Journal of Criminal Law and Criminology

Volume 52
Issue 2 *July-August*

Article 8

Summer 1961

The National District Attorneys' Association

Articles, Reports, and Notes
OF
THE NATIONAL DISTRICT ATTORNEYS' ASSOCIATION

[This section of the Journal has been added for the exclusive use of the National District Attorneys' Association. The selection and editing of the material contained herein is the sole responsibility of the Association's representative, Mr. Duane R. Nedrud, a former prosecuting attorney, and a member of the Association. However, neither Mr. Nedrud, the Association, nor the Journal assumes any responsibility for the views expressed by the authors of articles appearing in this section.]

Editor: **Duane R. Nedrud,** Associate Professor of Law, University of Kansas City, Kansas City, Missouri

ORAL ARGUMENT IN CRIMINAL PROSECUTION

MANLEY J. BOWLER

The author is Chief Deputy District Attorney, Los Angeles County, Los Angeles, California.—EDITOR.

A very wise judge once said that no trial lawyer needs to be told how to make a summation because within the inner recesses of his heart every advocate earnestly feels that he is the lineal descendant of Demosthenes with a little kinship to both William Jennings Bryan and Clarence Darrow thrown in for size. For this reason it is difficult to say anything about the subject which would be of interest to prosecutors. There are, however, a few fundamentals which might be considered.

With rare exceptions, oratory is not nearly as effective for a prosecutor as a clear, direct and logical discussion of the case—in effect, talking it over with the jurors, utilizing the type of argument that can be followed easily and which will lead to reasonable conclusions. Certainly it is not to be understood that the address to the jury should be a dull, unemotional discourse. If the case is one which calls for an appeal to the feelings and emotions, the prosecutor will quite naturally become oratorical at times; and as the natural and spontaneous product of the subject matter, this can be most effective. Such outbursts, however, should never be overdone either as to length, frequency, or number. Today, flamboyance is largely a thing of the past. Instead, the emphasis is on naturalism —being yourself. The greatest tool and technique of a prosecutor is to create from the very beginning of the trial an atmosphere of sincerity, earnestness, and confidence in the righteousness of the cause. If you do this, and then in argument follow through in simple, forceful terms, you have mastered ninety per cent of the problem.

PREPARATION

One of the first things to be considered in argument is preparation. It is indispensable to good argument that it be well-founded, logical, reasonable, and sufficiently interesting to hold the attention of the jurors. There are a few geniuses in our profession who can do this on the spur of the moment, but they are exceedingly rare. For most of us, the best technique is to make an outline of the argument before the trial begins, and then as the trial progresses it can be supplemented and revised so that just before actual presentation of your argument an orderly and effective arrangement of these points can be made quickly. This practice not only prevents the omission of a point but also encourages more concise, logical, and interesting presentation. It is the duty of the prosecutor in his summation to fit all the pieces of evidence together so that they form a comprehensive and comprehensible picture for the jury. This can not be done effectively without preparation from the beginning of the trial.

Waiver

What about waiving argument? It is inadvisable for a prosecutor ever to waive argument, even though a proper verdict seems inevitable and a foregone conclusion. Jurors view the argument as a necessary part of the trial and expect that each advocate will put up a fight to secure a verdict in his favor. If the prosecutor fails to make an argument, they wonder why. It is certain that one or more of the jurors are likely to interpret the omission as evidencing a lack of confidence in the cause; or, if they have confidence in the ability and integrity of the prosecutor, they might conclude that by reason of something within his own knowledge and not brought out at the trial, he is not satisfied that justice requires a verdict in his favor. Where the cause of counsel is so clear that argument seems unnecessary, the argument may be brief. It may include the statement that the case is so clear that argument is unnecessary, or even an apology for arguing so obvious a cause. But since we never know how all twelve jurors will take it, the argument should not be waived.

Content

Generally, what should be the content of the prosecutor's opening and closing argument? The answer to this question depends largely upon the facts of the case. Some months ago our office was trying L. Ewing Scott for murder. As you may recall, in that case we had no body, or any part of a body, and no admission or confession.[1] However, we had an insurmountable collection of circumstantial evidence. At that time a story about a comparable case, in which Mrs. "X" disappeared and her husband was charged with her murder, came to our attention. In his opening argument the district attorney spent the whole day reviewing in detail one incriminating circumstance after another, establishing beyond any reasonable doubt that Mrs. "X" was dead and the defendant was responsible. Defense counsel then rose and informed the jury he would be very brief because he was going to demonstrate to them that there was a lingering doubt in the minds of each and every one of them that Mrs. "X" was actually dead. With that he hesitated a moment, then as the door of the courtroom swung open, he said, "Why, there is Mrs. 'X' now—coming through the door." At that moment every head and eye in the jury box turned in unison toward the door of the courtroom. Defense counsel sat down with the word that the jury by its action had demonstrated its doubt as to the actual death of Mrs. "X". The prosecutor arose and acknowledged the success of defense counsel's little experiment and that it was true that when defense counsel said, "Why, there is Mrs. 'X'," everyone in the courtroom turned to look except one significant person, and that was the defendant himself. His eyes and head remained stationary as a sphinx because he, and he alone, knew with certainty that Mrs. "X" would never be coming through that courtroom door.

Generally, the prosecutor having the first argument must consider the possibility that at this point of the trial the jurors may not all be in favor of his cause. To some extent at least, the case of his adversary has made an impression upon them, especially since the defendant's evidence is still ringing in their ears. Therefore, he should not only present his case and its strong points, but should go farther and point out the weaknesses and lack of merits in the defendant's case, reconcile the conflict if the evidence is unfavorable, and eliminate whatever favorable impressions the defendant's case has made upon the minds of the jurors.

When it comes time to reply to defense counsel's argument, the prosecutor must be careful not to assume that his opponent's argument, which to him seems weak, illogical, and unreasonable, will be viewed by the jurors in the same light. Every seasoned trial lawyer is fully aware of the fact that such an argument directly will cause the jurors to develop doubt, be swayed, or even be influenced into returning a verdict. The only safe course to follow is, if possible, to destroy and remove its effect, even though it may seem to be unworthy of comment because of its obviously weak and illogical character. Unless this is done, there is always the likelihood that one or more of the jurors may accept such an argument; and should such a juror mention it during the deliberations in the jury room, it is well to have the prosecutor's argument to overcome and meet the point. If you have failed to furnish the required ammunition to blast the fallacious argument, it might prevail.

[1] See California v. Scott, 176 Cal. App. 2d 458, 1 Cal. Reptr. 600 (1959), *cert. denied*, 81 S. Ct. 245 (1960).

COMMUNICATION OF THE LAW AND EVIDENCE TO THE JURY

Some of the most vexing problems facing a prosecutor in argument to the jury are the everyday ones. If he tries to research these questions, he is likely to find that they have been generally neglected by the writers and authorities in the legal field. We might well consider some of these.

ARGUING LAW

One thing prosecutors face each day is the problem of arguing law to a jury. Perhaps the greatest fiction known to the law today is that jurors grasp and understand the court's instructions on principles of law which lawyers and judges have taken many years to learn- -and, in many instances, have never fully comprehended. In Los Angeles County, Judge Frank Swain of the Superior Court likes to write poetry. In his book, *Judicial Jingles*, he parodied this situation as follows:

"Ladies and gentlemen of the jury:
"The time now arrives
To brighten your lives
By reading unending instructions;
Though it is a fiction
That you heed my diction
When making juristic deductions.

"If you can agree
After these words from me,
I shall be surprised and delighted.
It's gambling, I know,
Like win, place, or show,
But for that you can't be indicted."

Unfortunately, the form of present day criminal jury instructions is not a laughing matter. It is an indictment of all members of the legal profession in their failure to fulfill the most basic attribute of advocacy, that of communication.

If the technical medical testimony of an expert witness is not communicated to the jury in simple, understandable terms, we could say with certainty that the advocate who called him as a witness was a failure. But an even greater failure is that of several generations of lawyers and judges who have been unable to draft instructions which will present legal theory in plain terms which appeal to common understanding. This failure on the part of the entire profession has imposed upon the individual advocate the burden of translating legal theory into common sense by his argument to the jury. If this is not done effectively, the individual advocate is not doing his job.

In California, counsel in criminal cases are materially assisted by a recent addition to our Penal Code (Section 1093.5) requiring that before commencement of argument the trial judge must decide upon the instructions he is going to give. It is apparent that the California Legislature, by enacting this provision, impliedly recognized the propriety of reference to law in argument. Reference to applicable law is indispensable in arguing the merits of a lawsuit and accurate statements of law are always permissible. It is generally held that the boundaries of such argument are within the discretion of the trial judge.

METHODS USED TO PRESENT THE LAW

The presentation of law to the jury, like most matters of trial tactics, is a matter of individual ingenuity and preference. There are, however, three methods which may be used in various combinations: Illustration, historical analysis, and repetition.

(1) *Illustration*

Illustration is probably the only effective means to communicate with jurors concerning those words which have a peculiar legal meaning. There is probably not one juror out of one hundred who knows that malice aforethought and premeditation are two different things. Illustration is always effective in making those subtle distinctions which laymen too often regard as legalistic "mumbo-jumbo."

Jurors frequently have their own ideas about legal theories. A good example is the right of self defense. In such matters, of course, we are always dealing with the reasonable man standard. It is effective to give examples of what the defendant as a reasonable man should have done. This may serve the dual purpose of clarifying the law to the juror and also removing any preconceived ideas he may have about the rights of a person in defense of himself.

This type of argument may be demonstrated by reference to a murder case tried in Los Angeles. It was given national publicity because it had aspects of a gangland killing and Mickey Cohen was prominently mentioned. In a bistro located in our

famous San Fernando Valley, Sam LoCigno shot and killed Jack O'Hara. LoCigno relied on self defense. It was successfully pointed out to the jury that the defendant's actions were not reasonable. O'Hara was a big fellow who had a bad reputation of using brute force in his role as an enforcer, but he was never known to carry a gun. O'Hara came to the restaurant to talk about a gambling debt. He approached the table occupied by Cohen, LoCigno, and four or five others, including two beautiful women. He stood at the table opposite LoCigno and held a brief conversation with one of the other men seated at the table. During this conversation, O'Hara slapped the man, and then made a remark to LoCigno, "You're next, you Dago ———." With that, LoCigno immediately shot O'Hara through the head with a .38 bullet. The gun he used was never recovered. It was pointed out to the jury that there was no indication that O'Hara was armed or that LoCigno had any reason to believe he was. The cafe was full of other patrons, including many of the defendant's mobster friends. Under the circumstances, LoCigno could have fired a warning shot or at least have shouted a warning before firing; he did not do so. Instead, he fled the scene immediately and went into hiding for several days.

In short, this method of illustration of what a reasonable man should do under the circumstances gives the prosecutor an opportunity not only to to clarify the law of self defense, but also to graphically bring home to a juror who might be faltering examples of what the defendant should have done. This will help to restore the juror to proper perspective.

(2) *Historical analysis*

When the subject matter is legally relevant, but lacks the moral or logical significance that it had in an earlier age, historical analysis may be of real benefit. Two examples may serve to illustrate this situation: where entrapment is claimed, and where evidence of good reputation is offered by a defendant.

We all know that if the jury in its deliberations finds itself confused as to the law, it may feel its confusion to be a reasonable doubt. It therefore is essential that these matters be put into proper perspective at the time of argument. A prosecutor may affirm his complete belief in the defense of entrapment and the jury's duty to follow the law. At the same time, he may minimize any undue or improper effect of the defense by describing its origin in the efforts of the court to protect the citizenry against the nefarious practice which prevailed when law was enforced by thief-takers or legal bounty hunters who made their living by obtaining convictions instead of securing justice. The jury will then understand that this ancient law does not indicate that the judiciary believes such outrages as entrapment are likely to be committed by a salaried professional police officer who has sworn to uphold the law. He has nothing to gain from a conviction; instead he has his conscience to live with.

The effect of reputation evidence may also be placed in perspective by pointing out its ancient origin, its validity in small medieval communities its irrelevance to an age of larger cities and rapid transportation.

(3) *Repetition*

Unless a rule of law is firmly fixed in the minds of the jury by repetition, they will make unauthorized variations upon it. For example, a prosecutor should not overlook the value of reiterating that there are no exceptions to a given rule of law and stressing the jury's duty to follow the law as it is, making no exceptions of their own. By the same token, it should be emphasized that a verdict contrary to law is a disgrace and an eternal burden upon the juror's conscience.

EXPERT TESTIMONY

Another matter prosecutors face each day is arguing expert testimony to a jury. The argument of expert testimony, both with reference to one's own experts and the discussion of those called by the defense, is of considerable importance. Yet, we frequently see it done with varying degrees of inadequacy. Almost always the fault can be traced directly to a confused presentation of the testimony of the prosecution's experts during the trial. These defects occur because of inadequate understanding by counsel of the subject matter to which the experts have addressed themselves. Therefore, the first step toward effective use of expert testimony as evidence, and in argument, is a reasonable grasp of the subject by counsel himself.

It is hard to conceive how a jury could understand the testimony of an expert and be persuaded to base a finding upon it, unless the attorney has

at least the same understanding which he expects the jury to have achieved after hearing the testimony and his argument. On the other hand, counsel does not need a Ph.D. in each branch of science in which he seeks to enlighten the jury. It is told of Fallon, the renowned trial lawyer, that at the conclusion of a brilliant cross examination of the head of Harvard's gynecology department, the distinguished expert asked Fallon, "May I ask you a question?" "Certainly," said Fallon. "When and where did you study gynecology, Mr. Fallon?" "Last night in my library," Fallon replied.

A comparatively short time well spent with the right books and with the expert can give one a surprising grasp of the most technical subject.

Nearly every concept and process of science which might be pertinent to a trial can be broken down into readily understood steps of explanation and reasoning. The rules of presenting and arguing expert evidence to a jury are the old basic ones: Understanding, simplifying, and clarifying. Frequently the experienced forensic expert has worked out his own methods of making the technical aspects of his testimony understandable to laymen. Let him exercise these first on you privately and, if possible, in the presence of your wife, girl friend, or grandmother. Whenever anything is not crystal clear to grandma, stop; then go over the point until she thoroughly understands it. Then, and only then, should you feel ready to present it to the jury.

In the presentation of expert evidence, let the expert show the jury, whenever possible, that he can make the findings he says he can. This is most important when experts are testifying as to identities. Witnesses such as the handwriting expert who establishes writing as that of the defendant or the ballistics expert who establishes that a particular bullet came from a particular gun are not expressing an opinion so much as they are giving the jury facts—facts known to them, but not generally known, by which they have been able to establish the connection of one piece of evidence to another. These witnesses are experts by reason of their special knowledge which enables them to look for and find distinctive characteristics and points of identity. This usually calls for the use of magnifiers, microscopes, spectroscopes, etc. When properly examined they can pass on to the jury their discoveries and knowledge so that the jurors themselves arrive at the ultimate opinion. The argument in such cases is then always less difficult. To a great extent, you argument will utilize the expert's simplest explanation as your explanation.

Obviously, different kinds of expert testimony call for different types of argument and presentation, each of which could easily be the subject of an extensive review. However, we might consider some general observations which are usually applicable irrespective of the field.

Within the limits of fair advocacy both in presentation and argument, it is most advisable to stress and enlarge the training, experience and qualifications of your expert. Never, of course, fall into the simple trap set by defense counsel in offering to stipulate as to qualifications of your witness. We should look to the expert as an instructor who will furnish the jury the required knowledge which they lack and which will enable them to decide the issue. Since the jury will accept the instruction, information, or opinion in direct proportion to their confidence in his knowledge, experience, and personal integrity, these factors should always be fully and fairly presented on voir dire of your expert. Perhaps you don't have an expert on that issue. You may be taken by surprise and the expert may be squarely against your position. Many of you have been confronted with this most dismaying situation and have your own way of meeting it. If you fail to cross examine at all, you risk having the jury conclude that you concede the point. When this happens, it is rather difficult to handle the argument. If you do attempt to cross examine, you will probably flounder helplessly and give the expert new chances to drive home his point. Then you compound your floundering in argument with conspicuous or specious explanations of the expert's opinion. When presented with unanswerable evidence in such cases, it is sometimes better to ignore it, and hope the jury will, too.

REASONABLE DOUBT

Seldom is the criminal case tried in which defense counsel fails to bear down on reasonable doubt. The courts in almost all of the states define this doctrine in the exact language Chief Justice Shaw used in 1850 in the famous Boston murder case of *Commonwealth* v. *Webster*.[2] Down through the years many thousands of words have been used to tinker with this definition, but it has

[2] 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711 (1850).

not been improved upon. Most defense lawyers pound away with all possible emphasis upon the burden of proof and reasonable doubt. Some of them will bear down on the words "moral certainty" and attempt to suggest to the jury that these words carry approval of a higher authority and therefore impose a heavier burden of proof on the prosecution than mere reasonable doubt. Some of them single out the word "abiding" and say to the jury, "Here is the key." They then embellish this and attempt to build up the required burden of proof out of all proportion. In effect, they say: "You jurors can never convict simply because you conclude that the defendant is probably guilty. You must be able to say, 'He really is guilty; of that I am morally certain.' " This instrument of confusion is utilized by most defense lawyers in conjunction with their efforts to confuse the jury as to the evidence or draw attention away from the evidence.

Prosecutors have very little difficulty with this situation if the facts are with them. Most of them avoid referring to the doctrine of reasonable doubt in their opening argument for two principal reasons: (1) the confusion surrounding the doctrine, and (2) a desire to avoid focusing undue attention upon the doctrine and inadvertently helping the defense lawyer in his argument. Instead they find it more advantageous to wait until the defense lawyer has predicated his argument upon the doctrine and upon attempts to confuse the evidence. In his closing argument, the prosecutor may then answer the attempts of the defense lawyer to confuse the issues and in doing so may review the highlights of the evidence and thereby gain the advantage of repeating and emphasizing the evidence.

But how can the prosecutor get the doctrine of reasonable doubt back in perspective? To start with, he should acknowledge the fact that the doctrine is a salutory rule evolved through decades of judicial experience, and that as an officer of the court and a lawyer, the prosecutor believes in it for the protection of not only the one on trial, but everyone in the nation. The jury should be told in strong terms that its purpose is to shield the innocent and not to provide a cloak for the guilty. Reasonable doubt is an actual and sincere mental hesitation caused by insufficient or unsatisfactory evidence. Here the "key word", abiding, can be used to the prosecutor's advantage. It is not a doubt prompted by sympathy for the defendant, nor a doubt conjured up in the mind to escape an unpleasant duty. It is not a doubt that is based upon the mere fact that there is a conflict in the evidence, because every juror knows that there will be a conflict. He should know that the very reason for the jury is to resolve such conflicts and determine where the truth lies. In short, it is a doubt where the mind hesitates because reason is not satisfied. It is not a doubt where the mind is convinced, but hesitates because of the fear of the consequences in declaring its conclusion; this is not doubt—this is timidity. This rule of law is an abstract statement of thought and it is most difficult to express affirmatively. It is questionable whether or not any amount of style or argument on this subject could possibly sway the jury unless the facts themselves warrant it.

CREDIBILITY OF WITNESSES

Obviously, nothing comes up more regularly in argument than the credibility of witnesses. Let us consider a few generalities.

Conflicts in testimony are virtually a necessary incident to the trial of any lawsuit. This ultimately raises a question of credibility. The attorney who insists that all his witnesses are persons of impeccable truth, honesty and integrity, and all who differ with their testimony are hopelessly depraved and entirely unworthy of belief, doesn't obtain many favorable verdicts. The brash assertion that a certain witness is a liar or has intentionally falsified is best avoided. If this is obviously the fact, the attention of the jury need only be directed to the fact that the witness is not worthy of belief and the reasons why this is true.

What are some of these reasons why witnesses are not worthy of belief? Among the most important of these matters which may be utilized is the witness's opportunity to observe and his motivation. The fact that witnesses disagree in their versions of an occurrence is not by any means evidence that one or more have intentionally falsified. The abilities of witnesses to observe and remember, the positions from which they viewed the occurrence, what they happened to be doing at the time, their emotions before, at the time of, and after the incident, and all the many other attendant circumstances and factors, must be considered and weighed. When done carefully and conscientiously it will often be found that the supposed discrepancies and conflicts can be logically accounted for and the true facts arrived at without questioning the honesty and veracity of any of the witnesses. As for possible discrepancies

in the testimony of your own witnesses, it is often the best practice to review and reconcile these in your opening argument, thereby taking the teeth out of your opponent's argument.

In arguing credibility, perhaps the greatest tool for the prosecutor is a thorough examination of the witness's motivation. Motivation affords dramatic contrast between prosecution and defense witnesses. In contrast to most defense witnesses, certainly it can be said that a vast majority of prosecution witnesses have no personal interest in the case. You might point out that they are ordinary citizens performing a civic duty and that they must live with their consciences and would not rest easy if they identified the wrong man. By contrast, defense witnesses may have strong motivations which affect their testimony. Obviously the strongest motivation is that of the defendant himself. He has the most to lose and it is almost expected that he will color his testimony to his own advantage. As for relatives of the defendant, their bias and interest, or motivations, are strong. Quite naturally they do not want to believe the worst of someone in their own family. Sometimes the soft approach is especially effective with a relative. For example, when a long-suffering mother of the defendant testifies on his behalf, you may develop undue sympathy for her and the defendant if you attack her vigorously. Instead, it may be much more effective to gently point out her difficult situation and her natural deep love and loyalty that only a mother can possess. You, of course, have the friends of the defendant to contend with also. Their motivations are similar to those of relatives, and the same considerations therefore apply.

Quite frequently in the trial of criminal cases you are confronted with character witnesses. The danger of such testimony is two-fold: (1) the court will instruct the jury that character evidence, in and of itself, may raise a reasonable doubt and this can hurt the prosecution's case when the jury is looking for a reason to acquit the defendant; (2) defense attorneys often argue that by introducing character evidence it has given the prosecution a chance to lay before the jury any offenses or arrests suffered by the defendant, and since there has been no mention of such arrests, the jury can assume that the defendant not only has a good reputation but also has a spotless record.

This argument is often countered with the rather weak approach that this may be the first time the defendant got caught and, furthermore, many people, including famous people in history, had excellent reputations in the communities where they lived. Basically your approach would probably be that defendants do not call their enemies nor disinterested persons, but always friends or friendly neighbors. Again your emphasis is one of motivation.

Conclusion

In conclusion, may I reiterate the following salient points in effective argument:

(1) Create from the start of the trial an atmosphere of sincerity, earnestness, and confidence in the righteousness of your cause.
(2) Preparation for argument starts before trial.
(3) Use oratory only when it is the natural and spontaneous product of the subject matter. Don't overdo it.
(4) Use simple, forceful, logical terms.
(5) Make your appeal to reason and common sense.
(6) Be yourself.

THE SOCIAL AND ETHICAL REQUIREMENTS OF CRIMINAL PROSECUTION

FRED E. INBAU

The author is a Professor of Law in Northwestern University. He is a former Director of the Chicago Police Scientific Crime Detection Laboratory. Professor Inbau is the author of *Cases and Comments on Criminal Justice* (1960) (with Claude R. Sowle); *Lie Detection and Criminal Interrogation* (3d ed. 1953) (with John E. Reid); and *Self-Incrimination: What Can an Accused Person Be Compelled to Do?* (1950).

This article is based upon part of a paper presented by Professor Inbau at a Canadian Conference on Criminal Law conducted by Osgoode Hall Law School in Toronto on September 23 and 24, 1960. —Editor.

Although it seems clear to all of us that it is socially desirable to prevent all crimes and to apprehend all criminals, there is actually a different philosophy that prevails, in effect, anyway, with respect to criminal prosecutions.

Have you ever stopped to consider thoroughly the *real* reason why we tolerate so many restrictions on the prosecution's efforts to convict and at the same time give so much leeway to defense counsel and to the defendant in their efforts to

avoid a conviction? Perhaps you may be inclined to say: "Certainly; it's for the protection of the innocent." This, of course, is one reason—and it is generally accepted as the only one. But there is another and a more basic one. Before suggesting it, however, I would like to raise a few points to indicate, at least to my way of thinking, that the only or major reason is not the usually stated one of protection of the innocent.

First of all, why is it that in a criminal prosecution the defendant—the one person who should be able to enlighten the fact-finders more than anyone else—need not take the stand and testify?

Why, in most jurisdictions, is it necessary that the jury be unanimous in its verdict, when democratic determinations of utmost importance—questions of group survival—are made upon the basis of a two-thirds vote, or even a majority vote of Congress, Parliament, or of some other body charged with similar responsibilities?

Why exclude unerring proof of guilt, as about half of our state courts do, solely because the police did not follow the prescribed procedures in obtaining it?

Why do we who are members of the legal profession, and why does the public at large, tolerate a standard of legal ethics that permits defense counsel to cross-examine, and by cross-examination "destroy" a prosecution witness when counsel knows, from what his own client has told him, and from what his own evidence clearly establishes, that the prosecution's witness is telling the absolute truth? And upon this point, give consideration to these words of an eminent and respected defense counsel; they appeared in an article of his which was published in a Bar Association journal: "If he [defense counsel] is defending a guilty person, and he usually is, his job is to prevent that fact from coming to light." The article further stated: "When I succeeded in enabling a malefactor to escape his just desserts I had a glowing gratification of having accomplished a professional *tour de force*. This gratification was intensified by the knowledge that I had lived up to my obligations as an officer of the court, and had acted in accordance with the codes of legal ethics."

Why the toleration of a rule that requires the prosecutor to disclose to the court evidence or witnesses favorable to the defense, when a similar obligation does not rest upon counsel for the accused? And why should the prosecution be required to make available, for the inspection of defense counsel, written statements obtained from the defendant and from the prosecution's witnesses, without placing a comparable obligation upon defense counsel?

Why not, as a prerequisite to the *defense of alibi*, require the defendant to serve notice and set forth the essential details of the alibi?

Why is it that the defendant may appeal from a conviction, but (in the United States, anyway) not the prosecution, and especially in cases where the judge has grossly erred in his instructions to the jury or in his rulings upon the evidence? And why is it that the defendant may appeal on the ground of improper conduct by the prosecutor, without according a similar right to the prosecution when defense counsel has engaged in unethical or even outrageous conduct that may have affected the jury verdict?

Why, at the conclusion of a criminal trial, do we not prosecute for perjury defense witnesses who have unquestionably lied under oath, and that fact is readily susceptible of proof? Why let the defendant himself get by with it? In fact, we are rather thoroughly committed to the view, tacitly anyway, that it is all right for him to do just that. Interestingly enough, one appellate court recently held that once an accused is acquitted he could not be tried for perjury regarding his testimony at the trial because the verdict of not guilty was *res judicata* of the issue as to whether he lied or not. In other words, the verdict of not guilty was a court decision that he had told the truth. And yet the case is one where the evidence of perjury is now obvious beyond a reasonable doubt.

While on the subject of perjury, why, may I ask, do we not try to convict for perjury, witnesses who have unquestionably lied during the course of a divorce trial? Occasionally we do prosecute if the case is an outrageous frame-up and has been exposed on the front pages of the newspapers, but otherwise no prosecution is ever undertaken. If it should be attempted, the chances of a conviction would be slim. And this last observation prompts me to raise another question of a little different nature from the ones previously mentioned.

Why do we tolerate a system or a practice that makes it so very difficult to convict such accused persons as paramour killers, mercy killers, and motorists who kill by reckless driving? And why do we permit defense counsel in such cases to employ the tactics they are generally known to employ for purposes of getting their client off? Recall,

if you will, the tactics of defense counsel as regards the insanity defense of the husband in "Anatomy of Murder."

The true answer to most, if not all, of the questions I have raised is certainly not—"For the protection of the innocent."

To get the real answer, what may be needed is to stretch the mind of the general public out on a psychoanalyst's couch. If we did that here is what I believe would be discovered:

We, the public at large, really do not want to convict all criminals, but only enough to discourage criminal conduct!

If you will ponder over this statement you will have to agree, I believe, that the psychoanalyst came up with a very plausible explanation for the behavior referred to in my various questions.

Assuming the validity of the couch revelation, what then may account for the patient's deep-rooted feelings?

Perhaps we, the public, and particularly the jury in a specific case, harbor some sort of psychological self-identification with the offender. In cases involving paramour killings, mercy killings, negligent homicides, and the like, this factor may be more apparent than in various other kinds of case situations. But in theft cases, also, and particularly as regards the offense of embezzlement, we may find the same self-identification factor. After all—and I submit this to you fully confident of its validity as to the approximation of percentages—about 85 out of every 100 persons will "steal" if the opportunity to do so is presented to them. I feel confident that this figure is about right and I base it upon the professional experiences some of us have had in the investigation of thefts and embezzlements committed by employees of banks, merchandising companies and other commercial houses. To be sure, I am not talking about large thefts and embezzlements, but thievery nevertheless. And I include such things as one's own enrichment by the padding of an expense account, the carrying home, by an employee, of merchandise belonging to the store where he works, and the pocketing of small overages in a bank teller's account at the end of the day. All this, of course, is a form of theft. And I wonder if our propensity for such conduct does not in some measure explain our laxity with respect to the legal prosecution of persons accused of thievery.

Before concluding our analysis, perhaps a few more points are in order.

If I recall correctly, as kids, in playing the game of "cops and robbers," most of us wanted to be cops. In college or law school, some students are attracted by positions in the field of criminal investigation; a number of them in the United States pursue a career in the FBI and other such law enforcement agencies. But how many law students express a desire to make a career of prosecuting attorney? I am not talking, of course, about using the office of assistant prosecutor as a tide-over or as preparation for becoming a criminal practitioner on the other side of the table; I am talking about a burning desire to be a prosecutor, rather than counsel for the defense. I know, of course, that there are economic and other factors that feature in such decision making, but the real reason must be a more deep-rooted one. It may be this, by way of differentiation between a desire to be a criminal investigator and the lesser interest in becoming a prosecutor. When the criminal case reaches the prosecution stage, the matter becomes quite personalized. Here stands *X*, the defendant, a particular individual, with his sympathy provoking background or situation. Our self-identification may come much easier and quicker at this point than when the police were searching for the unknown someone who committed the crime. Maybe that is one reason why we tolerate the practices and the kind of ethical standards that prevail in a criminal prosecution. That, perhaps, is why the position of counsel for the defense is more glamorous in the public eye than that of prosecutor.

It also seems to me that the feeling sometimes prevails that once an offender has been caught and has been in police detention and has been subjected to exposure for what he is, that may be punishment enough.

Undoubtedly, too, there is the economic factor of the public not being able to afford to keep in the penitentiary all the people who may technically belong there.

From what I have said up until now my readers may well be assuming that I deplore the philosophy that we do not want to convict all criminals; that we want to convict only enough to discourage that kind of conduct. But I do not. It does not disturb me at all, and I am prepared to accept that philosophy as a desirable way of life. However, I do object to the *excesses* that have developed, like barnacles on an otherwise good ship. I feel that the legislatures and the courts, and particularly the

courts, have gone much too far. And not only is that fact itself disturbing, but also the reasons for their doing so.

Here are two case examples of what I mean by excesses. One is a United States Supreme Court decision; the other a decision of the British Columbia Supreme Court.

In the very controversial 1957 case of *Mallory v. United States* (354 U.S. 449), the trial court conviction of an accused rapist was reversed solely because of the fact that the police had interrogated him and obtained a confession from him at a time when they were delaying (for a few hours) the taking of the accused before a committing magistrate, as prescribed by a federal rule which requires that the police must do so "without unnecessary delay." Soon after the release of the accused, he committed another offense; and he was sentenced to sixty days for assaulting the female complainant. A few months ago he was prosecuted in Philadelphia on a charge of rape and burglary, and was found guilty of burglary and aggravated assault upon a housewife. In my opinion, the release of persons of this type for the purpose of disciplining the police is going much too far.

About the same time of the Mallory case, the Supreme Court of British Columbia, in the case of *R v. McLean and McKinley* (1957) 31 W.W.R. 89, held a confession to a criminal assault upon a girl to be void because the police interrogator had made an untrue statement to the defendant when he was told that the police had talked to the defendant's accomplice, whereas in fact no such conversation had occurred. Since the officer's untruthful representation was not the sort of thing that might make an innocent person confess, this decision, in my opinion, is another example of a court going much too far.

If space permitted, many other similar examples could be recited, particularly from our federal courts. But these two are quite illustrative of an undesirable judicial philosophy that has developed in recent years.

What accounts for the present "turn 'em loose" philosophy which the courts have adopted? The answer, as I see it, is more serious and disturbing than the individual case decisions themselves.

It has become far too fashionable in judicial circles to line up "on the liberal side." In their zeal to become "great judges," the formula of some judges seems to be: adopt a "turn 'em loose" policy or count yourself out as a great judge. This amounts to the writing of one's own epitaph, and we have had too much of that from some of our judges in recent years.

Another factor accounting for this "turn 'em loose" trend of the past fifteen or twenty years is the failure of the police and prosecution adequately to present to the courts, legislatures and general public the police-prosecution side of the issue, whereas the civil liberties viewpoint has been enthusiastically voiced and effectively presented. Moreover, the civil liberty lawyers and other civil liberty exponents are constantly on the alert for any developments of the police-prosecution viewpoint; they are always on hand to rush in and stamp it out if they can.

We urgently need a moderation of the trend and developments of recent years, and a workable compromise of the two major competing interests; and I submit that it ought to be something along this line:

1. Make reasonably possible—though by no means certain—that the guilty will be convicted.
2. Make certain—insofar as reasonably possible—that the innocent are not convicted.

This should be the real concern of the courts—making it *reasonably* possible to convict the guilty, and setting up *reasonable* judicial safeguards for the protection of the innocent.

The courts have no right to police the police. That is an executive and not a judicial function. Furthermore, the courts have enough troubles of their own. Witness what goes on in some of the municipal or magistrate courts of our large cities. In my opinion there are, in such courts, more hurts to the innocent and more trampling over of basic individual civil liberties and ethical considerations than you will find in most police departments. Much of the concern, energy, and efforts that the courts expend with respect to police conduct could be better spent on getting their own house in order.