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THE EFFECTIVENESS OF THE OATH TO OBTAIN A WITNESS' TRUE PERSONAL OPINION

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INTRODUCTION

The use of personal opinions as evidence in litigation has grown rapidly in recent years. Their use is not new. Prospective jurors have always been questioned about their opinions concerning the case they may be asked to try, and personal opinions about the nature and impact of public sentiment are frequently solicited where a party to a case has requested change-of-venue.[1] The testimony of a witness under oath, the affidavit, and the opinion survey are devices increasingly used for evidentiary purposes in other legal cases (e.g., deceptive advertising and misbranding) where the nature of consumer reaction is all important.[2]

By personal opinion is meant the opinion of an average person about another person, idea, or event—and not what is commonly referred to as expert testimony which is provided by the professional witness (e.g., a doctor or cartographer) who is testifying with respect to the application of his technical skills. It is only with personal opinion that this discussion is concerned.

The purpose of this discussion is to explore a commonly respected axiom in the judicial arena: the act of administering an oath[3] to a witness who is subject to cross-examination in open court offers substantial guarantees for obtaining his full and true personal opinion.

The courts are not yet agreed on whether or not evidence consisting of personal opinions is admissible if it is obtained vis a vis opinion research interviews conducted outside of the courtroom. A common justification advanced in behalf of courtroom

[1] For the history of this practice see the writer's unpublished doctoral dissertation, *The Role of Public Sentiment and Personal Prejudice in Jury Trials of Criminal Cases*, The University of Chicago, Chapter II. The prospective juror who states under oath that he is fully impartial or that he has entertained beliefs regarding the merits of the case but promises to be impartial from now on is ordinarily accepted as impartial by the courts, and the prospective juror who swears that his personal opinions are outright prejudiced and that he is unable to assimilate the evidence without distortion is equally believed and released of his obligation to serve in the case at hand.

[2] See FRANK R. KENNEDY, *Law and the Courts, The Polls and Public Opinion*, ed. by NORMAN F. MIER and HAROLD W. SAUNDERS (Iowa City: University of Iowa Press, 1949); LESTER E. WATERBURY, *Opinion Surveys in Civil Litigation*, PUBLIC OPINION QUARTERLY, XVII (1953), 71; Note, *Public Opinion Surveys as Evidence*, HARV. L. REV., LXVI (1953), 498.

[3] The affirmation which is taken by some witnesses instead of the oath should be considered throughout this discussion even though it may not have the same connotations of the supernatural.

testimony is that the spokesman can be cross-examined under oath in open court. When evidence from the results of an opinion survey are offered, opposing counsel ordinarily alleges two points: (1) Many people interviewed anonymously outside the court may not say what they really believe when not under oath; (2) Many such interviewees, once questioned under oath, would want to qualify their original answers or withdraw their "first impressions."[4]

Little scientific interest has been evidenced in the extent to which the oath coupled with cross-examination has actually encouraged people to tell the truth on the witness stand. The incidence of perjury has not been systematically studied. Official crime statistics seldom list perjury as a crime or offer a breakdown of the number of such crimes prosecuted. Yet, the incidence of perjury has long been considered great by lawyers and writers on the subject.

> The opinion that perjury is common in our trial courts is one on which all of the writers on the question seem to be in complete agreement . . . We may accept the opinion of those who have examined the question as to the seriousness of the problem, especially when it is confirmed by everyday conversations of judges and trial lawyers . . . There seems to be no reason to doubt that perjury is common enough to constitute a major problem in the administration of the law . . .[5]

Perhaps the two assumptions most commonly cited in favor of obtaining personal opinion in the courtroom under oath rather than in outside interviews no matter how scientifically conducted are as follows:

1. A witness' personal opinion is more likely to be well thought through and discriminating. Thus the court will have a far better opportunity to receive better formulated personal opinions.

2. An individual is more likely to report truthfully about the nature of his personal opinion. Thus the court will have a far better opportunity to learn what the witness *really* thinks.

The third and fourth sections take up each one of these assumptions and describe the hypotheses which have emerged from the writer's interviews with witnesses, lawyers, judges and from his examination of legal and psychological materials.[6] It is hoped that further research can be done on these basic questions about the extent to which oath-taking and the attendant cross-examination in open court affect the formulation and reporting of an individual's personal opinion.

The Practice of Oath-Taking in the Courts

The role of the oath in the American legal system is an interesting one.[7] Its function with respect to witnesses in the courtroom is several-fold. The oath is felt to be a

[4] For a detailed examination of the arguments (including others not relevant here) employed against the use of evidence obtained by opinion research methods, the leading cases on the subject, and a bibliography of the few instances of writing on the subject, see Robert C. Sorensen and Theodore C. Sorensen, *The Admissibility and Use of Opinion Research Evidence*, N. Y. Univ. L. Rev., XXVIII (November 1953), 1213–1261.

[5] H. C. McClintock, op. cit., 727 and the citations therein.

[6] See reports on the writer's research cited in footnotes 1 and 3.

[7] Discussions of the use of the oath are contained in many articles including the following: T. R. White, *Oaths in Judicial Proceedings*, Amer. L. Reg., XLII (1903), 372; Harry Hibschmann,

deterrent to falsehood because the witness *must commit himself to truth-telling in advance of his testimony.* This involves various types of internalized response in that the witness swears to his God that he will tell the truth as he sees it.[8] The deterrent is solidified by the oath's second function: the provision of an occasion whereby a witness may be tried for perjury should it be demonstrated that he failed to tell the truth after promising to do so.[9] Thus administration of the oath serves not only to warn but also to hold over the head of the witness his own sacred assurance that he would speak only the truth.

The third function of the oath lies with the credence it lends to what its bearer has to say. An individual is seldom allowed to testify in court without first taking an oath (or affirmation), and it is doubtful that many jurors would credit any validity to the *challenged* testimony offered by a witness who had refused to do so. A fourth characteristic of the institution of oath-taking lies in the varieties of respectability and self-satisfaction it provides the witness by furnishing an occasion for conformity. In this connection, the manner in which the oath is administered is thought by many to influence the extent to which people will feel that society desires the oath to be honored.[10]

An early viewpoint saw the oath as an objective phenomenon in that its violation invited the direct punishment of the Lord. The individual who had told the truth was accepted as having satisfied divine conditions by the presentation of his testimonial. This has evolved to a subjective version whereby the oath is considered an occasion to anticipate God's potential sanctions:

> The purpose of the oath is not to call the attention of God to the witness, but the attention of the witness to God: not to call upon Him to punish the false-swearer, but on the witness to remember that

That Perjury Problem, JOUR. OF CRIM. L. AND CRIMINOL, XXIV (1934), 901; FRANK SWANCARA NON-RELIGIOUS WITNESSES, "WIS. L. REV., XIII (1932), 49; J. CRAWFORD BIGGS, *Religious Belief as Qualification of a Witness,* N. C. L. REV., VIII, 31; Denman, Speech in Parliament, see p. 25 HANSARD, PARLIAMENTARY DEBATES (3d series), CVI (June 22); JEREMY BENTHAM, RATIONALE OF JUDICIAL-EVIDENCE, (London: Hunt and Clarke, 1832) BOWRING'S ed., VI, 308; WILLIAM TRICKETT, *Recession of the Supernatural in Judicial Investigation,* DICKSON L. REV., XXX, 1.

[8] Bentham distinguishes between the moral and religious implications of the oath—a differentiation that should be kept in mind when the efficacy of oath-taking is considered with respect to one's personal *opinion.* He further observes: "What gives an oath the degree of efficacy it possesses, is, that in most points, and with most men, a declaration upon oath includes a declaration upon honor: the laws of honor enjoining as to those points the observance of an oath. The deference shown is paid in appearance to the religious ceremony: but in reality it is paid, even by the most pious religionists, much more to the moral engagement than to the religious." JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE (London: Hunt and Clarke, 1827), I, 374.

[9] Voluntary testimony of an untrue nature, at least untrue testimony of a sort not authorized by the law, may not be punishable. See, e.g., Larson v. State, 171 Minnesota 246, 213 N.W. 900 (1927).

[10] A typical instance is a 1937 report issued by the American Bar Association's Committee on the Improvement of the Law of Evidence. It suggests the following "to obtain the maximum efficiency of the oath": 1. It should be administered by the *judge,* not the clerk. 2. It should be *repeated,* word for word, by the *witness.* 3. It should be administered anew to each witness on coming to the stand, not to a group and in advance. 4. The judge and all persons in the court-room should *stand* while the oath is pronounced.

He will surely do so. By thus laying hold of the conscience of the witness and appealing to this sense of accountability, the law best insures the utterance of truth.[11]

Nevertheless, a belief in a cosmic force and the inevitability of retribution for false swearing is considered necessary. Wigmore observes that the standards for belief being what they are, it follows that "the *form* of the administration of the oath is immaterial, provided that it involves, in the mind of the witness, the bringing to bear of this apprehension of punishment,"[12] even though common law provided only for an oath binding upon conscience.[13]

The English and American courts no longer feel that it is necessary to demonstrate whether the prospective witness believes that retribution might be inflicted upon him in present life or in future life. Seldom is the witness challenged as to whether or not he shares the belief implied by the religious sanction he presumably risks when he subscribes to the oath. It is up to him to dissent if he dares to—something that the nonbeliever is unlikely to do because he will ordinarily accept the oath as a ritual and because he may have a strong desire both to be heard and to obtain full acceptance of what he has to say.

Older opinions that people of unsound mind were automatically disqualified from taking the oath were supplanted more than one hundred years ago by the philosophy that the merits of each individual case should be deciding.

It is for the judge to say whether the insane person has the sense of religion on his mind and whether he understands the nature and sanction of an oath . . . A man may in one sense be "non compos mentis," and yet be aware of the nature and sanction of an oath.[14]

However, the courts are concerned with mental competence to understand the oath as well as emotional consience to fear it.

Capacity to tell a comprehensible story requires not only capacity to understand the questions that may be put and to form and state intelligent answers, but also a sense of moral responsibility to speak the truth as he recollects it. Most courts still say that the witness must understand the nature and obligation of an oath before he will be allowed to testify, and much effort has been expended in contesting whether or not witnesses were or were not able to understand the import of an oath.[15]

Formulation of Personal Opinion for Presentation in Court

The first basic hypothesis, the antithesis of the first assumption mentioned in the introduction, is that the existence of the oath along with cross-examination in open court does not increase the probability that the witness' personal opinion of a phenomenon will be well thought through and discriminating.

It might be asserted that the depth and reasonableness of a witness' personal opinion is irrelevant, that "the fact that a person believes something is not supposed

[11] J. Ashburn, in *Clinton v. State*, 33 Ohio St. 33 (1877).

[12] Wigmore, *op. cit.*, 289.

[13] H. C. McClintock, *What Happens to Perjurers?* Minn. L. Rev., XXXIV (1940), 741.

[14] Campbell, J. C. J., in Rex v. Hill, 2 Den and P.C.C. 254 (1851).

[15] Manfred S. Guttmacher and Henry Weihofen, Psychiatry and the Law, (New York: W. W. Norton and Co., Inc., 1952), 360.

to make it true. A person's opinion of an event is by definition of a different level of abstraction than the event itself." This is indeed true in view of the fact that it is the witness' personal opinion which is the sole basis for the introduction of this testimony into evidence for consideration by the court.

However, the circumstances under which people are questioned in court about their personal opinions make for a basic difference in testimony about alleged facts and testimony about one's personal opinion. It is always obvious that a person who swears to what he saw or heard or knows did not see or hear or acquire his knowledge of facts while under oath. He acquired his knowledge prior to the occasion that he became involved in litigation.

On the other hand, the personal opinion is almost inevitably considered to be a sufficiently on-going phenomenon that it is still in the process of being moulded. In fact, it is not considered as finally or validly formulated before it has been subjected to whatever tests lawyers may want to put to it in the courtroom.

1. The very methods by which a witness is often selected and thus is asked to testify about the nature of his personal opinion often militate against the depth and discriminating quality of his personal opinion.

A person who is to testify about his personal opinion is often selected by counsel who wants these opinions to present a given viewpoint. Only those persons who are counted on as "wanting to be of assistance" or who are felt will provide the most favorable responses possible are solicited for assistance in the first place. Nor does the soliciting lawyer want their testimony to be presented in the courtroom unless he believes that the most favorable possible impression (the possibilities vary with different situations and cases) will be made in his client's behalf. In short, a person knows what his personal opinion is expected to be; otherwise he would not be asked to testify.

The witness called for his personal opinion is usually selected on the basis of the impression that *his association with* the point of view presented in his testimony is intended to make. Thus a person who is well liked, respected for his accomplishments and/or his integrity, and generally possessed of some brand of prestige is admittedly a choicer candidate for selection than one who could be selected only for the soundness of his personal opinion or the opportunity that he might have to obtain the opinions of others.

The number and kind of witnesses who are recruited and utilized by a lawyer in a given case bear no necessary relationship to the nature of the event about which they are to report their personal opinions. The number of witnesses may vary with such circumstances as the money and time accessible to the counsel, the available number of friends or people from whom the lawyer has particular reason to believe he can solicit favorable viewpoints, a number whose sheer magnitude is calculated to overwhelm the court by brute psychological force, and the number considered sufficient to equal or top the number of witnesses produced by opposing counsel.

If a witness' testmony about his personal opinion is invited by counsel on the basis of what he (the witness) is willing to say rather than how accurately he feels obligated to think through objectively and report on his opinion, the efficacy of the oath and cross-examination is questionable. At best, cross examination might reveal the superficiality with which such a personal opinion presenting only an "acceptable"

point of view was formed. But this means little because so many personal opinions about which testmony is given are formulated under similar circumstances; their discriminating qualities are no less impaired. Neither oath nor cross examination is going to have a retroactive effect in the sense that personal opinions gathered under these circumstances will thereby be reformulated along more thoughtful lines.

2. The oath does not obligate a witness to understand the origin and nature of his personal opinions about which he testifies.

The oath to tell the truth does not obligate an individual to be confident of the discriminating qualities of the personal opinions which he says he holds. He is only expected to be confident that he is truthfully telling what he believes. Different people will react in various ways. Many will probably scrutinize their personal opinions more carefully when they are repeating them under oath. But it is equally obvious that an individual, reporting on his personal opinion about which he alone is aware rather than discussing a fact which independent evidence suggests he at least may have acquired, can rationalize even the existence of his personal opinion which is not subject to evidentiary tests.

Research has been conducted by lawyers and psychologists to determine the extent to which people reliably reported upon actual events which they had witnessed. In a great many instances, people were willing to swear to the validity of their observations which were in fact errors, observations which they believed were valid. The percentage of errors was high in several instances; the factors to which it can be attributed were often unknown.[16]

Many will engage in what is known as "defensive lying" to themselves so as to protect their feelings from some fate which they believe to be worse than that of telling a falsehood. The matter is touched upon by Roche in connection with people directly accused of crime:

> The denial of the fact of the crime enables him to avoid a psychic pain far more threatening than the penalty for the crime or for the perjury. Since the accused does not know, it follows that neither does the judge, the prosecutor, nor the jury. This is to say apart from the material evidence of the unlawful act, everyone is in the dark . . . Often people "lie" against their own inner interests. "Lying" is often a defense against inner feelings of insecurity and inferiority. The insane do not lie—they expose the truth with alarming candor.[17]

The unconscious factor in any individual's judgment about his personal opinion does not admit of hasty measurement, is seldom articulated in response to cross-examination, and, if capable of evaluation at all, requires certain projective tests and other devices which cannot be employed in the courtroom.

Presentation of Personal Opinion in Court

The second basic hypothesis is that oath-taking and cross-examination do not assure the truthful presentation of a witness' personal opinion.

[16] See the following section of this paper for a discussion of research on perception and its meaning to the influence of cross-examination and desires for conformity upon the way in which a person reports his personal opinions.

[17] Philip Roche, *Truth Telling, Psychiatric Expert Testimony and the Impeachment of Witnesses*, Penn. Bar Assoc. Quart., XXII (1951), 140, 146.

1. A courtroom situation seldom if ever provides a sound opportunity for actually learning about the nature of a witness' present or past opinions.

The discussion about the second and third aspects of the above hypothesis indicates the barriers which cross-examination and confrontation in open court thrust in the way of obtaining a witness' actual personal opinion. Meanwhile, the existence of a penalty for lying under oath does not act as a very strong deterrent where one's personal opinion is concerned. In fact, very few cases exist in which a person has been indicted for falsely representing the nature of his personal opinions. No case is known where a witness was accused of perjuring himself so far as his personal opinion about public reaction (e.g., cases involving motion for change of venue) is concerned.

The average witness usually soon learns that perjury is a difficult offense to "establish within the law and to the satisfaction of juries."[18] The fact that someone's statement may conflict with what he had to say on the same subject but on a different occasion is irrelevant, for the law demands that proof be demonstrated as to which occasion represents perjury. The accused must have made his statement willingly, willfully, and knowingly; he must have made it in an absolute sense so that it can be demonstrated that he meant to commit perjury; and his evidence must have been material to the issue.

Who can demonstrate that a person does not really believe what he says was his personal opinion? Who can state that it is wrong for a personal opinion, unlike a fact, to change at the owner's slightest whim, even if it is changed on a conscious basis to accommodate a special set of circumstances? Can a distinction be made between a personal opinion changed in order to deceive and an opinion undergoing change as a natural step in its formation? The first involves an individual who swears to a personal opinion consciously amended in order to coincide with what other considerations may obligate him to want to believe. The second involves an individual feeling that there is something more important than the oath and all its deterrents—thus swearing one thing though actually believing another.

There is some judicial backing for these questions about what can be learned by inquiring into the personal opinions of a witness, even though he may be under oath and subject to cross-examination. On December 16, 1952, a professor of international relations, Owen Lattimore, was indicted on seven counts of perjury alleged to have been committed before the Internal Security subcommittee of the United States Senate. The ruling of United States District Judge Luther W. Youngdahl on the defendant's motion to dismiss all seven counts contains several points which illustrate one court's reaction to this question.

In connection with count number one which charges the defendant with lying in denying that he was a sympathizer or promoter of Communist interests, the court observed in dismissing the count:

> ... it seems to the court that this charge is so nebulous and indefinite that a jury would have to indulge in speculation in order to arrive at a verdict. Sympathies and beliefs and what they mean to different individuals involve concepts that are highly nebulous and speculative at best. I presume a person could sympathize with a belief and yet still not believe. To probe the mind in a situation like this would give rise to nothing more than sheer speculation on the part of the prober.

[18] HARRY HIBSCHMAN, *op. cit.*, 901, 904.

No case has been pointed out to the court which sustains a perjury count based on the speculative fathoming of the mind that will be necessary by the trier of fact in order to arrive at a decision under (this) count . . .[19]

2. The oath does little to deter a person's feelings of obligation to his own personal welfare or to others arising from his knowledge of public sentiment.

When an individual's anonymity is sacrificed in the courtroom, are the probabilities greater or fewer that he will tell the exact truth as he sees it? An individual who lacks anonymity for expressing his true personal opinion must inevitably consider the consequences.

Inquiry has been made into the extent to which anonymity affects the kind of answers given by respondents to identical questions. In face-to-face interviews, respondents are often found to answer questions differently to people they know than to people they do not know.[20] When interviews are conducted or questionnaires are distributed to people they express different personal opinions as members than they do when they are asked the same questions as individuals. Even people responding anonymously to written questionnaires indicate concern about the reaction to the answers they provide because they consider their relationship to those who will be processing and evaluating their opinion responses.[21]

In the mind of the usual witness, it is presumed, are images of those who he knows or guesses may be expressing an opinion similar to his true personal opinions. What kind of people are they? Are they the kind of individuals he would want it known he agreed with on the issue in question—regardless of whether or not the reasons for their agreement were the same? Will anyone want to help him or hurt him during his coming lifetime because of what he has said? For after all, is it not true that "facts are facts, but a man's opinion reflects on the man himself?" Lacking anonymity, does he anticipate being categorized by name as a member of a class with which he may or may not want to be associated? The safest alternative, of course, is to take no risks by expressing a personal opinion which might cause him to be classed in an unwelcome category. The consequences of this point of view are realized by the evidence supporting the final tentative conclusion below.

3. The use of cross-examination techniques tends to discourage a witness' efforts to testify truthfully about the nature of his personal opinion.

The witness' personal opinion is formulated in his own particular way, a process which is best illuminated by allowing its full description by the individual involved, subject to legitimate questions regarding the validity of his observations and the inferences he has drawn from them. A witness must be allowed to re-experience his personal opinion in order to convey it intelligently and truthfully. But in open court, there will inevitably be cross-examination of the witness which is calculated to discredit the opinion or distort its meaning in favor of the agency of cross-examination;

[19] THE NEW YORK TIMES, May 3, 1953, Section 1, 46.

[20] See, e.g., HADLEY CANTRIL and F. WILLIAMS, *The Use of Interviewer Rapport as a Method of Detecting Differences Between "Public" and "Private" Opinion*, JOUR. OF SOC. PSYCHOL., XXII (1945), 171.

[21] HERBERT HYMAN, *Interviewing as a Scientific Procedure*, THE POLICY SCIENCES, ed. by DANIEL LERNER and HAROLD D. LASSWELL (Stanford: Stanford University Press, 1951), 209.

this may succeed in concealing the witness' actual personal opinion and the reasoning behind it.

The process of cross-examination inevitably lends itself to the goals of counsel whose purpose is *not* to obtain the witness' true personal opinion but to elicit statements or a demeanor which will discredit the point of view which his particular opinion may truthfully substantiate. The "sporting theory of justice" requires that opposing counsel do its best to demonstrate that a witness is not describing what he really believes, is qualifying his answers, or does not know what he is talking about. Furthermore, friendly counsel is no less prejudiced in what he hopes to bring out in re-examination. These techniques are precisely the opposite of those which any legitimate opinion researcher is instructed to use; any resort to them, once reported, would result in his immediate dismissal.

Nevertheless, these procedures are inevitably utilized in the courtroom. And it is therefore questionable that every witness under these circumstances is going to defend literally the nature of his personal opinion regarding an issue in dispute. Were he an eye witness to an event, were he the possessor of some given facts, he would be far better prepared logically and emotionally to defend what he was confident to be fact. On the other hand, it is questionable how much stake he feels in his personal opinion of some issue or event—an opinion which he may have structured largely in connection with his being approached to give testimony. The suggestive question, a popular form of courtroom interrogation, can often—particularly in the realm of opinion—bring an affirmation which might otherwise not be made. Expressing an opinion or belief rather than knowledge, it is perfectly natural that one may be willing to admit that what he actually thinks was not at all what he previously announced he thought. In fact, the witness' personal opinion may undergo a change at the moment—if only in terms of the hostility he may feel for the attorney or defendant who "got him involved."[22]

Conclusion

Individuals sometimes want to swear to or insist on what they believe they know or feel, particularly when they feel obligated or know they are expected to express themselves in this fashion. The oath is a form of social control which demands little in one's formulating and reporting on his personal opinion. For one need not have exercised rigorous concern about the subject of his oath nor need one understand the ideas involved in what is being said.

Since external compulsion rather than personal conviction is the control applied to the witness, it is doubtful that he need even agree with or believe in what he has to say. The witness is forced to tell the truth about his personal opinion as he sees it

[22] The more dependent and easily influenced a man is, the more a question put to him operates as an imperative. And as he has usually exhausted in his narrative his store of clear and distinct ideas with reference to the experience, he hunts now among the remaining indistinct and fragmentary recollections for something wherewith to meet the question. We define suggestion, from the standpoint of the person influenced, as "the imitative assumption of a mental attitude under the illusion of assuming it spontaneously." An Abstract of Lectures on the *Psychology of Testimony and on the Study of Individuality* by Professor William Stern, University of Breslau, undated.

at the moment. "As he sees it at the moment" in court will depend, of course, upon his psychological reactions to the situation in which he is publicly put upon to commit himself and what little stake he may have held in the personal opinion before he took the witness stand.

For these reasons it is suggested that the professionally conducted interview conducted outside of the courtroom should not be ignored by the courts as a device for obtaining personal opinion. Its problems, too, are many, but it is doubtful that the oath in the courtroom succeeds under present procedures in assuring that a witness will present his full and true personal opinion.