

Chapter Eight: Denials and burden of proof.

We begin with *Denials*, and in Denial cases, with the tasks and tools of the accuser.

1

In a Denial case, the accuser's key task is to prove that the act alleged in the accusation was in fact done. If you are the accuser, your first step must be to choose a general strategy for doing this by choosing your theory of the case. You will select from the spectrum of possible theories. On one end are the most unspecific theories, such as the following, "bland" theory usable in any case:

The mass of circumstantial evidence clearly shows that the defender did it.

At the other end are the highly specific theories, telling a plausible story and incorporating details of your case:

The defender, a habitual wife beater, slowly escalated into increasing violence until finally, provoked by jealousy at evidence of his wife's affair, he brutally slaughtered her and her supposed lover.

Question: Which is better? Which is easier to prove? Which is more persuasive, if proved? When should you choose a more specific theory? when a more unspecific?

2

After the accuser has located her theory, the next step of course is to prove it. To help her do this, the accuser in a Denial case has available to her the set of Denial topoi that you have already met:

Motive

Means and Opportunity

Physical Evidence

Behavior Before & After

Character

As promised, let's take a closer look at the topos *Character*. The ancient Romans were quite willing to take bad character or prior crimes as evidence of guilt. Cicero says the following:

Cicero, Inv. 2.32, 34.

There can be little foundation for a motive for crime unless suspicion is cast on the character of the defender so that it will not seem to be inconsistent with the act. For as there is no point in discrediting the character of a man where there was no motive for him to go wrong, so it is idle to allege a motive for a crime if his character

is shown to be inclined to no line of conduct which is less than honorable. Therefore the prosecutor ought to discredit the life of the defender on the basis of his past acts and to point it out if he has previously been convicted of any crime equally serious. If this is impossible, he should prove that the defender has been under suspicion of similar crime before. . . .

If it cannot be shown that the defender has ever been implicated in any fault, the argument will be brought in by which the jurors are urged to think that the long-standing reputation of the man has nothing to do with reality. For he has been concealing his true character before, and has only now been caught red-handed; therefore this act should not be judged in view of his past life, but his past life should be discredited by this act; that previously he had no power or motive to commit the crime. And if none of these arguments can be made, one should have recourse to the last possible argument, that it is no wonder that he has now for the first time committed a crime: for one who wishes to sin, must have some first offence.

Now, we also make such inferences in our everyday accusations; for example, in most families if there is a piece of cake missing or a window broken, everyone knows who the likely culprit is. But officially speaking, in the contemporary United States we don't allow ourselves to use this Roman mode of reasoning. Our court rules of evidence generally prohibit introduction of the defender's bad reputation or prior crimes in order to prove bad character and thus indirectly guilt. (Reputation or crimes may be introduced if it is relevant to some issue other than character; for example, a reputation for lying may be introduced to challenge the defender's credibility, if he testifies). Consider the following excerpt from the Federal Rules of Evidence:

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes.

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607 , 608 , and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident, provide reasonable in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Question: Did the Federal Rules make the right choice? Should the defender's character be an issue in our criminal or tort trials? Why or why not? What rules should we adopt for our trials?

3

So the accuser in a Denial case has this topoi set: Motive, Means, Opportunity, Physical Evidence, Behavior, and possibly Character. How do you use these topoi? Topoi, remember, are what is known as a *heuristic*. A heuristic is a useful way of solving some problem—a way which generally gets the job done expeditiously, though we may not know precisely why. If a locked door won't unlock, for example, you may use certain heuristics to try to get it open: leaning on the door while turning the key; sliding the key in and out while jiggling it; spraying in some lubricant. A more scientific approach would be to determine exactly what is wrong, e.g. by using an x-ray machine, and then design an appropriate remedy. But that would usually take too long, so we use heuristics (rules of thumb, working principles, shortcuts) instead. (The argument diagrams introduced in previous chapters are an example of a heuristic. They are meant to clarify the argument; if they don't work, forget them.)

Topoi are a set of questions for jiggling your mind, to see if you can unlock any good ideas. Here's what Cicero says:

Cicero, Inv. 2.45-46.

You will more easily come upon things to say if you examine frequently and carefully you own narrative of the events and that of you opponent. Eliciting any clues that each bit of evidence may afford, ponder: why, with what intent and with what hope of success each thing was done; why it was done in this way rather than in that; why by this man rather than by that; why with no helper or why with this one; why no one knew about it, or why someone did, and why it was this one who did; why another act was performed earlier; why another act was not performed earlier; why this was done in immediate connection with the event, and this other thing after the event; whether this was done intentionally or followed as a natural consequence of the event; whether what [each witness] said is consistent with the events or with itself; whether this is a sign of this or of that, or of both—and then of which the more; what was done that ought not to have been done, or what was left

undone that ought to have been done. When your mind studies so attentively every part of the whole affair, then the topoi described above which are stored up in your mind will come forth of their own accord; and then sometimes from one, sometimes from a combination of topoi definite arguments will be produced.

So as you build your case, run through the topoi and see how you can develop arguments with each of them. Then assess whether these arguments are really worth including. Few cases will use all the topoi; some cases may use none of them. For example, if you have overwhelming Physical Evidence, you may be able to skimp arguing Motive, especially, say, if your Motive is highly speculative and not well supported. And this should be enough. Consider:

From the Jury Instructions, Simpson Criminal Trial.

Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

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There is one further task that the accuser has, however, that the topoi will not help accomplish: the task of adding up all the arguments into one strong case against the defender. Partly this is just a matter of winning: many small arguments are unlikely to persuade unless you can show, in Sherlock-Holmes-fashion, how they converge. But more than this, as the accuser you have the *burden of proof*. The defender is *presumed innocent*. Therefore, you must show not just that a variety of arguments *suggest* that the defender did it, but that the defender did *in fact do it*. If you don't meet your burden of proof, the jury won't even consider your case. So you need both to present your arguments and show what all your arguments add up to. Here is what celebrated (former) prosecutor Vincent Bugliosi has to say about the Simpson prosecution's fulfillment of this task:

From Vincent Bugliosi, *Outrage: The Five Reasons Why OJ Simpson Got Away With Murder*

I was particularly amazed that the prosecutors never argued to the jury the ridiculous improbability of all the things pointing to Simpson's guilt in this case being just a coincidence. Both prosecutors acted as if they hadn't the faintest idea how to prosecute a circumstantial evidence case. I've put people on death row--and this is not an exaggeration--where the circumstantial evidence was one hundred times less

powerful than in this case. . . . [The prosecutors] never, remarkably, put all of the evidence and circumstances *together* and pointed out that as the number of circumstances pointing to guilt increases, the likelihood of *any* of them being a mere coincidence dramatically decreases. That is, they never made the obvious argument that the *combination* of all these coincidences made the conclusion of Simpson's guilt mandatory.

In other words, argue to the jury:

"The five drops of blood at the murder scene as well as the blood on the rear gate *just happen* . . . to be Mr. Simpson's; the killer's size-12 shoes *just happen* to be the defendant's shoe size; only 299 pairs of these size-12 rare Italian-made Bruno Magli shoes were ever distributed in the United States in 1991 and 1992, and were sold in only forty stores in the entire country, one of which is Bloomingdale's in New York, and we know that Mr. Simpson *just happens* to have been a regular customer at Bloomingdale's during this same period, buying size-12 dress and casual shoes there; the glove left at the murder scene *just happens* to be the same, identical type Nicole bought for Mr. Simpson at Bloomingdale's in December of 1990, one of only two hundred pairs like them sold throughout the whole country that year; [etc., summarizing the arguments that can be made.]

"At what point do these things stop being a coincidence, ladies and gentlemen of the jury? When you folks, as intelligent human beings using your common sense, say to yourself: 'Aw, c'mon, you've got to be kidding. It's ridiculous to suggest all of these things are just an incredible coincidence. That's not life as we know it.' *That's* when all this circumstantial evidence stops being a coincidence. When you people, as intelligent, sensible human beings--and that's why we selected you folks for this jury--say to the defense attorneys in this case, 'Let's stop living in a fantasy world and come back to earth.'

"When a person is innocent of a crime, ladies and gentlemen of the jury, chances are there isn't going to be anything whatsoever pointing toward his guilt. Chances are there will be nothing. But now and then, because of the very nature of life and the unaccountability of certain things, maybe one thing, in rare situations maybe even two things, will peculiarly point toward his guilt even though he is innocent. And in highly unusual and virtually unheard-of situations, maybe even three things will point to his guilt, even though he is innocent. But ladies and gentlemen of the jury, in this case, everything, everything, points to this man's guilt. Not only does the physical, scientific evidence in this case conclusively prove this defendant's guilt, but virtually everything he said and did points irresistibly to his guilt. We've set forth for you a staggering number of pieces of evidence that point to this man, and this man alone, as the murderer of these two precious human beings. Under these circumstances, it is not humanly possible for him to be innocent. If O.J. Simpson didn't commit these murders, ladies and gentlemen of the jury, then the two victims in this case are still alive."

If you are the defender in a Denial case, you have more strategic choices to make since there are more different theories of the case available to you. Here is a list of commonplace theories of the cases--another heuristic you can use in brainstorming:

The "passive" defense: "The accuser has not met her burden of proof. Substantial doubts exist that I did what she says." If the accuser fails to produce enough evidence to support her case, or if she fails to "add it up" into a strong case against you, you do not have to put forward an active defense at all. You will still need to argue, though, in order to refute as many of the accuser's chains of argument as possible—enough to persuade the jury that she has not met her burden of proof. To help you in this task, you can use the same topoi the accuser used, only backwards, going through each one to raise objections against the accuser has tried to establish.

The "passive" defense is available in every Denial case, like the accuser's "bland" theory. Alternately, you can try to actively establish some conclusion that makes it impossible (or at least improbable) that you committed the crime. Even if the accuser meets her burden of proof, therefore, the jury could still decide in your favor. The following theories move from "the accuser hasn't proved I did it" to "I couldn't have done it." The pre-eminent defense theory of this type is:

Alibi: You show that you could not possibly have done it because you had no opportunity. You move from "the accuser hasn't proved I was there at the time" to "I was elsewhere at the time." To prove this, you can rely on the same topos of Opportunity as in the accuser's toolkit.

There are other defense theories which, like Alibi, try to establish impossibility: For example, you could prove that you had no access to or ability to use the means by which the crime was committed; you could prove that you had only strong motives to help the victim, or that your excellent character makes it impossible for you to have done the crime. Notice that any of these theories will require you to affirmatively establish some conclusion (that you were elsewhere, that you're a good guy) to counterbalance the accuser's case. In other words, in these theories the *defender* has a burden of proof.

Taking another tack, you could try accepting an even greater burden of proof by choosing to show who in fact is guilty of the crime. Thus the following two theories:

Alternative culprit: You claim that you didn't do it, someone else did. When you chose this theory, you become an accuser of someone else, with all the advantages and disadvantages that

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brings. One disadvantage is that now you have undertaken a burden of proof. One advantage is that you can now use all the accuser's topoi for yourself.

Counteraccusation: You offer a specific alternative culprit: namely, the accuser; a common strategy, e.g. between siblings. Again, the accuser's topoi can be used.

Finally, instead of focusing on the crime itself, you offer an explanation of why you are being falsely accused. If you can show that the accuser is accusing you not because he thinks you did it but for some other reason, it raises strong doubts about the accuser's case against you. There are at least two variations on this theme:

Rush to judgment: You are a victim of public hysteria. The police and/or the prosecutor were so concerned about publicity that they handled the investigation badly, fingered you as the easy suspect though they had no evidence, overlooked other leads and generally mismanaged the case.

The Frame-up, a/k/a Conspiracy theory: "A is really accusing me because.... [she hates me, she habitually accuses people falsely, she is a racist, she's trying to get out of it herself etc.]" Whereas "Rush to Judgment" suggested only that the accuser was negligent in bringing the accusation, this theory suggests that the accuser knew precisely what she was doing and did it on purpose. Elaborate versions of this theory allege conspiracies to "frame" the defender; thus the name. Here you again become an accuser: you are accusing the accuser of false accusation. So again you can use the accuser's topoi to help prove this charge.

Question: Which of these is better? Which is easier to prove? Which is more persuasive, if proved?

Question: Make a list of all the theories of the case that the defense in the Simpson trials have adopted. Which is the strongest? Why?

Note that many of these defense theories of the case can be combined. For example, you might choose to refute some of the accuser's arguments, prove an alibi, show that someone else did it and give a reason why the accuser is trying to frame you.

6

What is the burden of proof that the accuser must meet? How much proof is "enough"? It depends.

From the jury instructions, Simpson criminal trial

A Defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the Prosecution the burden of proving him guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge. The Prosecution has the burden of proving beyond a reasonable doubt each element of the crimes charged in the information and that the Defendant was the perpetrator of any such charged crime. The Defendant is not required to prove himself innocent or to prove that any other person committed the crimes charged.

From the jury instructions, Simpson civil trial

Plaintiff Goldman has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the . . . claims asserted in his complaint. . . . "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you're unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

Question: What do "beyond reasonable doubt" and "preponderance of the evidence" mean, anyhow? How does a juror tell that the proof meets these standards?

Question: Why does the accuser in a modern American criminal trial have to jump over a higher bar than the accuser in a modern American civil trial?

Question: What should be the accuser's burden of proof in the trials in this class?