STEALING SUNSHINE

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I
INTRODUCTION

"Stealing Sunshine" is a trial-advocacy technique whereby an attorney discloses, in the opening statement or on direct examination of a witness, information that seems *advantageous to the opponent's case*, before the latter elicits or reveals it, in order to mitigate its expected impact on fact-finders. We hypothesize that stealing sunshine is indeed helpful to a litigant's case. This study is the first to examine the efficacy of this tactic, both theoretically and empirically, contributing to the growing literature on the impact of various trial-advocacy techniques on decision-makers' perceptions and trial outcomes.[1] Given the primacy of our work, we draw on existing literature on a related courtroom technique commonly known as "stealing thunder," which is—in a sense—the mirror image of the tactic under scrutiny.

II
THEORETICAL FRAMEWORK

A. Stealing Thunder

James W. McElhaney was probably the first to use the term "stealing thunder" to describe a trial technique in which an attorney divulges information

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1. *See, e.g.*, Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357, 1380–85 (2009) (finding significant association between the jury's learning of a criminal record and conviction in cases with weak evidence); *see also id*. at 1358–64 (surveying prior research on the impact of knowing a defendant's criminal record on jurors' and judges' guilt perceptions and verdicts); Joseph L. Gastwirth & Michael D. Sinclair, *A Re-Examination of the 1966 Kalven–Zeisel Study of Judge–Jury Agreements and Disagreements and Their Causes*, 3 LAW, PROBABILITY & RISK 169, 174 (2004) (finding, based on data presented in HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY (1966), that in "close" cases a superior defense counsel, a sympathetic defendant, and prior criminal record affect judgments and generate disagreement between jurors and judges).

that is *detrimental to her case*, such as evidence that impairs the credibility of her own witness, before it is elicited or revealed by the opponent.[2] For example, in a criminal trial, the defendant's attorney may bring out the defendant's prior record on direct examination.[3] Similarly, in a civil trial, an attorney may reveal that her own expert witness expressed an opposite opinion in a previous case.[4] In so doing, the attorney aspires to take out at least some of the sting of the opponent's case.[5]

Disclosing harmful information about oneself is sensible only as a preemptive measure. If *P*'s opponent is not likely to reveal the harmful information, neither should *P*, because a litigant will generally be better off if evidence that might impair her case is not revealed at all. Put differently, no-thunder is preferable to any alternative.[6] But under conventional wisdom stealing thunder is preferable to thunder, although both are inferior to no-thunder.[7] A common piece of advice in trial-advocacy manuals is that where a weakness is apparent and known to the opponent, and the opponent is likely to use it, "you should volunteer it. If you don't, your opponent will, with twice the impact."[8] Trial lawyers have endorsed and utilized this advice before its validity has been empirically tested.[9]

From a theoretical perspective, the efficacy of stealing thunder is open to question. On the one hand, there are good reasons to believe that it works. First and foremost, a person who reveals information that seems against her best interest is deemed more credible.[10] Clearly, revealing negative information will

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2. James W. McElhaney, *Stealing Their Thunder*, 13 LITIG., Spring 1987, at 59, 59.

3. *Id.* at 60; *see also* JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 519 (3d ed. 1994); James A. Protin, *What Is a "Crime Relevant to Credibility"?*, 54 MD. L. REV. 1125, 1130 (1995); Kipling D. Williams et al., *The Effects of Stealing Thunder in Criminal and Civil Trials*, 17 LAW & HUM. BEHAV. 597, 600–03 (1993). Note that in the U.S. federal system, a criminal defendant who preemptively introduces evidence of prior convictions on direct examination waives the right to appeal an *in limine* ruling allowing the prosecutor to use such evidence. Ohler v. United States, 529 U.S. 753, 760 (2000).

4. *See, e.g.*, Kipling D. Williams & Lara Dolnik, *Revealing the Worst First: Stealing Thunder as a Social Influence Strategy*, *in* SOCIAL INFLUENCE: DIRECT AND INDIRECT PROCESSES 213, 217 (Joseph P. Forgas & Kipling D. Williams eds., 2001); Williams et al., *supra* note 3, at 603–07.

5. McElhaney, *supra* note 2, at 59.

6. *See* THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 47–48 (3d ed. 1992) ("There is obviously no point in volunteering a weakness that would never be raised at trial.").

7. *See, e.g.*, L. Timothy Perrin, *Pricking Boils, Preserving Error: On the Horns of a Dilemma After* Ohler v. United States, 34 U.C. DAVIS L. REV. 615, 616 (2001) ("Conventional wisdom advises trial advocates to disclose the weaknesses in their cases at trial before the other side has the opportunity to exaggerate their significance in the case."); Michael J. Saks, *Flying Blind in the Courtroom: Trying Cases Without Knowing What Works or Why*, 101 YALE L.J. 1177, 1180 (1992) (book review) ("Conventional tactical wisdom holds that we should try to present the information to the jury before our adversary gets the chance to, so as to 'take the sting out' of the evidence or increase the perception of our credibility or fairness.").

8. MAUET, *supra* note 6, at 48; *see also* Williams et al., *supra* note 3, at 597.

9. *See* Perrin, *supra* note 7, at 621; Williams et al., *supra* note 3, at 597–98.

10. *See* NEIL BREWER & KIPLING D. WILLIAMS, PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE 312 (2005); Lara Dolnik et al., *Stealing Thunder as a Courtroom Tactic Revisited: Processes and Boundaries*, 27 LAW & HUM. BEHAV. 267, 269 (2003); Perrin, *supra* note 7, at 617, 620;

prove futile if it incriminates the counsel's client, or contradicts one of the counsel's own witnesses. But as long as the harmful information is of secondary importance, disclosing it strengthens the speaker's overall credibility with respect to the more important issues. Second, stealing thunder enables the lawyer to frame the evidence in the least harmful way to the client: "The key is to mention the weakness without emphasis and to present it in its least damaging light . . . ."[11] Third and closely related, stealing thunder enables the lawyer to "warn" fact-finders about the upcoming harmful evidence, thereby making them more resistant to its submission by the opponent.[12] The presumed psychological effect of warning and framing may be analogous to the physiological effect of immunization through the preemptive administration of weakened pathogens.[13] Fourth, according to the commodity theory, the scarcer the information, the more valuable it is. If a piece of information is provided by both parties, it is less scarce and hence, less significant ("old news is no news").[14] Fifth, when one reveals negative information about oneself, the addressees endeavor to resolve the apparent inconsistency between the representation and what they expect that person to present by changing the significance or meaning of the representation to better fit their expectation.[15]

On the other hand, there are good reasons to believe that the tactic might be detrimental to one's client. First, due to the primacy effect and the confirmation bias, information heard earlier in the trial may set up a negative schema of the witness that fact-finders will use to interpret subsequent evidence they hear.[16] Second, assuming that the opponent will use the negative evidence anyway, stealing thunder increases its salience and hence, its availability.[17] Information mentioned twice is more easily remembered, and may thus have a stronger impact. Third, endorsing the negative information reinforces its veracity, turning it into undisputed evidence to the client's detriment.[18]

The first empirical study of the effectiveness of stealing thunder was published in 1993.[19] The study showed that by stealing the opponent's thunder, one gains credibility, and is consequently treated more favorably by fact-finders. The tactic was found equally effective in criminal and civil trials, whether used by the defendant or by the prosecutor or plaintiff. While stealing

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Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 389–90 (2008); Williams et al., *supra* note 3, at 598.

11. MAUET, *supra* note 6, at 48; *see also* Perrin, *supra* note 7, at 617, 621; Stanchi, *supra* note 10, at 388, 418; Williams et al., *supra* note 3, at 598.

12. *See* Stanchi, *supra* note 10, at 388, 418; Williams et al., *supra* note 3, at 598–99.

13. *See* Stanchi, *supra* note 10, at 399–408, 418 (discussing the inoculation theory).

14. *See* Dolnik et al., *supra* note 10, at 269; Stanchi, *supra* note 10, at 420; Williams et al., *supra* note 3, at 599.

15. *See* BREWER & WILLIAMS, *supra* note 10, at 312; Dolnik et al., *supra* note 10, at 269–70; Stanchi, *supra* note 10, at 420; Williams et al., *supra* note 3, at 599.

16. *See* Dolnik et al., *supra* note 10, at 268; Williams et al., *supra* note 3, at 600.

17. *See* Dolnik et al., *supra* note 10, at 268; Williams et al., *supra* note 3, at 600.

18. *See* Dolnik et al., *supra* note 10, at 268.

19. Williams et al., *supra* note 3.

thunder emerged and was initially studied as a courtroom technique, subsequent studies have demonstrated its efficacy in other contexts, such as interpersonal relationships,[20] organizational crisis management,[21] and politics.[22]

More recent studies examined possible explanations for these results. For instance, while the initial study found that the effect of the tactic may be attributed to enhanced credibility,[23] another found that stealing thunder may be effective even if it does not change the fact-finder's perception of the witness's credibility.[24] The latter also suggests that stealing thunder may be equally and at times more effective without framing the harmful information in a way that reduces its importance.[25] It remains unclear why this is so, and under what circumstances, if any, framing may augment the effect of stealing thunder.[26] Research has also raised doubts about the "old news is no news" argument, finding that non-repetition of the negative information by the opponent did not diminish the effect of stealing thunder.[27] Finally, there is some empirical support for the hypothesis that in cases of stealing thunder, fact-finders change the meaning of the representation to better fit their expectation.[28]

The boundaries of the tactic's efficacy have also been explored. For example, the initial study examined whether the effectiveness of the tactic depended on the exact timing of its use, namely early or relatively late in trial (but prior to the thunder), and found that stealing thunder was equally effective irrespective of the exact timing.[29] On the other hand, "acknowledging thunder" (after the opponent has already revealed the negative information) is ineffective.[30] Two studies found that stealing thunder reduced the damaging impact of negative information even when the information was relatively

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20. *See, e.g.*, Alvin Law, Stealing Thunder from HIV: Understanding the Processes Behind Timing the Disclosure of HIV to Potential Relationship Partners (Dec. 2008) (unpublished Ph.D. dissertation, Purdue University) (on file with Purdue University); Kathy Zablocki, Stealing Thunder About Having a Sexually Transmitted Disease (1996) (unpublished M.A. thesis, University of Toledo).

21. *See, e.g.*, Laura M. Arpan & David R. Roskos-Ewoldsen, *Stealing Thunder: Analysis of the Effects of Proactive Disclosure of Crisis Information*, 31 PUB. REL. REV. 425 (2005); Laura M. Arpan & Donnalyn Pompper, *Stormy Weather: Testing "Stealing Thunder" as a Crisis Communication Strategy to Improve Communication Flow Between Organizations and Journalists*, 29 PUB. REL. REV. 291 (2003).

22. *See, e.g.*, Sherri A. Ondrus, Scooping the Press: Reducing Newspaper Coverage of Political Scandal By Stealing Thunder (May 1998) (unpublished doctoral dissertation, University of Toledo) (on file with University of Toledo).

23. Williams et al., *supra* note 3, at 602–03.

24. Dolnik et al., *supra* note 10, at 283, 285. *But cf.* Eisenberg & Hans, *supra* note 1, at 1361, 1387–88 (noting that "[a]lthough the defendant's credibility can be harmed by knowledge of a [criminal] record, credibility does not appear to be the main way that criminal record information affects the guilt judgments of jurors.").

25. Dolnik et al., *supra* note 10, at 270–75, 283, 285; *see also* Williams & Dolnik, *supra* note 4, at 221–22.

26. Dolnik et al., *supra* note 10, at 285.

27. *Id.* at 278–79, 283, 285.

28. *Id.* at 278–79, 283–84.

29. Williams et al., *supra* note 3, at 603–07.

30. Williams & Dolnik, *supra* note 4, at 220.

severe.[31] However, it seems reasonable to assume that from a certain level of severity, stealing thunder might become counterproductive. As we stated above, revealing negative information is injudicious if it incriminates the counsel's client, or contradicts one of the counsel's own witnesses.

Other studies have examined whether the effectiveness of stealing thunder is affected by the personal characteristics of the stealer (for example, race)[32] or the fact-finder (for example, motivation and ability to process information).[33] The opponent's use of counterstrategies has also been investigated. For instance, non-repetition of the negative information by the opponent (that is, ignoring) did not diminish the effect of stealing thunder.[34] In contrast, it was found that one's opponent can mitigate the effect of the tactic by explaining the manipulation to the fact-finders.[35]

B. Stealing Sunshine

Hitherto, empirical studies have focused on preemptive disclosure of negative information about oneself (that is, stealing thunder). Our study offers a preliminary examination of the related yet unexplored technique of "stealing sunshine." From a theoretical perspective, stealing sunshine is analogous to stealing thunder in many respects. On the one hand, a person who reveals information that seems against his best interest may be deemed generally more credible and therefore more persuasive.[36] Stealing sunshine also enables the lawyer to frame the evidence in the least beneficial way to the opponent,[37] and to "warn" fact-finders about the upcoming evidence, thereby making them more resistant to its submission by the opponent. If a piece of information is provided by both parties, it is less scarce and hence, less valuable.[38] And when one reveals positive information about one's opponent, the addressees endeavor to resolve the apparent inconsistency between the representation and

31. *Id.* at 220–21 (examining the 2003 Baldwin and Williams study on stealing thunder in a political context).

32. *Id.* at 222–23 (examining the 1994 White and Harkins study and the 1999 Petty, Flemming, and White study indicating that race attributed to the source of a persuasive message).

33. *Id.* at 223–24 (analyzing the 1995 Ondrus and Williams study investigating stealing thunder in the political domain).

34. Dolnik et al., *supra* note 10, at 278–79, 283, 285; Williams & Dolnik, *supra* note 4, at 224–25.

35. Dolnik et al., *supra* note 10, at 276–79, 283, 285; Williams & Dolnik, *supra* note 4, at 224–25.

36. We explained that evidence concerning the possible effect of stealing thunder on witness and lawyer credibility is inconclusive. *See supra* notes 10, 23–24 and accompanying text. So if stealing sunshine is truly effective, the hypothesis that its effectiveness may be attributed to enhanced credibility merits further research.

37. Indeed, the evidence on stealing thunder suggests that framing might not matter. *See supra* notes 25–26 and accompanying text. But we believe that the body of evidence on this issue is currently sparse. Moreover, it relates to a specific type of framing in a very specific context. In our view, it cannot and should not be used to draw broad conclusions.

38. Again, although evidence on stealing thunder suggests that scarcity might not matter (*see supra* note 27 and accompanying text), the evidence is too sparse to be conclusive.

what they expect that person to present by changing the significance or meaning of the representation to better fit their expectation.

On the other hand, due to the primacy effect and the confirmation bias, information heard earlier in the trial may set up a positive schema of the opponent that fact-finders will use to interpret subsequent evidence they hear. Assuming that the opponent will use the positive information anyway, stealing sunshine increases its salience and hence, its availability. And endorsing the positive information reinforces its veracity, turning it into undisputed evidence. Additionally, research shows that people hearing secondhand information make more extreme judgments of the target person than people hearing the information firsthand from the target person. In several experiments, first-order listeners watched the target person describe reprehensible actions that he or she committed, and then told the story to second-order listeners. The second-order listeners rated the target more negatively than first-order listeners. This phenomenon is known as the teller-listener extremity effect,[39] and has also been observed in cases of disclosure of positive information.[40] It has been suggested that one of the explanations for this phenomenon, possibly the strongest, is that boasting affects the general impression (or liking) of a person. First-order listeners hear the information in first-person form ("I"), and may think the target person was boasting, whereas second-order listeners hear the information in third-person form ("She" or "He") and are less likely to think the target was boasting.[41] So theoretically, an attorney would better serve the interests of his client by letting the opponent reveal the positive information about the client. This sheds doubts on the efficacy of stealing sunshine.

Taking into consideration existing literature on stealing thunder, we hypothesize that stealing sunshine is comparably helpful to a litigant's case. If we are correct, volunteering positive information about the client's opponent may be consistent with the attorney's duty of zealous advocacy.

the defendant reveals positive information about himself. Forty participants received the Stealing Sunshine version, in which the prosecutor reveals the same information about the defendant.

Materials. The cases presented were based on those used by Lara Dolnik and fellow researchers in 2003 for their first study. The defendant was driving home from a party. He was involved in a head-on collision with another car on a winding, unlit road at 3:00 a.m. The defendant incurred minor injuries, but the other driver, a young woman, died after being trapped in the car with her two-year-old child. The child survived with minor injuries. The defendant was then charged with causing death by dangerous driving.[44] The main modification was that the relevant information about the defendant, revealed by a different party in each of the two conditions, was advantageous to the defendant (that is, sunshine), not detrimental (that is, thunder). In the Sunshine condition, the defendant revealed positive information about himself, that is, he had no criminal record, not even a traffic violation, and was a volunteer for a non-profit traffic-safety organization. In the Stealing Sunshine condition, the same positive information was revealed by the prosecutor.

Admittedly, the structure of our Stealing Sunshine condition may seem unrealistic. The defendant would normally reveal positive information about himself on direct examination, so the prosecutor could not steal the sunshine on his cross-examination. This study nevertheless used this structure for three interrelated reasons. First, we wanted to ensure that the only difference between the two conditions was the identity of the party revealing the information, and that all other things (for example, stage of trial and context) were equal. Second, this study is essentially a follow-up to stealing-thunder studies. Only if our methodology accords with that of previous studies, a systematic comparison of the two tactics will be possible in the long run. Third and foremost, the current study tests the effectiveness of the tactic, not the likelihood of a particular manner of its utilization. The only relevant question is whether the tactic is generally viable, and we believe that it is: The prosecutor in a criminal trial can definitely steal the defendant's sunshine, at times in the exact manner presented in our Stealing Sunshine condition. He can do so in at least three ways. The prosecutor presents the initial opening statement,[45] so he can steal the defendant's sunshine at this stage. The prosecutor can also do so on direct examination of one of the prosecution witnesses. Lastly, the prosecutor can steal the defendant's sunshine on cross-examination of the latter if the positive information has not been presented on direct examination of the defendant for some reason,[46] and the defense attorney is likely to reveal it on redirect examination or at a later stage.[47]

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44. Dolnik et al., *supra* note 10, at 271.

45. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.7(a) (3d ed. 2000).

46. For instance, the defense attorney may reserve some of the positive information about the defendant for later stages in order to take advantage of the recency effect. *See* Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 J. EXPERIMENTAL PSYCHOL. 91,

After reading highlights of the case and the trial transcript, participants answered several questions about their perceptions of the defendant and the victim. They were asked to determine whether the defendant was guilty, and to evaluate (on a 1–10 scale, 1 being the lowest estimate) the measure of the defendant's guilt, the defendant's credibility and remorse, their sympathy for the victim and for the defendant, and their identification with the victim and with the defendant. Finally, they were required to assign the proper punishment (0–10 years in prison). These measures served as the dependent variables.

Procedure. The experiment was conducted on an individual basis. Each subject received a link to an online questionnaire that included one of two descriptions of the particular case. As explained, some participants were exposed to the Sunshine condition (that is, the defendant's revelation of positive information about himself) and others were exposed to the Stealing Sunshine condition (that is, the prosecutor's revelation of the same positive information about the defendant). This study examined the effects of stealing sunshine by comparing the means of the dependent variables for the two groups.

A Principal Component Analysis (PCA) was employed to test whether there were clusters of variables. A PCA is a mathematical procedure that transforms a large number of interrelated variables into a smaller number of uncorrelated variables ("principal components"), which are ordered so that the first few retain most of the variation present in *all* the original variables.[48] The main applications of this technique are: (1) to reduce the number of variables and (2) to detect structure in the relationships between variables, that is, to classify them. Put differently, a PCA is applied as a data-reduction and structure-detection method.

IV

RESULTS

Nine measures were used to study the impact of Stealing Sunshine. Table 1 displays participants' verdicts and perceptions of the parties for each of the two conditions (Sunshine or Stealing Sunshine). Note that the first dependent variable is dichotomous, whereas the other eight are discrete.

99 (2001) (finding "consistent evidence of a recency effect in the impact of the trial information for both prospective jurors and students . . . .").

47. For example, it might be revealed during the sentencing procedure.

48. *See* IAN JOLLIFFE, PRINCIPAL COMPONENT ANALYSIS 1 (2d ed. 2002).

Table 1: Participants' Verdicts and Perceptions

			Sunshine [*n=42*]		**Stealing Sunshine [*n=40*]**	
Variable	**Label**	**Scale**	**M**	**SD**	**M**	**SD**
Guilt	Do you think the defendant is guilty?	0 = No 1 = Yes	0.67	0.477	0.80	0.405
Measure of Guilt	What is your assessment of defendant's guilt?	1–10 1 = Definitely Not Guilty 10 = Definitely Guilty	5.64	2.367	6.82	2.341
Punishment	What is your estimation of the proper punishment?	0–10 Years in Jail	3.71	2.874	5.08	3.277
Credibility_Defendant	What is your evaluation of defendant's credibility?	1–10 1 = Not Credible 10 = Very Credible	6.57	2.188	6.62	2.761
Remorse_Defendant	What is your evaluation of defendant's remorse?	1–10 1 = No Remorse 10 = Deep Remorse	7.10	2.377	6.45	2.726
Sympathy_Defendant	How much sympathy did you feel for the defendant?	1–10 1 = Low 10 = High	5.10	2.325	6.02	2.626
Sympathy_Victim	How much sympathy did you feel for the victim?	1–10 1 = Low 10 = High	8.55	1.656	8.02	2.391
Identification_Defendant	What was your level of identification with the defendant?	1–10 1 = Low 10 = High	4.81	3.094	3.84	2.982
Identification_Victim	What was your level of identification with the victim?	1–10 1 = Low 10 = High	5.02	2.937	3.88	2.830

To examine the efficacy of stealing sunshine, this study compared the means of evaluations of participants exposed to the Sunshine condition with those of participants exposed to the Stealing Sunshine condition. To detect a possible association between the condition and the first dichotomous variable (guilty or not guilty), this study used a Chi-Square test, and found no significant difference between the two conditions.

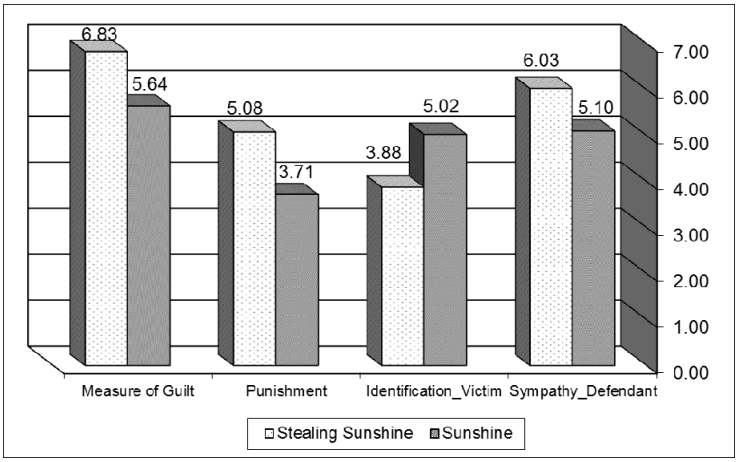
To examine the differences between the two conditions in other variables, this study used independent-samples t-tests. Thus, an independent-samples t-test revealed a significant difference between the two conditions in the measure of guilt [$t_{(80)}$=*–2.27*; p<*0.05*].[49] The mean measure of guilt in the Stealing Sunshine condition (*M=6.83*, *SD=2.34*) was significantly higher than in the Sunshine condition (*M=5.64*, *SD=2.37*). The difference between the two conditions in expected punishment also proved significant [$t_{(80)}$=*–2.00*; p<*0.05*]. The mean duration of incarceration in the Stealing Sunshine condition (*M=5.08*, *SD=3.28*) was significantly higher than in the Sunshine condition (*M=3.71*, *SD=2.87*).

The difference between the two conditions in sympathy for the defendant proved marginally significant [$t_{(80)}$=*–1.70*; p=*0.09*]. Sympathy for the defendant in the Stealing Sunshine condition (*M=6.03*, *SD=2.63*) was greater than in the Sunshine condition (*M=5.10*, *SD=2.33*).[50] This study also found a marginally significant difference between the two conditions in identification with the victim [$t_{(80)}$=*1.79*; p=*0.07*]. Identification with the victim in the Stealing Sunshine condition (*M=3.88*, *SD=2.83*) was weaker than in the Sunshine condition (*M=5.02*, *SD=2.93*).

49. We used Levene's test for equality of variances before comparing the samples' means. Levene's test is an inferential statistic used to assess the equality of variance in different samples. The null hypothesis tested by Levene's test is that the two variances are equal. Howard Levene, *Robust Tests for Equality of Variances*, *in* CONTRIBUTIONS TO PROBABILITY AND STATISTICS: ESSAYS IN HONOR OF HAROLD HOTELLING 278 (Ingram Olkin et al. eds., 1960). Because the p-value of Levene's test in our case was greater than the critical value (0.05), the null hypothesis cannot be rejected, and we can assume that the variances are not statistically different.

50. *Cf.* Eisenberg & Hans, *supra* note 1, at 1387 (finding a statistically significant negative association between sympathy for defendants' and jurors' knowledge of defendants' criminal records).

Figure 1: A Comparison of Means in the Two Conditions (significant or marginally significant differences only)



Finally, an independent-samples t-test yielded no significant differences between the two conditions in the remaining four variables, namely defendant's credibility, defendant's remorse, sympathy for the victim, and identification with the defendant.[51]

To identify clusters of dependent *discrete* variables, a PCA was employed. This study assumed independence of the components, and applied *varimax* orthogonal rotation. Not surprisingly, this study identified three components (according to the Kaiser criterion).[52] The loadings after the orthogonal rotation are presented in Table 2. The first component, hereinafter "Operative Component," included two variables: measure of guilt and punishment. This component explained 31.02% of the total variance. The second component, hereinafter "Attitude toward the Defendant," included defendant's credibility, defendant's remorse, sympathy for the defendant, and identification with the defendant. It accounted for 18.09% of the variance. The third component, hereinafter "Attitude toward the Victim," included sympathy for the victim and identification with the victim, and explained 13.15% of the variance. All three components accounted for 62.26% of the total variance.

51. To examine the condition's effect on the overall reaction to the case, a multivariate analysis of variance (MANOVA) was performed. The condition exerted a significant impact on the multi-dependent variable that contained all dependent variables. However, this finding may be attributed to the condition's strong impact on a few dependent variables, and therefore does not add much to the analysis.

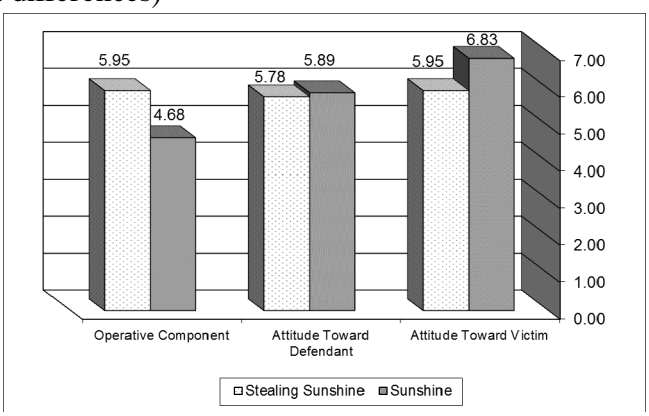
52. The Kaiser criterion is a method for selecting the appropriate number of principal components.

Table 2: Loadings of Variables on the Components after Rotation

Variable	**Component**		
	1	2	3
Punishment	0.889		
Measure of guilt	0.876		
Sympathy_Defendant		0.808	
Credibility		0.794	
Identification_Defendant		0.539	
Remorse		0.413	
Identification_Victim			0.830
Sympathy_Victim			0.638

To examine the effect of stealing sunshine on the overall reaction to the case, a multivariate analysis (MANOVA) was performed using Hotelling's trace criterion. The condition (Sunshine or Stealing Sunshine) exerted a significant impact on the multi-dependent-variable that contained the three components [$F(3,78)=4.22$, $p<0.01$]. This study found a significant difference between the two conditions in the Operative Component [*Univariate* $F(1,81)=5.76$, $p<0.05$, *Adj* $R^2=0.06$]. The value of the Operative Component in the Sunshine condition ($M=4.68$, $SD=2.42$) was lower than in the Stealing Sunshine condition ($M=5.95$, $SD=2.37$). In addition, this study found a significant difference between the two conditions in Attitude toward the Victim [*Univariate* $F(1,81)=4.20$, $p<0.05$, *Adj* $R^2=0.04$]. The value of this component in the Sunshine condition ($M=6.83$, $SD=1.91$) was higher than in the Stealing Sunshine condition ($M=5.95$, $SD=1.99$). Finally, this study found no significant difference between the two conditions in Attitude toward the Defendant [*Univariate* $F(1,81)=0.09$, *not significant*].

Figure 2: A Comparison of Components in the Two Conditions (including non-significant differences)



V

DISCUSSION

This is the first empirical study of the effectiveness of the so-called stealing sunshine technique. The results support the hypothesis that disclosing information that seems *advantageous to one's opponent*, before the latter elicits or reveals it himself, mitigates its impact on fact-finders' decisions. The immediate practical implications of this study are self-evident: Volunteering positive information about the client's opponent may benefit the client, and may therefore be consistent with the attorney's fundamental duty of zealous advocacy, at least under certain circumstances.[53]

This study tested the use of the tactic by the prosecution in a criminal case, and found that the mean measure of guilt and the mean duration of incarceration in the Stealing Sunshine condition were significantly higher than in the Sunshine condition. The difference between the two conditions with respect to the ultimate verdict (namely the dichotomous variable) was statistically insignificant, yet consistent with the hypothesis. Larger samples may yield a significant finding. To conclude, the prosecutor may benefit from using the tactic when possible.[54]

The study also found that sympathy for the defendant in the Stealing Sunshine condition was greater than in the Sunshine condition.[55] This marginally significant finding conforms to the positive teller–listener extremity effect.[56] It also indicates that the tactic does not work by reducing fact-finders' sympathy for the defendant—it actually worked despite an increase in sympathy for the defendant. Similarly, the study found that identification with the victim in the Stealing Sunshine condition was weaker than in the Sunshine condition, suggesting that the tactic does not work by increasing identification with the victim.[57] It worked despite a reduction in identification with the victim. The differences between the two conditions in the other variables were not significant.

Despite its apparent contribution to existing literature on persuasion techniques, this is a preliminary study. Additional studies are necessary to substantiate our basic finding. In particular, future research should test the hypothesis with a more representative sample of the population of interest (that is, potential fact-finders) to increase the external validity of the results. Special

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53. A U.S. litigator should bear in mind, however, that "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted." Ohler v. United States, 529 U.S. 753, 755 (2000); Perrin, *supra* note 7, at 647, 650–51.

54. *See* LAFAVE ET AL., *supra* note 45, at § 24.7(a); Carlson & Russo, *supra* note 46; *see also supra* text accompanying note 47.

55. We emphasize that this finding is only marginally significant, as explained in Part IV. We report and discuss it here due to the relatively small size of our sample.

56. *See* Inman et al., *supra* note 39, at 59–65, 73; *see also supra* text accompanying notes 39–41.

57. Again, this finding is only marginally significant, and we report and discuss it here due to the relatively small size of our sample.

attention should be given to three features of our sample that reflect the nature of the student body of the psychology department at the University of Haifa: (1) gender imbalance (73.2% of the participants were women); (2) limited age range (17 through 35); and (3) participants' education. We tend to believe that these factors are not responsible for the results, but only larger and more representative samples would enable comparison between different gender, age, and education groups.

Although there is now reason to believe that stealing sunshine is an effective tactic, it is not certain why that is so. In the Stealing Sunshine condition, the prosecution revealed the positive information about the defendant without a negative spin (framing). The results, therefore, do not support the argument that framing underlies the efficacy of the tactic. Similarly, the fact that in the Stealing Sunshine condition the defendant did not repeat the positive information undermines the "old news is no news" argument. This study showed that stealing the defendant's sunshine did not impair the defendant's credibility, but perhaps it improved the prosecutor's overall image and hence, the prosecutor's persuasiveness. Furthermore, we need to examine whether in cases of stealing sunshine, fact-finders change the meaning of the representation to better fit their expectation.

Further research is required to delineate the boundaries of the tactic's effectiveness in a given context. We need to determine, inter alia, whether the tactic's effectiveness depends on the exact timing of its use (namely early or relatively late in trial), on the intensity of the sunshine stolen, on the personal characteristics of the stealer or the fact-finder, or on the non-use of specific counterstrategies.

Finally, further research is necessary to determine whether the tactic is also effective in civil trials, and—perhaps more importantly—in non-legal contexts, such as advertising, interpersonal relationships, organizational crisis management, and politics. As explained above, "stealing thunder" was initially studied as a courtroom technique, but subsequently proved effective in other fields.[58] We conjecture that the efficacy of stealing sunshine similarly transcends the limited trial setting.

58. *See supra* notes 20–22.