown methodological principles.¹⁰¹ Interestingly, Saks's criticism parrots the repudiated complaint of many 19th-century laypersons against Darwin's *Origin of Species*. Presaging Saks, the "popular view" advanced in "the non-scientific press of the time" was that the work was flawed because it was "deductive, not inductive."¹⁰² No matter

97. See *id.* at 139-40 (discussing the impact on the scientific community of the announcement of the theory of relativity). Compare ALBERT EINSTEIN, IDEAS AND OPINIONS 273 (Sonja Bargmann trans., 1954) ("The natural philosophers of [the 18th and 19th centuries] were . . . most of them possessed with the idea that the fundamental concepts and postulates of physics . . . could be deduced from experience by 'abstraction'—that is to say, by logical means. A clear recognition of the erroneousousness of this notion really only came with the general theory of relativity . . .") with Saks, *supra* note 7, at 1181 (criticizing *Sponsorship Strategy* for not "beginning with well established phenomena of persuasion and then developing an *abstract* theory to explain them" (emphasis added)). Cf. LESZEK KOLAKOWSKI, THE ALIENATION OF REASON: A HISTORY OF POSITIVIST THOUGHT 139-40 (Norbert Guterman trans., Anchor Books 1969) (noting how the doctrine of conventionalism exposed the "fiction[] . . . according to which science is always created by inferring alleged 'inductive laws' from alleged 'facts'").

98. EINSTEIN, *supra* note 97, at 273.

99. See, e.g., Ernest Nagel, *The Nature and Aim of Science*, in PHILOSOPHY OF SCIENCE TODAY, *supra* note 95, at 10 (noting the "inadequacy" of "the popular view . . . that a scientific inquiry must begin by collecting facts, the data thus collected being then pressed through some sort of logical sieve which finally yields a uniquely determined formulation of a regularity between the events under study"); ALBERT EINSTEIN & LEOPOLD INFELD, THE EVOLUTION OF PHYSICS: THE GROWTH OF IDEAS FROM EARLY CONCEPTS TO RELATIVITY AND QUANTA 33 (1938) ("Physical concepts are free creations of the human mind, and are not, however it may seem, uniquely determined by the external world.").

100. Saks, *supra* note 7, at 1181.

101. Saks also appears to espouse the now-discredited view that scientific theories are discovered, not invented. See David L. Hull, *Charles Darwin and Nineteenth-Century Philosophies of Science*, in FOUNDATIONS OF SCIENTIFIC METHOD: THE NINETEENTH CENTURY 115-16, 120 (Ronald N. Giene & Richard S. Westfall eds., 1973) (describing the debate over whether scientific theories are discovered or invented). Because Saks cited no relevant authority for his view, however, it is unclear whether he was aware that the debate even took place.

102. Alvar Ellegard, *Darwin's Theory and Nineteenth Century Philosophies of Science*, in ROOTS OF SCIENTIFIC THOUGHT 537, 559 (Philip P. Wiener & Aaron Nolan eds., 1957).

how Saks came upon this discredited chestnut, his prohibition of deductive theorizing is more than mere error. It would, if followed, most likely forever consign the field of trial advocacy to its present "pre-scientific" condition.¹⁰³

This is the present state of trial advocacy: It abounds with propositions that would be inconsistent if formulated explicitly¹⁰⁴ and with rules that are articulated only vaguely, if at all.¹⁰⁵ Saks admitted as much in acknowledging that the field lacks any overarching theory.¹⁰⁶ Because, as we have noted, meaningful experimentation cannot be performed in the absence of a theory,¹⁰⁷ his ban on deductive theorizing and insistence that it be preceded by inductive data collection would virtually ensure that the field remain in its pre-scientific state.¹⁰⁸

Saks's remaining criticisms also reflect his captivity in a bygone methodological framework. First, he complained that, once we ar-

Cf. THOMAS H. HUXLEY, LECTURES AND ESSAYS 172 (1908) ("Critics . . . who have never determined a scientific fact in their lives by induction from experiment or observation, prate learnedly about Mr. Darwin's method, which is not inductive enough, not Baconian enough, forsooth, for them. But . . . there are multitudes of scientific inquiries, in which the method of pure induction helps the investigator but a very little way.").

103. A pre-scientific era is one in which the accumulated rules and knowledge are articulated vaguely and never categorically because they are not offered for truly critical analysis. See MARX WARTOFSKY, CONCEPTUAL FOUNDATIONS OF SCIENTIFIC THOUGHT 63 (stating that pre-scientific knowledge is "a body of homely and ubiquitous truths that are scarcely articulated for critical reflection, because they are so pervasive and well entrenched in our practical speech and behavior"); *id.* at 67 (noting that "the aim of science [is] to be consciously and deliberately critical").

104. Compare, e.g., MAUET, *supra* note 2, at 276 ("Confronting [your] weaknesses has . . . advantages.") with *id.* at 277 ("[F]orce your opponent to argue his weaknesses . . . [thus] creating a negative impression.").

105. See, e.g., KENNEY F. HEGLAND, TRIAL AND PRACTICE SKILLS 19 (1978) (discussing whether to volunteer a weakness on direct examination and advising: "If the story on direct holds together as a unit, if the attack you foresee rests on collateral evidence or on the demented mind of your opponent, then you may either anticipate or ignore."); MAUET, *supra* note 2, at xix (noting that "there is no 'right way' to try cases").

106. See Saks, *supra* note 7, at 1190 (acknowledging *Sponsorship Strategy's* "sound conclusion" that the field of jury trial practice lacks an overarching theory).

107. See *supra* text accompanying notes 85-94.

108. Cf. Letter of Charles Darwin to Henry Fawcett (Sept. 18, 1861), in 1 MORE LETTERS OF CHARLES DARWIN 194, 195 (Francis Darwin ed., 1903) ("About thirty years ago there was much talk that geologists ought only to observe and not theorise; and I well remember some one saying that at this rate a man might as well go into a gravel-pit and count the pebbles and describe the colours. How odd it is that anyone should not see that all observation must be for or against some view if it is to be of any service!"). Keeping this enlightened statement in mind, Saks's admission that "thousands of empirical studies" have already been conducted over the past half-century in the field of persuasion cannot possibly help his thesis that more data collection is needed before theorizing can begin. See Saks, *supra* note 7, at 1187.

rived at the premises of our theory—sponsorship’s assumptions of how the jury reasons—we did not empirically test them.¹⁰⁹ Saks erred, however, in supposing that a theory must be evaluated by whether its assumptions are realistic. As Professor Milton Friedman has written, “to suppose that . . . the conformity of [a hypothesis’s] ‘assumptions’ to ‘reality’ is a test of the validity of the hypothesis . . . is fundamentally wrong and productive of much mischief.”¹¹⁰ The goal of the theorist is to “explain[] much by little”¹¹¹ Consequently, the most significant theories will have assumptions that are, as Einstein noted, conceptual inventions.¹¹² In this regard, such constructs—as opposed to their predictive implications—cannot and should not be subjected to empirical testing.¹¹³

As an adjunct to his attack on our theory’s premises, Saks sought to undermine them by charging that they were “built on . . .

109. Saks, *supra* note 7, at 1183. Saks repeatedly asserted that sponsorship theory’s assumptions are unsupported by empirical data. For example, he noted that the theory’s “essential propositions are assumptions made by its authors”; referred to our “assertions about what juries assume [and] think”; charged that “the authors offer no direct evidence to support their claim that juries in fact behave in the stated ways”; and grumbled that the theory “is not grounded in empirical generalizations about what persuades jurors.” *Id.* Similarly, he asserted that “[t]he authors offered no empirical evidence about the extent to which juries process information as the theory assumes they do” *Id.* at 1185.

Saks also suggested that our “assortment of quotations” from various sources were designed to serve as “evidence of how jurors in fact evaluate and use information.” *Id.* at 1183-84. On the contrary, these quotations were used to indicate the breadth of phenomena that sponsorship theory explains, which is a longstanding technique for demonstrating the plausibility of a theory. See, e.g., SMITH, *supra* note 90, at 140 (“It gives us a pleasure to see the phenomena which we reckoned the most unaccountable, all deduced from some principle . . . and all united in one chain”); Letter from Charles Darwin to F.W. Hutton (Apr. 20, 1861), in 1 MORE LETTERS OF CHARLES DARWIN, *supra* note 108, at 183, 184 (“I believe that [my] view in the main is correct, because so many phenomena can be thus grouped together and explained.”). Saks himself appears to have unwittingly succumbed to this technique. See Saks, *supra* note 7, at 1184 (acknowledging “the essential plausibility of [sponsorship] theory”).

110. MILTON FRIEDMAN, *The Methodology Of Positive Economics*, in ESSAYS OF POSITIVE ECONOMICS 14 (1953). See also Crombie, *supra* note 90, at 131 (noting the ancient Greek conception of science as “deductions from *indemonstrable* principles” (emphasis added)).

111. *Id.*

112. See EINSTEIN, *supra* note 97, at 273 (noting “the fictitious character of fundamental [theoretical] principles”). See also FRIEDMAN, *supra* note 110, at 15 (stating that the issue is “not whether [the assumptions] are descriptively ‘realistic,’ for they never are”).

113. It is error to assume that whatever application this point may have in the physical sciences, such as physics, it has none in the human sciences. For instance, regarding the economic assumption of profit-maximization by a firm, Professor Friedman noted the irrelevance of “whether businessmen do or do not in fact reach their decisions by consulting schedules, or curves, or multivariable functions showing marginal cost and marginal revenue.” FRIEDMAN, *supra* note 110, at 15. What is important, he observed, is “the conformity to experience of the implications of [that hypothesis].” *Id.*

guesses.”¹¹⁴ Having arbitrarily decided upon these premises of jury reasoning, according to Saks, we then simply applied “logic” to them to derive the theory’s conclusions.¹¹⁵ Criticizing a theory for how it was supposedly created, however, conflicts with the principle that what matters instead is the theory’s merits.¹¹⁶

Saks’s assumption that our theory was created by guesswork is also wrong. In creating a theory, the theorist begins with experience-based intuitions about what is relevant to the cause of the phenomena in question.¹¹⁷ At the beginning of the process, however, no explanation exists for these intuitions. The next step is to subject these intuitions to rigorous analysis, with the goal of constructing an all-embracing explanation of the phenomena. Along the way, new terms and concepts are invented as the theorist gains a better understanding of the phenomena.¹¹⁸ If the process is successful, universal propositions can be identified and formulated using the newly invented terminology.¹¹⁹

In formulating our theory of sponsorship, we considered dozens of provisional theories and sub-theories and compared them to our own trial experiences. Our premises regarding how the jury reasons¹²⁰ emerged through this process of theory invention. In arriving at this system, we were not simply making up a theory out of whole cloth, divorced from our real-world experience. Professor Saks’s misunderstanding again lies in the fact that the deductive textbook presentation of a theory “does not show the way in which

114. Saks, *supra* note 7, at 1186.

115. See *id.* at 1178. Indeed, we are said to have “courageously followed [these] derivations even to conclusions that are contrary to conventional, often unanimously endorsed, wisdom.” *Id.* at 1181. The inference is that we gave advice in the face of personal misgivings simply because it followed from our premises.

116. See KARL R. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 31 (1959) (“The question of how . . . a new [scientific theory] occurs to a man . . . is irrelevant to the logical analysis of scientific knowledge.”).

117. See JOSEPH A. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* 561-62 (Elizabeth B. Schumpeter ed., 1954) (“[B]efore embarking upon analytic work of any kind we must . . . acquire ‘intuitively’ a preliminary notion of how [the phenomena in question] hang together or, in other words, of what appear from our standpoint to be their fundamental properties.”).

118. See HEMPEL, *supra* note 89, at 37 (noting that when developing a theory, “the scientist has to invent a set of concepts—theoretical constructs, which lack immediate experiential significance”).

119. See *id.* at 36-37 (discussing how a theory helps “establish explanatory and predictive connections between the data of direct observation”).

120. KLONOFF & COLBY, *supra* note 1, at 20 (“[T]he jury assumes that each advocate will make every contention and introduce all available evidence that he believes will materially favor his case. At the same time, [it also assumes that the advocate will] seek to accomplish the[se] tasks with minimum effort.”).

the matter [being] taught was discovered."¹²¹

Finally, Saks proclaimed that sponsorship theory is "backwards" because it was announced prior to empirical testing of its predictive propositions.¹²² This criticism misunderstands the nature of scientific theories. It has *never* been a requirement that a theory's predictions—even ones with highly significant implications—be verified prior to announcement.¹²³ Indeed, announcement prior to testing has certain advantages, for it has traditionally been those empirical tests conducted *after*, not before, announcement of a theory, that have led to widespread acceptance. This acceptance emerges because the results of such testing could not possibly have been "built into" the theory in its creation.¹²⁴ Professor Saks's criticism leaves a theorist with paltry alternatives: to hold back the theory from publication, mentioning it only to close friends, or to publish it in a book containing the legend, "Warning: theory untested by empirical tests." When pushed to its inevitable result, Professor Saks's criticism becomes absurd.

It should also be noted that we did in fact experiment with the theory in numerous trials and achieved dramatic results.¹²⁵ Furthermore, we have never claimed that our own trial experience establishes the theory by scientific standards.¹²⁶ We welcome for-

121. Rene Descartes, *Reply to the Second Set Of Objections*, in 2 *ESSENTIAL WRITINGS OF DESCARTES* 49 (Haldane & Ross ed., 1955). Cf. KUHN, *supra* note 91, at 180-81 (noting that textbooks contain "the finished achievements of modern physical scientists" and that "the textbook mode of presentation must inevitably be misleading").

122. See Saks, *supra* note 7, at 1181 ("When I say that sponsorship theory is backwards, I mean that its suggested applications precede the phenomena of persuasion when it [sic] should follow them. A positive theory is ready for application only after it has been empirically confirmed.").

123. If that were so, Einstein's theory of relativity, to cite a familiar example, would forever have remained a secret. Few areas of Einstein's theory are even accessible to a direct comparison with nature and, consequently, remain untested to this day. See KUHN, *supra* note 88, at 26 ("[T]here are seldom many areas in which a scientific theory, particularly if it is cast in a predominantly mathematical form, can be directly compared with nature. No more than three such areas are even yet accessible to Einstein's general theory of relativity.").

124. See KUHN, *supra* note 88, at 155 (noting that the unanticipated consequences of a theory are especially persuasive when attempting to prove it because they have not been "built into the new theory from the start").

125. See KLONOFF & COLBY, *supra* note 1, at 11 (summarizing the authors' own successful application of sponsorship theory and unsuccessful use of conventional methods of trial advocacy).

126. In this regard, we stated only that our trial experiences "convince[d] us that the chances for success at trial can be improved considerably by understanding and applying sponsorship principles." KLONOFF & COLBY, *supra* note 1, at 11. For that reason, Saks's criticism is unwarranted. Cf. JOHN S. MILL, *A SYSTEM OF LOGIC* 328 (Longman 1970) (characterizing Darwin's *Origin of Species* as an "unimpeachable example of a legitimate

mal testing of our theory and are confident that the results will support it.

III.

One might be justifiably puzzled that Abrams marshalled a multimillion dollar trial defeat as proof of the asserted tactical errors of the winning attorney. There is no cause, however, for puzzlement. Notions developed in a pre-scientific era are characteristically "taken for granted" and embraced "unreflective[ly]." ¹²⁷ In particular, Abrams grew up with the maxim that volunteering weaknesses is a good idea. It is undoubtedly an integral part of his experience as a litigator. If his reliance on the *Newton* case is any guide, however, he probably considers cases in which he used the tactic as confirming its wisdom, regardless of whether he won or lost. For that reason, his "experience" is of little or no weight in assessing the merits of sponsorship theory.

Professor Saks, for his part, voiced "intellectual" criticisms that are more than a century out of date. Here again, there is no cause for surprise. Because the field of trial advocacy is not grounded in science, professors in that field have not been expected to keep abreast of changes in scientific methodology. In a strange way, therefore, although Abrams and Saks come from different vantage points, they are united in how they both so fittingly reflect the primitive state of trial advocacy.

Given the inability of either reviewer to locate evidence to undermine sponsorship theory, the question arises as to why both are so disturbed by it. We submit that the reason lies in the deductive nature of the theory. In particular, what appears to have upset Abrams most is the certitude with which our theory sets forth its conclusions. ¹²⁸ Yet, that is characteristic of any deductive system, where conclusions follow necessarily from premises. Saks's displeasure with the deductive nature of the theory is, as we have noted, explicit. Given his apparent unfamiliarity with the role of deduction in theory formation, however, his discomfort is entirely understandable. Until academics and practitioners alike are willing to embrace

hypothesis" and observing that "[i]t is unreasonable to accuse Mr. Darwin (as has been done) of violating the rules of Induction. The rules of Induction are concerned with the conditions of Proof. Mr. Darwin has never pretended that his doctrine was proved. He was not bound by the rules of Induction, but by those of Hypothesis.").

127. WARTOFSKY, *supra* note 103, at 63.

128. See Abrams, *supra* note 6, at 1161 (disparaging the "opinion letter quality assurances" of *Sponsorship Strategy*).

the deductive approach and not condemn it reflexively, the field of trial advocacy will never advance beyond the futile proclamation that there is no “right way” to try a case.