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In the Courtroom

THERE are three chief places in democratic societies where logical fallacies are held at bay as a matter of principle: the courtroom, the copy desk, and the laboratory. The copy desk has a find tradition — not invariably lived up to — of holding to facts in the news columns, and reserving opinions for the editorial page. The laboratory, as we have seen, must exclude fallacious reasoning if science is to progress. Any use of *ad hominems* and "self-evident truths" would mean to fudge experiments and nullify conclusions.

As for number one, the courtroom, we have already glanced in while court was in session, to listen briefly to the reasoning employed by the professional reasoners there. Now I will try to pull these scattered observations together with a layman's summary of the principles and logic found in the courtroom. There are in effect two separate sets of principles and logic: those of Anglo-Saxon law, developed over the centuries, and the methods of up-and-coming trial lawyers to get around the rules of evidence.

Most of us are not jailed very often, however decorated our car may be with parking tickets. So we have little first-hand knowledge of the magnificent safeguards which Anglo-Saxon law throws around an accused person. These safeguards were not always there. Some early chapters in English history record black injustices practiced in every rank of society including the highest. Kings and tyrants did not scruple to

remove by assassination their political rivals, real or potential. The famous painting of the two little princes, imprisoned in the Tower of London, innocent victims of a power struggle for the throne, symbolizes those evil deeds.

Gradually the reforms appeared. First the nobles in 1215 wrung Magna Carta from King John, curbing his power. Then the revolution of the middle classes under Cromwell put further checks on tyrants and demagogues. Later, poor people were given equality before the law. American courts took over this legal apparatus, bag and baggage, and put part of it firmly in the Constitution.

The heart of Anglo-Saxon criminal law is the technique by which guilt is proved. By and large it follows the correct order of steps for straight thinking: First the relevant facts, then rigorous deductions from the facts, and finally conclusions and judgments. Much of what passes for "evidence" and "proof" on the street, in a public debate, or in committees of Congress, could go sailing out the window of even the lowliest police court. If counsel or witness begins his remarks with "Your Honor, everybody knows …" he will be stopped in his tracks. This is the fallacy of "self-evident truth," which no judge in his sense can tolerate. Nobody knows anything until the facts are put on the record.

Few of these historic safeguards have been used in the Congressional trials, and loyalty board hearings, of recent years. Congressional investigations, as preliminary to specific legislation, are of course an old, tested, and invaluable procedure. But legislative trial of persons accused of "subversive tendencies" is relatively new. Such trials and hearings are justified by their advocates as corrections to the delays and technicalities of the courts. They are indeed faster; but a price is paid, both by the accused and by society. Says Alan Barth:[1]

[1] *Government by Investigation*, Viking, 1955.

> The legislative trial is a device for condemning men without the formalities of due process. It has become the accepted means of dealing with persons suspected of Communist affiliations or of that even vaguer offense, Communist sympathies. Courts of law are, in the view of zealots, slow, cumbersome, and uncertain instruments for this purpose. . . .

Various government loyalty and security boards have shown some quaint notions of what constitutes proof. A woman, for instance, was kept from her government job for months while the local Security Board investigated charges by her landlady.[2] The landlady had deposed that the woman was holding Communist meetings in her apartment. Asked how she knew they were Communist meetings, the landlady explained that it was obvious, because they used only one candle and kept their voices low.

ANGLO-SAXON JUSTICE

If you have ever been in a large law library you have seen some of the thousands of volumes devoted to jurisprudence. It is of course quite impossible to summarize centuries of legal evolution in a few paragraphs, and if I were a lawyer I am sure I would not dare attempt it. Yet it may not be too presumptuous to set down some of the outstanding principles which guide a trial in court today, principles broad enough and few enough to be readily remembered. They are not strictly "logic," except in the broad sense of a body of logic a way to approach a person accused of crime.

1. When the accused is brought to trial, he is presumed to be innocent until competent evidence—not candles and low voices—proves him guilty "beyond a reasonable doubt." The courtroom parallels the laboratory in using high probabilities rather than absolutes.

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[2] Adam Yarmolinsky: *Case Studies in Personnel Security* (Bureau of National Affairs, Washington,.1955).

2. The accused does not have to prove his own innocence; the prosecution must do the proving. "The general rule is that he who asserts a fact must prove it, and not he who denies."[3]

3. Evidence turns on acts committed, not on opinions, beliefs, philosophies, or loose talk. A witness is supposed to tell what he saw or heard, not what he believes. Expert witnesses, however, may express an opinion of what the facts indicate. In a murder trial involving death by a bullet, a properly qualified expert in ballistics is permitted to testify that from the markings on the bullet, and grooves in the barrel of the revolver, he is of the opinion that the fatal shot was fired from that particular gun. Similarly a qualified psychiatrist is permitted to testify whether in his opinion the accused was sane when the crime was committed.

4. In a criminal trial before a jury, the judge lays down the law involved, and guides the jury in finding the facts allowing, or disallowing, the evidence which counsel seeks to present. Whether there is competent evidence is for the judge to say. Whether the facts as found demonstrate guilt or innocence is for the jury to decide.

5. The accused may cross-examine his accusers face to face; evidence against him on the basis of secret information is disallowed. If he cannot afford counsel, the Court will provide him with one.

6. The accused has the right of appeal to a higher court.

7. In examining witnesses, counsel is not allowed to ask leading questions, which suggest the answer counsel wishes to receive.

To these seven safeguards should be added those specified in the American Bill of Rights—freedom of speech, press, assembly, and religion; security from unreasonable search and

[3] *Encyclopedia Britannica* on "Evidence."

seizure; the right to a speedy and public trial by jury; freedom from "double jeopardy," or being tried twice for the same crime; freedom from testifying against oneself, and from excessive bail or fines, and from "cruel and unusual punishment."

BACK TO THE DARK AGES

Americans as we have seen are losing some of these freedoms. "McCarthyism," as defined in a preceding chapter, has attempted to set up a different kind of law in a different kind of court, to replace, if not reverse, the principles of Anglo-Saxon justice. Cases which would not be admitted in the regular courts have been brought under administrative jurisdiction, i.e., loyalty boards, or before investigating committees of Congress and state legislatures. Many an accused person has been declared guilty with no proof beyond the charge, and then tried for his associations, ideas, suspected intentions, family connections, rather than for his specific acts.

Senator Thomas C. Hennings of Missouri, after looking into the loyalty-security program of the federal government, in hearings before his subcommittee on Constitutional Rights, summed up his early findings in these words:

> Free Americans have been brought to judgment by government officials without even the safeguards given accused criminals in our courts… The use of undisclosed witnesses in security hearings… the shifting of the burden of proof to the accused… the doctrines of guilty by association and by kinship… these are some of the aspects of the growing new body of law.[4]

Seen on television, the legislative trials looked judicial enough, at least they looked like a Hollywood version of a trial. Actually, however, they were a legal no-man's land, without tradition or rules. An accused person absolved by one committee might be promptly worked over by another

[4] AP dispatch, November 3, 1955

committee, or summoned back by the first committee on the flimsiest pretense of new "evidence"—and thus be denied any protection against double jeopardy. Responsible lawyers, trying to defend clients before these revolutionary tribunals, felt as though they were living in a nightmare, so alien was it to all their experience in court.

Critics declared it returned the law to the Dark Ages, and introduced into America the inquisitorial methods of totalitarian states today. We remember the answer of the Emperor Julian to Delfidius, the prosecutor, in a famous Roman law case: "Can anyone be proved innocent if it be enough to have accused him?" In spite of the excuse of catching a lot of spies and conspirators, actually the tribunals exposed almost none.

A collateral effect has often been to carry the accusation from the investigating committees into the press. In a few cases this has helped the accused person. Certain army officers, for instance, came out of the McCarthy hearings better than the Senator himself. David Lilienthal's classic statement, "This I Do Believe," was his defense against a critical senatorial investigator, and it made history. In other cases, publicity has virtually resulted in "trial by headline"—a type of mental torture which even the Inquisition, lacking press and radio, could not impose. Some radio commentators meanwhile have set up kangaroo courts on the air, with witnesses, quoted documents, "evidence," usually on the level of "one candle and low voices," all complete.

AD IGNORANTIAM

Both the formal logicians and Anglo-Saxon law reject a fallacy known as *argumentum ad ignorantiam*. It is something like *tu quoque* (your're another), in that the challenge is revolved on the challenger, thus:

"The State Department is full of Reds!"
"Prove it."
"I don't have to, let's see you disprove it."

And again:

"Allah selected Mahomet as his prophet."
"How do you know?"
"Well, you can't prove he didn't!"[5]

Instead of proving your argument, you challenge your opponent to disprove it. If he can't, then you triumphantly assert that you have won. You do no demonstrating at all—which I suppose is where the "ignorance" comes in. Nice work if you can get it, and strictly forbidden in court. It amounts to forcing the accused to prove his innocence. The new administrative tribunals, however, and the practice nicknamed "trial by headline," thrive on *ad ignorantiam*.

THE FALLACY OF "MULTIPLE QUESTIONS"

Though Anglo-Saxon law employs the principles of straight thinking described in this book, sharp attorneys are constantly trying to get around the rules, often by using one or another of the fallacies we have been at pains to analyze. Thus one of the five lawyers defending the men accused of murdering the Negro boy Emmett Till is reported to have addressed a Mississippi jury: "Your fathers will turn over in their graves if you return a verdict of guilty."[6] The judge must have been napping, for this is illegitimate *ad verecundiam*. To produce evidence of a corpse turning over in its grave would not be easy.

There is another classical fallacy much favored by fast-working trial lawyers if they can get away with it. It is part of the begging-the-question group and is usually called the

[5] Following Lionel Ruby.

[6] *New York Times*, September 25, 1955.

fallacy of "multiple questions." The trick is to combine two or more questions into one, and demand a yes-or-no answer. The outstanding example in all the textbooks is a familiar one:

"Have you stopped beating your wife? Answer yes or no!"

If you answer *yes*, you admit you used to beat her; if *no*, you admit you still beat her. To find the true facts demands *two* questions: (1) "Have you ever beaten your wife?" (2) "If so, have you stopped?" The prudent course for a witness confronted with a multiple question is to say: "What do you mean?" and get broken down into component questions.

Another example: "When did you give up drinking?" If you set a date you are done for.

"What do you think of that crook Robinson?" is out of bounds, and so is: "You saw the defendant at the meeting looking pretty suspicious, didn't you?" And so is: "What time was it when you met this man?" when the intent is to bring out the admission that such a meeting had taken place.

In Congressional investigations of subversion the technique of the leading question has often been used. Here is an actual case. A witness denied that he was a Communist, and cited as evidence that he had been vigorously denounced by the Communist paper, the *Daily Worker*. Whereupon the chairman observed: "Let us put it this way: if I were an ardent member of the Communist party would I not have taken the same action?"

It is true, of course, that party members have been known to camouflage themselves by pretending to be anti-Communist. The witness knew this and he was under oath. Thus he could not answer "no" to the Chairman's question, but if he answered "yes" he would be trapped by this fallacious syllogism:

> Communists cover up by spurious anti-Communist activities.
> The witness has engaged in anti-Communist activities.
> Therefore the witness is a Communist.

The art of cross-examination can become a systematic exploitation of the fallacy of the multiple or leading questions, as counsel seeks to force an opposing witness to aid counsel's case. In the courtroom there is a judge to halt such exploitation, but in the legislative trials and security hearings, the sky is usually the limit.

Meanwhile out on the hustings, smart politicians are not strangers to the fallacy of multiple questions:

"Are you for the Republicans and Peace and Prosperity?"

"Are you for the Democrats and the Bill of Rights?"

As I write, the courts are moving to the defense and rehabilitation of loyal citizens scarred by extra-legal procedures and abuses of power. Judgment in case after case is being reversed. It is a heartening spectacle, and if I may be permitted a legitimate *ad verecundiam*, it shows again the wisdom of our forefathers in giving Americans the protection of Anglo-Saxon law. If there is to be any turning over in graves it should be when this great legacy is denied. The law may sometimes seem tardy, but it is still there, firm ground beneath our feet.