THE TULLY MESSAGE BOX AS A HEURISTIC FOR MODELING LEGAL ARGUMENTATION AND DETECTING COVERT ADVOCACY

JOANNA P. KIMBELL[*]
ALISON BERRY[**]

The formalization of covert advocacy techniques highlights the struggle attorneys experience balancing service to clients and service to the justice system. Advocacy is a standard and expected courtroom practice, and covert advocacy, directed at persuading the jury to such a degree that jury independence may effectively be lost, is not a recent invention. Formalization of covert advocacy tactics and support for such in the literature is more recent and raises the issue of when covert advocacy may distort traditional persuasion into manipulation. The Tully Message Box (TMB) provides a framework for modeling legal argumentation and discusses the use of covert advocacy. By utilizing the TMB, attorneys may be better positioned to identify the advocacy path in a case and reveal which issues are ripe for opposing counsel's use of covert advocacy. Outside the courtroom, the TMB can be used for analyzing cases in classrooms to engender discussions about covert advocacy techniques in cases which present ethical dilemmas. The prosecution's view of *United States v. Harold Austin* is analyzed using the TMB to demonstrate how this framework can be used to discuss the ethics of covert advocacy and to indicate how it may be used in the future to augment trial preparation.

I. INTRODUCTION

To find an answer to a legal problem, attorneys identify some factors or factors to which they can attribute a result.[1] At the same time, constituents of the United States' legal system view evidence as a way, sometimes the only way, to decipher, communicate, and act upon the truth.[2] Evidence is presented within legal literature and the courtroom as proof or non-

[*] J.D., CIA, CFE, Clinical Assistant Professor of Business Law and Management, West Texas A&M University.
[**] Ph.D., Assistant Professor of Business Communication and Management, West Texas A&M University.
[1] Jerry Frug, *Argument as Character*, 40 STANFORD L. REV. 869, 870 n.4 (1988).
[2] W. TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS (Cambridge Univ. Press 2006).

negotiable truths used to communicate past events that allow an audience (e.g., judge or jury) to make decisions (i.e., obtain a verdict).[3] Attorneys meanwhile may see their efforts to assist the jury in reaching the best judgment of what happened as art, with testing theories and pointing out competing interests in the case being normal and necessary.[4] In the eyes of those not in the profession, it may seem that through advocacy law and even truth become malleable.[5]

Some attorneys admit that the system may be flexible but insist that any such flexibility is limited and the result of a decision in a case may, in fact, depend upon some aspect that isn't flexible at all.[6] The attorney's responsibility is to find some aspect of relative stability in the case, sufficiently immune from controversy, to serve as a base for directing the decision makers to the proper legal result.[7] In the vernacular of the communications field, this is known as the evidence-only approach.[8]

In contrast, if evidence is considered to have no intrinsic ability to communicate with an audience, it becomes the means through which the claims of attorneys may be validated.[9] From this perspective, individuals who

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[3] Hock Lai Ho, *The Legal Concept of Evidence*, STAN. ENCYCLOPEDIA OF PHIL. (E.N. Zalta ed., 2015); *see also* Joel D. Lieberman & Jamie Arndt, *Understanding the limits of limiting instructions: Social psychological explanations for the failures of instructions to disregard pretrial publicity and other inadmissible evidence,* 6 PSYCHOL. PUB. POL'Y & L., 677-711 (2000) (noting that discussion about legal communication is often centered on the rules that govern what evidence is presented at trial).

[4] Kenney Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. LEGAL EDUC. 69, 74 (1982).

[5] Legal argument, we have contended, consists instead of a series of shifting appeals to the various grounds for decision making, with any particular ground on which the decision said to rely ultimately resting on yet another ground …. In legal argument, this kind of shifting of the basis of decision can continue *ad infinitum* without ever finding an adequately stable place on which the decision can grounded. Attempts to appeal to precedent (or to facts or intention or policy considerations) can lead to different-even opposite-legal results depending on the basis on which one builds the reading of precedent (or the facts or the intention or the policy considerations).
Frug, *supra* note 1, at 870-71.

[6] *Id.* at 869-70.

[7] *Id.* at 869-70 (noting: "Traditionally, disagreement how legal decisions are made has centered over what such places are, not whether such places exist.") An alternative response is, because no one can ever know with certainty what happened in a case, lawyers can't be held responsible for the truth. *See* Hegland, *supra* note 4, at 73-74 (noting that advocacy by such philosophy would seem to focus not on revealing the truth but on pointing out falsity, a fallacy since just because there is no truth does not establish that there are no lies); Frug, *supra* note 1, at 872 ("A further view is the one that accepts legal argument as a form of rhetoric. This view focuses on the effects of legal arguments, examining elements such as facts, precedents and principles to see how they form attitudes or induce actions in others.").

[8] *See also* Section III.B. – Evidence-only approach.

[9] D. Simon, *A third view of the black box: Cognitive coherence in legal decision making*, 71 U. CHI. L. REV. 511 (2004).

present, evaluate, appraise, and communicate the context of the evidence influence how the evidence is evaluated.[10] Legal communication transforms from an evaluation of *what is* and *what can be said* to an exploration of *how it is said*. This may be the case even if truth is not fluid but evidence is open to the interpretation of the attorneys, such that outcome determination is ceded to those willing to manipulate the evidence instead of those assigned the task of determining justice.[11] In such situations, the attorney moves beyond advocacy to persuasion.[12]

II. ADVOCACY AND ETHICS

Whether attorneys acknowledge the ethical challenges of advocacy directly or adjust the dialog by framing the issue as a study in advocacy and rhetoric, agreement can be found on the base that, because of the structure of our adversarial process, attorneys can influence juries and impact verdicts.[13] Techniques designed specifically to influence the jury like covert advocacy tactics are effective, and there is concern that overuse or improper use of such tactics coincides with the diminishment of courtroom ethics. Covert advocacy techniques are examples of such tactics.

A. *Covert Advocacy*

Courtroom tactics designed to influence juries are nothing new in concept, the label of covert advocacy and categorization of specific tactics being the more recent developments.[14] A classic example of covert advocacy applied in the courtroom comes to us from Clarence Darrow, who is said to have "pushed a wire through the center of his cigar to prevent the ash from falling. He lit the cigar, and as the ash grew impossibly longer, all eyes in the courtroom were focused on the ash rather than the witness."[15]

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[10] L. DAVIS, SEE YOU IN COURT: A SOCIAL WORKER'S GUIDE TO PRESENTING EVIDENCE IN CARE PROCEEDINGS (2015).
[11] Alex Stein, *The New Doctrinalism: Implications for Evidence Theory*, 163 U. PENN. L. REV. 2085 (2015).
[12] Jansen Voss, *The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom*, 29 L. & PSYCHOL. REV. 301, 301 (2005) ("In the context of a trial, persuasion is the organization of legal arguments and evidence within the framework of court procedures in a way likely to cause the jury to make a certain decision.").
[13] Victor Gold, *Covert Advocacy. Reflections on the Use of Psychological Persuasion Techniques in the Courtroom,* 65 N.C. L. REV. 481, 500 (1987).
[14] Voss, *supra* note 12, at 305 ("Lawyers have long used personal charisma and skillful orations to persuade juries."); at 481 ("For centuries trial lawyers have exploited psychological principles derived from intuition and experience.").
[15] *Id.* at 312; *see also* Gold, *supra* note 13, at 495.

Not only have such tactics long been a reality but they are considered by some to be an imperative.[16] Though many attorneys develop their own persuasive techniques through experience, social scientists and others have noted a scientific basis for what had before been seen as the art of persuasion and lawyers are encouraged to stay aware of new advocacy tactics as they are identified.[17] A growing body of literature on the subject makes it easier to stay informed.[18]

Covert advocacy tactics are rhetorical tactics used by attorneys to persuade juries.[19] The goal of using such tactics is to "prevent the jury from independently choosing what values to reflect in its verdict and what evidence and arguments to accept or reject."[20]

Covert advocacy tactics can be divided into two groups based on the intended effect of the tactic on the jury: extralegal basis for decision making and illogical evaluation of evidence.[21] An extralegal basis for decision making is either irrelevant to the legal or factual issues of a case or is considered by the law to be an otherwise improper basis for decision making.[22] Subcategories of extralegal bases are courtroom style techniques and techniques aimed at inducing the use of bias.[23] Tactics that induce illogical evaluation of evidence attempt to interfere with either the jury's inferential or perceptual abilities.[24] Subcategories of illogical evaluation of evidence tactics are meaning manipulators and weight manipulators.[25]

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[16] Voss, *supra* note 12, at 302.
[17] Voss, *supra* note 12. "Although attorneys have developed their own persuasive techniques as a result of experience, social scientists have been exploring the scientific basis of persuasion." *Id.* at 305 n.5.
[18] Gold, *supra* note 13, at 481-83 (noting a large and growing body of academic literature on the issue of the formal use of psychological techniques in the courtroom).
[19] Gold, *supra* note 13, at 502.
[20] *Id.*
[21] *Id.* at 484.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 495.
[25] *Id.*

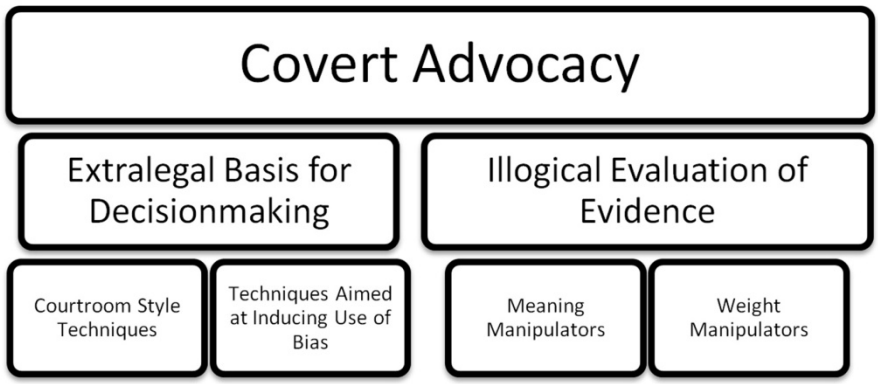

Figure 1. Covert Advocacy Taxonomy, based on Gold[26]

Courtroom style techniques involve body movement, physical appearance, demeanor toward the jury, physical relationship to the jury, and use of language.[27] Courtroom style tactics are an extralegal basis for decision-making because "the demeanor of attorneys or witnesses usually has no connection to the legal or factual issues that should be the basis for the jury's verdict."[28] Modern examples include the defense attorney's deliberate choice of tribal pattern ties to wear in court and staging of artwork and photos on walls jury members walked past on their way to examine the crime scene of the case.[29]

Use of language is another longstanding form of courtroom-style covert advocacy. Such techniques are good examples of the long history of covert advocacy techniques.[30] The introduction of scientific studies to advocacy has formalized the understanding of speech patterns and their importance in influencing juries and led to the development of specific covert advocacy

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[26] *See* Gold, *supra* note 13.

[27] *Id.* at 484; *see also* Voss, *supra* note 12, at 319 ("Experts suggest that lawyers eliminate physical barriers-legal pads, books, desks, tables, lecterns, articles of clothing such as vests and buttoned suit coats between themselves and the jury. These physical barriers serve as psychological barriers between the lawyer and the witness; physical barriers serve as a psychological security blanket for the adverse witness but serve only to weaken the lawyer's physical presence.").

[28] Gold, *supra* note 13, at 484; Voss, *supra* note 12, at 326 (discussing social scientific recommendations on physical appearance and nonverbal communication techniques also focus the jury's attention on extra-legal matters).

[29] O.J.: MADE IN AMERICA (ESPN Films, Laylow Films 2016) (noting the tie choices of Johnny Cochran and the changes made to artwork inside the Simpson home before the jury walked through).

[30] Voss, *supra* note 12, at 306 ("Lawyers have long manipulated their speech patterns and word choice in an effort to persuade juries.").

techniques.[31] It was found that "a defense attorney, particularly in criminal cases, can gain an advantage by making the meaning of the evidence vague or unclear," therefore, defense attorneys should make conscious effort to use fewer adverbs, as adverbs tend to increase specificity when the defense attorney's goal is to keep some things vague.[32]

The impact such techniques can have on a jury's perception of the evidence and even the outcome of the case is illustrated through an examination of decisions attorneys make while crafting cross-examination questions:

> For example, assume an attorney asks the witness "The defendant is not a friend of yours, is he?" The question can imply that the defendant and the witness are enemies. But compare the question "The defendant is not an enemy of yours, is he?" This question does not imply that the defendant and witness are friends, despite the identical structure of the two questions. Instead, the implication is that the defendant and the witness are neither friends nor enemies. The reason for the difference in the ability of these questions to convey an assertion of fact apparently is based on commonly held beliefs concerning socially acceptable verbal behavior.[33]

Research also indicates that attorneys knowledgeable in psychology and conversation can formulate nonleading questions that directly communicate information to the jury, information that goes beyond the content of what's being discussed.[34] The impact of such tactics is difficult to counter or correct:

> Jurors who accept the premises embedded in such questions resist rejecting those premises even when the responsive testimony or other evidence suggests the premises are invalid. In this manner counsel can covertly communicate theories and arguments subconsciously to the jury simply by asking questions during witness examination. Because an attorney's questions are not themselves evidence, when an attorney exploits this knowledge he or she again seeks to induce the jury to employ an extralegal basis for decision making.[35]

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[31] Voss, *supra* note 12, at 306 n.42.
[32] *Id.* at 308-09.
[33] Gold, *supra* note 13, at 488-89.
[34] *Id.* at 489.
[35] *Id.*

Meaning manipulators and weight manipulators, in contrast with courtroom style techniques aimed at interfering with the jury's inferential or perceptual abilities by drawing focus away from the evidence, are focused on influencing how the jury evaluates the evidence.[36] Meaning manipulators induce juries to incorrectly decide that evidence is or is not probative of a fact in issue and weight manipulators induce juries to permit evidence to have an effect on decision making that is disproportionate to the probative value of that evidence.[37] Through weight manipulators, an attorney can induce a jury to give value to evidence that has no actual probative weight.[38]

B. *The Ethics of Covert Advocacy*

Some experts have warned that unethical use of covert advocacy techniques could lead to an erosion of the U.S. judicial system.[39] Indeed, there is always some risk that attorneys will focus more on rhetoric than truth because of their innate drive to win,[40] but recognizing the existence of the

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[36] Gold, *supra* note 13, at 484 n.12 (noting overlap between groups and stating that he's classifying based on what seems to be the primary effect on jury decision making); Voss, *supra* note 12, at 310 (referring to this as the biasing effect, a technique that causes juries to misperceive evidence. In such a case, the categorization of the technique is easiest made based on the primacy effect on the jury but should in fact be made on the intent of lawyer using the technique).

[37] Gold, *supra* note 13, at 494.

[38] *Id.* at 495. In one case, a woman had become a quadriplegic as the result of an accident in defendant's swimming pool. When the woman was pulled from the pool, one of her arms was bright blue. Medical experts for both the prosecution and the defense agreed they could not find a cause for the phenomenon or ascribe any meaning to it. However, jury simulations conducted by behavioral scientists employed by the defense revealed that the blue arm evidence was important to a mock jury. The consultants suggested that defense counsel "constantly infer" to the jury throughout the trial that the blue arm meant that the woman had some prior physiological problem that made her susceptible to drowning. Counsel were apparently cautioned against making overt efforts at attributing this interpretation to the blue arm because that interpretation was not supported by any of the expert testimony or by any other evidence. Thus, counsel were able to give the appearance of importance to evidence with little or no probative value.

[39] Voss, *supra* note 12, at 302; Gold, *supra* note 13, at 484 n.60 ("Some researchers suggest, however, that in controversial trials or in trials in which the evidence is not clear cut, extralegal bias may influence the result in as many as half the cases.").

[40] Voss, *supra* note 12, at 316 n.149; *see also* Gold, *supra* note 13, at 501 ("Ethical considerations aside, advocates are not concerned with the truth so much as they are with winning. Thus, when it advances their cause advocates may not hesitate to exploit jury biases or induce the jury to commit errors of logic."); Hegland, *supra* note 4, at 75 (explaining that the innate drive to win is not a negative trait *per se*): "It is certainly true that the practice of law, particularly trial work, is in many ways gamelike. There is no need to apologize. A great deal of personal satisfaction comes from playing well and winning. This satisfaction is inherent in the process; it is not dependent on any external goal, such as 'doing justice' or 'helping solve human problems.' As with all games, one approaches the practice of law with a

risk is not the same as championing abstention from the action. Rather, we should acknowledge that risks of unethical action in the courtroom exist and be clear about why and how covert advocacy techniques increase those risks: covert advocacy techniques are used unethically when they obscure the import of relevant evidence or mislead the jury as to the actual meaning or value of the evidence.[41]

There are two reasons attorneys have the power to work unethically before a jury. First, juries depend upon the presentation and context of evidence to help them achieve justice.[42] Two, many covert advocacy techniques, particularly courtroom style techniques, enhance attorney credibility.[43] Because of the impact, those two factors have in the courtroom, juries, while trying to do their duty, may evaluate evidence in light of the attorney's credibility instead of the value of the evidence.[44] As an example, attorneys may refer to existing jury heuristics, "cognitive simplifying strategies used to reduce the complexity of information that must be considered in making a decision," as part of their advocacy.[45] Reference to a heuristic combined with a credible attorney and witness will increase the risk of juries making inferential errors.[46] The combination will "produce the impression that evidence offered by [attorney and witness] is reliable while focusing the jury's attention away from gaps or inconsistencies in the evidence that are far more probative of reliability."[47] It induces inferential error and does so in such a way that it is difficult for the jury to either detect or prevent the error.[48]

Unethical covert advocacy hurts both the trial process and the greater judicial system. Covert advocacy can be used to circumvent procedural law,

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desire to play well and win. We should not lament this aspect of lawyering or feel guilty about our enjoyment of it."

[41] Gold, *supra* note 13, at 488; *Id.* at 507: It is clear, however, that psychological techniques now available can affect jury decisionmaking. It is also clear that any technique capable of reducing the uncertainties of a jury trial even slightly is likely to be attractive to many lawyers. This alone should be enough to make covert advocacy cause for concern; *Id.* at 508: …the introduction of professional behavioral science into the courtroom increases those risks. Although modem psychological techniques come with no guarantees, they increase the probability that counsel will breach jury cognitive independence successfully and erode the jury's ability to decide cases logically and in an unbiased fashion. As techniques are further refined, the risks will increase. The balance of risks against benefits must then change.

[42] F. J. Bex, et al., *A hybrid formal theory of arguments, stories and criminal evidence*, 18 ARTIFICIAL INTELLIGENCE & L. 18, 123 (2010); *see also* TWINING, *supra* note 2.

[43] F. J. Bex, et al., *A hybrid formal theory of arguments, stories and criminal evidence*, 18 ARTIFICIAL INTELLIGENCE & L. 18, 123 (2010).

[44] *Id.*

[45] *Id*. at 489.

[46] *Id.*

[47] *Id.*

[48] Gold, *supra* note 13, at 491.

achieving objectives that would not normally be permissible under procedural rules.[49] Covert advocacy can also circumvent due process and raise equal protection issues.[50] Additionally, it can degrade jury legitimacy and therefore, jury independence. It is assumed that a jury will, when allowed, "choose what evidence to accept and what community values to reflect in its verdict" to make a decision that is logical and fair."[51] But covert advocacy can prevent the jury from exercising its option to reject a specific message and even erode the ability to evaluate subsequent evidence independently.[52] This interferes with the jury's ability to express its values in the verdict, ultimately preventing the jury fulfilling its role in the judicial process.[53]

Again, this is not to say that covert advocacy is inherently bad. In fact, there may be times when such techniques benefit the judicial process. Consider the case of a defendant in a rape and murder trial who wore a T-shirt and jeans in the courtroom.[54] The clothing revealed the defendant's tattoo to the jury, an arm tattoo depicting "an octopus engulfing a nude female."[55] Was the defendant innocent or guilty? The jury found the defendant guilty.[56] That does not answer the question of actual guilt, and it introduces another: would the verdict have been different if the defendant were better attired? Covert advocacy in such a case could help the jury focus on the evidence in the case instead of adopting a bias.[57] The challenge is for

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[49] Voss, *supra* note 12, at 325 nn.261-63.

[50] Gold, *supra* note 13, at 501: The covert manner in which these extralegal matters shape jury decision making makes them particularly dangerous. Most jurors would reject an overt suggestion to evaluate witness credibility based on social status. When a lawyer makes the suggestion covertly through manipulation of linguistic style, however, the jury may be unable to detect and reject the subtle thrust of the lawyer's efforts. Similarly, a verdict overtly based on considerations of social status would raise serious moral and constitutional questions that any trial or appellate judge could identify. When damage awards decrease commensurately with a decrease in the apparent social status of the plaintiff and those witnesses associated with the plaintiff, the law improperly values individual rights and life differently for the powerful than it does for the powerless. These issues are no less pertinent when counsel influences a verdict subtly by exploiting the psychological divisions between the linguistic patterns of the poor and inaccurate stereotypes of supposedly more credible speech.; *Id.* at 485 n.23 (indicating that these covert tactics may raise due process and equal protection issues when the status of the litigants and their witnesses overcome the proper legal issues).

[51] *Id.* at 498.

[52] *Id.* at 498, 502.

[53] *Id.* at 498, 502; Voss, *supra* note 12, at 324.

[54] Voss, *supra* note 12, at 324.

[55] *Id.*

[56] *Id.*

[57] *Id.* ("[I]f you have a client who wears the wrong thing or is just generally unattractive, should you not use covert advocacy?"); Gold, *supra* note 13, at 504 ("Counsel can use some of these techniques to enhance communication between counsel and the jury by helping to identify and eliminate extralegal distractions such as dress, linguistic style, and other aspects

attorneys to understand what is and is not ethical and balance accordingly with respect for both their responsibilities to their client and the judicial system.[58]

C. *Combatting Unethical Covert Advocacy*

Any efforts to curb unethical covert advocacy should be undertaken with the objective of allowing the jury to fulfill its role.[59] This presents challenges, the first being a determination of who is best suited to institute controls. It is not realistic or practical to ask juries to simply ignore covert advocacy techniques. Since such techniques are aimed at accomplishing subconscious persuasion of the jury, it cannot be expected the jury will even detect when the techniques are being used.[60] Judges certainly possess the authority to combat unethical covert advocacy techniques but making it their responsibility would assume that judges could detect the covert advocacy techniques being used and successfully combat it.[61] It also raises the issue of changing the balance of power in the court system, taking control away from the attorneys and entrusting it to the judges.[62]

If instituting controls is not best placed with the jury or the judge, it should be left to the attorneys to self-regulate.[63] Certainly, it can be said that if attorneys are guardians of the justice system, they have some responsibility for combatting anything that would make the system unfair.[64]

The issue then becomes how attorneys can combat covert advocacy. To combat something, one must first be able to detect it, and attorneys face some

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of courtroom demeanor."); *see also* Joseph F. Anderson, Jr., *Setting Yourself Apart From the Herd: A Judge's Thoughts on Successful Courtroom Advocacy*, 50 S.C. L. REV. 617, 631 (1998) (regarding the impact of word choices).

[58] Anderson, *supra* note 57, at 636-38.

[59] Gold, *supra* note 13, at 509.

[60] *Id.* at 502, 512-14 (presents some ways juries could thwart covert advocacy and notes that use of the same would require restructuring the trial court system).

[61] *Id.* at 485-86 ("Nonetheless, the perceived correlation between speech style and credibility was strong; jurors persisted in linking credibility with the power component of speech even when the judge's instructions cautioned against it.").

[62] *Id.* at 509; *see also id.* at 499, 500, 502 (expressing concern about abuses by judges if too much power is granted to them and not checked by distribution of power to juries and attorneys).

[63] *Compare id.* at 504 ("Generally, the prosecution or the plaintiff has the advantage of primacy, however, the defense is not lacking in methods to counteract it."); *see also* Voss, *supra* note 12, at 312 ("Psychologists offer two strategies to minimize the defense-induced primacy effect: (1) lengthen the trial (2) examine many character witnesses.").

[64] Anderson, *supra* note 57, at 623-24.

of the same challenges detecting covert advocacy as do juries.[65] Moreover, if unethical covert advocacy is detected in the courtroom, the attorney must immediately address it before further damage is done to the client's case, but here counsel faces the same challenges as judges.[66]

The solution then lies not in relying on courtroom actions which may or may not occur but on actions taken to prepare for the case.[67] If the attorney adds to trial preparation not just an anticipation of the arguments of the other side but also of when and how unethical covert advocacy may be used, he or she will gain the opportunity to discourage unethical acts.[68] The attorney could use a visual aid or checklist before trial to accomplish this goal and use the same for reference as the case proceeds.[69]

Law programs that focus on courtroom skills courses, particularly programs modeled on the National Institute of Trial Advocacy (NITA) program, create an ideal atmosphere for training attorneys to anticipate and plan the use of covert advocacy tactics as a part of trial preparation.[70] Emphasis should be laid on avoiding and preventing unethical covert advocacy; after all, if questions about values and ethics are not addressed in law schools, "where will they be considered and by whom?"[71] Indeed, the argument is made that such topics must be addressed in law schools, since teaching advocacy

> in a vacuum tends to communicate, first, that attorneys have no obligation to the truth; second, that law practice is simply a game, that its only meaning can come from playing the game well from the effective use of technique; and third, that the only goal of the client is to win, even if winning means abusing one's opponents.[72]

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[65] Gold, *supra* note 13, at 504 ("The jury may be unaware that a subconscious process they have been cautioned against is even taking place. For the same reason, opposing counsel may not even be aware that covert advocacy is being employed and needs response.").
[66] *Id.* ("Responding to covert advocacy with covert advocacy may be even less promising. It is unlikely that a jury subconsciously exposed to bias and illogic favoring one side will be moved back toward fairness and logic by subconscious exposure to bias and illogic favoring the other side.").
[67] Anderson, *supra* note 57, at 619.
[68] Under the general competitive principle that the best defense is a good offense.
[69] Anderson, *supra* note 57, at 620.
[70] *See* Kenneth Broun, *Teaching Advocacy the N.I.T.A Way*, 63 A.B.A. J. 1220 (1977). *See also generally* Hegland, *supra* note 4 (discussing the dangers that come with teaching advocacy techniques in such programs without also reflecting on the ethical implications of the techniques applied).
[71] Hegland, *supra* note 4, at 72.
[72] *Id. See generally* Steven Lubet, *What We Should Teach (But Don't) When We Teach Trail Advocacy*, 37 J. LEGAL EDUC. 123 (1987).

If the next generation of attorneys is to learn how to balance service to clients and the justice system with an innate drive to achieve and excel, issues like unethical covert advocacy must be addressed in the law schools.[73]

III. ANTICIPATE COVERT ADVOCACY – THE TULLY MESSAGE BOX

The anticipation of potential interpretations of evidence, as well as an understanding of varying interpreted truths that may be constructed from evidence, is necessary to identify covert advocacy. Both utilizing an extralegal basis for decision-making as well as illogically evaluated evidence may only be identified if the attorney recognizes that the evidence, itself, can stand as reasoning for multiple perspectives. The Tully Message Box (TMB) provides a means for analyzing the evidence as a basis for constructing an argument even when that basis is neither logical nor legal.[74] Because of this, covert advocacy may be better anticipated, recognized and potentially combatted if the TMB is used.

The TMB is "…a simple four-square box to summarize your message with what you say about yourself, what your opponent says about herself, and what both sides say about the other."[75] The TMB provides a framework for constructing an argument against an opponent for evaluation by an outside audience.[76]

Table 1. The Tully Message Box

What You Say About You	What They Say About Them
What You Say About Them	What They Say About You

The TMB has been utilized within the context of political communication to present claims about evidence.[77] Evidence is often employed in political contexts, though evidence in political contexts is

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[73] Hegland, *supra* note 4, at 86 ("While acknowledging that students have a legitimate and compelling need to learn technique, law teachers should nonetheless assert their belief that they have another compelling, if less immediate and less visible, need-to explore what their use of technique might do to them, to their clients, and to their society.")

[74] BRAD FRITCH, MEDIA RELATIONS HANDBOOK FOR AGENCIES, ASSOCIATIONS, NONPROFITS, AND CONGRESS 54 (TheCapitol.Net 2004).

[75] CHRISTINE PELOSI, CAMPAIGN BOOT CAMP: BASIC TRAINING FOR FUTURE LEADERS 86 (2008).

[76] *Id.*

[77] *See generally* K. M. Erville, *2008 General Election Message Box*, EMERALD STRATEGIES (2016), http://www.emeraldstrategies.net/2008-general-election-message-box/.

frequently treated differently than in legal contexts, where evidence is objects taken under consideration. As within legal communication, presentation of evidence in political contexts still influences the actions of different parties.[78] Political evidence is presented during a campaign, and the candidates may derive very different conclusions about its meaning without changing the facts in question.[79] Therefore, the utilization of the TMB may help candidates understand, anticipate and respond to these potential interpretations. In addition to the interpretations of evidence constructed by politicians, the conclusions drawn from the evidence in political communication are evaluated by an outside audience, as is the case with the legal system. 'Fact-checkers' are individuals or organizations who develop articles marketed to the public regarding the validity of political evidence and conclusions presented during a campaign.[80] And, although political candidates and stakeholders in the political process may refer to fact-checkers as having untainted and objective insight into the validity of evidence, the articles published to evaluate political evidence often present varying conclusions.[81]

This speaks to evidence as playing a role in constructing an interpreted or alleged truth, or the concept that there are several potential realities which depend upon the perspective taken by the evaluator.[82] When this perspective is adopted within a legal context, and legal evidence is viewed as having relevance to multiple potential 'truths,' in other words, when covert advocacy techniques will likely be utilized, the TMB framework may have a similar application to its use in political communication.

For this study, the TMB was extended as a theory for legal communication construction.[83] *United States v. Harold Austin*, a no-body murder case, was utilized as a means to demonstrate the applicability of the

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[78] Jayne R. Henson & William L. Benoit, *Because I said so: A Functional Theory Analysis of Evidence in Political TV Spots*, 47 SPEAKER & GAVEL 1, 2 (2016).
[79] LUCAS GRAVES, DECIDING WHAT'S TRUE: THE RISE OF POLITICAL FACT-CHECKING IN AMERICAN JOURNALISM 10 (Columbia Univ. Press 2016).
[80] *See id.*
[81] Jeffrey W. Jaman, *Influence of Political Affiliation and Criticism on the Effectiveness of Political Fact-Checking*, 33 COMM. RES. REP. 1, 9-15 (2016).
[82] J. Lin, *Returning to the Truth of Evidence: On the Methods of Interpreting the Concept of Evidence*, 44 J. ZHEJIANG U. 98 (2014).
[83] ROBERT E. STAKE, THE ART OF CASE STUDY RESEARCH 21-77 (Sage Publications 1995) (The steps for the instrumental case study included (1) posing research questions related to a theory or construct, (2) gathering information about the case and its context, (3) analyzing the theory in relationship to the case, and (4) interpretation). This study applied these steps by (1) exploring possible communicative frames for legal communication concerning case theory (2) identifying and categorizing the primary evidence presented in an historical trial (3) identifying the major considerations for each communicative frame, and (4) applying the TMB to a historical case in order to ascertain its applicability in a legal context.

TMB in studying covert advocacy, and an instrumental case study conducted.[84]

An instrumental case study may be used to,

> accomplish something other than understanding a particular situation. It provides insight into an issue or helps to refine a theory. The case is of secondary interest; it plays a supportive role, facilitating our understanding of something else. The case is often looked at in depth, its contexts scrutinized, its ordinary activities detailed, and because it helps the researcher pursue the external interest.[85]

The primary purpose of the case within an instrumental case study is to act as a vehicle to examine phenomenon related to and extend the theory.[86]

When research aims to "…confirm, challenge, or extend the theory," then the rationale for using a single instrumental case study exists.[87] An instrumental case study was an appropriate methodology for this study as (1) the construct, or theory, of the TMB in analyzing potential use of covert advocacy techniques was the primary focus and (2) the case was a secondary interest to extending this theory.

Additionally, use of the TMB framework is contrasted here with the use of an evidence-only framework.[88] The comparison shows that focusing only on the evidence may not allow for analysis of covert advocacy while the use of the TMB framework allows for a robust discussion.

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[84] The instrumental case study was conducted by assessing *United States v. Harold Austin* as tried in January of 2006 in Washington, D.C. Information about the evidence within this case as well as the case theory and legal rhetoric utilized was gathered from accounts of Thomas A. DiBiase, Assistant United States Lawyer in the District of Columbia. The accounts were presented, discussed and published through a manuscript available on the lawyer's website. *See* Thomas DiBiase, Missing, Presumed Dead (2013) (unpublished manuscript, retrieved from http://www.nobodycases.com/mybook.html) [hereinafter DiBiase 2013]; *see also* Thomas DiBiase, *"No-body" Murder Trials in the United States* (June 7, 2015), http://www.nobodycases.com/no_body2.pdf [hereinafter DiBiase 2015].

[85] P. Baxter, & S. Jack, *Qualitative case study methodology: Study design and implementation for novice researchers*, 13 THE QUALITATIVE REP. 544, 544, 549 (2008).

[86] GINA GRANDY, ENCYCLOPEDIA OF CASE STUDY RESEARCH 474-75 (Albert J. Mills, Gabrielle Durepos & Elden Wiebe eds., SAGE Publications, Inc. 2010).

[87] ROBERT YIN, CASE STUDY RESEARCH: DESIGN AND METHODS 40 (3d ed. 2003).

[88] An evidence-only approach to the evidence and claims of the case are presented in Table 4 and a Tully Message Box (TMB) approach to the evidence and claims of the case is presented in Table 5.

A. *The Case: United States v. Harold Austin*

United States v. Harold Austin concerned Mr. Harold Austin defendant in the murder of Ms. Marion Fye, his girlfriend.[89] The body of Ms. Frye was never located. During the murder trial, five individuals, three of whom were the children of Ms. Marion Fye, testified against the defendant and claimed they witnessed (i.e., heard) the murder.[90] Additional evidence was found that both supported and negated the possibility that a murder had occurred. The defendant testified to struggling with Ms. Marion Fye over a gun when it went off and killed her but later claimed innocence, saying that the previous testimony was made under duress.[91] The defendant was convicted of murder and sentenced to 42 years in prison.[92] He later died in prison.[93]

According to the prosecutor, former police officer Thomas DiBiase, the case was, "Unique legally. Unique factually. Unique in the effect on the victim's family, friends, and loved ones. It is this uniqueness that poses a significant challenge for police and prosecutors investigating these cases."[94] This particular case was selected for analysis here because it presented unique challenges regarding evidence organization (e.g., a no body murder trial) which allowed for a thorough test of the applicability of the TMB framework to analyzing evidence and advocacy. Additionally, the prosecutor's account of *United States v. Harold Austin* was comprehensive which allowed for a rich, emic perspective necessary to ensure rigor for instrumental case methodology. [95]

To appropriately accomplish the instrumental case study, available evidence within the case of *United States v. Harold Austin* was identified as presented by the prosecuting attorney. Missing evidence (i.e., that which the prosecutor identified as typically expected or beneficial in legal

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[89] DiBiase 2013, 2015, *supra* note 84.
[90] *Id.*
[91] *Id.*
[92] THOMAS A. (TAD) DIBIASE, NO-BODY HOMICIDE CASES: A PRACTICAL GUIDE TO INVESTIGATING, PROSECUTING, AND WINNING CASES WHEN THE VICTIM IS MISSING 71 (CRC Press 2015).
[93] DiBiase 2013, 2015, *supra* note 84.
[94] DiBiase 2013, *supra* note 84, at 1.
[95] For purposes of this exercise, the OMS framework was applied from the prosecutor's point of view. This is consistent with the idea that each side, no matter how good the lawyers are at predicting behavior on the other side, are ultimately limited by the contents of their own trials notebooks. In a classroom setting, an exercise could be designed in which different student groups, representing each side in the case, apply the TMB framework to analyze their respective positions. The groups would later compare frameworks then discuss whether or not they correctly predicted the covert advocacy tactical choices of the other side, and why, if differences exist, such are present.

communication but was not available in this case) was also identified and discussed.[96]

Table 2. Testimony and evidence concerning *United States v. Harold Austin*

Testimony Available	Non-testimonial Evidence Available	Testimony Missing	Non-testimonial Evidence Missing
Confession of an "accidental" killing by the defendant after arrest but then claimed innocence.	The victim vanished.	No confession or information from a co-defendant.	There was no body found.
Victim's sisters and brother said the victim was shot by the defendant when her children were in the house.	Victim's children made little effort to investigate the gunshot they heard.		There was very little forensic evidence about the victim's death.
The victim's children heard the victim yell "no" and a gunshot. She was never heard from again.	Victim's bed was splattered with blood. Blood was possibly from the victim based on DNA evaluation.		
Victim's child saw the defendant with a gun after the shot.			

[96] Table 3 presents an analysis of the both the available and missing testimony/evidence within *United States v. Harold Austin*.

B. *Evidence-only Approach*

An evidence-only approach can be defined as an approach to legal communication in which the evidence itself is considered the primary medium for communication. The evidence-only approach, applied to this case, revealed two main focal considerations: (1) supporting or negating the death of the victim and (2) the guilt or innocence of the defendant.[97] These considerations emphasize that, if no body or other substantiating evidence of death can be presented, establishing the defendant's guilt may become secondary to establishing the victim's death.[98] This approach also demonstrates that only a dichotomy of interpretations, and not the advocacy drivers, would be anticipated if the attorney focused solely on the evidence.

In the case of *United States v. Harold Austin*, the absence of the body meant there were restricted methods available for solving the case: "forensic evidence; a fellow defendant, jailhouse informant, or friend of the defendant snitches; or the defendant confesses."[99] A review of the evidence in the case reveals that none of these methods were ripe for exploration.[100] Evidence and available testimony were limited.[101]

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[97] *See* Table 4.

[98] A "no body" murder trial is a particular form of the *corpus delicti* case type. As defined in Black's Law dictionary, *corpus delicti* is "Loosely, the material substance on which a crime has been committed; the physical evidence of a crime, such as the corpse of a murdered person. Despite the common misunderstanding, a victim's body could be evidence of a homicide, but the prosecutor does not have to locate or present the body to meet the *corpus delicti* requirement." BLACK'S LAW DICTIONARY 369 (8th ed. 2004). Use of the defendant's confession in this case created additional evidentiary challenges for the prosecutor in this case as it triggered the *corpus delicti* rule. "Generally: The doctrine that prohibits a prosecutor from proving the *corpus delicti* based solely on a defendant's extrajudicial statements. The prosecution must establish the *corpus delicti* with corroborating evidence to secure a conviction. BLACK'S LAW DICTIONARY 369 (8th ed. 2004). For an overview of the *corpus delicti* rule, including its history and purpose, *see generally* Thomas Mullen, *Rule Without Reason: Requiring Independent Proof of a Corpus Delicti as a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F. L. REV. 385 (1992); *see also* Rollin M. Perkins, *The Corpus Delicti of Murder*, 48 VA. L. REV. 173, 178-82.

[99] DiBiase 2013, *supra* note 84, at 10.

[100] *See* Table 3.

[101] DiBiase 2013, *supra* note 84.

Table 3. An evidence-only based approach to *United States v. Harold Austin*.

Evidence to Support the Death of the Victim:	**Evidence to Negate the Death of the Victim:**
• The victim vanished. • Victim's bed was splattered with blood. Blood was possibly from the victim based on DNA evaluation. • The victim screamed "No, [defendant's name] shortly before a gunshot was heard. The victim was never heard from again.	• There was no body found. • There was very little forensic evidence regarding the victim's death. • Victim's children made little effort to investigate the gunshot they heard. • The blood on the bed was not conclusively established as being the victim's.
Evidence to Support the Guilt of the Defendant:	**Evidence to Support the Innocence of the Defendant:**
• The defendant confessed, at one point, to an accidental killing. • The defendant was accused by the victim's sisters and brothers of shooting the victim when her children were in the house. • The defendant was seen with a gun after the shot was heard.	• No viable confession from the defendant or information from a co-defendant.

Using the evidence-only approach, it would seem that conviction of the defendant might not stand to rationality since the jury could decide based on the limited available evidence that the missing person, Ms. Marion Fye, was still alive.[102] If the evidence-only frame had been utilized by the prosecution, it might have prevented the case from being tried or from allowing both the defendant and prosecution to develop case theory.[103] This finding is reiterated

[102] Perkins, *supra* note 98, at 185-86 ("It may be mentioned…that proof of the unexplained disappearance of the alleged victim is never sufficient in itself to establish the corpus delicti.").

[103] In this case the absence of a body results in shared uncertainty, not knowing if the victim is alive or dead. It is a shared uncertainty because both prosecution and defense know the same information and are aware that the knowledge is shared. Situations where knowledge is not

by the prosecutor, who states that trial law largely prevents an investigation into the cause of death (e.g., possible murder) to occur at trial and, thus, it is typically believed that 'no body, no case.'[104]

With the evidence-only approach, attorney rhetoric and advocacy is focused on presenting evidence in the one logical, available view. If covert advocacy tactics are used at all, it is likely to be for the purpose of helping the jury focus on the evidence instead of forming and then acting upon some bias.[105] Note the limitations of anticipating covert advocacy that come with applying such a framework. Because there is no body, focus and attention remains on the unanswered question of whether or not Marion Fye is dead. It is not possible, within the evidence-only framework, to approach the issue of whether or not the defendant is guilty of murder, let alone identify areas where covert advocacy techniques may be used. Additionally, an application of an evidence-only approach to the case revealed that this method of evaluation did not provide a pragmatic perspective for identifying covert advocacy. If this evidence-only restricted view of how the evidence could be presented at trial were adopted, the attorneys would have a limited paradigm from which to view the trial rhetoric.[106]

C. *TMB Framework*

Using the TMB framework produces a richer understanding of various potential evidence interpretations and encourages attorneys to evaluate evidence from multiple perspectives. This process provides a route for determining the natural advocacy path, or how the evidence could be

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shared or awareness is lacking may call for application of a different framework than the evidence-only framework to be applied and compared with the efficacy of the TMB framework. *Compare* Charles Bultena, et al., *Fighting Futility II: More Tools for Mediation Success*, 3 S.J. BUS. & ETHICS 42, 45-48 (2011) (discussing application of the Johari Window, which models known and unknown information between two parties, applied to communication visualization in mediation).

[104] DiBiase 2013, 2015, *supra* note 84. A frequently quoted response to such misconception about no-body murder cases comes from Judge Story: "[A] more complete encouragement and protection for the worst offenses of this sort could not be invented, than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas." United States v. Gibert, 25 F. Cas. 1287, 1290 (C.C. Mass. 1834) (no body was recovered in the murder case but multiple witnesses reported seeing the defendant throw the victim overboard).

[105] *See supra* notes 54-58 and accompanying text.

[106] The concept of requiring and expanding the paradigm of the evidence in order to have a successful outcome at court was reiterated by the prosecutor, who said in reflection about the case, "I accepted the single box of documents and immediately began to read it as Scarpelli departed. The more I read, the more convinced I became that not only was Fye dead but that her boyfriend, Devine, had killed her. Knowing it and proving it, however, are two different things." DiBiase 2013, *supra* note 84, at 12.

appropriately interpreted to support a truthful, persuasive argument. The TMB-approach has four basic components: (1) what you say about you, (2) what they say about you, (3) what you say about them, and (4) what they say about them.[107]

Table 4. Application of the TMB to *United States v. Harold Austin*

What You (Prosecution) Say About You (Defendant) *"The defendant did, beyond a reasonable doubt, kill the victim."* The victim vanished. • The victim had a strong relationship with her children. Limited communication is not characteristic of her behavior. • The victim did not access credit cards, bank accounts, or contact anyone for outside assistance. Victim's bed was splattered with blood. Blood was possibly from the victim based on DNA evaluation. • The blood was located in the same location as the screams were heard. • The blood could be the victims and, thus, supports a possible injury leading to her death. The victim screamed shortly before a gunshot was heard. The victim was never heard from again. • The sequence of events creates a clear story as to how the death occurred.	**What They (Defendant) Say About Them (Defendant)** *"[The defendant] did not kill [the victim]"* No real confession from the defendant. • The confession was made under extenuating circumstances. It is not proof of guilt but, rather, proof of duress. No information from a co-defendant. • No reliable, conclusive testimony has been presented to prove the defendant's guilt.
What You (Prosecution) Say About Them (Defendant) *"The defendant thought he could kill the victim and could get rid of the body and nobody would care or notice."* The defendant confessed, at one point, to an accidental killing. • When presented with an affidavit detailing the evidence against him after his arrest, the defendant admitted to killing the victim. He admitted to dumping her body in a garbage can. He is guilty. The defendant was accused by the victim's sisters and brothers of shooting the victim when her children were in the house. The defendant was seen with a gun after the shot was heard. • A weapon which fits the events described by the siblings was seen by the victim's child at the crime scene. This supports an easily understandable story as to how the defendant committed murder.	**What They (Defendant) Say About You (Prosecution)** *"The government cannot prove that the defendant killed the victim."* There was very little forensic evidence regarding the victim's death. The blood on the bed was not conclusively established as the victim's. • Without a body, the only thing which could lead one to prove a death is forensic evidence. This does not exist within this case. Victim's children made little effort to investigate the gunshot they heard. • There are gaps in the prosecution's case and the testimony used to support it.

[107] Pelosi, *supra* note 75, at 86.

The natural advocacy path in *United States v. Harold Austin*, from the prosecutor's point of view, becomes clear in the What You Say about You segment of the TMB-analysis.[108] Following that path, one focal consideration emerged, the guilt of the defendant.[109] Essentially, if the jury were to be convinced of death with the evidence available, regardless of the availability of a body (i.e., take the death as self-evident), a persuasive argument could be made for cause of death (e.g., possible murder) based on the assumption of death.[110] By applying the TMB approach as a communicative frame, the considerations of *United States v. Harold Austin* became focused on how the evidence could be interpreted to support the prosecution's case theory rather than on the whether the victim was, in fact, dead.

As the major considerations within *United States v. Harold Austin* derived from the application of the OMS-approach demonstrate the evidence within a case does not necessarily dictate the approach taken to the argument, claims or conclusions constructed by opposing sides. Indeed, the conclusions presented in court during the *United States v. Harold Austin* trial were not necessarily definitive. The evidence stands as reasoning and support for contradicting arguments – the absence of a (live) body stood as support for death in the case of the prosecution whereas the absence of (dead) body stood as support for life in the case of the defendant.[111] Therefore, the conclusions established by utilizing the TMB approach substantively depends on the interpretation of evidence.[112] This demonstrates how application of the TMB framework, unlike application of the evidence-only approach, focuses the rhetoric of the case to the prosecution's primary concern and required burden of proof.

Because the natural advocacy path is identified and outlined within the TMB-approach, attorneys can more readily identify when covert advocacy may be utilized by the opposing side to disrupt the follow of this truthful communication from the attorney to the jury. In the case study, the TMB framework revealed three issues, in addition to the lack of a body, there were open to multiple interpretations: (1) the forensic evidence, (2) the actions of the victim's children, (3) the reliability of the confession.[113] *For United States v. Harold Austin,* these arguments were the focal arguments. Such arguments, because they are open to multiple interpretations, present

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[108] *See* discussion *infra* Section III.C.1. – Step 1: What You Say About You.
[109] *See infra* Section III.C.1. – Step 1: What You Say About You.
[110] H.E. Cauvin, *Murder case without body puts D.C. prosecutor to test*, WASH. POST (Jan. 30, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/01/29/AR2006012900960.html.
[111] DiBiase 2013, *supra* note 84.
[112] Twining, *supra* note 2.
[113] *See* Table 5.

opportunities for covert advocacy tactics including but not limited to inducing use of bias, meaning manipulators and weight manipulators.[114]

A detailed discussion of the TMB framework applied to *United States v. Harold Austin* offers a demonstration of how TMB can be used for trial preparation or classroom discussion. The strategies identified are divided for discussion below into the four basic components of the TMB frame, followed by feedback and evaluation.

1. Step 1: What You Say About You

The first component, or square, of the TMB, considers What You Say About You. As is the case with the application of the TMB in political campaigns, this section should be the "best foot forward."[115] The theme identified within the What You Say About You that reflected the prosecution's case theory during *United States v. Harold Austin* was, "The victim is, beyond a reasonable doubt, dead." This claim could be considered the most important factual, legal, and thematic element to the legal communication of the prosecution. Dead, or murdered, held a clear message to the jurors and, thus, provided a foundation to which all claims could be connected. If the jury did not believe the victim was dead, there was no case to consider as represented by the findings when applying the evidence-only based approach.

Overall, within the What You Say About You, the attorney and client may establish the major claim in the case, or the strongest statements toward the preferred verdict, to ascertain which evidence may best fit this claim. This theme should include consideration of both the legal and factual aspects of the case, as both evidence and law should be able to stand in support of What You Say About You. Therefore, the thematic elements and communicative claims that emerge during the creation of What You Say About You will likely follow the natural advocacy path for the case. Any application of covert advocacy techniques should be related to removing barriers between the evidence and the jury, such as telling witnesses to dress to cover tattoos or avoid using language that would offend or confuse the jury.

As during the traditional process of case theory development and argumentation, consideration should be given to what will be presented during closing arguments to prepare the strongest claims supporting the desired verdict.[116] As the prosecutor stated in his reflection on *United States v Harold Austin*, "To me, a new case file was like a new book. It was a story

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[114] *See supra* notes 33-38 and accompanying text.
[115] Pelosi, *supra* note 75, at 86.
[116] DENT GITCHEL & MOLLY TOWNES O'BRIEN, TRIAL ADVOCACY BASICS 245 (2006).

that started near the end, someone's death. My job was to write the final chapter. Each file, like a book, had a plot (why had this person been killed? how had it happened?), characters (witnesses, detectives, and officers), and, like most good books, an unanswered question (who did it?)."[117]

2. Step 2: What They Say About Them

The second component of the TMB considers What They Say About Them. The theme identified within What They Say About Them that reflected the defendant's case theory during *United States v. Harold Austin* was, "[The defendant] did not kill [the victim]." This argument stands directly opposed to prosecution's desired verdict. If innocence was the theme maintained by the defendant, all factual and legal considerations prepared as a consideration in What They Say About Them should be aimed at supporting this argument.

The development of What They Say About Them requires an attorney and client to take on the role of the opponent to develop what is believed to be the opponent's best possible argument. Using all known factual and legal considerations, attention should be given to what the other side will attempt to convince the jury. Essentially, this portion of TMB-approach should be formed in much of the same way as the What You Say About You component but with role-reversal.

During the formation of What They Say About Them, attorneys may seek to recognize when covert advocacy, especially unethical covert advocacy, may occur. For example, if the natural advocacy path must be violated as determined in What You Say About You or if weak interpretations of evidence may be necessary in order to sustain the What They Say About Them section of the TMB, the potential for an attorney to utilize covert advocacy may increase in order to build a persuasive argument. Further, the types of covert advocacy that may be employed are more readily identified when the themes of this segment are anticipated.

3. Step 3: What You Say About Them

The third component of the TMB considers What You Say About Them. The theme identified within What You Say About Them that reflected the prosecution's case theory in *United States v. Harold Austin* was, "[t]he defendant thought he could kill [the victim] and could get rid of the body and nobody would care or notice." This message counters the claims made by the defendant. The perspective taken in What You Say About Them within the analysis of *United States v. Harold Austin* aimed to deteriorate the possibility

[117] DiBiase 2013, *supra* note 84, at 9.

of innocence as maintained by the defendant while also refocusing the jury on the central message – the victim was dead. Weakening the focus on the opponent while eliminating or deteriorating opponents' arguments should be the goal during the development of What You Say About Them.[118]

Constructing What You Say About Them requires the simultaneous consideration of the factual and legal aspects of the opponent's claim to create a foundation for reasoning against the What They Say About Them argument. Specifically, developing claims in What You Say About Them is an opportunity to identify an offensive communicative stance and provide reasoning for the jury as to not only why the opposition's case is faulty but also why What You Say About You should be at the forefront of consideration.[119] This particular component of the TMB-approach begins consideration for opponent messaging as the legal communication should consider the opposing viewpoints and provide reasoning for the dismal of the opponent's themes.[120]

In addition to considering What They Say About Them, the attorney and client should work to develop new interpretations of evidence and legal considerations. As aforementioned, the absence of a body within *United States v. Harold Austin* offered a base for two opposing arguments. Therefore, evidence should not necessarily be dismissed as being in support of the opponent. Rather, it should be integrated into the offensive perspective to reorient the jury and provide reasoning to, when possible, support the claim formed during the What You Say About You component.

Designing What You Say About Them encourages attorneys to consider the covert advocacy in which he or she may engage and promotes ethical questioning to avoid utilizing unprincipled communicative strategies. Essentially, reorienting the jury, deteriorating opponents' arguments and weakening the focus of some of the opponents' arguments are potential means for employing covert advocacy. However, as covert advocacy is not intrinsically or inherently unethical, outlining the types of covert advocacy likely employed at trial will ensure evaluation. Active acknowledgment and evaluation of covert advocacy tactics are the only means through which attorneys can ensure ethical covert advocacy.

4. Step 4: What They Say About You

The fourth component of the TMB considers What They Say About You. The theme identified within What They Say About You that reflected the defendant's case theory in *United States v. Harold Austin* was, "[The

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[118] Pelosi, *supra* note 75, at 86.
[119] *Id.* at 105.
[120] *Id.* at 106.

defendant] didn't kill [the victim], and the prosecution cannot prove that he did." This message is aimed at rescinding the interpretations of the evidence and legal considerations presented by the prosecution by both demonstrating the gaps within the prosecution's arguments and refocusing the jury on innocence.[121]

DiBiase as prosecutor stated in his reflection about the case that,

> There is often so much focus on the defendant and who the witnesses are, what they have said, and how they will testify on the stand, that the victim becomes almost an uninvited guest to a party… If we were going to prove she was dead, we needed to show what she was like when she was living. Ironically, in the one case where the victim was gone, it was going to be critical not to forget her.[122]

Essentially, considering all possible interpretations of the evidence and legal considerations allows attorneys to prepare for the ways the opposition will attempt to deteriorate focal arguments and, thus, engage in covert advocacy.

Further, during the formation of the What They Say About Them component, careful consideration of how the opposition will react to the arguments presented within What You Say About You is warranted. The formation What They Say About Them provides an opportunity to play effective defense. Depending on the strength of the presentation made in What You Say About You, it is possible that unethical covert advocacy techniques in the category of Illogical Evaluation of Evidence will be used in What They Say About You.

5. Step 5: Feedback and Evaluation

The TMB approach to legal communication allows for the revision of the legal and factual considerations as new elements arise. The revision process will likely be continuous and may occur at each phase leading to trial. Because the messages and themes, not the evidence, are considered at the heart of the TMB approach, the legal communication it functions to develop may be improved by the consideration of feedback, potential new

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[121] DiBiase 2013, *supra* note 84 (In *United States v. Harold Austin*, the prosecution was able to persuade the jury of the opposite likely because these arguments were anticipated and, therefore, the evidence and legal considerations used to form them were accepted under the prosecution's perspective.).

[122] Thomas DiBiase, Missing, Presumed Dead, Chapter 2 (2013) (unpublished manuscript, retrieved from http://www.nobodycases.com/Chapter2.pdf), at 12-13.

interpretations, and theme adaptation. The necessity of ensuring a continuous revision process regarding legal communicative approach is reiterated by DiBiase who, in reflecting on the prosecution of *United States v. Harold Austin* said,

> It was all laid out for the reader in neatly (I hoped) organized folders and Redwelds: police reports, crime scene photos, crime scene diagrams, autopsy report, ballistics report, statements from eyewitnesses, etc. I would sit at my desk, with a legal pad close at hand and read through the file, j offing down the basic facts of the case, questions to be answered, and what needed to be done. Inevitably I would find myself immersed in the world of the case, to the extent that I would imagine myself as a silent observer to everything that had happened. The more interesting or difficult the case, the more I would think about it. Even away from the office I would begin to plot out how I was going to bring this story to life in front of a jury.[123]

IV. CONCLUSION

In their role as guardians of the justice system attorneys have a call to protect the system's integrity against degradation. This includes protecting the independence of the jury from the influence of unethical covert advocacy tactics. Because it's challenging to combat covert advocacy tactics once they are used, the best way for attorneys to combat them is to prevent them, and this is accomplished through predicting, during trial preparation, when such tactics may be used.

As demonstrated through the analysis of the prosecution's view of *United States v. Harold Austin*, the TMB framework offers a rich trial preparation, compared to using an evidence-only frame. The enriched trial preparation can help attorneys determine who to best advocate for their clients while avoiding and preventing the unethical use of covert advocacy. Use of the TMB frame will aid attorneys who seek to balance their dual service responsibilities to clients and the justice system.

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[123] *Id.* at 9.