

1918

Testimony and Human Nature

M. C. Otto

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

M. C. Otto, Testimony and Human Nature, 9 J. Am. Inst. Crim. L. & Criminology 98 (May 1918 to February 1919)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

TESTIMONY AND HUMAN NATURE

M. C. OTTO¹

The state must find some just and effective way of dealing with the anti-social being or become a memory and an admonition, along with Lot's wife. The fundamental problem is, of course, prevention, but two others are even more immediately pressing: How best to determine the guilt or innocence of those accused, and how to deal wisely with those found guilty. Something is being accomplished in the way of solving the latter problem, but the former is treated for the most part as non-existent. Moreover, until a less suspected method of establishing guilt or innocence shall have replaced the present one, it is vain to look for the dispersal of the fog of sentimentality through which many people view crime and criminal. And any substantial reform waits upon a wide-spread appreciation of the great difficulty of arriving at the truth through the taking of testimony.

It appears to be a matter of perennial surprise to most people that conflicting stories are told by apparently truthful eye-witnesses of a particular occurrence. Even those who in one way or another have gained some insight into the nature of testimony and therefore expect a certain amount of disagreement under ordinary conditions, feel that such discrepancies are due in the main to factors which might easily be controlled. Given reliable witnesses, they think, and a capable examiner will find it a relatively simple matter to discover just what took place. If there is fundamental disagreement as to what happened during the labor troubles in Colorado, when the German army invaded Belgium, or the angels marched at Mons, this is not due to the seeing, but to false reports of what was seen. It is assumed to be impossible that in the deplorable panic at Calumet, Michigan, the Christmas tree was actually seen to be on fire, that a boy with a burning cap on his head was actually seen hurrying down the aisle, that a man wearing a certain button was actually seen rushing into the hall from the rear. It is assumed to be impossible on the ground that none of these things happened. Such statements are credited to excitement or imagination, if the critic is generously minded, and to prejudice or malice, if he inclines to cynicism. And we are not disturbed by the fact that our position comes to this: We learn what happened by ruling out unreliable testimony; and we know what testimony to rule out as unreliable by learning what happened.

That it is not a simple matter to discover what is reliable and what unreliable testimony has been shown by psychological experiments, and it was shown once more, together with some of the principles involved,

¹State University, Madison, Wis.

by an experiment conducted in one of the classes at the University of Wisconsin. For eight weeks, seventy-five young men and women, largely upper-classmen, had been studying logic, when, without warning, a carefully rehearsed disturbance took place in the class room. Student Jones struck student Brown with his fist, whereupon the latter hit his assailant with a book. These students were seated next the outside aisle of a large class room and half way from the front. At the first sign of disaster, student Smith, occupying a seat in the front row and five seats from the outside aisle, threw two silver dollars into the air, and scrambled to recover them as they fell to the floor. The instructor, who was collecting papers from the class when the altercation began, ordered the three students from the room. Taking advantage of this tense moment while the three students were preparing to go and were leaving, the instructor went to the platform in the front of the room, and with his back to the class, looked at his watch, wrote "9:45" on the blackboard, erased the figures, repeated these actions, then faced the class just as the last man to go was at the door. Before there could be any interchange of opinions, he asked the class to write as fair and complete a statement as possible of what had happened. And that the testimony might be of practical use, certain definite questions were agreed upon as the basis of the reports.²

There is no element of surprise in the fact that no report of the affair covered it completely. We all know that attention, like the opera-glass, means enlarged vision, but restricted field, and we are therefore prepared to find that a given witness observed only snatches of what took place. But the most striking feature of the reports is by no means that each comes short of a full description of the disturbance; it is the amount of conflicting testimony, and on matters of importance. For example, in answer to the important question, "Where was the instructor when the disturbance began?" the testimony is as follows: According to 22, he was near the front of the room; according to 20, in just about the middle; while 21 say that he was in the rear. The variation becomes still more striking if we try to locate the instructor more exactly. Of those who insist that he was in the front of the room, one is sure that he was opposite the first row of seats west of the center aisle; another that it was the second row; another that it was the third row, and on the other side of the aisle. Furthermore, each of five different students report, and according to later interviews, would have felt forced to testify under

²The students at the University of Wisconsin are on a self-government basis. They knew that the testimony they gave might be used as evidence in the student court, and that they might be called upon to stand by it. Many of them afterwards stated that they expected their testimony to be so used.

oath, that when the disturbance began the instructor was just in the act of taking his particular paper and was thus opposite to the seat in which he sat. These seats are located on both sides of the center aisle, and from the front to the rear of the room.

Testimony like this shows that the hop-skip-and-jump nature of attention may not be regarded as a light matter in the weighing of evidence, and for this important reason: The breaks in observation do not remain in memory as so many blanks. On the contrary, the snatches that are noticed slide together, and the resulting whole is accepted by the witness himself as a faithful record of what actually took place in his presence. Only the student in seat 26 was quite correct in her statement that "the instructor was just passing the seat that I occupy when I heard a noise as of fighting on my left"; but she felt no more certain of the truth of her statement than did the young men in seats 92, 74, 58, 40, who were wrong. It takes time to collect papers from seventy-five students in a large room, but for these four men all that had occurred from the time they had handed their papers to the instructor to the time when the disturbance began not only dropped out of existence but left no trace of its ever having been. And it is important to remember that the reports were made immediately after the occurrence and not after the lapse of hours, or days, or weeks.

This tendency on the part of observers unconsciously to abridge and contract events and to accept the abbreviation as a true record of what happened, co-operates with another natural human propensity which has a bearing on the reliability of testimony, namely, seeing with "the mind's eye." When testimony is demanded on features of an occurrence which were simultaneous with blind moments in the act of observation, then fragments from other experiences may be introduced, in perfect unconsciousness of the process, to fill up the gaps in question.

It will be recalled that while the men who were ordered from the room were leaving, the instructor stood with his back to the class, writing on the blackboard, until the last of the three "culprits" was nearing the door. Only five of the seventy-five observed this with even approximate completeness; their attention was fixed elsewhere. Still, in answer to the question, "Where was the instructor, and what was he doing when the students left the room?" only six say they do not know. The other 64 give very definite testimony as to his whereabouts and actions. Three state that the instructor went to the door and held it open for the students to pass out; one that he stood in the centre aisle muttering "I'll break this up, or know the reason why"; three have him seated dejectedly at his desk, his face buried in his hands; while the remaining fifty-seven essentially agree that he was

seated at his desk, "toying with the papers that he had collected," (or with class cards, watch chain, piece of chalk, etc.) "as if not knowing what to do," and that "his face wore an expression of embarrassment and uneasiness."

Now granting that the instructor's face testified to embarrassment, it was at the time invisible to most of the students. Their reports here as in their description of his position and actions are a composite of past experience and what they saw when their attention returned to the instructor. What the witness thinks he saw is actually largely a fiction, having its roots in part in his own emotional nature and in part in idiosyncrasies and habits of this or of other instructors, now vicariously doing duty for the unobserved.

The two mental characteristics so far considered play into the hands of a proclivity to make a story of the observed. The snatches retained of an occurrence are not kept in isolation like so many loose beads of knowledge, but are strung on a thread; are combined into what is meant to be a harmonious narrative. It will be recalled that the two men who began the disturbance occupied seats next to the outside aisle of a large room, and half way back. As soon as the disorder was under way, Student Smith, who was seated five rows to the front and five seats from the outside aisle, dropped some money and scrambled to pick it up. Now the interesting fact is that in the testimony these two events are brought together in the relation of cause and effect, and thus become incidents in a story which harmonized them. Two of the accounts will illustrate. "One of the students," reads a report, "either Jones or Brown, dropped some money. A scramble immediately took place between them, while the money rolled toward the front of the room where it was grabbed by Smith who made considerable noise doing it." It was quite natural for this witness to introduce a bit of stage business which gives still more unity to his conception of the disturbance. "There was also," he says, "a very general shuffling of feet as is usual when money is dropped."

In the other account the two occurrences are united under the influence of a common student experience. The seats in the university class rooms are equipped with adjustable desk-arms. Sometimes the mechanism fails to work when the student tries to adjust the arm and occasionally in such cases the arm is broken off and a little steel ratchet-ball falls to the floor. Although at this time no seat-arm was broken off, reports of students sitting in different parts of the room agree in substance with the following: "Brown said something to Jones and then in a minute a scrap was on. In the tussle a seat-arm broke off and Brown tried to poke Jones with it, but it fell to the floor. I heard the little iron ball from the ball bearings roll to the front of

the room. Smith made a grab for it and so he too got into trouble." It is striking that among those who found this particular connection between what Jones and Brown did and what Smith did, is the immediate neighbor of the latter, whom one would expect to be a reliable witness of Smith's part in the affair. But instead of seeing Smith drop money he saw "a little steel ball come rolling out between Smith's feet, and Smith grabbed it and put in his pocket." He was never convinced that this was fiction, and when last heard from insisted that if called into court he would be compelled to stick to his original story in spite of what others claimed to have seen.

Another illustration of the impulse to make a story of the fragments observed is found in the answers to the question, "How did Jones, Brown and Smith look as they passed out?" In the big majority of cases the replies are in harmony with the attitude taken by the witness toward the affair as a whole. If the account is one in which the students appeared only slightly blameworthy, so that the action of the instructor in sending them from the room seemed unreasonably severe, then Jones, Brown, and Smith looked "angry," "injured," or "abused," as they passed out. On the other hand, if it was felt that the actions of the disturbers could not be defended, they looked "embarrassed" or "ashamed." The student, just referred to, who saw Smith do nothing more reprehensible than put into his pocket a little steel ball which rolled down from the scene of disorder, describes him as looking "very angry," while Jones and Brown, with whom he thought the trouble had originated, looked "sheepish."

These results show something more than that a witnesses misses part of what occurs, and that there is danger of positive distortion when the examination of witnesses is delayed until they have time to forget and to pick up items from others. It shows that a witness spontaneously mixes art with observation on the spot, and that an idea somehow having taken possession of him acts as the motif or theme in harmony with which, all unawares, he sketches the occurrence as he believes it to have taken place. And it is important to note that in this work of art items which had their counterpart in reality are not distinguished from those which had not. The witness may be made to feel doubtful about his testimony, but he will yield at the one point no more readily than at the other. When the members of this class in due time learned of the various discrepancies in their testimony, some of the most puzzled individuals were those who claimed to have heard the little steel ball roll along the floor. It now appeared indisputable that no steel ball had fallen to the floor, and yet the experience of its having fallen would not fade for all that. As one of them expressed it later: "It is positively uncanny. I could swear I

heard that little ball bound from step to step as it rolled to the front."

All that has been said is emphasized by the testimony received regarding an incident not yet considered. In addition to the students mentioned so far, the experiment included a fourth, whom we shall call White. He was seated on the opposite side of the room from the rest, and near the front, and his part in the affair was to leave the room the moment the disturbance began. The purpose was to see whether, under cover of the excitement, he could get away unobserved. He performed his part as rehearsed, leaving his seat just as the instructor turned upon the other three and ordered them to go.

How many actually saw him leave the room it is impossible to determine, for when quiet had been restored and the students were beginning to write their accounts of the affair, one of them asked: "Are we to include the fact that White rushed from the room at the beginning of the disturbance?" The instructor replied: "In an affair of this kind it is better that I make no suggestions whatever. Please report what you saw as completely as you can, but report no more."

At this point we get an amount of agreement conspicuously absent elsewhere. Out of seventy-five reports, 64 mention the fact that White left. Now, undoubtedly, a number of the students saw White leave, and in the case of some of these the impression was vivid enough to have remained in the mind. In the case of others, however, whose impression was not so vivid, the chances are that this bit of observation was actually erased from the memory by the intense experience which followed directly on its heels, and that it was revived by the question being asked so soon after the original experience. Had the question not been asked at all the actions of White would in these cases have been represented by one of the blind spots in observation already referred to. This is important, because when such memory-ghosts are conjured up by a question, they come distorted by the form of the inquiry. That is why most of the students not only saw White leave, but saw him "rush," or "hurry," or "bolt," or "make a wild dash" from the room. This suggestion was subtly conveyed to them in the unfortunate question.

But the question did something more than revive faint impressions. It undoubtedly led many to believe that they had observed White's movements when their faces were in fact turned away from him. The students in the immediate zone of the disturbance could hardly have avoided centering their attention upon Jones and Brown just at the time when White left from the other side of the room. In such case they could not have seen him. Still, those seated next to, in front and in back of Jones, Brown, and Smith, all saw White go, observed the manner of his going, and even noted his facial expression.

The importance of these facts is obvious. If it is impossible for a witness to reproduce an occurrence as it took place in his presence, even when asked to do so directly after the occurrence; if it is his very nature to demand consistency in such items as he does get, to the point of rejecting some and creating others; if such a thing as sending three men from a room at the same time may act as a suggestion around which is built up what the witness believes himself to have observed concerning them; what are the chances of arriving at the truth under conditions which often obtain where testimony is taken? In view of a witness's sensitiveness to suggestion, what justification can there be for the "third degree," and what assurance is there of getting at the facts by methods constantly practiced even in law courts, that is, by asking leading questions, by laying down narrow lines beyond which the witness may not stray in his answers, and by acting on the assumption that if a witness contradicts himself he lies, if he lies he is a liar, and if he is a liar, nothing he says is true?

Unless we presume to know the facts before we begin, or are indifferent whether we get at them in the end, the taking of testimony is difficult even under most favorable conditions. And a first step would seem to be a recognition on the part of society that this constitutes a genuine and most vital problem, and one of peculiar niceness and complexity; a problem, moreover, which is not simplified, but enormously complicated when we have hired two lawyers, each called upon to supply a theory as to the "facts in the case," each armed with the ability to brow-beat witnesses and to appeal to the emotions of jurors selected for their "innocence," and each, in the very nature of the case, forced to feel greater concern for victory than for truth. We have done something to make the examination of witnesses humane, but we have done little enough to make it intelligent. Our attitude is describable as a child-like faith that someone is taking care of such difficulties as may be connected with the matter.

Punishment acts as a deterrent to some extent even if it falls like God's rain on the just and the unjust. Consequently, a defective method of determining the guilt or innocence of those accused of anti-social acts may long be accepted as satisfactory. There comes a time, however, when the gulf separating a given institution from the general state of relevant knowledge becomes so wide that the need of adjustment is felt. It is encouraging to believe that we are entering upon this stage; that we shall presently show less of a tendency in the face of crime to indulge in sentimental inebriety—itsself a dangerous anti-social attitude—and shall instead give whole-hearted support to the movement which aims to make the taking of testimony more scientific and hence more just.