

Judicial Fact-Finding and Psychology*

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Lawyers and judges must constantly act as psychologists or psychiatrists. The lawyer in his office often serves as an amateur psychiatrist to his clients. Our legal vocabulary shows that courts cope daily with such psychological matters, as, for instance, "motive," "intention," "malice," "mental cruelty," "delusions" and "undue influence."

In particular, the psychology and psychiatry of witnesses has immeasurable significance for the following reasons: Decisions in law suits determine the fate of litigants. In a criminal suit, the decision affects the liberty, and sometimes the life, of the defendant. In a civil suit, it may mean the financial ruin or loss of reputation of one of the parties. And most decisions turn on the oral testimony of witnesses. For the facts of most lawsuits happened in the past, so that the trial court acts as an historian: It can learn of those facts only as an historian learns of facts — at second or third hand, through the stories of witnesses. If a witness, deliberately or unintentionally, tells a story that is significantly inaccurate, and if that witness is believed by the trial judge or jury, then a man may wrongly lose his life, liberty or fortune.

Thus oral testimony usually is pivotal. And the accuracy of the trial court's evaluation of the accuracy of testimony is usually the most important element in the administration of justice in courts. The most excellently wrought legal rules, whether judge-made or embodied in statutes, though expressive of the highest ethical attitudes, go to pot in many a lawsuit because the decision rests upon erroneous findings of fact which derive from undiscovered mistakes in testimony.

Yet the methods by which trial courts ascertain that accuracy are amazing sloppy. Worse, the legal profession has done surprisingly little to study those methods to see whether they can be improved. One would think that the greatest care would be taken to insure that so far as possible, errors on the part of witnesses be detected.

In some cities today a man cannot obtain a license to drive a car without an examination to determine whether he can see and

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hear or has any grave mental defects because it is recognized that an incompetent driver, since he may destroy human life or property, is a sort of lethal weapon. It is no less true than an inaccurate witness, if his inaccuracy is not discovered, may destroy life or property, may be thus a lethal weapon. We are, however, not nearly as careful in checking up on witnesses as we are on prospective drivers.

(Parenthetically, I want to bear down on the tragic results in civil cases, because almost exclusive attention has been given to the tragedies resulting from mistaken testimony in criminal cases, and because little heed has been paid to tragedies which similarly result in civil cases.)

It is a commonplace that a witness may be seriously mistaken in one or all of three ways: (1) He may have erred in his original observation of the past event. (2) Or in his subsequent memory of what he observed. (3) Or in the way his memory of his original observation is communicated to the trial court.

The psychologists and psychiatrists know much about each of these three foci of infection and about the physiological and psychological factors which cause such errors. The courts, however, have done relatively little to learn, or to use, this psychological and psychiatric wisdom.

Long ago, Muensterberg called this lack to public attention.¹ In the late 20's, Robert Hutchins (then of Yale) and some associates began to suggest the practical value to the courts of closer cooperation with those other professions.² Since then, virtually nothing along those lines has been done, although a few of us have repeatedly urged joint studies of the kind under consideration at this meeting.

Psychological and psychiatric experiments as to errors in perception, memory, and communication have been conducted largely in laboratories. To make them useful court-wise, they need to be adapted to court-room conditions. It is helpful in this connection to look upon a trial as basically a process of attempted, and often defective, communication conducted in singularly difficult circum-

¹ MUENSTERBERG, ON THE WITNESS STAND (1933).

² See Hutchins, *The Law and The Psychologists*, 16 YALE L. J. 678 (1927); Hutchins and Slesinger, *Some Observations on The Law of Evidence: Spontaneous Exclamations*, 28 COL. L. REV. 432 (1928); *Some Observations on The Law of Evidence: Memory*, 41 HARV. L. REV. 860 (1928); *Some Observations on The Law of Evidence: The Competency of Witnesses*, 37 YALE L. J. 1017 (1928); *Some Observation on The Law of Evidence: Consciousness and Guilt*, 77 U. OF PA. L. REV. 1 (1929); *Some Observations on The Law of Evidence: State of Mind in Issue*, 29 COL. L. REV. 147 (1929); *Some Observations on The Law of Evidence: Family Relations*, 13 MINN. L. REV. 675 (1929); *Legal Psychology*, 36 PSYCHOL. REV. 13 (1929).

stances.³

Whether such studies can yield practical and specific expedients for trial purposes, no one can be sure. Perhaps they will do no more than to underscore the fallability of testimony — and therefore of court decisions — and thus induce changes in legal rules so as to make allowance for chances of errors in the decisions. Such a result would by no means be valueless.

But we ought to explore the possibility of reaching more useful results. For instance, we may be able to develop what I would call "testimonial experts," whose testimony will assist trial courts in evaluating testimony. I mean something like this: A psychologist and a psychiatrist will examine a witness and report to the trial court whether he has marked defects in perception, memory, and communication, with particular reference to the specific matters about which the witness testified. To a limited extent, such testimony has been employed in respect of complaining witnesses in prosecutions for sex offenses. In the *Hiss* case,⁴ the psychiatrists testified about the witness Chambers. But they did so without an opportunity for clinical examination or interviews. It may be doubted whether, in such circumstances, the expert testimony can be helpful. Here is a field for joint exploration by lawyers, psychologists and psychiatrists. I warn that there are some unsettled legal problems here on which I am giving no opinion. Incidentally, there should be considered the question whether, in this context as well as others, the current conventional use of expert testimony does not need to be drastically revised by centering on the testimony of neutral experts called by the judge.

The competence of a witness to testify at all — because of infancy, senility, or other conditions affecting the capacity to testify has long been a judicial problem of an obvious psychological character. In such a case, psychiatric advice to the judge is often essential to a sound ruling.

Such advice is also sorely needed in other circumstances, as where an apparently competent witness is allowed to testify and does so in a plausible manner which covers up his inability to testify accurately, an inability which a psychologist or psychiatrist might uncover. The extreme case is that of the litigious paranoiac; but there are other witnesses whose dearrangements are far less obvious.

Sidney Simpson said, a few years ago, "A completely reliable lie detector might revolutionize court procedure." Such devices, in-

³ See Cleary, *Evidence as a Problem in Communicating*, 5 VAND. L. REV. 277 (1952).

⁴ *United States v. Hiss*, 88 F. Supp. 599 (S. D. N. Y. 1950).

cluding truth serums, have been much discussed.⁵ There is a general agreement that they are not sufficiently reliable, as yet at any rate, for court-room use. But they deserve further study.

Those who hope by such semi-mechanical devices to ensure that perjured testimony will be exposed neglect this fact: No such contrivance will expose those biases of honest witnesses which are not lies but which account far more for inaccurate testimony than does perjury. Nor will any such device help to expose gross errors in a witness' honest, original observation of an event. Can the psychologists and psychiatrists devise less mechanistic means for that purpose?

Fiction writers such as Dickens and Trollope have correctly shown how ridiculous it is to expect an ordinary man, unfamiliar with court-room ways, to give accurate testimony when hampered by the exclusive use of the question-and-answer method, especially when this is accompanied by brow-beating in cross-examination. Yet in this country that method of handling witnesses still largely maintains. Psychologists and psychiatrists could do much to show up the folly of this method, and thus lead to its drastic modification.

Our courts hold that the demeanor of a witness while orally testifying in court — his fluency, hesitation, steady or shifting gaze, and the like—constitutes a crucial factor in evaluating the reliability of his testimony. So much is this so-called "demeanor evidence" stressed, that upper courts, unable to see and hear the witnesses, usually refuse to review the trial court's conclusions of fact insofar as they rest on the trial court's evaluation of an orally-testifying witness' credibility.

Many psychologists and psychiatrists, however, on the basis of experiments, have expressed skepticism as to evaluations founded on a speaker's demeanor. Accordingly, this question needs much study: Does such skepticism justify a complete rejection of the present judicial reliance on "demeanor evidence"?

We do know, from occasional candid remarks by trial judges, that some of them utilize absurd rules-of-thumb such as these: A witness unquestionably lies who, while testifying, throws back his head; or wipes his hands; or shifts his gaze rapidly; or blushes, or bites his lips; or taps steadily on his armchair. Many litigants must have been victimized by judges who employed such or similar undisclosed yardsticks for measuring credibility.⁶

This points up the need for educating trial judges in at least the rudiments of modern psychology and psychiatry.

It points to more: A trial judge is himself a witness — a wit-

⁵ See Dession, et al., *Drug-induced Revelation and Criminal Investigation*, 62 YALE L. J. 315 (1953).

⁶ See, e.g., *Quercia v. United States*, 289 U. S. 466 (1933).

ness of the witnesses. His faulty observation of the witnesses, due to inattention or other factors, or his mistaken recollection of his observations, affect his fact determinations.

Perhaps more important, a trial judge's reaction to a witness, and thus the judge's decision, may be the consequence of an unconscious bias, a bias unknown to the judge himself, for or against persons with red hair or black hair; for or against women or old women or pretty young women; for or against Irishmen, priests, Jews, Negroes, policemen, etc. The decisional process in trials is at the mercy of such hidden prejudices. Must we not, in our law schools, educate future trial judges, through fairly intensive self-explorations so that they have some acquaintance with their own idiosyncratic, buried prejudices, and so that, with such acquaintances when they become judges, they will have at least a chance to overcome those biases? But how, without the considerable expenditure of time and money involved in psychoanalytic treatments, can most law students — future trial judges — engage in such self-exploratory voyages?

I have for some years discussed this problem in print. I talked it over recently with Harold Lasswell who made the following suggestions which he authorized me to quote:

"Law schools can be made more effective teaching institutions if they enlarge the opportunities for self-understanding available to the students. A great deal can be done to develop awareness of bias and alertness in coping with it. Two promising lines: (1) Provide a sequence of training films sufficiently comprehensive to give a modern conception of the growth of personality and the dynamisms of collective action. This ought to be a basic tool course for everyone dealing with people. In order to capture the immediate interest of students in a professional school the general films should be supplemented by films dealing explicitly with the judicial process. Research is needed to evaluate the effectiveness of pilot courses, and to aid in discovering the needs and interests of the student audiences. The problems connected with the improvement of self-understanding are fruitful topics for research. (2) Provide an appraisal center accessible to law students where tests of aptitude and attitude can be comprehensively given. The results should be interpreted to the student, and will in many instances lead to the request for therapy. But the principal aims of the center is to contribute to self-understanding, and hence to a more valid estimate of the credibility of witnesses, and of the problem of using the coercive instruments at the disposal of society in constructive ways in dealing with problem persons. The appraisal center would provide a valuable body of information about the manner of man who seeks out the legal career in our civilization."

I think these proposals merit careful consideration. But I strongly incline to doubt whether, if adopted, they would alone go far enough to create the needed self-awareness on the part of future trial judges.

Would it not be well to have attached to the courts a judges' psychiatrist whom a trial judge could visit periodically, when he feels himself subject to strain, a visit which would arouse as little comment as if he were going to a dentist or barber?

To advance further along these lines, what can the students of the "mind" or "psyche" do to illuminate the subject of the trial judge's "gestalt"⁷ — his reaction as a whole to the testimony? What is the relation of this "gestalt" to the judge's decision and to his so-called opinion — *i.e.*, his explanation of his so-called decision — if he publishes one?

Except for a little that has been learned about litigious paranoics, lawyers, psychologists and psychiatrists seem to know next to nothing of the motives which induce men to bring or defend law suits. We should endeavor by joint efforts to go deeper into the motivations of litigants. For those motivations may often influence their testimony.

And here we come upon a subject to which at the outset I briefly adverted: The psychiatric function of a lawyer with respect to his clients. Surely here the psychiatric experts can aid the lawyers.⁸

A related problem is that of the lawyer interviewing witnesses. There is danger that, try as he will, he will inadvertently coach those witnesses so that they will partly — and more or less unconsciously — fabricate parts of their testimony.

Finally, naive, stereotyped but unverified notions of the aims of litigants, as if they were uniform and standardized, affect many policy judgments which, in turn, enter into important legal rules and doctrines.

I have spoken of trial judges and little of juries. This I have done for two reasons:

(a) I have attempted, as above indicated, to underscore civil litigation as distinguished from criminal suits; and much civil litigation goes on before judges sitting without juries. Of course, most of the problems that I have outlined arise in connection with both criminal and civil actions. But in the past few decades, most of the time and money devoted to psychological-legal problems has been limited to the criminal field; and at this moment considerable sums of money are available for such investigations. Money is

⁷ See, KOPFFKA, *Gestalt*, 6 ENCYC. OF SOC. SCIENCES 642 (1931).

⁸ See Fortas, *The Legal Interview*, 15 AM. J. OF PSYCHIATRY 91 (1952).

lacking, and studies are essential, however, with respect to psychological problems which have no unique relation to criminal suits or criminology. To be sure, the studies of those interested in crimes and criminal procedure have thrown, and will continue to throw light on the entire legal-psychological area. But I do urge that we deviate from tradition by focussing more attention on these deficiencies not peculiar to criminal trials.

(b) Without doubt, jury trials render far more difficult the task of bringing psychological insights to bear on trials and trial-court decisions. In civil litigation, we seem slowly to be moving towards the condition in England where relatively few civil jury trials occur. In criminal trials, however, the trend away from the jury in this country is far less marked. How to educate future judges, psychologically and psychiatrically, in dealing with testimony, is baffling. How to so educate prospective jurors is an even more horrendous problem. Something of the sort can be done by requiring prospective jurors to attend schools for jurors, in which fairly intensive education would be given on the aims and various methods of court-house government. Here again, the psychologists and psychiatrists can be of service.

Unless we solve most of the problems I've presented, we shall continue to have a legal system so defective that it provoked this disturbing remark from Learned Hand, our wisest judge: "I must say that, as a litigant, I should dread a law suit beyond almost anything short of sickness and death."

In closing, let me say that modern students of the psyche should not turn up their noses at the lawyers. For it was Francis Bacon, a keen lawyer, who said, "Numberless are . . . the ways, and sometimes inscrutable, in which the affections color and affect the understanding"; and that "a man's disposition and the secret working of his mind are better discovered when he is in trouble than at other times."

I make that reference, lest you think I advocate surrendering legal administration to the "mental" experts. I do not. I respect them — that is, some of them — profoundly. But I think we need to be beware of the tendency, ascribed by someone to me) the psychiatrist the sole "hero of contemporary culture."