

**Unjust Courtroom Practices:**  
**Always Seating the Prosecution Closest to the Jury**

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## Unjust Courtroom Practices: Always Seating the Prosecution Closest to the Jury

Clarence Darrow once remarked:

“Jurymen seldom convict a person they like, or acquit one they dislike. The main work of the trial lawyer is to make a jury like his client, or at least to feel sympathy for him; facts regarding the crime are relatively unimportant.”<sup>1</sup>

How can a criminal defense attorney make the jury feel anything for their client, when the accused is seated halfway across the room at an uncomfortable proximity? In courtrooms across America it is well established that the prosecution always sits at the table closest to the jury. There are no laws mandating such, but it has become an unwritten, uncodified rule of implicit understanding. Whenever a defense lawyer challenges such custom, the judge or prosecution typically replies that the state or government carry the burden of proof and are therefore entitled to an added advantage. This paper seeks to bring to light the illegality of such practice. The fact that the state always sits at the table nearest to the jury proves this is indeed beneficial. Our laws are designed for fairness of all parties in litigation. In civil suits where the plaintiff carries a burden, no such entitlement of tables exists. The custom of seating arrangements is determined by which party arrives in the courtroom first to claim their table. So the notion that “carrying a burden” requires special treatment carries no legal weight. If anything at all, our law points to the defendant in a criminal case as being granted special privileges: the right to a lawyer where he cannot afford such, the privilege to not testify, and compulsory process for obtaining witnesses in his favor, all of which do not exist to a party in a civil suit. The 6<sup>th</sup> Amendment to the United States Constitution states:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed...”

The 5<sup>th</sup> Amendment guarantees “due process of law” to all persons. Our Constitution is clear in that those accused of crimes are entitled to due process of law by an impartial jury. So, simply put, any added benefit to the state violates due process. The next question is: “Does seating the prosecution nearest to the jury create *in any way* a partial jury?” The clear and unequivocal answer to that question is yes. This is based not just on the prosecution’s act of doing it every time, but on the vast body of social science literature. Between 1964-2003, more than 1200 papers on personal space were recorded in the PsycInfo database, with two thirds (67.6%) published before 1983 proving the study of personal space in the socio-environmental context is highly relevant to the understanding of processes in social psychology.<sup>2</sup>

Intangible and immeasurable factors do influence judgments of law because it has been said “Law is neither all reason nor all emotion; it is neither all explicit rules nor intuitively assessed principles of justice; it is a composite.”<sup>3</sup> Major theorists of psychology over the past century have argued that physical distance cues have adaptive significance.<sup>4</sup> People communicate their feelings and intentions by regulating the

distance they maintain between themselves and others.<sup>5</sup> Construal level theorists purport that temporal, social, and spatial distance fall under the umbrella of “psychological distance” (Liberman, Trope, & Stephan 2003); however William Bagh in a 2008 study has determined that it is the other way around.<sup>6</sup> A primitive understanding of distance develops in infants at 3-4 months of age (Leslie 1982) and it is this foundation of psychological distance that gives humans the pervasive tendency to conceptualize the mental world by analogy to the physical world as opposed to the other way around (Mandler 1992).<sup>7</sup> A 2008 Yale study proved that perceptual and motor representations of spatial distance could influence people’s phenomenal experience. In this study, participants were asked to plot points on a Cartesian plane.<sup>8</sup> The greater the distance plotted by participants, the less emotional attachment they felt towards others, family and even their own hometowns.<sup>9</sup> Greater distances were also associated with more enjoyment of violence and embarrassments.<sup>10</sup> There is overwhelming evidence that people with a positive attitude toward others stand or sit closer to each other than those who do not.<sup>11</sup> From a basic sociological perspective, lay people understand that physical proximity is a reflection of our basic instincts of others. We tend to physically distance ourselves from those we do not harbor positive feelings for. An isolated defendant from the jury box sends the message he is distanced for a reason. This is highly dangerous in that people often look to their environment for clues on how they should feel, as a natural part of the situational appraisal process (eg. Lazarus 1991, Trope 1986).<sup>12</sup>

The study of interpersonal distance (IPD) of human beings is known as proxemics. Interpersonal distance is defined as the distance individuals characteristically keep, or desire to keep, between themselves and others. It is related to such variables as liking, acquaintance, personality characteristics and social attitudes.<sup>13</sup> Interpersonal distance is a very salient cue to both young and old given its ethological significance thereby making it a particularly effective nonverbal signal for the attainment of various goals.<sup>14</sup> The interest in proxemics received its impetus from ethological studies dealing with territoriality among non-human species.<sup>15</sup> Hediger (1950) noted consistent patterns of distance maintenance by animals and introduced the concept of a number of zones surrounding the organism in which specific types of interactions occur. This eventually led to Halls’ work with proxemics.<sup>16</sup> Hall described an individual’s personal space as a series of concentric circles within which interactions of varying levels of intimacy take place.<sup>17</sup> The equilibrium theory suggests that interpersonal distance, eye contact, smiling and other affiliative behaviors serve to express “intimacy” towards others in social interactions. Once a comfortable or appropriate level of intimacy between people is achieved, there is pressure to maintain that level in that setting. Subsequent changes in one or more of the intimacy components produces compensatory reactions, restoring equilibrium.<sup>18</sup> Not only are proximity and interpersonal distance social dynamics integral in human relationships, but also once a level of social intimacy is established, it takes on a life of its own in the maintenance of those relationships. Concomitant with proximity is attachment theory. Attachment theory is the presumption of a biologically based drive for proximity with potential caregivers amongst humans and other primates, developed through natural selection.<sup>19</sup> Bowlby’s models of attachment are working cognitive models that detail the structure of attachment experiences, which guide individuals’ perceptions regarding themselves, others and close relationships.<sup>20</sup> These models are presumed to play a significant role in motivating people to seek or avoid emotional

proximity to others and promote the show of behaviors or behavioral strategies that further these attachment goals.<sup>21</sup>

At the root of attachment is genuine likeability. The principle of propinquity is that, other things being equal, people are most likely to be attracted to those in closest contact with them.<sup>22</sup> Closer interaction distances are related to less directly confronting orientations and minimized conflict.<sup>23</sup> This comports with one of the most productive research foci in contemporary social psychology, which is the investigation of factors influencing attraction.<sup>24</sup> Among such factors the major determinants are attitude, similarity, personality, physical proximity and frequency of exposure.<sup>25</sup> Physical proximity can affect one subconsciously. A 1978 University of Miami study showed that relationships were seen as significantly less positive with increased distance.<sup>26</sup> The less distance an individual maintains from another person, the more positive their attitude is towards that person.<sup>27</sup> A 1981 study of Harvard students proved that people who are in closer proximity to others are rated as more sincere, natural, likeable and loving than others; these folks are also perceived to be less dominant by peers.<sup>28</sup> The inverse distance-liking relationship is a well-established social schema proven in children as young as 8 years old.<sup>29</sup> Interpersonal distance is curvilinearly related to similarity.<sup>30</sup> This explains why interpersonal mimicry heightens one's perception of interpersonal closeness with others and decreases their physical proximity to others.<sup>31</sup> The message of similarity also equates with friendliness. A number of investigators have found a social or friendly orientation results in a decrease in interpersonal distance between people.<sup>32</sup> The study of interpersonal distancing has also been empirically verified in illuminating other social behaviors such as the locus of control, aggression and dislike.<sup>33</sup> It is not surprising that perceived intimacy varies inversely with distance.<sup>34</sup> In a study of nursery age children, the most frequent type of social participation involved parallel activity where children played in physical proximity to each other with little interaction.<sup>35</sup> This demonstrates an instinctual need for closeness identification that transcends word. Ideally, in addition to close physical proximity, people prefer face-to-face seating for communication.<sup>36</sup> Females prefer even closer proximity standing or seated compared to their male counterparts.<sup>37</sup> Race can also have an effect on proximity.<sup>38</sup> One study, which recorded space preferences varying with race, found that African Americans prefer smaller interaction distances than Whites.<sup>39</sup>

The most obvious perception of space proximity involves threats with the attachment system serving to protect people from physiological and emotional distress.<sup>40</sup> Spatial distance and affect are inextricably linked due to the principle that "distance equals safety," which is deeply ingrained in humans' biological makeup.<sup>41</sup> Greater distance is preferred in situations of relatively high tension.<sup>42</sup> The experience of failure or high anxiety levels are regarded as negative which correlate spatially with greater interpersonal distances.<sup>43</sup> People prefer more distance when anticipating stressful situations.<sup>44</sup> A study using 60 interviews with 4 psychiatrists showed patients displayed anxiety the farther they sat from therapists,<sup>45</sup> proving highly anxious people stand farther away from others compared to less anxious people.<sup>46</sup> In a study of 73 New Zealand prisoners, violent offenders clearly preferred a significantly larger interpersonal distance than nonviolent offenders.<sup>47</sup> Forcing the citizen accused to sit farthest from the jury sends the message he or she is a threat to either the juror's person or their peace of mind. It appears to shadow a predetermined uncomfortable verdict or, at the very least, a level of

anxiety in the nature of being a juror. This feeling of discomfort is unconscious, as people unconsciously use information about space proximity within their environment to construct psychological frameworks of reference.<sup>48</sup> The message of “keep a distance” from the defendant that is sent to jurors may exacerbate their insecurities and influence the potential of a first impression into becoming more, particularly since the table positioning never changes.<sup>49</sup>

There are two ways of looking at space proximity in a courtroom and how it affects the citizen accused. First, one can view it from the perspective of the other person. For example, as mentioned earlier: if the courtroom is seating the defendant farthest away from the jury what does that say about the defendant? Outside of sending the nonverbal message the citizen accused is a threat, jurors may also wrongly perceive the defendant feels he is guilty and desires space. It has been shown a more confident person can tolerate closer interpersonal distances.<sup>50</sup> This suggests people choose an interpersonal conversational distance that aligns with how they feel about themselves versus how they feel about others.<sup>51</sup> Distance has been shown to demonstrate how stressed an individual feels, with stress producing greater distances from the subject to others.<sup>52</sup> However, just as important is what people subconsciously think and feel from their spatial proximity perspective. In this regard, distance perception has been linked with identity affirmation.<sup>53</sup> In a study where 178 people were asked to estimate distances between points representing themselves and others that were already plotted, it was found using language such as “we-I” and “others-we” influenced distance.<sup>54</sup> The study found that asymmetry from a group or self resulted in greater distance estimations.<sup>55</sup> People’s social interactions decrease with greater distance.<sup>56</sup> This is a natural outflow of the study that proved as the degree of liking of another increased, so too did the separation between the subject and the imagined person decrease.<sup>57</sup> As evidence of the comfort zone people prefer, it has been shown people talk longer about personal topics at an intermediate distance of 5 feet (versus 2 or 9).<sup>58</sup> This puts the state’s positioning at the closest table in the most ideal range for communication both verbally and nonverbally.

The party closest to the jury has the added advantage of picking up on more body language signals communicating how the jury is both thinking and feeling. Unintended cues to emotion are present in people’s body posture and movement.<sup>59</sup> It has been suggested that 80% of our decisions are influenced by nonverbal language, which includes body signals, gestures, mimicry and actions.<sup>60</sup> Nonverbal cues account for more message variance than verbal clues.<sup>61</sup> Clearly, if a verbal message is ambiguous, nonverbal cues become critically important in interpreting what was said.<sup>62</sup> Distance also amplifies the effect of space proximity in what is known as “the immediacy principle”. Mehrabian (1972) states, “more immediate postures and positions of a communicator are associated with his greater liking...and leads the addressee to infer that the communicator likes him more.”<sup>63</sup> Even in a therapist setting, it was proven patients felt closer to therapists with high immediacy, eye contact and closer distance, as opposed to a therapist with low immediacy.<sup>64</sup> There is greater communication at closer distances in perceived responsiveness. The incidence of head nods was found to be greater at four feet than ten feet.<sup>65</sup> Ratings of responsiveness are higher in high immediacy conditions as opposed to low immediacy conditions.<sup>66</sup> Our body language influences the body language of others as people mirror or compliment each other.<sup>67</sup> Nonconscious interpersonal mimicry engenders liking, affiliation, empathy and other positive social

results.<sup>68</sup> It is poignant to note interpersonal mimicry heightens one's perception of interpersonal closeness with others and decreases the physical proximity to them.<sup>69</sup> This is why, ethologically, interpersonal distance is a very salient cue to young and old, which makes it a particularly significant nonverbal signal for the attainment of personal goals.<sup>70</sup> It is unfair to give this advantage to a sole litigant in court.

Eye contact is critical in nonverbal communication. It has been said the "eyes reflect, mirror, speak-not infrequently, more strongly than words and body language combined."<sup>71</sup> It is very difficult to distinguish between eye contact and other forms of looking behavior as distance between two interactors increases from 2 to 10 feet.<sup>72</sup> Pupil signals are unconsciously sent and received between individuals.<sup>73</sup> Studies have shown the pupils expand when something excites us, whether the stimulus evokes pleasure or fear.<sup>74</sup> The lack of eye contact between the defendant and the jurors sends a devastating message. By not looking at a person, that person becomes designated as a "nonperson": to not receive eye contact for an extended time span leaves one feeling uncomfortable, irritated or rejected, and it becomes extremely difficult to counteract this nonverbal exclusion communication.<sup>75</sup>

Not only does distance make it difficult to pick up on eye signals, but also sitting farthest from a jury makes other gestures difficult to ascertain. It is important to note that a smiling expression increases one's perceived physical attractiveness and people associate it with positive attributes.<sup>76</sup> Laughter is also significantly greater at nearer distances.<sup>77</sup> Great communicators read from people's body language the desired communication style. It is said there are two styles one can read from looking at a person's body language according to regulatory fit: eager and vigilant. Eagerness is characterized by movements forward, the use of gestures that involve animated, broad movements, and hand movements that openly project outward: forward leaning body positions, fast body movement and fast speech rates.<sup>78</sup> Vigilance is characterized by gestures that show precision: "pushing" motions represent slowing down, slightly backward-leaning body positions, slower body movement and a slower speech rate.<sup>79</sup> Regulatory fit is equating the message delivery with the recipient's preferred style of communication. Eager types want cognition; while vigilant types want closure. When tested, an eager nonverbal delivery style results in greater message effectiveness for promotion-focus recipients, while a vigilant nonverbal delivery style is more effective for prevention-focus recipients.<sup>80</sup> Even unconsciously, there is ample research showing that individuals are able to influence social interactions with nonverbal behavior.<sup>81</sup> This is underscored by the fact that subtle nonverbal cues people show in group interactions determine the social hierarchy of the group.<sup>82</sup> Doctors understand the importance of body cues. Doctors who are good at reading and correctly interpreting people's nonverbal languages have more satisfied patients.<sup>83</sup> In analyzing patient satisfaction, it has been found that face plus voice encoding measures are slightly better predictors than voice only encoding measures.<sup>84</sup> Greater patient satisfaction has been associated with expressive nonverbal behavior such as more gestures, forward leanings, closer interpersonal distance and more gazing.<sup>85</sup> This proves the ability to read and interpret body language is critical to effective communication. In a study of 80 undergraduates at American University who were asked to evaluate skill levels of counselors in training it was found that inconsistent verbal and nonverbal messages from a counselor resulted in more interpersonal distance than that which occurs with consistent messages.<sup>86</sup> The

obvious conclusion to the importance of body behaviors is that the intensity and credibility of the verbal message is enhanced when nonverbal language is combined with the spoken word.<sup>87</sup> It is grossly unfair to award the best advantage of this form of communication to the prosecution throughout the duration of an entire trial when the Constitution gives every benefit to the defendant.

An increase in space hinders interpersonal communication as audible sound grows fainter with distance. The intensity of sound varies inversely with the square distance, for example: at nine feet one receives only 1/9<sup>th</sup> the volume of sound one hears at 3 feet.<sup>88</sup> Successful communication requires high-level skills such as tacitly recognizing the fact that one must significantly increase their vocal intensity as interpersonal distance from speaker to listener changes from 4 to 12 feet.<sup>89</sup> In one study, patients expressed they could not get their point across as well at 9 feet opposed to 3 and 6 feet due to the disruption of communication at this distance.<sup>90</sup> Psychologically, communication takes on different meanings at different distances. One study showed a receiver of a positive abstract message perceives closer proximity to the speaker than a receiver of a positive concrete message; the receiver of an abstract negative message perceives closer proximity to the speaker as opposed to a receiver of a negative concrete message.<sup>91</sup> In this same vein, communication has been proven to be more concrete at intermediate versus farther distances<sup>92</sup> proving the proxemic basic that regulation of interpersonal distance is a way to control intimacy and involvement;<sup>93</sup> proper regulation of distance between individuals also seems to intensify and personalize interactions.

Discussion of concrete and abstract messages leads one to consider the introspection of emotion in the thought making process. Space proximity is necessary for the decoding of emotional messages sent by body language. There is evidence that emotion, in its physical component of the amygdala, is deeply and necessarily involved in judgments.<sup>94</sup> The importance of emotional states have been linked to moral thinking in the context of normative judgments.<sup>95</sup> DeSouza (1987) argued that far from being the enemy of good judgment, emotion is an essential element in rational thought.<sup>96</sup> The ability of the jury to see a defendant also may influence verdicts and his/her emotional state. For example, one study found the defendant's emotion significantly affected jurors' judgment of guilt when the defendant was a female.<sup>97</sup> Another study showed that when a defendant appeared sincere throughout the trial, he or she was more likely to be spared death in a capital case.<sup>98</sup> However, all of this is irrelevant if the jury is not situated close enough to read the defendant's body language.

Jurors seek to achieve "total justice" and many studies cite emotional and intuitive factors in their thinking that cannot be satisfied by blinding them to the defendant by use of physical space.<sup>99</sup> A survey of 4,654 jurors in North Carolina found that the chief complaint of jurors was the time spent in jury service.<sup>100</sup> The defense is in control of how long a trial will endure, as they have no burden to prove, yet is at the biggest disadvantage in the courtroom of gauging jurors' needs because of an inability to read their body language due to distance. The Court places itself in an unethical position of making a comment on the weight of evidence by signaling that the defendant, due to their strategic farthest placement from the jury, is either undesirable or a danger. It is well established in the social sciences that while far interpersonal distances may be appropriate in some contexts, the message of "keep a distance" may influence the potential of a first meeting to become "something more" in social science parlance.<sup>101</sup> In

conclusion, Lawrence E. Williams and John A. Bargh in a Yale University research article said it best summarizing the importance of space proxemics:

“The basic concept of spatial distance has profound effects on the cognitive processes involved in appraisal and affect, effects that are beyond the purview of Construal Level Theory. Feelings of distance can moderate the emotional intensity of stimuli, and can be activated by physical cues without reference to the self. These effects reveal the fundamental importance of distance cues in the physical environment for shaping people’s judgments and affective experiences, and highlight the ease with which aspects of the physical environment (and the spatial relations therein) can activate feelings of closeness or distance without one’s awareness.”<sup>102</sup>

In short, one need not be a social scientist to understand that interpersonal proximity is directly related to the nature of the evaluative feedback anticipated or perceived.<sup>103</sup> It is time for judges to stop sending biased signals to juries regarding the citizen accused and his/her placement in the court theater, which indirectly comments on the weight of evidence. If the prosecution wants to argue they deserve an advantage in trial because they carry the burden of proof they need to reacquaint themselves with the Bill of Rights. The citizen accused has been afforded every advantage in a criminal trial due to the principles of the Founding Fathers in recognizing that liberty is valued most of all and before it is taken the Government must satisfy its burden. It would not be in the spirit of the Founding Fathers and the principles they laid out in the Bill of Rights to all of a sudden place a citizen accused in the worst possible physical position in the courtroom; particularly where it places jurors in a disadvantageous position to fulfill their duties in administering justice. The Government cannot continue to claim this added advantage at the expense of the citizen accused as envisioned by the Constitution. Jurors deserve proximity to the defendant when assessing the citizen’s fate. Much is lost in nonverbal communication that is essential to the fundamentals of justice deserved by a citizen accused. They cannot be afforded optimal defense when their lawyer is shielded both visually and audibly from the jury. Even billion dollar sports industries operate on the premise of changing sides to negate any added advantage of space proximity (eg. basketball, football, tennis, soccer). At a bare minimum, laws should be passed to address the disadvantage the defendant is being unduly burdened with despite the spirit of the law; 5th Amendment, no burden of proof, ability to employ the government to secure and subpoena witnesses, etc. No such automatic advantage applies to a plaintiff in a civil suit and for the prosecution to claim automatic title without question is manifestly unjust, particularly in light of the overwhelming proof from the social sciences that exists regarding the importance of space proximity in communication.

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