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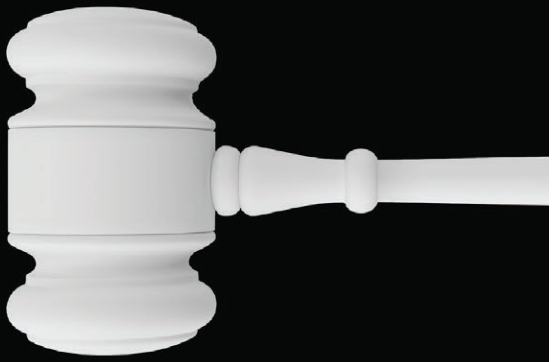

ATHEISM ON TRIAL

A LAWYER EXAMINES THE CASE FOR UNBELIEF

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A LEGAL PRIMER

I LIVE WITH ONE FOOT in the world of law and one in the world of faith. For almost forty years, I have earned my living working in courtrooms across America and throughout the Western world. The life blood of a just court is truth. Courts exist to ferret out the truths that matter most in life. In courtrooms, society resolves disputes peaceably rather than by force. Judges and juries make decisions whether people should forfeit their property, their freedoms, or even their lives. Courts determine which divorcing parent is, in truth, fitter to rear a child. When operating at their best, courts are civilization's best tool for getting to the core truth about life's greatest issues.

My other foot is in the world of faith. As a disclaimer, and by way of introduction, the reader should know that I am a religious person. I believe there is a God and that he has revealed himself to humanity. I am a Christian by faith. Prior to law school, I took a degree in biblical languages (Hebrew and Greek) and have worked with the Bible over forty years.

Both of those feet—the one walking in law and the one walking in faith—belong to me. I move freely between those two worlds, and often I find the worlds merge. This book is a fruit of such a merger. As a lawyer, my legal training, both in law school and on the job, has affected the way I think, research, evaluate options, and make decisions.

It intersects with my faith in what I believe and why I believe it. I am first and foremost a man of evidence. My life's work is built on evidence and arguments. Without it, my law firm doors would close. So in my faith walk, I analyze evidence and arguments. It is the way I think.

Law school begins with an orientation. For most of one week, the professors give a warm-up to the incoming class, explaining the basics of what lies ahead. Forty years ago, I was one of those students listening to a professor explain that law school would change us.

"It changes the way you think," he explained. He continued, "You won't notice it at first, but there will be signs. One morning over breakfast you will find yourself reading the warranty on the toaster—and enjoying it!"

Law school drives critical thinking and precision of thought. Generally, most students already have a bent toward that direction. The Law School Admission Test (LSAT) that every law school applicant takes is basically a logic test. If you can't score well on the logic test, you don't get into law school, much less graduate and pass the bar exam.

Law students take a range of different legal courses, each instructing the lawyers-to-be how to research carefully, think logically, and identify errors in thought. Sometimes the teaching does so directly (one of our courses was called Research and Writing); other times the new skill set underlies the legal rulings or rules of law you learn. For example, a law school evidence class is typically based on the Federal Rules of Evidence. You learn what is hearsay, and why it is generally excluded from evidence. You also learn what hearsay is admissible, the exceptions to the hearsay rule that are deemed credible enough for consideration. Those rules are the culmination of Western thought on how to discern relevant, careful evidence suitable for proving guilt or innocence with enough confidence to take someone's life, liberty, or property.

The Rules of Evidence are based on logic. The rules include logical determinations of whether evidence is relevant or irrelevant to an argument. There are rules that inspect and ensure the authenticity of

evidence. In addition to the actual rules, students read and learn cases where courts have interpreted those rules. These case decisions become additional laws that guide other courts. For example, the Supreme Court set up guidelines for when opinion testimony meets the necessary academic and logical rigors to validate its usage.[1]

In a trial, lawyers use those rules to present disputes to juries and other tribunals for "findings of fact." Successful trial lawyers must be adept at identifying arguments that do not meet the necessary logical rigors for consideration. This is what frequently makes the television and movies as a lawyer stands up saying something like, "Objection, your honor; assumes facts not in evidence!"

EVIDENCE—TYPES

In this book, I will discuss the evidence for and against certain beliefs. A lot of non-lawyers speak of evidence but have a very limited view of it. Evidence in the legal arena is all-encompassing. For example, courts use scientific evidence, which is critical in assessing claims about the material world of science. But scientific evidence is limited in what it can prove. For example, it can never be used to prove a motive or the knowledge of an individual. Yet motive and knowledge clearly exist and, in certain cases, must be proven by evidence. So courts use evidence of all types, not simply scientific evidence. The key is that the evidence must be credible in the field from which it is offered.

These rules of evidence, and the legal system built around these rules, provide the best tools civilization has developed to answer difficult questions about matters past, present, and future. Courts determine things as diverse as whether someone ran a red light, whether spouses love each other, and whether one is likely to need surgical intervention years down the road.

Sometimes there is direct evidence for the matters being proven. By this courts mean there is an eyewitness who can testify to the matter based on personal knowledge. This is the person who says, "Donny

Driver ran the red light. I know this because I saw him driving a car through the light at a time where I could also see his light was red."

Often scientific evidence is direct evidence. If I want to prove benzene is in drinking water, there is a conclusive test for that. However, even scientific evidence is frequently open to interpretation.

Most of the time, however, cases don't have much direct testimony. Most times the key evidence is circumstantial. That means the circumstances lead to the conclusion. The classic law school example distinguishing between direct and circumstantial evidence is proving whether it is raining outside. Going out and personally experiencing the rain is direct evidence. Staying inside but hearing thunder and the patter of water on the windowpanes, and seeing people come in with wet umbrellas and clothes is circumstantial evidence.

In a case like Donny Driver and Plaintiff Peggy, I might need to prove how much Peggy suffered from the collision before dying. Without Peggy to give direct testimony, I would need to rely on circumstantial testimony. I would offer evidence of how long she was conscious after the wreck, what her body was going through because of the injuries, and so on.

Circumstantial evidence is just as reliable as direct evidence. Often it is the only type of evidence available. It makes sense that it can be as valuable if one considers the classic illustration of a murder case. If a murder is committed where there is an actual eyewitness, that witness can testify, and the defendant be convicted. The testimony of the eyewitness would be considered direct testimony. The testimony directly addresses whether a defendant is guilty.

But circumstantial testimony can also serve to convict a murderer, and this is important because very few murders have eyewitnesses. Circumstantial testimony includes things like discovery of a murder weapon, finding fingerprints of the defendant on the murder weapon, motive, opportunity, invalid alibis, and the like. Judges routinely instruct juries that they are to consider circumstantial evidence.

I have tried many fraud cases. In fraud cases, I must prove that the defendant intentionally deceived another. I have yet to see a fraud case where there is direct evidence of the "intent" element of fraud. Intent is a personal, subjective thought process. There are no eyewitnesses to intent other than the one who is deceiving. No one comes right out and says, "Yes, I misled Mr. So and So on purpose! I wanted him to rely on my misrepresentation to his own detriment!" I prove intent through circumstantial evidence: motive, knowledge, opportunity, and so on.

EVIDENCE—CREDIBILITY

Courts also recognize that some evidence is more credible than other evidence. This might be because of the kind of evidence. For example, I was trying a case over whether the drug Vioxx could cause a myocardial infarction (a heart attack). Some studies were double-blinded randomized trials involving thousands of patients. Those studies were more credible than a case report of how the drug worked in a single individual.

Credibility involves many factors, including the reliability of a witness. Credibility is very important. It determines how authoritative the evidence is deemed to be.

I recently tried a case over whether a type of artificial hip implant was defective. The implant was made of a metal ball rubbing against a metal cup. I believed that the metal debris from the rubbing had destroyed the tissue in my plaintiffs' hips (there were five plaintiffs in this trial). I put on my case, setting out the evidence from tissue samples, from documents, and from an array of experts, including one of the world's preeminent orthopedic surgeons who said he never used metal-on-metal hip implants because of concerns over their safety. After I concluded my case, the defendant manufacturer's lawyers began putting on the company's case. One of their witnesses was an orthopedic surgeon who swore that metal-on-metal hip implants were fine.

The witness made a good impression at first, but then I started to cross-examine him. I began my cross-examination by pointing out that the witness had received royalties from implant manufacturers. In other words, he was getting paid by the companies that made products like the one at issue in the case. This was relevant on whether he had an unbiased opinion. The actual transcript of the trial reads,

> **Q.** (by me) "You're one of these royalty type people. You've been paid by my count $6,870,362.69 in royalties, haven't you?"
>
> **A.** "I actually don't accept that number. I don't think it's even been close to that."

I then began to detail what he was paid. I listed one type of implant called a Mallory-Head system where I asserted he'd been paid $1.4 million dollars for that implant alone. The transcript recorded his response,

> **A.** "I think you're getting me mixed up with somebody else. I've never had royalty in the Mallory-Head system . . . I think you're just making things up. I'll try to keep you on the straight and narrow, but already you have said things that are untrue."

At this point credibility was in play, both his and mine. If I could prove he had received those royalties, the jury would know he either had a very poor memory, or he was dishonest in his testimony. Either way, his credibility would be shot.

The judge rested us for the day, and we started again the next morning. I went straight back to the credibility issue. The record from the next morning reads,

> **Q.** "Sir, one of the things you said yesterday that I found disturbing—it's on page 248 of the record starting at line 12. You said to me: 'I think you're just making things up.' And you said it with earnestness in your voice. Do you remember that testimony?"
>
> **A.** "Yes, I do."

I then began showing check after check labeled "royalty payment" made out to the doctor, mailed to his home address, for the Mallory-Head system, and showing that for years he regularly received royalty payments and that they added up well in excess of the amount I had asserted.

The jury had heard this doctor's evidence, but now his credibility was next to nothing. He wasn't honest, and it was evident. That called into question the entirety of his testimony. Now just because someone is dishonest, it doesn't mean that everything they say is wrong. But it increases caution and suspicion about what they say, especially if it is solely opinion testimony.

So as I weigh evidence, and as a jury weighs evidence in the legal system in a trial, nothing is taken at face value. It needs to be weighed. Motives of the source should be examined. Credibility should be assessed.

BURDEN OF PROOF

Here is one more important trial concept—the burden of proof. This is a basic concept about which side has the burden or obligation to prove an issue.

I spend most of my professional life as a plaintiff's lawyer. (In litigation, the person bringing the case is called the *plaintiff*.) That means that day in and day out, across the country, I go into courts before judges and juries to prove that my client has been wronged, that such wrong caused a damage, and that my client is entitled to recovery for that damage.

How is that done? I have what the law calls a *burden of proof*. I must prove certain things to allow my client to recover. If I am unable to prove my case, then my client loses. It is that simple.

Now while I am the lawyer for the aggrieved, called the *plaintiff's lawyer*, there is a lawyer for the party or parties on whom I am placing the blame. These lawyers are called *defense lawyers*. They defend those accused of wrongdoing. If I, as the plaintiff's lawyer, am unable to prove my case, if I am unable to carry my burden of proof, then

the defense wins. The defense lawyer doesn't have to do anything at all to win if I haven't first proven my case.

In court there are special procedures built around this understanding. When presenting evidence and the case, the plaintiffs always go first. As the plaintiff's lawyer, I begin the trial using witnesses and documents to prove my case. After I "rest," it is the defense lawyer's turn. Before the defense lawyer starts, however, that lawyer can ask the judge to stop the case immediately, right in the middle, as it were. The defense lawyer stands up and asks the judge, "Your honor, the defense asks for a directed verdict." In other words, "Direct that the plaintiff loses because the plaintiff hasn't carried the burden of proof." If the plaintiff doesn't offer sufficient proof, the plaintiff loses. Game over.

Once the plaintiff has offered sufficient proof to allow one, if one chose to believe such evidence, to vote in favor of the plaintiff, then the defense puts on a case refuting the evidence of the plaintiff. Once all the evidence is in, the jury (or judge in certain cases), decides whether the evidence proves the plaintiff's case. This is the final decision of who wins, but even here, it is a question of whether the plaintiff has carried the burden of proof. Has the plaintiff proven her or his case?

Something important happens here. Enforcing the burden of proof means that some cases that are valid are still lost in a court of law. For example, if my case centers on Driver Dan running a red light and crashing into Plaintiff Patty, then I must prove Driver Dan ran the red light. Now Driver Dan might have actually run the red light, but I might not have any proof. Driver Dan might be dead and unable to testify. Plaintiff Patty might be in a coma and unable to testify. There might be no witnesses to testify. So I am left unable to carry the burden of proof, and I lose the case, even though actual historical events were that Driver Dan ran the red light.

Who has the burden of proof is key in any case. If I get to assume that Driver Dan ran the red light *unless Driver Dan can prove otherwise*,

then I can win the case with no witnesses. Driver Dan would not be able to carry his burden of proof. Of course, in American courts, such is not the case. The plaintiff is required to prove the case first, not the defendant, although if the defendant is asserting their own affirmative contention, they may have a burden to prove that contention. The same principle is true in a criminal case. The state, through the prosecutor, has the burden of proof. The defendant is presumed innocent until proven guilty. In some cases, the defendant may truly *be* guilty, but without proof, even that defendant can go free.

The burden of proof will be important in this book. I have tried to bring together authentic and credible witnesses for the various issues under consideration. (So when I write up why atheists don't believe in God, I use atheist sources.)

American courts have evolved rules and procedures from over a thousand years of society's efforts to determine truth. These rules are the latest and greatest tools at hand for discerning important matters of life and liberty. Some of history's greatest minds have sculpted and refined these rules so that logic and common sense, when applied to properly handled evidence, can produce judgments worthy of society's confidence.

I will use that approach, use those rules of logic, common sense, and fair play, to examine the tenets of atheism, agnosticism, and scientific materialism. I do so admittedly from a Christian perspective, but not out of defensiveness for what I believe. I try to approach each argument to see if I might be wrong. I want truth. The courtroom gives me the best tools for finding that truth. So that is the scope of this project.

With this legal primer in place, and with appropriate explanations of methodology and my disclosure of personal faith, let me begin.