

1993

## The Urban Criminal Justice System & The Juror's Perception

David Lewis

*Lewis & Fiore*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Courts Commons](#)

---

### Recommended Citation

David Lewis, *The Urban Criminal Justice System & The Juror's Perception*, 20 Fordham Urb. L.J. 561 (1993).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol20/iss3/12>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

## THE URBAN CRIMINAL JUSTICE SYSTEM & THE JUROR'S PERCEPTION

David Lewis\*

*The icon of the cop is that he is wise — wise in a way that he protects us from the terrible knowledge that he needs to do his work. In his wisdom lies our safety. The iconography is that the police officer will guide us through this case because we are lost. His testimony has a heightened value despite the jury's pledge to treat him like any other witness.*

The witness stands strong and tall to take an oath to tell the truth, the whole truth and nothing but the truth. All dressed in blue, the witness displays a nameplate over the breast pocket. Above the nameplate the little squares of color and metal are affixed — decorations and awards of some sort. The oath completed, the witness nods to the judge and tries to settle into the witness stand. Uncomfortable, the witness moves the leather belt to shift the flashlight that dangles from the belt hook. The gun in its holster is moved around so it hangs from the other side of the chair. The gun is not needed to testify in a courtroom. A direction is given and the witness reels off name, badge number and command in response. The judge nods at the prosecutor who lobs the first question. Turning slightly in the witness chair towards the jury as the academy teaches, the witness faces the jury to give the first answer and every answer thereafter. The witness is a cop. Testifying in court is part of the job. It is the safest part of the job. Nobody shoots at, curses at or disbelieves a cop. It's good to be a cop.

The criminal justice system is anchored in its belief that twelve citizens are capable of working together to sift through the most difficult and complicated information without any preconception or bias to arrive at a "just" result. The belief is a myth made stronger each time by the fact that the system primarily ends with the appropriate results. The means by which the jury arrives at the result, however, is not tied to what occurs at trial alone. They are not a blank slate but rather a multiple inscribed stele bearing all the impressions and prejudices of the society in which they function. The urban jury in

---

\* Partner, Lewis & Fiore; B.A., New York University, 1976; J.D., Fordham Law School, 1979.

the criminal justice system is made up of equal parts of rage, television imagery and the residue of icons long treasured.

It is the very process in the courtroom that is a vital fuel running the engine of the adversary system. In the courtroom, the proceedings help the jurors process information. The means by which the processing is done rests on the life experience of the jurors gleaned until the moment they step across the courtroom's threshold. What they believe is often a civic myth, i.e., all police officers are trustworthy, or innocent people never get arrested. This myth exists and is used in the courtroom to evaluate the players and the information or evidence. The acceptance of the received myth renders the witness or the lawyer or the judge into an icon, an objectification of the received myth. Many of the images or beliefs of the jurors are based on a civic faith which creates and defers to icons, without facts or myths to support or justify such deference. This same civic faith also creates icons that may not stand the test of the adversary system.

The defense lawyer's job is to contend with and utilize these icons to the client's best advantage in the courtroom. Since the iconography was not reasoned into the juror, the process in court cannot reason the juror out of that iconography. As part of the defense, the defense lawyer can and does chip away at and destroy the received myth or the icon of the cop and the prosecutor. This essay attempts to give a realistic view into the courtroom myths through an analysis of the role of the defense lawyer.

The jurors come into the courtroom with a swirl of images, beliefs and iconography. The defense lawyer knows that there is no socialization in favor of the defendant. In fact, privately the jurors refer to the defendant as the criminal even though there has been no such adjudication. The jury presumes the very fact which they are there to decide. They trust the judge although there is no basis in fact for that trust. The elevated stage, the black costume and the bench itself all conspire, along with the trappings of power, the gavel and the flag, to command that trust. Some judges are evil in the ends to which they use their power. It is both a contemporary and an historical fact. Yet the trust is there. The trust emerges out of faith in the judge as judge. Without faith in the judge, the system slips into irrelevance. To that extent the image of the judge is one of a number of icons in the courtroom. For the process it is an affirmative icon. For the defendant it may be as vicious an icon as Ivan the Terrible. The jury does not engage in questioning; it has an icon and an attached and revered myth.

As to the perception of the prosecutor, the jury is not as taken in by

the representative of the People or the State or the United States of America. When the prosecutor seeks to cut down the tree of liberty and ascend to the stump to preach conservation of those values, his image or icon is vulnerable. There, the Jimmy Stewart icon, the Frank Capra cinematic version of the common man as hero, a latter day Cincinnatus who leaves his plow to defend Rome from invasion, becomes a more powerful icon and thus the wedge to undermine the prosecutor's claim of moral authority. The Man of the People invokes the myth:

This prosecutor is not the People. The Constitution said it first 'We the People' — You're the People, I'm the People and the defendant here, he is the People. This man is an employee doing a job. You and all of us and even him — all of us are the People. The great American experiment Mr. Prosecutor is one in which we embrace and include each other not exclude people like this man here. We are the People, remember that.

With a statement like that in the opening statement or during the jury selection, the icon of the majesty of the state is smashed in favor of the stronger and more resonant American patriotic icon.

Similarly, a defense lawyer can rise above the image of the weasel trying to save the client for money or for subversive ends, by calling the jury to its noble tasks under democracy in this free and noble nation. The defense lawyer can elevate the discourse by creating an affirmative icon in the courtroom as part of the process. The courtroom is a place where the lawyers create and destroy icons and demystify as much as possible in order to ensure that the process is adversarial. In the end, the jury, a twelve-headed monster, misses nothing.

The jury's perception of the police officer and, to a lesser degree, prosecutors, is not governed by any objective reality. As a rule, the courtroom is sterile and silent as to the cops' and the district attorneys' bona fides or honor. Honor is presumed. Unlike the legally required presumption of innocence that is honored more in the breach than the actualization, the honor of the police and the prosecutor is reinforced by the limitations of trial and the long-standing affirmative images assigned to crime fighting and crime busting. It is only when the cop is a defendant that the defendant is treated as the system requires defendants to be treated. Whenever the defendant is not a cop, the constitutional niceties are ignored. In the end, the cops tried as defendants are perceived as law keepers and not law breakers, no matter what the evidence shows. The first Rodney King trial outcome is not unusual. The videotaped beating is the additional piece of evi-

dence. But the cop's defense is always the same: "Are you going to believe me, or your lying eyes?"

The reason that a police officer can be found not guilty, in the face of almost any evidence, is that the police are believed in mythology and iconography to be the last line of defense against the great unwashed, whatever their race and class. The image of the police officer as our friend and our line of defense begins with our earliest civic indoctrination. The grade school child is taught that the police are the friends to lost children. From that point on, unless there is a dramatic and traumatic encounter with the guardian being the villain, the police officer is the beneficent public presence. He is the face of government in the daily life as amiable and as benign as the postman and as brave as the fireman. Despite society's nominal advances toward equality, only the male police officer is perceived as an icon. As the child progresses through school there will be other periods of indoctrination and opportunities for the police to show its benign public face. Depending on one's class and race, the police officer will bring home the kid who has drunk too much or wrecked the car or committed some other juvenile mischief with "a warning," thereby earning the gratitude of all.

Police are extremely conscious of class and hierarchical structure in the paramilitary society as well as in the civilian society. As a paramilitary organization, police departments inculcate the social values, including status and class niceties, to be observed. At the same time, police departments are slow to do anything about problems of race, sex and class, which flourish in these paramilitary societies, since the need for the "us against them" mentality is the backbone of a society trained to react and not to reason. Finally, the public rallies around the police as different urban events unfold. Sometimes, in the urban setting, police officers kill members of the public, often of another race, in street encounters. Rarely are the police indicted or tried for these crimes because the police are supported by a public that gives them the true benefit of the doubt. Similarly one must wonder about the struggle of the prosecutors who must use police officers to investigate and charge other police officers with crimes.

Often the outrage of the community is seen as an inappropriate class uprising when it is a *cri de coeur* for justice from a system that favors the police officer over the citizen. When the dead civilian has had previous encounters with the criminal justice system, that information is quickly released in order that it seem that the police exterminated a social evil, rather than committed a crime. At bottom, society tolerates the police as urban executioners where they can jus-

tify the actions with the slightest bit of information or misinformation. The average citizen would never admit that it is acceptable for cops to kill criminals, but then again whenever there is a civilian shot and there is a public protest, one would look long and hard for a protester in a tie and jacket or other raiment indicative of membership in the upper class.

These are the received wisdoms maintained at a subconscious and conscious level by the jurors. Citizens, despite what they see in the newspapers and view on the television, bring background icons and received myths to court. They do not and will not believe that police officers lie unless it can be shown by blunt, forceful and successful cross-examination, impeaching the police officer on the actual matter rather than collateral issues. Whether the police officer got the times or the dates or the distances right or wrong in his report is often too trivial to the jury for it to believe that the police officer is lying. To prove that the police officer lied, it must be shown that he lied on a fundamental fact crucial to the case against the defendant. If there is no such fact that can be proven as a lie, then the theory that the cop lied slips down the drain, unless the defense position is from start to finish that the entire cop story is a lie. The jury will believe that the cop lied if there is a singular crucial fact.

For example, in an identification line up case, the defense was that the victim picked someone else out of the line up and that the cop changed the report to reflect that the defendant was picked. The cop who ran the line up came in with his written recordation of the line up, but without a tape recording or a stenographic version of the line up. This was curious. A subpoena to the police department seeking the written recordation of the same line up by the same cop produced a piece of paper exactly the same except that another number had been selected and identified as the defendant. The police officer testified that he ran one and only one line up, going so far as to assert that there was no reason to have a second line up or any other report except for the one he handed in. When the cop was confronted with the other report with his signature and the same date and time as he testified to as the line up, he literally had no answer. Repeatedly he had to answer, "I don't know," when confronted with each of the details of a non-existent and exculpatory line up report in his handwriting. The judge recommended that the cop be prosecuted for perjury. The officer had approximately one hundred other cases with that District Attorney's Office. There was no prosecution.

The image of the police officer in the courtroom begins to solidify early in the process. The very appearance often marks him as a hero

figure. The weapon, the uniform, all of these trappings make the police look invincible. The heart of the power of the image is that he keeps us all safe from the unknown. The icon of the cop is that he is wise — wise in a way that he protects us from the terrible knowledge that he needs to do his work. In his wisdom lies our safety. The iconography is that the police officer will guide us through this case because we are lost. His testimony has a heightened value despite the jury's pledge to treat him like any other witness. The result of this desire for the police officer to protect us and guide us is that the jury relies on his testimony as wisdom.

The defense lawyer's overarching job is first to destroy the idolatry by destroying the idol. The vulnerability of the police officer as the wise leader is that the police officer beneath it all is an ordinary human. What demystifies the cop is the very thing that makes him special — what he knows. A good defense lawyer wants to force a police officer to admit in the courtroom, about this case — his case — that there are facts and there is information as to which the police officer is ignorant — stone cold, dead on, absolutely ignorant. Once the police officer admits there is something he does not know, then the veneer is beginning to rinse away. The good defense lawyer presses this button over and over again. The more the police officer does not know something about his case, the less he becomes in the eyes of the jurors.

The defense lawyer manipulates the icon of the wise guardian into a more truthful representation of the witness's inner essence. The reality is that the cop, too, shrinks smaller when forced to admit over and over again that yes it is his case but no he does not know about this fact. A thorough preparation for cross examination of the first officer at the scene of a murder, allows the defense lawyer to show that the police failed to do the many procedures that are required to protect and safeguard a homicide scene, to follow the procedures that are required to preserve and collect evidence, and to do all that is taught to them and required of them when they discover a homicide. In the non-homicide case, there are often rudiments of investigatory technique that police fail to follow. Finally, even in desperate straits, a defense lawyer in possession of the police officer's procedure manual can show that the police officer failed to follow recommended procedure or did not know his department's recommended procedure, thereby eliciting a string of "I don't know's" leading again to the cutting down of the icon of the police officer to a manageable size.

Often the most successful tactic is that the cop is mistaken. The mistaken police officer's position is a judo move in the courtroom

designed to win by unbalancing the enemy. The principle of judo is to use the opponent's own weight or tactics to defeat him. In an urban setting, as well as anywhere else, the judo approach disarms and conquers the witnesses before they understand what is happening to them. Police officers claim to be overworked, which they are. Police officers claim to be understaffed, which they are. Police officers claim to be under pressure from within and outside the department to clear cases and produce results, which is also true. The result is that nothing gets the full-time attention that is needed. Cops are treading water. But the icon requires that the wise guardian come up with a just result after a thorough inquiry.

The image of police officers is that they do not make mistakes because they cannot afford to. A police officer's mistake leads to uncertainty or doubt as to the resulting arrest of the defendant. Cops will repeatedly admit that they are overworked and understaffed. They will not admit to the pressure. They will also indicate that they have been as complete, accurate, and thorough "as best they can." In the end there is a key discrepancy between the statement of their institutional problems and their assertion of infallibility. Add to the mix something that the cop has failed to do or has done improperly or negligently, and there is an issue of whether this case is infected by "sloppy police work." While the cop will not admit it, the jury can see that the officer is fallible and has not done everything to achieve a just result. Where the police work is sloppy, the jury will locate doubt that is reasonable enough to stay their hands in voting for conviction.

How does the judo method work? The cop will admit that he has a huge caseload and will admit that he does not have enough help. These self-evident admissions allow the officer to "explain" or anticipate a need for a "way out" of a failure to do something. The officer will work harder to preserve his self-image than to save the case from acquittal. The cop rationalizes the situation as one in which he gave the prosecutor a great case that the prosecutor blew. The cop tells us under cross examination that he did the best he could. The fallible or struggling police officer sweeping back the ocean's tide is an acceptable icon in the courtroom. It is available without challenging anyone's view of the world. It is accessible and believable without calling anyone a liar and it is a true image, a valid and agreed upon icon.

Developed properly, the officer's self-preservation of his own image is weight that the defense lawyer uses to pull him and then the jury over to the side of the defendant. The jury needs to be reassured that they are doing the right thing if they convict a defendant. They are terrified that they might convict an innocent man. The police officer,



given the opportunity, will state that there was more that he could have done on this investigation. It appears that he is expressing something in the nature of doubt as to his own result. If that icon can be created in the courtroom through cross-examination, and the jury has been cued since the voir dire to wait for this moment, it appears as a confession of weakness, an acknowledgment of his own limitations, and undermines the wise guardian icon.

Juries trust police officers. They trust them on some level because there is no other option. Just as the judge is seen as an icon without question in the courtroom, the police officer is seen as an icon without question on the street. Most citizens believe that the police do their job well. Out of sight, out of mind is another way to look at it. More cynical observers say that the cops who do "bad" things are doing the "right" thing in the right place. As long as it cannot happen here, then whatever is is right.

The retreat from the Warren Court decisions designed to curb police excesses has been hailed by the citizen on the street. Secure that their rights are not to be violated, they are pleased and silent until suddenly they are defendants. But then it is too late. The public has been bombarded by the image of the diligent police officer who does his duty and is deprived of his right to a conviction by a "technicality." The abandonment of the idea that the constable could bumble has led to a new generation of unfettered police officers. Increased political involvement in police unions, and the drive to recruit minority officers have led to the creation of an urban police force that serves more and more like an occupation army. Like an occupation army, it makes crucial mistakes of policy and procedure leading to embarrassment or even death.

When the cop appears in front of the jury, the way the officer is perceived is often a function first of whether the cop is seen as preserver or occupier to the individual juror. In the selection process in an urban setting, the more minorities placed on the jury the more likely that there will be a juror or two who see the police as an occupying force. Whether the minority members are of the middle class, believing that they require the protector, or of another lower economic group, thereby being occupied by the protector, determines whether they favor the police or not. Minority members of the jury are often torn between what they know of the police as observed first hand and how the police appear at trial.

Selection of the jury with respect to the police is determined by the defense theory. If the theory is that the police set up the entire case, then the jury has to be members of the community to whom such idea

is acceptable. To that end, the lawyer for the defendant is seeking individuals who see the police as an occupying force that is inherently dangerous to the citizens of the community. If the theory is that the cops are doing sloppy police work, the suburban matron critical of her family, her neighbors and her friends is an acceptable juror. In some situations the defense has decided that the only way to win a case is to try to "hang the jury." By preventing a resolution of the case, the defense gets some leverage on plea bargaining. If that is the strategy then the perfect jury includes the suburban matron and those who believe the police to be an oppressive occupying force. The idea is that people of competing values and classes cannot come to agreement upon a verdict. A cautionary note is in order: people of competing values and classes come to agreement every day.

The public needs to believe that there is no inherent knowledge or wisdom in any player in the criminal justice system. Even the judge may be ordinary. The heart of the system is that the people make the decision. Often they are able to see through the blue smoke and mirrors erected by all sides and often by the judge. It is not, as the Wizard of Oz says, that there are bad men; it is that there are bad wizards, that's all. The process is a crucible. The defense lawyer's deeds and skills are put in service of the client alone. He has no responsibility to society except for the Canons of Ethics. The defense lawyer vindicates the defendant's right to be black hearted guilty, but nonetheless to be set free if there is a failure by the state to prove guilt beyond a reasonable doubt to twelve unbiased citizens. To that end, selecting jurors in order that they not reach agreement on guilt is part of what is required by the adversarial process, expected by society and deserved by the defendant.

The prosecutor has the responsibility to obey the law and strike hard blows but fair ones with all the might of the state. In an urban setting, the tool for all these activities, the vessel by which the fight is engaged and the victim of the lawyer's black arts is the police officer. Testifying in court is part of his job. Most of the time the worst beating administered to the badge is not on the street; it is in the courtroom. When it goes bad on the street, a cop can always pull a gun. In the courtroom all a cop has is his or her wits.

