

## Chapter Five: Argument basics.

1

Here's everything you need to know about argument:

To *make an argument*, ask yourself all the questions a reasonably skeptical person would have about your theory of the case, and then answer them before they are even asked.

That's the short explanation. If you master it, you will become an outstanding arguer.

Now for a longer explanation.

2

Consider the following story of the use one man made of one fact.

### **On a desert island: a footprint**

It happened one day, about noon, going towards my boat, I was exceedingly surprised with the print of a man's naked foot on the shore, which was very plain to be seen in the sand. I stood like one thunder-struck, or as if I had seen an apparition. I listened, I looked round me, I could hear nothing, nor see anything. I went up to a rising ground, to look farther. I went up the shore, and down the shore, but it was all one; I could see no other impression but that one, I went to it again to see if there were any more, and to observe if it might not be my fancy; but there was no room for that, for there was exactly the very print of a foot—toes, heel, and every part of a foot. How it came thither I knew not, nor could in the least imagine. But after innumerable fluttering thoughts, like a man perfectly confused and out of myself, I came home to my fortification, not feeling, as we say, the ground I went on, but terrified to the last degree, looking behind me at every two or three steps, mistaking every bush and tree, and fancying every stump at a distance to be a man; nor is it possible to describe how many various shapes affrighted imagination represented things to me in, how many wild ideas were found every moment in my fancy, and what strange unaccountable whimsies came into my thoughts by the way. . . .

I slept none that night. The farther I was from the occasion of my fright, the greater my apprehensions were; which is something contrary to the nature of such things, and especially to the usual practice of all creatures in fear. But I was so embarrassed with my own frightful ideas of the thing, that I formed nothing but dismal imaginations to myself, even though I was now a great way off it. Sometimes I fancied it must be the devil, and reason joined in with me upon this supposition; for how should any other thing in human shape come into the place? Where was the vessel that brought them? What was there of any other footsteps? And how was it possible a man should come there? But then to think that Satan should take human shape upon him in such a place, where there could be no manner of occasion for it, but to leave the print of his foot behind him, that even for no

purpose too, for he could not be sure I should see it; this was an amusement the other way. I considered that the devil might have found out abundance of other ways to have terrified me than this of the single print of a foot; that as I lived quite on the

other side of the island, he would never have been so simple to leave a mark in a place where it was often thousand to one whether I should ever see it or not, and in the sand, too, which the first surge of the sea, upon a high wind, would have defaced entirely. All this seemed inconsistent with the thing itself, and with all the notions we usually entertain of the subtilty of the devil. . . .

In the middle of these cogitations, apprehensions, and reflections, it came into my thought one day, that all this might be a mere chimera of my own; and that this foot might be the print of my own foot, when I came on shore from my boat. This cheered me up a little too, and I began to persuade myself it was all a delusion, that it was nothing else but my own foot; and why might not I come that way from the boat, as well as I was going that way to the boat? Again, I considered also, that I could by no means tell, for certain, where I had trod, and where I had not; and that if, at last, this was only the print of my own foot, I had played the part of these fools who strive to make stories of spectre and apparitions, and then are frightened at them more than anybody. . . .

But I could not persuade myself fully of this till I should go down to the shore again, and see this print of a foot, and measure it by my own, and see if there was any similitude or fitness, that I might be assured it was my own foot. But when I came to the place, first, it appeared evidently to me, that when I laid up my boat, I could not possibly be on shore anywhere thereabout; secondly, when I came to measure the mark with my own foot, I found my foot not so large by a great deal. Both these things filled my head with new imaginations, and gave me the vapors again to the highest degree; so that I shook with cold, like one in an ague; and I went home again, filled with the belief that some man or men had been on shore there; for, in short, that the island was inhabited, and I might be surprised before I was aware. And what course to take for my security, I knew not.

This is a story about *inferences*. An inference is a step from one proposition (statement) to another. If the inference is a good one, then the truth of the first proposition will allow a step to the truth of the second. For example, in this story there is a motion from a first, apparently true proposition:

There is a footprint on the beach.

to the truth of a second, new proposition:

There is another human being on this island!

The first proposition is commonly called the "premise"; you might think about it as the place set down at the beginning, the starting point from which the step is taken. The second proposition is called the "conclusion"; it is the place at which the step ends up or concludes. Often we mark off premises and conclusions verbally, using words like "since, because, on account of" to indicate premises, and words like "therefore, thus" to indicate conclusions. For example:

Because there is a footprint on the beach, there is another human on this island.  
There is a footprint on the beach. Therefore, there is another human on this island.

We can also draw the step of an inference from premise (P) to conclusion (C) like this:

P -----> C

Here the arrow represents the inference: the step taken from P(remise) to C(onclusion).

Inferences are things which people can *make*, as Robinson Crusoe in this story makes an inference from seeing the footprint to the conclusion that he's not alone. When a person makes an inference, he or she moves from a belief that the premise is true to a belief that the conclusion is true.

3

Inferring is something that a person can do on her own. Now we need to consider a situation involving at least two people. One, who we will call Ann (or A) wants, for whatever reason, to get another, Robinson Crusoe (RC), to believe something. How can she go about doing this?

One strategy would be just to go fishing for the belief, seeing if Robinson will agree:

A: "You know, there must be another person on this island!"

At this point, Robinson might respond:

RC: "Hey--I think you're right!"

But how likely is this? At least in the forensic situation, there will always be another side and that other side is not likely to just give in. So the strategy of fishing for belief will not often succeed. Instead, Robinson will respond by expressing his doubts--that is, he will respond by asking a question:

A: "You know, there must be another person on this island!"

RC: "Why? Why should I believe that?"

(Go back to the story and notice how Robinson doubted even his own inferences. Isn't it likely he would doubt even more what someone else was saying? And still more, when that person was a forensic advocate, clearly out to win the case for her side?) Typical questions that Robinson might ask include:

"Why should I believe that?"

"How do you know that?"

"What do you have to go on?"

"What's your evidence?"

"Is that really true?"

So: what is Ann to do? She needs a more complex strategy. If Robinson has doubts about the thing Ann wants him to believe, she can find something else he *does* believe and *show* him how he can move from that belief to the conclusion she seeks. In other words, Ann can overcome his doubts by showing him how to make an inference. This is the strategy of *argument*. An argument shows how an inference can be made. It puts forward a premise and demonstrates that the conclusion follows. Giving an argument therefore is a strategy for overcoming doubts. So the full dialogue might look something like this:

A: "You know, there must be another person on this island."

RC: "Why should I believe that?"

A: "Well, look--there's a footprint. Therefore there must be another person on this island!"

RC: "Now I see!--You're absolutely right!"

Ann has just made an argument.

Question: If you want someone to believe someone, you might try the strategy of fishing for belief, or you might try the strategy of arguing. What other strategies are there for getting someone to believe? What are their advantages and disadvantages?

Ordinarily, when a person is trying to figure something for himself out he starts from the premises he already knows to be true and seeks to infer what conclusions may be supported by them. Robinson Crusoe, for example, starts with the footprint and inquires whether it will justify believing that the devil made it. An arguer usually works backwards. The arguer commonly starts with the conclusion that she wants her audience to believe, and only then tries to locate premises which she can present in order to resolve her auditor's doubts.

In legal argumentation, the advocate on each side is trying to get her audience to believe her theory of the case. Each advocate faces an audience that doubts whether her theory of the case is true, that asks, "and why should I believe that?" To answer such doubts, each advocate searches among the things that the audience already believes--searches among the "mixed mass of evidence." Each fact in the mass might resolve some doubt--each fact, in other words, is a potential premise for an inference that the theory is true. An advocate makes a bare-bones legal argument when she asserts one fact and calls for her audience to believe her theory. For example, a student's theory of the case might be that since she is a very hard worker in general, her absence one day should be excused. She might support this theory by making an argument: "You know how much extra work I did on that last paper. Therefore, you should let me off now."

Simple. So far, so good.

Question: Which of the four kinds of truth does an argument help establish? Why do you say that?--defend your answer.

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Not so simple. Occasionally it will work: you just bring forward one fact and draw the conclusion that the accused is guilty (or not), and your audience agrees with you. But more often, this simplest form of arguing will not work. Why? Because it is still unlikely that your audience will believe what you want them to believe after you show them how they can move from a fact to your theory of the case.

It is one of the basic assumptions of legal (or any other kind of) argumentation that *those to whom arguments are addressed will doubt them*. It is your job as an arguer, therefore, to *design your arguments so as to satisfy all reasonable doubts*. As the doubts multiply, the designs you will have to use become more complex as well.

Consider the advice in the following selection from John Henry Wigmore's *Principles of Judicial Proof*. Wigmore was a law professor in the first half of this century. His massive treatise on the law of evidence remains a standard work even to this day. But he insisted practicing attorneys needed to know more than the law of evidence; they needed to know how to use evidence to prove their cases. Wigmore wrote his *Principles* to serve as the textbook for a law school course rather like the course you are taking now. But the course died with him: law schools have up to recently resisted intellectually serious investigations of actual legal practice. Luckily for you, you're not in law school! (At least, not yet.)

**Wigmore, "Simple and Catenate Inferences "**

[Note: some modifications of terminology have been made to bring Wigmore into line with the terms used in these materials.]

In books on logic, the various kinds of inference or fallacy [i.e., bad inference] are usually illustrated by (what may be called) simple inferences; thus, "The sun is shining; Therefore, the air outside is warm"; or, "Here is wheat growing in June; Therefore, somebody planted it in February"; or, "The deceased said he was going to New York; Therefore he did get to New York."

But in judicial trials it can rarely happen that the inferences offered are simple. The [premise] immediately next to [i.e., before] the original [conclusion] will usually be . . . a fact which has itself been reached by an inference; and perhaps this inference in its turn has been reached from another fact based on an inference. Such a series of inferences may be termed catenate (i.e. forming a chain). In symbols they would take this form:

F--->C1--->C2--->C3--->C

[Here "F" means "fact" and "C" means the ultimate conclusion; interim conclusions are labelled "C1," "C2" and so on, additional facts, "F1," "F2".]

For example, if in the hand of a murdered man is found a scrap of coatcloth, and a coat [with a scrap missing] . . . is also produced from [the accused's] room, the catenate inferences offered may thus be analyzed:

F1=the scrap of cloth grasped fits this coat--->C1, the scrap came off this coat;

C1=the scrap grasped came off this coat--->C2, this coat was worn by another person than the victim at the time of the assault;

C2=the wearer of the coat at the time, being the accused who owned it --->C, the accused was the assailant.

The process most needed for correct thinking on pieces of evidence is the analysis of inferences. When we have dissected and laid out explicitly the several steps of sub-conscious reasoning, then and then only can we discern the possibilities of fallacious inference.

For example, in the above illustration, the dissection has not been thorough enough. Where does it fall short? At C2. This inference is really based on three distinct facts, instead of one, for the coat was only found in the accused's room, yet C2 assumes that he was the owner. The analysis should therefore read:

C2=[someone other than the victim was wearing the coat at the time of the assault]--->C3, [the person wearing it was the assailant];

F2=the coat was found in the accused's room--->C4, the accused is its owner;

C4=the accused, being its owner--->C5, the accused was wearing it at the time;

(Combining C3 and C5)

C3 + C5=the other person, i.e. the accused was wearing the coat at the time--->C, the accused was the assailant.

Note that at each of these steps of inference there is room for doubt, and that each of the inferences rests on a conclusion supposed to be reached through the preceding inference. The scrap may not have come off this coat (C1); this coat may not have been worn at the time of the assault (C2); the accused may not have been the owner (C4), or though the owner, he may not have been the wearer (C5), and finally, though he may have been the wearer, he may not have been the assailant (C3), but a bystander coming to assistance.

It is thus only by careful dissection of the implicit steps of inference that we can lay bare and locate the possibilities of doubt. Many years of experience in teaching this subject have shown the author that this rule is the one most needful for self-training in reasoning about Evidence. The failure to observe it in every day's use of Evidence is the source of most fallacies [wrong inferences].

And it is precisely at the point of these omitted inferences that e.g. the frequent plea of "frame-up" finds its logical basis; because the inference from F2 to C4 is fallacious, if some one else (either the actual assailant or a malicious agent) placed the coat in the innocent accused's room.

So, in using the illustrations later, for the various kinds of evidence, it will be found that the careful and explicit analysis of catenate inferences is the one necessary safeguard for correct thinking.

Question: Arguing is hard to do well. For example, I'm not sure Wigmore has got the "coat-scrap" argument right. Try designing the argument and drawing the picture (diagram) that starts with the facts:

F1: The victim was found clutching a coat scrap.

F2: A coat with an identical piece missing was found in the accused's closet

and getting to the conclusion:

C: The accused fought with the victim.

Wigmore points out that the process of raising and answering doubts (questions) can keep going and going. Consider again the footprint on the island. The basic argument runs like this:

A: "There is a footprint. Therefore, there must be another person on this island."

What questions can Robinson still ask? What about:

RC: "Why should I believe that there's a footprint?"

Then Ann might have to respond:

A: "Here's a photo of the footprint."

But that might just produce further questions:

RC: "Well, how do I know that that's really a photo of a footprint from this island?"

A: "Here's the affidavit of the person who took the print--she swears that she took it yesterday, right here on the island."

RC: "What assurance can you give me that you didn't forge that affidavit?"

A: "Look, it's notarized!"

If it helps, you might want to think of this with a picture or diagram. A basic argument just has one step:

P----->C

But the premises themselves can be questioned, leading to arguments that "chain" backwards (in Wigmore's words) like this:

P<sub>4</sub>----->P<sub>3</sub>----->P<sub>s</sub>----->P<sub>1</sub>----->C

So here's an obvious question: How do you know when to stop? It's like the game that children play, continually asking "why" until their parents can't answer any longer. If an advocate had to answer *all* the questions that could be raised, her speech would go on indefinitely. And that wouldn't make for a fair or efficient trial.

In forensic rhetoric, there's a straightforward answer to this question. The forensic advocate stops when she gets to the *facts*. Much of the work of the trial--all the questioning of witnesses, and introduction of physical evidence--is aimed at establishing the facts.

Let's say a witness stands up in open court, and testifies that she saw the accused running from the scene of the crime. What is the fact? Not that the accused was running from the scene of the crime, since she could be lying or mistaken. But it is a fact that she stood up in open court and said it. Everyone was there--advocates and jurors alike--and saw and heard her testify; no one can question that *in fact* she did testify.

In other words, you might think of a trial as a machine for making facts.

Question. Which if any of the following are facts? Defend your answers.

There is a footprint on RC's island.

RC saw a footprint on his island.

RC says he saw a footprint on his island.

There is a shape in the sand that looks like a footprint on the island.

6

An argument answers questions before they are even asked; it puts forward premises that support an inference to a conclusion. What then is a *good* argument?

A good argument is one that is *strong*. How do we measure argument strength? We measure the strength of an arm by seeing how much it can lift--the more it can lift, the stronger it is. We measure the strength of an argument the same way, by seeing how many doubts (questions) it can answer. The more doubts it can answer, the stronger it is.

Question: Ann is arguing to Robinson that there is another person on the island, because there is a footprint. How strong is that argument? Are there more questions Robinson could ask?—what are they? If Ann answers them in advance, do you see how her argument will become stronger?

Question: Strength is one standard for judging arguments--the main one. What other standards do we use? How do you want your own arguments judged?