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The Policeman as a Witness

In the past decade violent crimes have allegedly increased 174% at a time when the population of the United States has increased only 11%. Murders have allegedly increased 129%; forcible rape, 192%; robberies, 226%; and aggravated assaults, 139% [*1*]. During the same decade local spending for law enforcement has increased sevenfold, from one billion to seven billion dollars [*1*]. In addition, during the past half-decade, the Law Enforcement Assistance Administration has provided $3.5 billion to help state and local law enforcement agencies in an effort to stem crime on the national scene [*1*].

Contemporaneously, spending for police, courts, and prisons has spiralled from $3.5 billion in 1960 to $8.6 billion in 1970—a ten-year period. From 1970 to 1973 an additional $4.4 billion dollars has been allocated for such purposes representing about a third of the total $13 billion presently allocated for such purposes [*1*].

Nationally, less than half of all crimes are reported to police. In some cities less than 20% of all crimes are reported [*1*]. Many of the crimes reported go unsolved. It is well known that 10% of the murders committed in the United States annually are never solved. How many more "unknown" murders remain unreported and unresolved as the direct consequence of the antiquated methods prevalent in some states of investigating deaths is anyone's guess. We do know, however, that many persons are fearful of walking on city streets at night due to the universal surging rise in reported crime. The Phillips-Sindlinger survey of March 1974 indicates that from 40 to 67% of persons residing in metropolitan areas harbor such fear [*1*]. A three-year study by the University of California Center on Administration of Criminal Justice, financed in part by the Justice Department's Law Enforcement Assistance Administration, in a 1026-page study, indicated under the title "The Prevention and Control of Robbery" that detectives make only 10 to 30% of robbery arrests [*2*]. The report asserted that the effectiveness of detectives is a myth and that in this area of police operations there is extensive resistance to change or serious self-examination. Entrenched political power within police departments and detective bureaus is blamed for the unwillingness to confront serious issues in fighting crime. So long as the "kiss-me-up and kick-me-down" system continues to be employed within the bureaucracy of law enforcement agencies it may well be expected that the modern Sherlock Holmes will not fare well in future reports.

Facts and figures, of course, do not answer causative questions. They inform us of the goings-on but do not tell us why. However, they do give us some insight into the results of crime and the present status of law enforcement officers. For example, the Phillips-Sindlinger survey indicates that during the past half-decade public confidence in the police has declined. While 17% of the polled population indicated they had more confidence in the police, 32% stated they had less confidence. This represents a net loss of 15% of the public [*1*].

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Larger police forces, more patrol cars, sophisticated detention aids, computerization of data, special units, helicopters, television surveillance, ready identification systems, and billions of dollars have not aided the apprehension of offenders nor boosted the rightfully deserved respect of the law enforcement officers. Television programs are still viewed as "cops and robbers" or "cowboys and Indians" fantasies of childhood. Amazingly, until recently, very little attention was given to the social problems, the humanity of the policeman, or to the forensic sciences as applied for the benefit of Mr. Average Man. Duties and obligations, morality and cooperation, and human interrelationships between the average citizen and *his* police enforcement agencies have been more noticeable by their absence from presentation than by actual assertion.

The courts, the legal profession, the medical profession, probation officers, parole boards, prison systems, welfare departments, social agencies, and other assistance groups are inextricably involved in the entire area of crime prevention. This is true whether the precrime or postcrime events are considered; whether prevention of the crime or reprevention is considered; whether precrime attitudes and inclinations are recognized or rehabilitation efforts are successful; and whether the cause is recognized and prevented or never recognized nor utilized to prevent recidivism.

As we collectively must search for a solution to these ever-increasing problems, there are some things which we can do, as human beings, to slowly change public support in favor of law enforcement personnel. One of these methods involves the direct involvement of the citizenry in active anticrime efforts. By working together with law enforcement personnel such involvement can only generate an appreciation of the momentous task of the police and contemporaneous respect and support. Once the populace begins to understand the underlying social problems which cause crime it may be expected that support will be garnered to alleviate these causes.

Law enforcement agencies and individual officers can also make initial efforts to turn dislike into respect and honor. This can be achieved in many ways: using proper and ethical discretion on the beat, in the handling of parking and traffic tickets, enforcing flagrant as opposed to innocuous violations, and by conducting daily activities in a gentlemanly and ladylike manner, and doing so whether on or off duty. The public will hardly respect or honor the policeman who arrests the prostitute while conducting himself in a manner indicative of extramarital sexual activity, drunkenness, or other indecorous conduct. Humility, honesty, candor, and friendliness are but some of the honorable characteristics which should be emphasized in the personality of law enforcement personnel.

This, then, brings us to the consideration of the policeman as a witness. It is in this capacity that the true mettle of an officer may often times be tested. The courtroom is frequently the arena of tragedy extending from personal injury to crimes against person or property. The policeman is in a position during courtroom interrogation to display and present law enforcement at its best or its worst.

Again, integrity, candor, humility, and other honorable traits of the individual will be tested by the advocates, viewed by the jury, and displayed to the general public. Tarnished testimony and evidence presented in obvious embellishment are damaging not only to the matters presented before court and jury but also to the witness' reputation. Advocating for a side, whether for the state or commonwealth versus a defendant in a criminal case, or for plaintiff or defendant in a civil case, is in bad taste and may well lead to blistering cross-examination. It is not uncommon for the true advocates, the attorneys, to assist the witness in his embellishments, his obvious advocacy, braggadocio attitudes, self-adulation, or enlargements of partial knowledge and half-facts, only to completely destroy the reliability of the witness by asking one crucial question just before concluding the examination.

Competent legal counsel will generally treat all witnesses in a courteous and respectful

manner. But woe unto the witness who fabricates the smallest and most insignificant detail in order to win! As a revengeful panther leaps on his prey, the courteousness will leave the respectful demeanor of the lawyer and will be replaced by full-blown anger, disgust, and contempt for the witness. The true acting technique of the trial lawyer will remain with the jury no matter what attempts are made thereafter to recoup the witness' composure. Honor and integrity once lost are not regained in a moment, an hour, or even a day. The wound resulting from the loss of integrity can only be healed by time and constant honorable conduct, and this will not occur during the short course of a trial.

It should be remembered that cases are not won and lost by the presentation of the greatest number of witnesses. Numerical strength frequently is offset by the increased opportunity of contradiction probabilities [*3*]. This is precisely the reason why the chain of possession involving the handling of physical evidence is kept as short as possible.

Police officers are often called as expert witnesses. Although it is true that anyone, including the lay public, may express his opinion of events as heard, seen, tasted, felt (by actual touch), or smelled, there are areas of testimony which can be testified to only by reason of the person's experience, peculiar knowledge, education, or training.

As a witness in the courtroom, the police officer may be called to testify as an expert regarding his personal investigation into matters of cause and effect, particularly if he has been properly trained to reach a differential conclusion as to matters of identity of persons or things. He may usually render an opinion based on the information obtained during the course of his investigation.

There may be occasions when over-zealous prosecutors will attempt to "compromise" the expert police witness to strengthen an otherwise weak case. It is foolhardy to yield to the temptation of "blind loyalty" or "team concepts" simply because some advocate wants to win his case. When approached by either the prosecutor, or plaintiff or defendant via legal counsel, the police witness should be candid, honest, fully cooperative, and should reveal both the good and the bad factors involved in the matter. Any attempt to deceive, mislead, cudgel, or otherwise warp the truth surrounding the facts of the matter should be discouraged.

Many adults resemble children while testifying under the tension of courtroom decorum. Once the solemn oath to tell the truth is taken the psychological preconditioning of the witness becomes apparent. Police officers are no exception. Those witnesses who have gone through a properly arranged pretrial conference, who have not memorized their story, and who have been instructed to tell it as it is, present believable testimony by reason of their sincerity and candidness on both direct and cross-examination. However, the witness who is self-assured on direct examination, overly friendly to the prosecution or defendant, ill-prepared, and who has memorized part of his testimony becomes fair game on cross-examination. His memorized testimony is usually presented in a different manner than the testimony given by simple recall. His speech pattern becomes more rote, more rapid, more trance-like. It will stand out from the rest of his testimony [*4*]. He may use words substantially different from his usual vocabulary. The artful cross-examiner will tactfully illustrate these differences. He will attempt to cause the hostile attitude of the witness to shine forth. He will attack the ill-prepared areas of the testimony. He will help to strengthen the recall of the memorized testimony only to destroy it by contradiction in fact or by vocabulary differences.

The experienced trial lawyer will be familiar with the methods used by police officers in investigating various crimes. He knows the structure of the hierarchy. He will have learned all about the internal machinations of the bureaucracy. He also has the belief that all police officers are trained to psychologically accept that every defendant in a criminal case is guilty. He knows that most police officers will normally try to determine

the motive behind the question before an answer is given. Therefore, experienced trial counsel will frequently resort to the flashback and change-of-pace techniques. Questions will appear disconnected. The rapidity of questions asked will change from hesitatingly slow to a pace difficult for the witness to maintain. Counsel will use no logical sequence but will jump from one area of testimony to another. Each time the witness makes an error or blurts out even the smallest inconsistency, the able trial lawyer will make notation. Just when it appears that all is over a series of speedy questions will emphasize these errors, contradictions, and exaggerations.

Of all the faults plaguing humans, the gap in human memory recall is most apparent. An event usually occurs in a matter of seconds. The mind and the eye cannot keep up with these fast-moving occurrences, so the brain fills in the gaps with that which to that individual seems to be the most logical thing to have happened during the lapse of recall. This is then connected to actuality and is repeated as the truth even though it may later be shown to be absolutely impossible by virtue of scientific, medical, or physical impossibilities.

Police officers are human beings and are, by virtue of human attributes, also subject to this phenomenon. And this phenomenon also takes place when persons are told about events. This is most notable by the careless form and manner in which statements made by a witness to an event are notated. Usually, on the witness stand, a great deal may be added to the testimony of the police witness based on these notes. The able cross-examiner will dwell at length on statements allegedly made but not noted. Any testimony already presented which should normally be recorded in the police officer's notes, but which the officer failed to notate, will be scrutinized by the most jaundiced eye of the cross-examiner. Again and again failure to notate will be emphasized. This is referred to as negative cross-examination. Inadequacy and indifference towards the matter notated and reported will often times reflect on the integrity of the witness. Capable trial counsel will never afford the opportunity for explanation. He will emphasize absence of notation and the enlargement of exposition based solely on the words notated for the purpose of prosecution and not obtained for the purpose of telling the whole truth.

Police officers should observe the attitudes of the advocates. Usually browbeating finds its rightful place only in the movies or on television. Since jurors usually consider the witness to be at a disadvantage while testifying, the experienced trial lawyer will present the appearance of fairness, courteousness, and considerate conduct; but if the witness becomes offensive, angry, hostile, intemperate, and discourteous, the jury's feelings will favor the cross-examiner. When the witness is boiled over, fried in his own venom, the jury will delight in the witness' squirms and agony.

Trial counsel often use reports, memoranda, and statements given by the witness to the prosecutor, grand jury, or other investigating personnel. When questions determine the occasioning of such events, counsel should ask the trial judge to direct the prosecutor or investigating officer to supply him with any and all testimony, statements, or memoranda of the witness [5]. Whenever such material provides inconsistent statements, gratuitous conclusions, or errors of fact, it can readily be used to destroy the credibility of the witness. It should be remembered that the principle and technique of cross-examination are identical whether applied in a criminal or civil case.

The knowledgeable and experienced trial lawyer will shy away from any question which allows a witness to explain why something was stated. He will not risk asking a question of a witness if he does not know what answer to expect. If he does not receive the expected answer his demeanor will never change unless it will aid in conveying to the jury the impropriety of the answer.

The policeman who is to be a witness should keep accurate records. Time, place, and date of discovery of evidence should be noted. The person from whom he received the evidence and to whom he forwarded the same should be recorded. He should fully

comprehend the role played by the judge, the jury, and the opposing legal counsel. Whereas the judge's function extends to the determinations on all matters of law, the jury's function is to determine the true facts when facts are in dispute. The attorneys ask the questions to present the evidence to the court and jury. They ask those questions which they believe will assist the jury in its evaluation of the evidence and credibility of the witnesses and will assist the jury in giving the proper judgmental weight to the proof presented.

The court determines what evidence is admissible under the applicable rules of law. This is done to protect against undue influence being asserted on the jury. The rules of evidence are applied whenever either lawyer objects to a question asked or an answer given. By objecting to either question or answer the lawyer presents to the court an argument. He is saying by that simple word objection that the proposed evidence is not admissible. The court follows with its determination of admissibility as a matter of law.

There probably is nothing more irritating in the courtroom than to listen to a policeman drone on from the witness stand about the suspect, the complainant, the person, or party. If a suspect, complainant, person, gentleman, lady, or party has a name, it should be mentioned directly. "Mr. Jones was asked where he was at 10:30 p.m. on October 2, 1974," not "The suspect was asked ..." Even though Mr. Jones may be the defendant now in court, and even though he was a suspect at the time in question, he should be given the respect due to any human being, liked or disliked, suspect or not. He has a name and it should be used! If it is not used, do not be surprised when the artful cross-examiner, with disdain in his voice, never uses the witness' name and continuously refers to "your suspect."

The laws relating to evidence, its applicability and its admission, vary depending on locality, city, county, state, and federal jurisdiction. Evidence must be obtained in the prescribed manner if it is to be considered by the court as admissible in the matter then being tried. Every law enforcement officer should be aware of these variations as they apply to his particular jurisdiction. Failure to do so may result in serious trial repercussions and an unsuccessful prosecution. It may also have adverse reflections on the police department and the police officer himself.

Every policeman should be familiar with the rules for seizing evidence and preserving, identifying, and evaluating it. It is important to utilize every type of evidence to establish the guilt or innocence of any accused person. Since evidence may be physical, direct, indirect, documentary, opinion, corroborative, prima facie, cumulative, competent, relevant, material, or that which is classed as being within judicial notice (or knowledge), the policeman should be aware of the distinctions applicable to each.
Summarily, these may be classified as follows:

(1) Physical—real or demonstrative;
(2) Direct—testimony resulting from use of the five senses;
(3) Indirect—inferred from knowledge of other facts;
(4) Documentary—written documents, public or private;
(5) Opinion—based on skill, learning, or experience;
(6) Corroborative—supports or confirms other evidence;
(7) Prima facie—acceptable as proof unless refuted;
(8) Cumulative—additional evidence of same character;
(9) Competent—acquired legally and from reliable sources;
(10) Relevant—directly related to facts to be adjudged;
(11) Material—having some importance; not insignificant;
(12) Judicial notice—factually known by court and jury requiring no further proof; for example, a state statute.

The policeman witness may testify as an expert whenever he can speak authoritatively

on some particular matter not generally familiar to the lay populace. However, it is important that he has received and is possessed of special training or experience with regard to the technical matter to be presented. Special training or experience is the key which unlocks the door. As such an expert, acting within the field of forensic science, he must be capable of demonstrating his qualifications before offering his opinions or conclusions. Thus, the firearms expert, police chemist, document examiner, fingerprint expert, polygraph operator, photographer, and all other such experts must first be qualified and capable of demonstrating their qualifications before testifying in regard to their specific determinations.

Although not all municipalities have police departments maintaining fully equipped and professionally staffed crime laboratories, every state in the United States has access, through its own Attorney General's Office or the Federal Bureau of Investigation, to laboratory facilities. Forensic pathologists, toxicologists, biologists, immunologists, psychiatrists, odontologists, physical anthropologists, engineers, scientists, criminalists, document examiners, lawyers, pharmacologists, chemists, and other qualified experts are available through the American Academy of Forensic Sciences. Submission of evidence garnered by the policeman witness, and transferred for analysis to any of the named experts, carries with it the integrity of its obtainment and accompanying information and data. It is important, therefore, that the fundamental rules of fairness, candidness, and reliability are preserved. If not, the evidence may be destroyed at trial by impeachment as unreliable, and costly waste of effort and taxpayers' funds will be the end result.

In conclusion, a brief statement contained in the renowed Miranda Case would appear appropriate [*6*]:

> Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means ... would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

So too, as a witness, the means used to convict a defendant can never be justified if they are wanting in truth, fairness, candidness, and equity.

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[*4*] Bailey, F. L. and Rothblatt, H. B., *Successful Techniques for Criminal Trials,* Lawyer Co-Operative Publishing Co., Rochester, N.Y. and Bancroft-Whitney, San Francisco, 1971, p. 190.
[*5*] *People v. Rosario,* 9 N.Y. 2d 286, 173 N.E. 2d 881 (1961).
[*6*] *Miranda v. Arizona,* 384 U.S. 436 (1966).

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