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Recommended Citation

Thomas L. Shaffer, *Judges, Repulsive Evidence and the Ability to Respond*, 43 Notre Dame Law. 503 (1968)..

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JUDGES, REPULSIVE EVIDENCE AND THE ABILITY TO RESPOND

Thomas L. Shaffer*

I. Introduction

This is a sequel to *Bullets, Bad Florins and Old Boots*, which reported the attitudes of Indiana trial judges toward the trial lawyer's "arsenal of gadgetry."¹ The opportunity presented in 1963 was the Indiana Trial Judges Seminar and a series of sessions within it on demonstrative evidence. The opportunity this year was a series of sessions on "The Court's Control Over Demonstrative Evidence" at the 1967 Indiana Judicial Conference.² There were four of these sessions, all of them conducted by Judge Creighton R. Coleman of the 37th Judicial District of Michigan (Calhoun County). Each session was attended by a group of 25 to 35 Indiana trial and appellate judges.³

Both *Bullets* and this, its sequel, are empirical reports. *Bullets* was organized according to the sort of exhibits presented, and in the order in which they were presented. I have organized this report differently, in an attempt to cut through categories of demonstrative evidence and categorize instead the responses of the judges who saw it.⁴ This is justified, I think, because in this species of law-making the immediate response of a trial judge is almost always the last word on what the "law" is. Rulings on demonstrative evidence are more closely related to immediate response (I would say "emotional" response, but that adjective has a bad name in a legal system that still pretends to be Aristotelian) than to the intellectual rationalization that characterizes appellate law. This relationship is especially important because rulings on demonstrative evidence are probably as immune from appellate interference as any that a trial judge is likely to make.⁵

* Professor of Law, Notre Dame Law School; B. A., University of Albuquerque, 1958; LL.B., Notre Dame Law School, 1961. Reporter, "The Court's Control over Demonstrative Evidence," Indiana Judicial Conference, 1967. I am grateful for the thoughtful comments and suggestions of Judge Creighton R. Coleman and Professor Robert E. Rodes, Jr.

1 39 NOTRE DAME LAWYER 20, 21 (1963).

2 This conference was in the Continuing Education Center of the University of Notre Dame, October 18-21, 1967, and was the first of the official Judicial Conferences in Indiana. Judges of all courts of record, including the Appellate and Supreme Courts, attended. The Indiana judicial structure is briefly explained in *id.* at 20 n.3.

3 The first group met Thursday morning, October 19; the second on Thursday afternoon, October 19; the third on Friday morning, October 20, and the fourth on Saturday morning, October 21. No judge attended more than one session; each group approached the material, therefore, without any prior exposure to it or discussion of it.

4 The 1963 meetings were conducted by two experts, Donald P. Lay (now associate judge of the United States Court of Appeals for the Eighth Circuit) and Judge Spencer Gard of Kansas. At both conferences, attending judges were asked to read a substantial sheaf of background material; the 1963 readings are listed in Shaffer, *Bullets, Bad Florins, and Old Boots: A Report of the Indiana Trial Judges Seminar on The Judge's Control over Demonstrative Evidence*, 39 NOTRE DAME LAWYER 20, 34 n.35 (1963).

5 Judge Coleman explained that one reason for this narrow review is that the record on demonstrative evidence is almost always limited. The fact is broader than the explanation, though, as he indicated: "Normally an appellate court will be very slow to reverse rulings on

The trial judge's response is here illustrated mainly in terms of reaction to repulsive evidence.⁶ The reason for this choice of sample is fortuitous: Judge Coleman's most evocative exhibits were repulsive exhibits. (The 1963 exhibits, by and large, were more dispassionately explanatory — charts, models, graphs, etc.) Given this sort of sample, and the approach that has been chosen here, two hypotheses have occurred to me:

First, *the terms in which evidence rulings are made — in particular evidence rulings on repulsive real and demonstrative evidence — have less to do with prejudice than with accuracy.* The distinctions and conclusions that emerged from the 1963 meeting were, I think, closely related to the appellate literature on jury prejudice. In the appellate literature, the prejudice *probably* generated by a given piece of evidence, utterance, or demonstrative device has to be weighed against the probative value an appellate court thinks it had.⁷ (The past tense is appropriate because appellate courts always look back at a trial.) In specific reference to repulsive evidence, this suggests rulings by trial judges that balance prejudicial effect against probative value. My first hypothesis is that this appellate distinction was not borne out in the attitudes of this group of trial judges, although they may have talked as if it were; that is, they often used the rhetoric of balancing. Instead, this hypothesis says that these trial judges looked at a given piece of evidence in terms of its accuracy. If it accurately portrayed a fact (or if, in the case of real evidence, it *was* the fact), these judges regarded it as admissible. Furthermore, they regarded it as admissible despite the horror it evoked in them.

Second, *these trial judges conceive of their duty in dealing with real and demonstrative evidence as a matter of control rather than as a matter of ability to respond (responsibility) to the demands of judicial administration.* This hypothesis depends on a distinction between the trial judge who sees himself as a referee, a peace-keeper who settles disputes between suitors (*i.e.*, between the lawyers in his courtroom), and the trial judge who sees himself as a representative of the community with a responsibility to see that the trial is fair and that the record for appeal is adequate. The judge in the first group is interested primarily in control of the courtroom battle. The judge in the second group will, if the occasion demands, act on his own initiative to prevent prejudice (or inaccuracy) or a vague trial record. I have stated this in existentialist terms by conceiving of responsibility as a matter of free choice resulting in an ability (a *chosen* ability) to respond.

demonstrative evidence. You've got all the power there is." Very few appellate judges attended these conferences, but of those who did, only one mentioned a case in which his court had reversed on a demonstrative evidence ruling; that case involved the introduction of the picture of a homicide victim laid out in a casket.

⁶ Judge Coleman began each session with a distinction between real and demonstrative evidence. A generic classification is that both kinds are directed to the senses of the fact-finder, he said, but real evidence is that which had a direct part in the facts, while demonstrative evidence is that which is merely explanatory or illustrative.

⁷ See Shaffer, *Appellate Courts and Prejudiced Verdicts*, 26 U. PITT. L. REV. 1 (1964), in PERSONAL INJURY ANNUAL 751 (Frumer & Friedman ed. 1965).

II. Repulsive Evidence as a Question of Accuracy

A. *Reaction to Repulsive Evidence*

The first hypothesis is that prejudice is less important than accuracy, a conclusion that rests on my impression that these trial judges were ambivalent on the "law" of repulsive evidence. On the one hand, in abstract discussion they expressed themselves in terms taken pretty much from the appellate literature—that admissibility of real and demonstrative evidence is a matter of balancing prejudicial effect against probative value; as Judge Spencer Gard put it in the 1963 conference, the question is one of impact.⁸ However, their responses to particular pieces of evidence and the distinctions they made among demonstrative devices focus more on accuracy than on impact and seem to involve relatively little conscious balancing.

Judge Coleman brought with him a set of color slides that had been taken in the police morgue in Detroit. He projected these slides for the Indiana judges with little or no advance explanation. The judges' reactions to three cases illustrate my hypothesis on accuracy.

In one case (three slides), a young man had been beaten to death by blows on his head with a pistol. The first slide showed his head and shoulders, on a morgue table, and illustrated clearly the location and nature of his wounds. The second and third slides had a less revolting perspective and an additional element: someone was holding a pistol by the dead man's head to demonstrate how the wounds were made.

The second case was very similar; death had been caused by a beating on the head with a lead pipe. The wounds were on the back of the skull, which had been shaved to make them visible. The first slide showed the wounds. The second slide was taken further back and was somewhat less revolting; it also showed a piece of pipe which was held next to the wounds it supposedly made.

The third case showed no body at all. The victim had been killed by a knife wound that pierced his heart. The slides (three of them) were of an excised portion of the aorta. One showed only a small, pale piece of tissue on

8 Judge Gard said that, in his opinion, the color photography issue is not necessarily a question of accuracy at all; it may be a question of impact. Concededly, honest color photography is more accurate than black and white photography. But the readers of newspapers and custodians of family picture albums who sit on juries are accustomed to seeing their photographs in black and white. Shaffer, *supra* note 4, at 28.

It is interesting to compare this with the fact that the 1967 judges expressed virtually no objection to color, and assented to Judge Coleman's observation that amateur use of color photography by judges was one reason for its general acceptance as evidence. "Color pictures are true to life"; "If that is a true likeness of what they [witnesses] saw, then they [litigants] have a right to have it introduced."

Another interesting comparison, and one that supports a generalization in terms of accuracy, is the relatively greater judicial suspicion of movies as evidence. Most judges have allowed them, but they have taken the precaution of routinely previewing them before they are shown to the jury. Some of the judges said their orders on editing often resulted in such broad removal of material from the movie that counsel decided not to use it. Other judges suspected misuse: "More splicing takes place after the judge has seen the movie than before" (this comment, by the way, from an appellate judge). Another judge said he explained the films to the jury himself while they ran. The judges seemed generally to feel that movies required a more exhaustive foundation than still photographs.

a morgue table; the second showed the same tissue with a serrated knife next to it; and the third was an enlarged version of the second.

Judge Coleman posed the same question for all three sets of slides — a case (civil or criminal) in which death and the cause of death were at issue. In terms solely of their rulings, a majority of the judges in each of the groups would have (1) admitted slides from the first and second cases which showed the wounds alone, (2) excluded slides from those two cases which included the pistol or the lead pipe, and (3) admitted all of the slides from the third case.

In the first and second (pistol and lead pipe) cases, the pictures that did not show the pistol and pipe were more revolting than the pictures that did — this was because they were taken closer to the bodies and because the presence of the metal object tended to divert attention from the bodies. None of the judges, however, objected to the repulsive exhibits before them, although many of them expressly objected to the attempt at demonstration that was involved in the pictures comparing the wounds with the pistol or pipe. Some of their comments: "Let that come in by testimony . . . this is too theoretical." "The jury's guess is as accurate as the fellow's who posed the photograph. . . . It's unrealistic to pose the pipe." "This enters into the realm of speculation . . . don't know as how I could go along with that." The last judge emphasized that he thought the comparison similar to testimony by a morgue police officer on how the death occurred, which would be excluded because the officer was not present when the wounds were inflicted. One judge thought this visual comparison was in effect hearsay testimony; another thought that, in a criminal case, the comparison would violate the defendant's right to confront and cross-examine his accusers. "You're introducing a separate element, a foreign object," one judge said, although he admitted that he would allow a comparison of the pipe and the picture of the wounded skull by a witness whose competence to testify on the issue was shown. This alternative, another judge at the same session said, would remove the hearsay objection.⁹ It did not alter these conclusions to point out, as Judge Coleman did in one session, that the officer who "posed" the weapon was present and testifying when the slide was shown.¹⁰

In the third case, the knife-aorta pictures were not repulsive, but they clearly involved a certain amount of posing. The two most representative comments on these pictures were probably that of a judge who expressed spontaneous admiration for the close detective work the "posed" slides demonstrated and that of a judge who said that the fundamental purpose of trials is to dis-

9 Judge Coleman also suggested a hypothetical sand box, used to demonstrate comparisons of footprints. A bare majority of the judges would have allowed the box; some of the objections: "A little far-fetched"; "You're quite a ways from home base on that"; "Might lose a lot in the translation there."

10 The fact that these slides were in color raised a small amount of interesting discussion. At one session, Judge Coleman asked, before he showed any of these slides, whether the judges objected to color photography when black-and-white pictures of the same matter were available. No one said he had general objections to color—although some indicated that they had changed attitudes on that point in the last decade. See note 8, *supra*. Furthermore, no one indicated a change of mind after he saw the slides. Some, in fact, said they preferred color pictures. "Blood is red, isn't it?" Judge Coleman said to them. However, each of the groups demonstrated revulsion ("Holy cow!") at graphic color slides.

cover truth — “you have to use common sense.” All of the judges would have admitted the picture of aortic tissue without the knife; a very clear majority of them would have admitted the aorta and knife; a bare majority of them would have admitted the enlarged picture of the aorta and knife. The general and strong objection against posed pictures that was demonstrated in the skull-wound cases was eroded when the demonstration involved was clearly accurate, as it was in the posed knife-aorta pictures.

Can the difference be explained in terms of gruesomeness? The aorta slides were not really gruesome at all. The lead-pipe slides were very gruesome and the pistol-whipping slides relatively gruesome. But I did not detect the balancing between probative value and gruesomeness that is found in the appellate literature.¹¹ I detected instead clear dispositions (1) to let the jury see the results of what happened (the skull pictures), (2) to protect them from conjecture as to *how* it happened — at least from conjecture outside the courtroom (the pistol and lead-pipe pictures), but (3) to expose them to conjecture which tended to demonstrate clearly its own probative sanction (the aorta and knife pictures). The generalization in terms of accuracy, rather than impact, is certainly suggested in this bit of data.

This is not to say, though, that revulsion is unimportant. The pistol-whipping and lead-pipe demonstrations were not only less accurate, they were also more repulsive, although those with demonstrative elements were less repulsive than those without demonstrative elements. I think it is fair to say that the test of accuracy is applied somewhat more closely where revulsion is involved. In other words, it is possible that a demand for accuracy almost instinctively burst forth when bloody pictures were presented, a demand that was not so intense where the evidence was not so repulsive. That generalization is subject to two further verifications in my data.

The aorta slides are an inadequate test because they were relatively less repulsive than the skull slides, as well as relatively more accurate. The best test would be a picture that was as gruesome as the skull slides yet as accurate as the aorta slides. Judge Coleman had a possible case for that test — two slides showing the head and shoulders of a young woman who had been fatally shot through the head. One of these slides showed the corpse only; the other showed the corpse with a probe inserted into and out of the fatal wound, demonstrating the path the bullet took. One group would have allowed the second of these slides on the expressed theory that otherwise the party having the burden of proof could not have demonstrated the path of the bullet. (Testimony, though, was available on that point.) Another group, however, would have allowed it only after a testimonial foundation from the person who inserted the probe; otherwise “how can you tell it’s not pinned?” The third group agreed that the question was one of the illustrative value of the probe. In the fourth group, one judge said he had allowed a similar picture. This bit of first-

11 See 4 WIGMORE, EVIDENCE §§ 1157-58 (3d ed. 1940). “Gruesome” is probably the usual word to describe this sort of evidence, but I prefer “repulsive” (which Fowler says is better for my purposes than “repellent”), because “repulsive” covers the observer’s reaction more than it covers a supposed inherent quality in the exhibit.

hand experience tended to dampen discussion; one other participant, though, said he thought that the picture without the probe proved nothing that testimony could not prove as well. The probe picture, therefore, may demonstrate that a repulsive picture with an accurate demonstration in it is admissible, even though an equally repulsive picture with a less accurate demonstration is not. It should at least indicate that the test is one of accuracy, not of revulsion.

Another way to test the hypothesis would be to see if accuracy is less closely guarded where the evidence is not repulsive. Judge Coleman had several exhibits and orally presented several abstract problems, which were relatively bland and involved varying degrees of accuracy:

1. A building collapses and the builder is sued for defective construction. There are offered in evidence (A) samples of the brick and mortar from the defective building and (B) samples from a "good" building not otherwise at issue. Most judges would have overruled objections to the defective material, but sustained objections to the "good" material. The articulated reason for the difference was that the second exhibit involved an out-of-court demonstration of the way bricks are properly laid. Some of the judges, however, said they would allow a demonstration to the same effect in the courtroom.

2. In a slip-and-fall accident case, plaintiff's counsel offers exhibits of properly roughened tile to illustrate why the defendant's smooth tile fell below the standard of care. Most judges would not have admitted the tile, absent evidence of a custom in the business community. Judge Coleman mentioned that, in a recent case in his court, he had not permitted evidence on reflectorized tape on railroad cars, nor a showing of Interstate Commerce Commission regulations requiring its use.

3. In a narcotics prosecution, the government offers a spoon and syringe used in taking heroin. Most judges would have permitted the spoon and syringe the defendant used, but not any sort of model.

4. In a will contest involving mental capacity a snapshot of the testator taken at about the time of the will execution is offered by the proponent. Most judges would have required a showing of the relevance of physical condition; their discussion suggested that a physical image of the testator might otherwise influence the jurors improperly. (That it might not be *accurate* on the issue of mental capacity?) In one session, this question evoked a relatively vigorous debate:

Judge A: "That could be very misleading to a jury." (Murmurs all around.)

Judge B (to Judge A): "What right do you have to substitute your judgment for that of the jury?"

Judge C: "There's no probative value in that." (Murmurs all around.) Judge Coleman then asked whether the judges would allow sound movies of an entire will execution, and the judges replied, with renewed unanimity, that they would.¹²

5. Judge Coleman presented an interesting contrast between Indiana's

¹² TIME, Dec. 22, 1967, at 49, describes the use of this device by Mr. Thomas Cassidy of the Peoria, Illinois, Bar—apparently more as insurance against contest being brought, though, than as potential evidence of capacity.

little-used rules on jury views¹³ and the use of composite pictures and models. The picture involved was used in a rape-murder prosecution. It showed a hundred yards of verdant, residential river bank. The victim had been knocked down at the far right edge of the scene, raped at about the center and murdered at the far left. The picture was a clear, exactly done composite of twelve enlarged exposures. No one at any of the sessions disapproved of it. What is the difference between this picture and the "posed" comparisons of skulls and murder weapons? Which has the greater possibility of error? Which is repulsive? (It is interesting to note that some of the judges who approved of this picture would not have allowed the slides showing the probe through the gunshot wound or the knife-aorta slides.)

The model, which Judge Coleman described orally, showed a curved section of highway on which a collision occurred. It presented an aerial view; which was inadequate to illustrate the perspective presented to the driver of an automobile on the highway. The model maker had corrected this inadequacy by providing a sort of periscope, into which jurors could look, which simulated the scene as it was presented to the driver. The judges expressed nothing but admiration for this reconstruction and approved of the Michigan trial judge who had admitted it into evidence. One judge recalled that he had allowed a similar model showing automotive acceleration; another had allowed a model of a tree which had been struck by an automobile. Judge Coleman remarked to these judges that most questions of accuracy go to weight, not admissibility. Compare the reconstructions involved in the autopsy pictures of the pistol and lead pipe in terms of their accuracy and repulsiveness.¹⁴ The judges who admitted composite photographs and models but disapproved of photographic comparison of weapons and bodies seemed to be referring to degrees of demonstrated accuracy, rather than to degrees of revulsion. A judgement on accuracy, rather than a balancing between gruesomeness and probative value, seems to me the best explanation of the "law" as it was developed in these sessions.

B. What Makes Evidence Repulsive?

The above discussion of the first hypothesis implied that revulsion was less important than accuracy but admitted that revulsion continues to count for something. Thus, it might be well to explore the nature of the revulsion exhibited in these sessions.

The first and most obvious factor in revulsion was a sudden confrontation with death. In only one of the four sessions did Judge Coleman announce to participating judges, before he turned on his projector, what his slides were or where he got them. Three of the groups, in other words, did not know until after one or more slides were shown that they were looking at dead bodies. This circumstance posed a nice opportunity to observe revulsion at death.

¹³ See Shaffer, *supra* note 4, at 29 nn.26 & 27, and accompanying text for the 1963 discussion on this point.

¹⁴ Compare also the fact that a majority of these judges would have permitted the out-of-court sand box experiment described in note 9, *supra*.

The first slide shown to each group showed the head and shoulders of a middle-aged woman; she was reclining on what was in fact a morgue table, but it could have been viewed as a treatment table in a hospital emergency room. Her eyes were closed and there was a round black-and-blue mark, about an inch in diameter, near her swollen right eye. The picture, assuming it illustrated a less-than-fatal wound, was not repulsive. The three groups who saw it without first being told that the woman in the picture was dead showed no audible or visible reaction to it. Neither did the group who knew before they saw it that the woman was dead. But the three groups who learned the woman was dead as they looked at her, by Judge Coleman's telling them the picture had been taken in a police morgue, visibly and audibly reacted to this information. The three groups were revolted at a sudden confrontation with death, even though they had not been revolted at the wound itself, and even though members of a similar group were not revolted by death when they were prepared for it in advance. Death is obviously a principal source of revulsion to real and demonstrative evidence. (This seems to bear out the commonplace observation in psychological literature that death is to our culture what sex was to the Victorians.¹⁵) Death is a factor that heightens the interest of trial judges in accuracy and that therefore results in a more demanding "law" of real and demonstrative evidence.

Two sets of slides bore interestingly on a second factor in revulsion, a *suicide* factor which is perhaps a refinement of the death factor. These sets of slides were both presented by Judge Coleman as involving a single death. One of them showed the head and shoulders of a young woman who had been hanged. The body showed rope burns, and a gag was still around the head and into the half-open mouth. In the other slide, the young woman's wrist was shown and on it were several scars made by a knife or razor blade. These scars were, Judge Coleman said, the "hesitation marks" commonly found on the bodies of suicide victims, who often attempt to bleed themselves to death before they choose some more efficient method. (Both sets of slides might be relevant in civil litigation under, for instance, the suicide clause of a life-insurance policy. Both could also be relevant in a criminal prosecution for homicide.) None of the judges would have excluded any of these pictures, assuming their relevance was shown, although all were revolted by them. None would have required black-and-white pictures instead.

It is possible, though, that the judges were more revolted by the fact of suicide than by the fact of more conventional death. It is difficult to reach such a result on the basis of the hanging and hesitation-marks slides, but a third series somewhat strengthens this conclusion. In this third series, as Judge Coleman put the problem, the body of a middle-aged woman was found, terribly scarred by scalding, in the bathtub of a hotel room. The issue (civil or criminal), as he put it, was whether she was killed or had committed suicide. The judges

15 Lifton, *On Death and Death Symbolism: The Hiroshima Disaster*, 27 *PSYCHIATRY* 191 (1964), in *PEACE IS POSSIBLE* 14 (Hollins ed. 1966). A common empirical verification is the fact that sadism, gore and the messier kinds of violence are "naughty" subjects not raised in polite conversation but raised, and enjoyably raised, in the worst sort of pulp literature and in whatever provides for the moment a barracks level of male conversation.

saw these slides, however, *before* this issue was posed to them. It seemed to me that they were more revolted after the suicide question was posed than they had been when they first saw the scarred body itself.¹⁶ In any event, all of the judges would have admitted the picture, and none would have required black-and-white versions of it. "It would help me," one judge said. "I don't know what it tells you for sure, but it might tell you something," another said. And a third: "If it's part of their theory . . . they should be entitled to develop it by evidence."

One judge commented, "As a judge, I would let it in; as a lawyer I don't know if I would fool with it." This illustrated the judges' concern for jury revulsion, which another group discussed at some length, in terms of the means a judge might use to lessen the sickening effect of this sort of picture on jurors. Most of the judges in that group agreed that they should try, *even on their own motion*, to prepare jurors for the experience by warning them, or asking if any had weak stomachs.¹⁷ (This was an expression of two facts, I thought: (1) Judges are probably more hardened to the revulsion of death in the courtroom than jurors are, or at least judges think that is true. (2) The threshold of revulsion in the average man is not the test in the "law" of real and demonstrative evidence; these judges were willing to attempt to prepare jurors for an unpleasant experience; they were not, however, willing to relieve them of the experience.) It is possible to conclude from these observations, although the conclusion may not be exactly compelling, that evidence demonstrating suicide, or pain plus death, is more revolting than painless death, or violent accidental or homicidal death.

Pain is, certainly, a primary source of revulsion — possibly, as Freud may have indicated,¹⁸ a stronger source than death itself. What was to me the most repulsive picture in Judge Coleman's collection showed a mangled leg. It was taken in the morgue, but it was presented to the judges as having been taken in a hospital emergency room. The picture showed only the mangled leg, which had been virtually severed in a bumper accident. The victim had been apparently pinned against a wall, or automobile, by an automobile bumper.

Almost everyone found that picture sickening; it was not only bloody and vivid, but also spoke eloquently of human pain. In fact, it was on the issue of pain that the judges said they would have admitted the picture. Admission, however, would require a foundation showing some period of consciousness after the injury, although some judges found it relevant on another kind of pain, the more subtle anguish caused the victim when he saw his own mangled limb, whether he felt pain in the injured area or not. ("That's what he had

16 MENNINGER, *MAN AGAINST HIMSELF* (1938), is a classic study of the complex psychological factors that are involved in this reaction.

17 Or, as one judge put it: "Suppose a juror refuses to look?," an intriguing question which brings to mind the crew of the *Bounty*, assembled for one of Captain Bligh's floggings. This discussion assumed that greater exposure to the revulsion produced by seeing death reduced the revulsion. There is some evidence that the reaction of physicians is suppressed but not reduced; see Kasper, *The Doctor and Death*, in *THE MEANING OF DEATH* 259, 261-62 (Feifel ed. 1959).

18 Freud developed the death-instinct in *FREUD, CIVILIZATION AND ITS DISCONTENTS* (Riviere transl. 1930). He tacitly conceded there that pain holds no attraction for the healthy psyche.

to wake up and see.") One judge said he would have found the picture admissible, but added he would probably not have admitted it ten years ago. His updated opinion was apparently like that of one Indiana judge who said, "The jury has a right to draw conclusions . . . The picture ought to go in, for whatever it's worth." This routine admissibility was, however, accompanied by expressions of distress at the picture: "Man o man!" "Sure is graphic." "Would increase the damages a little . . . might get a settlement." "Holy smoke!" "You say that's typical [of bumper-accident injuries]?" Two judges in one group were more skeptical. One said he would require a strong showing of necessity before he would admit such a vivid color picture; it may be relevant that his experience on the bench has been exclusively in a criminal court.¹⁹ The other dissenter said the picture would have to tend to "prove something, . . . otherwise the tendency to inflame outweighs probative value."

Revulsion was a minor obstacle to the admission of the bumper-accident picture. An abstract question, put by Judge Coleman, on allowing jurors to see the scars made in accidents or by assaults at issue in a given case drew a clearer response. All the judges would permit jurors to see these scars subject, apparently, to a limitation posed by "decency." Very few would permit jurors to *feel* the scars, however, even where their texture is relevant, and that too may have been a matter of "decency."²⁰ This abstract and fairly vague example, coupled with heightened caution and apparent revulsion when a color picture was presented, suggests that graphic demonstrations of pain are a principal source of revulsion — which is to say that they present another circumstance in which the test of accuracy will be applied with heightened care.

An ancillary set of impressions on the pain factor in repulsive evidence was stimulated by Judge Coleman's arsenal of surgical and orthopedic devices. The surgical devices included a skin-grafting knife (a long scalpel which is used with a metal screen and roller in removing skin for grafting), drill, screw-driver and orthopedic plates and nails (for inserting metal support to fractured limbs), a scalpel, an amputation saw, and an incredibly heavy mallet and chisel which are apparently used in orthopedic surgery. (Some of them have become obsolete with the development of new surgical techniques.²¹) A majority of the judges reacted negatively to these devices. In one group a probably representative judge said he couldn't see any purpose in offering them. He may have been questioning their relevance, although that group's discussion did not otherwise raise questions of relevance. Another said he would admit devices actually inserted in the patient (nails, plates, etc.), but not the tools with which they

19 This is one of several points at which a distinction between civil and criminal trials was made. Some judges apparently felt that the only differences lay in the nature of the factual issues presented. In one judge's experience, for instance, a photograph of beer in the defendant's automobile had been admitted in a civil negligence case, but excluded in a criminal case which did not charge drunken driving. Many judges felt, though, that constitutional due-process and a relatively more intense level of review imposed a stricter standard in criminal cases, even where the factual issues were similar.

20 In one discussion, the judges said they would not allow hypnotism or "truth serum" demonstrations in the courtroom, but most of them would allow physical demonstrations of pain, paralysis, restricted mobility, etc.

21 For instance, Judge Coleman, after reading this article in manuscript, commented in a letter: "I must protect . . . our local surgeons. The mallet I brought has not been used for some years in the local hospital from which I obtained it."

were inserted. Another group seemed to approve of the devices—even in an automobile personal-injury case. One judge in this group advised his brethren to admit the surgical device—“and you let the jury feel it,” he said. Another judge in the same session agreed, but indicated practical limits. “I don’t think you have to introduce the entire hospital.”

Several judges in a third group were worried that the tools, if not marked and admitted into evidence, would not be part of the record on appeal. These judges proved to be more strongly negative than those in the first group. Surgical tools, a member of this group said, are never relevant outside medical malpractice cases. “Doesn’t matter how it was done . . . highly prejudicial . . . too remote from the thing that’s on trial.” Another said he would allow surgical devices only in bench trials. A third said, “I’m not going to permit these demonstrations . . . startling to [jurors] . . . patient sees none of it, feels none of it . . . is oblivious to it.”

However, one judge in this third group disagreed; he likened the surgeon’s procedure to a carpenter’s and said that, in any event, oral testimony from the surgeon was as prejudicial as a glimpse of his tools would be. This judge was not only in the minority, but he was even met with what is the most radical procedure an Indiana judge ever suggests—the belief that a demonstration of surgical tools should be stopped by the trial judge on his own motion. A second opponent of liberality agreed: “I would listen very closely to a motion for mistrial;” in fact, he said he had once granted a motion for mistrial in a similar situation.

The fourth group was more evenly divided, although it had its voices of emphatic disapproval (“It’s inflammatory when they bring in all this equipment”) as well as its proponents of liberality (who said, for instance, that the mallet may bear on the patient’s post-operative pain).

Orthopedic devices provoked less cautious attitudes, possibly because they are not as crudely suggestive of surgical mayhem. Judge Coleman had in his materials a neck collar and home traction devices for use on a door (neck traction) and in bed (back traction). Most of the judges said they would have permitted these, both as evidence and as demonstration, on a showing that they were either the same devices the litigant uses or wears, or exactly like them. “If it was used in the treatment of the injury, it would be admissible.” Most would allow the devices to be passed to the jury.²² The main source of dissent on orthopedic devices was the use of them without their being marked as evidence. One judge said he would stop non-evidentiary use of a neck collar on his own motion. “I’d speak up . . . you can contaminate a jury”; another disagreed by stating “that means in Indiana we have no illustrative evidence.” Most of the judges indicated they would control the practice of leaving demonstrative or evidentiary devices in the sight of the jury during later, or earlier, stages of the trial.

One explanation of the difference in attitudes toward surgical and orthopedic devices is that the latter usually involve conscious pain and are therefore

²² Indiana trial judges do not allow any exhibits to be taken into the jury room. See the 1963 discussion in Shaffer, *supra* note 4, at 22-23.

usually relevant on damages. Surgical devices, however, are normally used when the patient is unconscious and are therefore irrelevant. On the other hand, not all surgical devices are used under anesthetic, and not all orthopedic devices involve pain. When these distinctions were raised in the discussion, however, the immediate tendency of the trial judges toward suspicion of saws, mallets, and drills, and a much calmer reaction to collars and traction devices, remained. An alternative explanation may be that the pain factor is more starkly present to a judge when a surgical device is presented to him than when a traction device is presented. Graphic pain, pain approaching mayhem, is more repulsive than the subtle suggestion of pain raised by orthopedic devices.

Another factor, and one not completely illustrated in these sessions, was that of "decency." Judge Coleman repeatedly mentioned that his exhibits contained nothing indecent. In the cases of the hanged and scalded women, he mentioned that there were full-body slides which he had excluded from his demonstration because they were not decent. (And, apparently, jurors in his court would not be allowed to see them, for the same reason.) In the discussion on exhibiting scars to the jury, one judge said he did not allow witnesses to disrobe in his courtroom because it was indecent; others also indicated that decency would set limits on disrobing in their courts. "Decency," in these examples, apparently means a circuitous treatment of sexual anatomy: It would be worse to exhibit the scalded female body in toto than to see a relatively asexual, albeit scalded, part of it, and the difference is not due to the increased exposure of scalded tissue. The objection to seeing the body of a hanged young woman, with ugly slash marks on her wrists, would be increased, maybe even increased to the point of exclusion, if the picture were also sexually complete.²³

"Decency," or something like it, seemed to figure also in a special revulsion associated with pictures of dead children. Judge Coleman had two sets. In one, a small, fair-haired child of perhaps five had been electrocuted when he touched a high-tension wire. The relevant wound was a small burn, about half an inch in diameter, in the palm of his hand. In the first slide only the hand and arm of the body were shown. It was a fairly clinical exhibit that might have been important in, for instance, illustration of expert medical testimony. No one objected to its admission. The second slide was of the head and face of the dead child and was, of course, more affecting. The judges clearly indicated that, given a choice, they would have excluded the second and admitted the first. Judge Coleman's questions did not, however, give them a choice. Some judges would have admitted both slides ("That'd be worth a lot — that child's head in there"). One judge noted that this was not a case of demonstrative evidence, but was real evidence — the thing itself.²⁴ Some vocal members of another group were opposed to the second slide, but it was not clear to me whether they would have excluded it if it were the only picture offered (or would perhaps have ordered counsel to crop it). A third group

²³ Judge Coleman, after reading this paragraph in manuscript, wrote me the following comment: "While I hope that I do have a standard of decency, certainly I have no problem myself in observing slides of fully exposed human bodies. I think that I would allow my jurors to see such pictures if relevant to the case."

²⁴ See note 6, *supra*.

found the first picture preferable but would, if pressed, have probably admitted both.

The second case of death in a child, a case for which two slides were offered, showed the body of a ten-year-old Negro child who had been shot through the chest. One slide (frontal) showed the entrance wound, and the second showed the exit wound in the child's back. None of the judges would have excluded either picture, since each had an accuracy value not present in the other, but several judges expressed dismay at the pictures ("Who shot that child?"), which they had not expressed at equally ugly wounds in adult corpses. The graphic confrontation with the death of human beings who seemed far removed from death and toward whom one feels instinctively protective is more revolting than death in an adult. Perhaps that factor can be placed under "decency," at least for purposes of this analysis.

III. Control and the Ability to Respond

My second hypothesis turns on a distinction between control, by which I mean the judicial conduct appropriate to a referee, and the ability to respond, by which I mean a *chosen* duty of responsibility for the sound administration of justice.²⁵ The hypothesis is that these trial judges saw their function more as one of control than as one of responsibility.

The judges' dialogues on surgical and orthopedic devices may illustrate the distinction, in terms, first, of responsibility for a good appellate record and, second, of responsibility for a fair trial. (The two points tended to shade into one another in discussion.) In one group, Judge Coleman asked what these trial judges would do if one attorney in a trial were using unmarked, unadmitted surgical devices during a physician's testimony, to a clearly prejudicial degree, and the attorney for the other side did nothing about it.

Judge A: "If the lawyer for the other side doesn't object, you can do anything you want, can't you?"

Judge Coleman said he thought a trial judge has responsibility for a fair trial and for an adequate appellate record.

Judge B: "If [the lawyers] fail to act, should the trial judge protect appellate justice?"

Judge C: "The less they [appellate judges] know, the better."

Judge D: "It [the situation Judge Coleman presented] would not be the basis of error in the appellate court."

Judge B pointed out that the appellate court can call for exhibits it does not find in the record, and that it has, in his experience, done so.

Judge E said he thought that if the testimonial record were clear enough and the surgical devices were purely demonstrative, they need not be marked and introduced, and, by implication, that he would not stop the hypothetical demonstration on his own motion.

²⁵ In this context, if in no other, a trial judge has the *power* to see that justice is administered efficiently and fairly. "Ability," in the sense used here, is a matter of his moral choice.

In another group, in response to a similar hypothetical question, one judge said he would stop the demonstration upon objection, but would not act on his own motion. Another judge then said the main problem was an adequate appellate record, but the first judge disagreed: "They're not supposed to weigh the evidence anyway—they do, but they're not supposed to."²⁶ In a third group, in response to a similar question, one of the judges said, "It's the duty of the attorney to make his record—not the court." Judge Coleman, who was not terribly successful at convincing these judges of his theory of responsibility, said, "Judges do have some responsibility. . . . They are not sterile water."²⁷

These dialogues, considering the caution these same judges showed toward repulsive pictures, suggest that they are more alert to keep the evidence clear for the jury than they are to keep the record clear for the reviewing court. (However, they did not seem passionate enough about either objective to act on their own motion.) Corroboration for the conclusion that juries are more important than appellate courts was available in their discussions of sloppy, illegible blackboard diagrams. Most judges said they tried, on their own motion, to keep the diagrams clear, but very few showed any interest in the occasional suggestion that photographs be made of blackboard diagrams for insertion into the record. Very few, to take another example, thought it particularly important that clear record references be made to exhibits being handled during testimony. Most judges, to take yet another example, would require, on their own motion, that surgical and orthopedic devices be taken out of the jury's sight after they have been presented, but many were not concerned that these devices be offered in evidence and made part of the appellate record.

Very few judges claimed to have made any extensive use of the Indiana statutes permitting jury views, but this was apparently because a jury out-of-doors is under diminished control and not because the jury view is not in the record.²⁸ (As a matter of fact, the jury view is not considered evidence in Indiana.²⁹)

Judge Coleman's hypothetical question on the misuse of surgical devices involved more than a potentially weak record for the appellate court. It also invoked a calculated and probably prejudicial effect on the jury. However, it appears that these judges would only rarely interfere with lawyers to prevent a prejudicial verdict, even though interference is one of the surest ways of preventing reversal.³⁰ The apparent reason is that lawyers are a more potent influence in their lives than appellate judges. A few judges indicated they would

26 An appellate judge in one of the sessions invited this sort of comment by saying that, to him, the admissibility of photographs and the amount of foundation required was always a matter of degree.

27 Judge Coleman, after reading an early draft of this paragraph, wrote this inquiring comment: "Did I try very hard?" My answer is that it seemed to me that he *did* try, although his manner was courtly and his influence subtle.

28 One judge told of a jury view in a case involving a county gravel truck on a sloping highway. While the jury was at the scene, to view the highway, a loaded county gravel truck "happened" to appear.

29 *Shular v. State*, 105 Ind. 289, 4 N.E. 870 (1885). Cf. IND. ANN. STAT. § 2-2014 (1946).

30 See Shaffer, *supra* note 7, at 43-46, 51-61.

use courteous (deferential?) forms of interference — a recess, a bench conference, or excusing the jury — but very few expressed a willingness to interrupt lawyers when no objection is made from the other side, and the trial is otherwise under good control.

I had an interesting dialogue, during a coffee break, with a judge who had said during the session that he intervened more often in criminal than in civil cases. He told me that he felt he represented the community in a criminal case, and that the community's interest in a defensible conviction is direct. On the other hand, he said, a civil case is a contest between private litigants, and he is there more as a referee. He added that strict constitutional rules on evidence and waiver, as well as the developing law of constitutionally adequate defense counsel, gave him a pragmatic motive for being more active in criminal cases.³¹

It remains open to doubt whether trial judges feel at all keenly the supervisory power of the appellate courts (a power which I thought might be felt on questions of adequate record, as well as on questions of prejudiced verdicts). At times during these sessions, I thought that these judges fear appellate supervision more than one might think an elected judiciary would — possibly because we all seek some criteria for our performance, and a trial judge's record on appeal is the most obvious and most sophisticated grading system available. One judge mentioned a criminal case in which one link in the chain of real evidence (police custody of it) was weak, and the other side had not made a record on the point. "I felt myself that the evidence was proper," he said, "and I wanted justice to be done." He decided to point out the weak link in his instructions to the jury (apparently on his own motion). He said he did this mainly in order to avoid reversal. "Look upstairs; they're watching me," he said, but he seemed to me to look upon reversal more as inconvenience and expense to the community than as disapproval of his work by a superior. This was not the same judge who talked to me during the coffee break, but a similar sense of responsibility was implied in this story.

Another interesting exchange on appellate review occurred when an appellate judge who had written two Indiana opinions on per diem damages argument said he was keenly interested in the way trial judges regarded his work and mentioned, before he listened for a reply, that the appellate record in one of those cases had been in dismal shape; the blackboard on which the argument had been made was not in the record, and his court was able to act in the case only because a sound recording had been made of the argument. The trial judges did not comment on his aside, but they answered his question: Some of them have generally allowed per diem argument; some have prohibited it; they all said the two appellate opinions had not affected their practice in the matter.

Making a good appellate record is, in these judges' opinions, the least important part of their task. What about their sense of responsibility for a fair trial, their willingness to reduce prejudice, not in terms of possible appel-

31 See note 19, *supra*.

late review, but in terms of a fair verdict? The hypothetical question on misuse of surgical devices suggests they would not *interfere* with a lawyer, on their own motions, to prevent prejudice. The small amount of other data available here indicates that they are rarely willing to act at any other time, on their own motions, to prevent prejudice — that control, keeping the peace between the lawyers involved, is the more important factor, and that the course of the trial rests in the hands of the lawyers as long as they act in an orderly manner.

Pre-trial conferences and orders to prevent prejudice are an alternative to interference during the trial. The use of pre-trial was raised and recommended in the 1963 session;³² responses in the 1967 sessions indicated that it has grown in popularity in Indiana, but is still more not used than used in most counties. Judge Coleman's court was open to inspection on this point and is obviously an ideal — operating, as it does, under a mandatory Supreme Court rule³³ that has been extensively implemented in local pre-trial rules.³⁴

32 Shaffer, *supra* note 4, at 33-34.

33 MICH. GEN. CT. R. 301.

34 From the Rules of the Calhoun (Michigan) County Circuit Court, Rule 8 (courtesy of Judge Coleman):

8.1—*Pretrial Docket*

By virtue of the authority and the requirements of Michigan Court Rule No. 501 [301], as amended, there is hereby created and established an official Pretrial docket, which docket shall also include pretrial admission and discovery practice.

8.2—*Request for Pretrial or a Trial*

Any attorney desiring to obtain a pretrial conference or a trial or hearing of any contested civil case which has not been set, which is at issue as to all parties and ready for pretrial or trial, as the case may be, shall request of the Assignment Clerk, in writing, a pretrial conference or trial, as the case may be, and serve a copy thereof on opposing counsel or opposite party. The filing of such a request shall be noted on the calendar entries in each case. Pretrials in criminal cases shall be on motion and at the discretion of the Court.

8.3—*Setting Case for Pretrial*

As soon as possible after the receipt of said request for pretrial, the Assignment Clerk shall set the case for pretrial and shall notify the attorneys of record of such fact.

8.4—*Appearance at Pretrial*

The attorneys of record shall appear at the time specified on the date set for pretrial in the chambers of the trial judge. Parties shall be present and available for conference.

8.5—*Pretrial Forms*

Pretrial hearing forms must be filled out completely by the recipients. The original of such form, properly filled out, must be presented to the pretrial judge on or before the day of the pretrial hearing, and a copy of such form shall be served on all attorneys of record at the time the original is presented to the pretrial judge.

In actions for personal injuries suffered, such statement shall set forth the manner in which the accident happened, and shall contain a summary of the physical injuries sustained by the claimant, the length of time he or she is incapacitated, medical and hospital expenses incurred, the place and type of employment, the dates he or she was off work, the loss of wages or earnings suffered, and any other item of expense incurred or loss suffered. In death cases, in addition thereto, the ages and names of the parties suffering the pecuniary loss, their relationship to the deceased, and the amount they claim to have lost.

8.6—*Exhibits*

Exhibits not submitted at pretrial for identification and introduction, or provided for in the pretrial statement, may be submitted at trial only after motion and notice that such is to be offered at trial, giving reason why such evidence was not produced at pretrial.

8.7—*Failure Either to Appear or Complete Pretrial Order*

On failure of any attorney to appear at pretrial hearing, or on failure expeditiously to complete any pretrial order, the pretrial judge may assess costs or dismiss the action, or take such other action as may be appropriate.

His practice is similar to that now followed in a few Indiana courts.³⁵

Real and demonstrative evidence is, in this modern practice, presented and ruled upon before trial. The rulings on all evidence and testimony, except that which necessarily arises at the last moment, are then put into binding pre-trial orders. Lawyers who violate the order are subject to having their evidence excluded, or to adjournment to give the other side preparation time. (Judge Coleman did not mention direct discipline, though.)

The Indiana trial judges expressed admiration for mandatory pre-trial³⁶ and said they thought it provided fairness to trial judges. They admitted they had known about it for a long time, but most of them said they still do not use it. That curious state of affairs they explained by reference to Indiana's unique and baleful rule on changes of venue, a rule that permits lawyers to shop between at least two state courts literally without inhibition. One judge said the members of his bar warned him against establishing local pre-trial rules: "Judge, if you're going to do that, you're not going to try any jury cases."

One answer that was proposed at one of the sessions is a mandatory Supreme Court rule on pre-trial conferences; most of these judges would endorse it. Are there other answers? I think, first, that it is not for an arrogant pedagogue to call the Hoosier trial bench to judicial courage, but it was interesting to me that judges in the metropolitan systems which now have pervasive pre-trial rules feel that worry about court-shopping is exaggerated. An answer to the metropolitan judges might be that changes of venue are not likely to embarrass or offend judges who are already too busy and who are much less directly dependent on the bar because the bar in their jurisdictions is larger and less cohesive. Another answer might be based on the fact that the change-of-venue rule normally operates only as to contiguous counties. Judges in multi-county regions could adopt a uniform pre-trial rule and at the same time eliminate to some extent motives for change of venue. (The final answer, and probably the only satisfactory answer, is to reform the change-of-venue practice by appropriate legislation.)

35 For example, Rule VI of the St. Joseph Superior Court (a three-judge court of original criminal and civil jurisdiction in St. Joseph County, Indiana) provides that

(a) The attorneys for the several parties to an action will be directed in writing to appear before a Judge of this Court, at Chambers in South Bend, Indiana, at a time certain, for a conference within the intendment of Rule 1-4 of the Rule of Practice and Procedure, to consider:

1. The disposition of all pending motions;
2. The simplification of the issues;
3. The necessity or desirability of amendments to the pleadings;
4. The possibility of obtaining admissions of facts and of documents which will avoid unnecessary proof and shorten trial time;
5. The names and addresses of prospective witnesses, the subject matter of their testimony, and the limitation of the number of expert witnesses;
6. The examination and identification of proposed exhibits;
7. Such other matters as may aid in the disposition of the action including the possibility of settlement;

excepting only such of said items as are necessarily inapplicable to this action.

The rest of Rule VI sets forth in great detail the procedure to be followed by attorneys in dealing with the above-mentioned items at a pre-trial conference.

36 For example: "Sure saves a lot of time at the trial"; "They [counsel] really get a judge in a trap [otherwise]"; "It stops ambush . . . you get your problem of gruesomeness discussed and over with."

IV. Conclusion

Both of the points that seemed to me worthy of analysis in these sessions represent changes in the attitudes I carried away from similar meetings of Indiana trial judges in 1963. I thought in 1963 that the criteria Indiana trial judges used in admitting or excluding demonstrative and real evidence centered around what Judge Gard called *impact*.³⁷ In the 1967 sessions I think the question was more one of *accuracy*, especially where the evidence involved was repulsive. Most repulsive evidence will be admitted if it is accurate.

My second conclusion in 1963 was that Indiana trial judges are reluctant to use the discretion that is properly theirs in controlling demonstrative evidence.³⁸ Their apparent timidity in the face of appellate review and their admitted reluctance to interfere with counsel led me to infer that the trial bench was intimidated by the appellate bench. The 1967 sessions leave me doubting my earlier emphasis on the appellate bench as a source of intimidation. Because of the difference in sample, or the passage of time, or maybe a keener reporter's ear, I sensed in 1967 that appellate intimidation is relatively unimportant.³⁹ Intimidation from the bar now seems to be considerably more significant.⁴⁰

37. See note 8, *supra*.

38. Shaffer, *supra* note 4, at 34.

39. I admit to having reached the same conclusion in earlier research on appellate cases. Shaffer, *supra* note 7.

40. In evaluating the judges' responses reported in this article, the reader may want to take into account the material that was reproduced and given to the judges. This consisted of: Ratner v. Arrington, 111 So. 2d 82 (Fla. App. 1959); Milwid, *The Misuse of Demonstrative Evidence*, 28 INS. COUNSEL J. 435 (1961); and Spangenberg, *The Use of Demonstrative Evidence*, 21 OHIO ST. L.J. 178 (1960). The judges were also given citations to other material: Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); Braddock v. Seaboard Air Line R.R., 80 So. 2d 662 (Fla. 1955); Belli, *Demonstrative Evidence*, 10 WYO. L.J. 15 (1955); Crocker, *New Fields for Demonstrative Evidence*, 26 INS. COUNSEL J. 562 (1959); Dooley *Demonstrative Evidence—Nothing New*, 42 ILL. BAR J. 136 (1953); Faxon, *Demonstrative Evidence and Handwriting Testimony*, TRIAL LAW. GUIDE, Feb. 1957, at 1; Goldner and Mrovka, *Demonstrative Evidence and Audiovisual Aids at Trial*, 8 U. FLA. L. REV. 185 (1955); Gordon, *Demonstrative Evidence Past Present and Future*, 32 WIS. BAR BULL. 11 (1959); Ladner, *Demonstrations and Experiments*, TRIAL LAW. GUIDE, Aug. 1959, at 1; and Yegge, *How Much "Blood" May a Jury See?*, 1959 INS. L.J. 215.