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Informal Fallacies in Legal Argumentation

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INFORMAL FALLACIES IN LEGAL ARGUMENTATION

KEVIN W. SAUNDERS*

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I. INTRODUCTION

Fallacies are simply invalid or faulty arguments. The fallacies that attract the attention of logicians are those that are faulty, but not obviously flawed—“arguments which, although incorrect, are psychologically persuasive” or those “that may seem to be correct, but that prove[], upon examination, not to be so.”¹ Formal fallacies are mistakes in formal arguments, and this class is usually defined widely enough to include faulty syllogisms.² Informal fallacies are the remaining fallacies—the errors that occur in informal debate.³

Judge Aldisert’s recent book on logic and law,⁴ as well as the short lessons on informal logic contained in several of his opinions,⁵ reflects legal scholars’ interest in informal fallacies. The judiciary’s interest is more widespread than Judge Aldisert’s alone. Opinions from a wide variety of courts discuss informal fallacies identified in briefs, testimony, and other opinions.⁶

1. IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 92 (8th ed. 1990); accord IRVING M. COPI & KEITH BURGESS-JACKSON, INFORMAL LOGIC 111-12 (2d ed. 1992).

2. A syllogism is a “deductive argument in which a conclusion is inferred from two premises.” COPI & COHEN, *supra* note 1, at 191. The fallacies of affirming the consequent and denying the antecedent might more properly be considered formal fallacies. However, because courts often classify them as *non sequiturs*, a form of informal fallacy, they are discussed in this Article. See *infra* notes 197-210 and accompanying text.

3. See COPI & BURGESS-JACKSON, *supra* note 1, at 112.

4. RUGGERO J. ALDISERT, LOGIC FOR LAWYERS (2d ed. 1992).

5. See, e.g., First Interstate Bank of Utah, N.A. v. IRS, 930 F.2d 1521, 1526 (10th Cir. 1991); Kobell v. Suburban Lines, 731 F.2d 1076, 1100 (3d Cir. 1984) (Aldisert, J., concurring); Fox v. United States Dep’t of Hous. & Urban Dev., 680 F.2d 315, 319 (3d Cir. 1982); United States v. Jannotti, 673 F.2d 578, 622 (3d Cir.) (en banc) (Aldisert, J., dissenting), *cert. denied*, 457 U.S. 1106 (1982); Ungar v. Dunkin’ Donuts of Am., Inc., 531 F.2d 1211, 1225 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

6. In addition to the opinions discussed in this Article, see, e.g., Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511, 521 & n.8, 522 (10th Cir. 1987); Finberg v. Sullivan, 634 F.2d 50, 84-85 (3d Cir. 1980) (en banc) (Aldisert, J., dissenting); Aaron v. State, 192 So. 2d 456, 459 (Ala. Ct. App. 1966); Miles v. Idaho Power Co., 778 P.2d 757, 769 (Idaho 1989) (Bristline, J., concurring); Cunningham v. MacNeal Memorial Hosp., 266 N.E.2d 897, 904 (Ill. 1970); Seegers Grain Co. v. United States Steel Corp., 577 N.E.2d 1364, 1370 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 140 (Ill. 1991); State v. Montigue, 605 P.2d 656, 662 (Or.) (en banc) (Lent, J., concurring in part and dissenting in part), *cert. denied*, 449 U.S. 846 (1980); Amadio v. Levin, 501 A.2d 1085, 1092 (Pa. 1985) (Cirillo, P.J., dissenting); Commonwealth v. Leet, 585 A.2d 1033 (Pa. Super. Ct. 1991), *appeal granted*, 602 A.2d 857 (Pa. 1992); Borello v. U.S. Oil Co., 388 N.W.2d 140, 144 (Wis. 1986); State v. Meddaugh, 435 N.W.2d 269, 272 (Wis. Ct. App. 1988), *review denied*, 439 N.W.2d 143 (Wis. 1989).

With minor exception, all the discussions of informal fallacies in legal arguments simply assume that the arguments that are fallacies in other areas of debate are also fallacies in legal argumentation. However, considerations that are irrelevant and perhaps even misleading in areas of purely rational discourse, such as philosophy, may be relevant and enlightening in law. With its mixture of rational debate of legal issues, inquiry into factual issues, and concern with the demands of justice, law may tolerate a wider variety of arguments.

This Article examines each of the informal fallacies common in legal writing and argument.⁷ Examples from case law are used to explain the nature of each fallacy. The Article also considers whether an argument that is an informal fallacy in other areas is fallacious in the context of legal argument.

II. VARIETIES OF INFORMAL FALLACIES

A. *Argumentum ad Hominem*

The *argumentum ad hominem*, or “argument directed to the person,”⁸ is one of the most common informal fallacies. Rather than attacking the reasoning of the opponent’s argument, the *ad hominem* attacks the person offering the argument. Instead of addressing the issue presented by an opponent, the *ad hominem* makes the opponent the issue. The *ad hominem* is a fallacy because a speaker’s character and circumstances demonstrate nothing about the validity or invalidity of the speaker’s argument or about the truth or falsity of the speaker’s conclusions.⁹ Even persons of wretched character sometimes offer valid arguments, and the fact that a conclusion coincides with the speaker’s economic or political interests has no bearing on the truth or falsity of the conclusion.

Ad hominem arguments may be characterized as either abusive or circumstantial. The abusive variety attempts to disparage the character of the opponent with the hope that the audience’s negative feeling toward the opponent will be transferred to the opponent’s argument.¹⁰ The circumstantial variety focuses not on a character flaw, but rather on the opponent’s

7. Informal fallacies in addition to those discussed in this Article exist. One fallacy discussed in most logic texts is the *argumentum ad baculum*, or the appeal to force. See, e.g., COPI & COHEN, *supra* note 1, at 105. This fallacy plays such a limited or nonexistent role in legal argument that it is not discussed here. Other fallacies not discussed also have limited application or are sufficiently similar to those discussed, obviating the need for separate analysis.

8. COPI & BURGESS-JACKSON, *supra* note 1, at 127.

9. COPI & COHEN, *supra* note 1, at 97.

10. See COPI & COHEN, *supra* note 1, at 97-98.

potential bias that results from the opponent's circumstances.¹¹ The line between the two may not be easy to draw. The response "What else would you expect from a communist?" may be an abusive *ad hominem* because the respondent might hope that the audience disrespects communists and will thus refuse to accept the communist's argument. This statement may also be circumstantial if it suggests that the opponent's argument is based on or intended to further communist principles.

Courts have recognized the fallacy behind an *ad hominem* in a variety of circumstances. In *Ford Motor Co. v. EEOC*¹² Justice O'Connor noted the dissent's claim that the majority had "'misrea[d]' the Court of Appeals' decision, 'transform[ing] a narrow Court of Appeals ruling into a broad one, just so [we could] reverse and install a broad new rule of [our] own choosing,' rather than attempt, as best we are able, to decide the particular case actually before us."¹³ Believing that the Court's framing of the issue was correct and fair, Justice O'Connor "decline[d] the opportunity to address further this *ad hominem* argument."¹⁴

The dissent's argument is an *ad hominem*, at least in part. Admittedly, a simple claim that the majority misread the lower court's opinion would not be directed at the character or circumstances of the majority and hence would not be an *ad hominem*; however, the claim that the misreading was the result of an improper (or even legitimate) motive—the desire to establish a broad new rule—is an *ad hominem*. Rather than merely arguing that the majority's view is incorrect, the dissent strongly suggested that the majority had a motive to transform the lower court ruling. Even if the majority did have such a motive, the dissent's *ad hominem* does not establish that the majority acted solely on that motive or that the majority's argument is flawed.

In *United States v. Kimberlin*¹⁵ the government asked the court to

11. *Id.* at 98-100. Professor Copi includes as part of the circumstantial variety of *ad hominem* a suggestion of inconsistency. *Id.* at 100. However, showing that a speaker's argument is inconsistent with other of the speaker's positions may not be employing a fallacy at all. If the inconsistency is real, the speaker must give up one of the positions.

Professor Copi also states that an accusation of hypocrisy is a form of the *ad hominem* fallacy. COPI & BURGESS-JACKSON, *supra* note 1, at 129. Resting on a claim of the opponent's hypocrisy to prove one's position is an informal fallacy because demonstrating hypocrisy shows only that the opponent fails to adhere to the position espoused, not that the opponent's position is incorrect. *Id.* This variety of *ad hominem* is similar to a *tu quoque*. See ALDISERT, *supra* note 4, at 11-12 to -13. The fallacy of *tu quoque* is discussed *infra* part II.O.

12. 458 U.S. 219 (1982).

13. *Id.* at 221 n.1 (alterations in original) (citation omitted).

14. *Id.*

15. 898 F.2d 1262 (7th Cir.), *cert. denied*, 498 U.S. 969 (1990).

strike the reply brief filed on behalf of the appellant. The court granted the motion and quoted from the reply brief to demonstrate the brief's tenor: "Judge Dillin's spitefulness toward Kimberlin and the casuistry of AUSA Thar in defending Judge Dillin are apparent from what we have presented in our original brief and from the government's brief in response. The government's response by AUSA Thar is an exercise in sophistry."¹⁶ Further, the brief stated: "Judge Dillin and AUSA Thar have deliberately neglected their duties in this case."¹⁷ The brief concluded:

"We have . . . demonstrated the bad faith of AUSA Thar in defending the inexcusable rulings of Judge Dillin. The personal animus of both of them toward Kimberlin and AUSA Thar's desire to ingratiate himself with Judge Dillin have already delayed the consideration of the appeal on the merits for six months and required appointed counsel and the court to spend many unnecessary hours. We therefore respectfully ask the court in a published opinion to impose personal sanctions against AUSA Thar and to censor [sic] Judge Dillin."¹⁸

The court found no indication that either the judge or the prosecutor bore a grudge against the defendant. Accordingly, the court labelled the attack an *ad hominem* and granted the motion to strike.¹⁹ The appellant's brief attacked the character and motive of both the trial judge and prosecutor rather than the reasoning behind the lower court's rulings.

Of course, prosecutors have also been known to employ an occasional *ad hominem*. The court in *United States v. Biasucci*,²⁰ found inappropriate the prosecutor's addressing the defense counsel as "you sleaze," "you hypocritical son—" and describing defense counsel as "so unlearned in the law."²¹ Despite finding that the remarks were improper, the court declined to reverse the conviction because the remarks were "inconsequential, isolated aberrations . . . not . . . made in bad faith" and did not prejudice the defendant.²²

The Supreme Court has warned counsel against using the *ad hominem*. In *United States v. Young*²³ the Court stressed the duty of prosecutors and defense counsel to refrain from personal attacks on opposing counsel.²⁴

16. *Id.* at 1265 (quoting reply brief).

17. *Id.* at 1265-66 (quoting reply brief).

18. *Id.* at 1266 (quoting reply brief).

19. *Id.*

20. 786 F.2d 504 (2d Cir.), *cert. denied*, 479 U.S. 827 (1986).

21. *Id.* at 514 n.9.

22. *Id.* at 514.

23. 470 U.S. 1 (1985).

24. *See id.* at 9.

The Court also noted that counselors do not gain license to engage in *ad hominem* attacks simply because they have been provoked by their opponents.²⁵ Moreover, an *ad hominem* directed toward the judge, whether abusive or circumstantial, is also unacceptable and may even lead to a citation for contempt.²⁶

The recognition of the *ad hominem* as irrelevant and unacceptable in legal argument appears to be well established. However, situations exist in which such arguments are both perfectly acceptable and common practice. The Federal Rules of Evidence allow the introduction of evidence of both bad character and bias for the purpose of attacking a witness's credibility.²⁷ The introduction for impeachment purposes of evidence concerning a witness's bad character appears on its face to be an abusive *ad hominem*; impeachment by a showing of bias seems to be a circumstantial *ad hominem*. Yet, both are allowed in counsel's attempt to discredit a witness's statements.

The allowance *ad hominem* attacks on witnesses but not on judges or opposing counsel is explained not by the respective statuses of the various actors in the legal system, but rather by the issues the individuals address. Philosophers recognize the *argumentum ad hominem* as a fallacy because the argument is irrelevant to the sort of rational, nonempirical debate in which philosophers engage. Theoretically, judges and attorneys similarly engage in rational debate—they offer arguments regarding points of law. The characters and circumstances of judges and attorneys do not speak to the validity of their arguments.

On the other hand, witnesses speak to questions of fact. A witness's contribution is not a rational argument that should stand or fall on its own strength. A witness offers empirical information, which cannot be tested by an examination of its logical strength because it has no such strength.

25. See *id.* at 10 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE 4.99 (1980)).

26. See 18 U.S.C. § 401(1) (1988) ("A court of the United States shall have power to punish . . . such contempt of its authority, and none other, as . . . [m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."). Although questions concerning summary adjudication exist, abusive comments toward the court are grounds for contempt. See Teresa S. Hanger, Note, *The Modern Status of the Rules Permitting a Judge to Punish Direct Contempt Summarily*, 28 WM. & MARY L. REV. 553, 561 n.42, 562 (1987).

27. See FED. R. EVID. 607 ("The credibility of a witness may be attacked by any party, including the party calling the witness."); *id.* 608 (character for truthfulness or untruthfulness); *id.* 609 (prior criminal conviction); *id.* 611(b) (scope of cross-examination); *United States v. Werme*, 939 F.2d 108, 114 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1165 (1992); *United States v. Honneus*, 508 F.2d 566, 572 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *Tinker v. United States*, 417 F.2d 542, 544 (D.C. Cir.), *cert. denied*, 396 U.S. 864 (1969).

Therefore, opposing counsel must discredit a witness's testimony by exposing a character flaw that indicates a lack of veracity or by showing why the witness has an incentive to lie or to see things in a slanted way. Even expert witnesses do not offer arguments; rather, they simply state conclusions after establishing the predicate facts. Because expert witnesses offer no rational arguments, they also must be attacked by questioning their expertise or incentives for testifying.

B. Argumentum ad Misericordiam

In an *argumentum ad misericordiam*, or an appeal to pity, the audience is asked to accept an argument not because of the strength of the argument, but rather because of the speaker's piteous circumstances.²⁸ Since whatever pity one may feel for a speaker has nothing to do with the validity of the arguments offered by that speaker, the appeal to pity is an informal fallacy. Nevertheless, courts regularly accept such arguments.

For example, in *People v. Ryan*²⁹ the court reduced from one year to six months the defendant's sentence for obstructing governmental administration. The court's reason was "the completeness of the defendant's disgrace, his discharge from the Department, his loss of pension, and the piteous spectacle of his stricken wife and handicapped children, all utterly reliant on his presence."³⁰ The court recognized that it was responding to a plea *ad misericordiam*, but stated that when confronted with such a plea the court "must take a broader view of all the facts and circumstances, measuring justice and the rights of society, punishment and the avoidance of cruelty."³¹ The court added that "mercy, in its proper place, is an attribute of an appellate court."³²

In a civil context, the court in *State ex rel. Commissioners of Land Office v. Amoco Production Co.*³³ considered an oil and gas lease that was to continue "as long . . . as oil or gas . . . [was] produced in paying quantities."³⁴ Production at the well subject to the lease ceased because of mechanical difficulty beyond the lessee's control. The lessee immediately drilled a second well and restored production. Because the lease produced no royalties for a time, the lessor asked that the lease be cancelled. The

28. COPI & COHEN, *supra* note 1, at 104; *cf.* COPI & BURGESS-JACKSON, *supra* note 1, at 131-32 (describing the fallacy of an emotional appeal to pity).

29. 327 N.Y.S.2d 207 (App. Div. 1971).

30. *Id.* at 209.

31. *Id.*

32. *Id.*

33. 645 P.2d 468 (Okla. 1982).

34. *Id.* at 470 (quoting lease agreement).

court refused, noting that “[c]ancellation of the lease under these circumstances would be harsh and unfair.”³⁵ The court recognized the *ad misericordiam* nature of the argument against cancellation, quoting language from cases tracing back to the views of Justice Cardozo:

“There is no undeviating principle that equity shall enforce the covenants of a mortgage, unmoved by an appeal *ad misericordiam*, however urgent or affecting. The development of the jurisdiction of the chancery is lined with historic monuments that point another course One could give many illustrations of the traditional and unchallenged exercise of a like dispensing power. It runs through the whole rubric of accident and mistake. Equity follows the law, but not slavishly nor always.”³⁶

Of course, an *argumentum ad misericordiam* does not always sway a court. In *Fox v. United States Department of Housing & Urban Development*³⁷ the court entered a decree requiring HUD financing for a redevelopment project. Subsequently, mortgage rates changed radically. Judge Aldisert, writing for the court, was unaffected by what he characterized as the *argumentum ad misericordiam* that unless financing were available at a lower rate the project would not be built, and the failure would negatively affect the community.³⁸ The court stated that its “role requires dispassionate and neutral application of settled legal precepts governing consent decrees.”³⁹

An *argumentum ad misericordiam* does not appear to be a fallacy when equitable relief is sought. As one commentator noted:

Since all or almost all equitable remedies are discretionary, the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor’s discretion. . . .

. . . .

The existence of some hardship . . . is undoubtedly an element in equity’s traditional opposition to forfeitures and harsh contracts, and some cases of mistake, impossibility and frustration of contract may contain a large element of hardship.⁴⁰

35. *Id.* at 471.

36. *Id.* at 471 n.1 (quoting *Murphy v. Fox*, 278 P.2d 820, 825 (Okla. 1955) (quoting *Graf v. Hope Bldg. Corp.*, 171 N.E. 884, 886-87 (N.Y. 1930) (Cardozo, J., dissenting))).

37. 680 F.2d 315 (3d Cir. 1982).

38. *Id.* at 319.

39. *Id.*

40. DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 52-53 (1973).

Similarly, an appeal to pity—to the hardships faced by a defendant’s family or to the defendant’s abused background—appears relevant to criminal sentencing that is not subject to strict mandatory guidelines.⁴¹

The acceptability of the *argumentum ad misericordiam* in equity and criminal sentencing is explained by the nature of the decisions to be reached in those contexts. Both equity cases and discretionary sentencing decisions involve attempts to do justice and are thus different in nature from questions of fact or law.⁴² Doing justice requires looking at hardships that already exist and deciding whether imposing a penalty or a remedy would cause a greater hardship in a particular case than normally accompanies that sentence or remedy. In such cases, an *argumentum ad misericordiam* is not a fallacy because it is actually relevant to the decision.

However, if the question under consideration is a factual issue—whether the defendant committed the crime charged or whether the parties agreed to a contract—an appeal to pity is irrelevant; it simply deflects attention away from the facts. Similarly, if the question is one of law—what the elements of a crime charged are or whether mailing or receipt of an acceptance is required to establish the existence of a contract—an *argumentum ad misericordiam* should play no role. Again, such an argument shifts the debate away from what is relevant. Moreover, consideration of pity in such cases introduces the possibility that the fallacy will become the basis of the hard case that makes bad law, which then may be applied inappropriately to future cases in which pity should play no role.

C. Argumentum ad Populum

The *argumentum ad populum*, or the appeal to emotion, attempts to establish its conclusion by associating the conclusion with values the speaker’s audience holds dear.⁴³ The argument is the converse of some uses of the *ad hominem*. In the abusive *ad hominem* the proponent associates the opponent’s argument with negative values, specifically the negative character traits of the opponent.⁴⁴ However, the *ad populum* associates the

41. *But see* COPI & BURGESS-JACKSON, *supra* note 1, at 132. As Professors Copi and Burgess-Jackson noted:

This fallacy of emotional appeal (to pity) is sometimes used with ludicrous effect, as in the trial of a youth accused of the murder of his mother and father with an axe. Confronted with overwhelming proof of his guilt, he pleaded for leniency on the grounds that he was an orphan.

Id.

42. *See* DOBBS, *supra* note 40, at 53 (“The end product of all this is an attempt at balancing all the hardships and equities to reach a fair result . . .”).

43. *See* COPI & COHEN, *supra* note 1, at 103-04.

44. *See supra* note 10 and accompanying text.

proponent's conclusions with positive values. The latter approach is as logically flawed as the former: just as the known liar may offer a valid argument, the popularly accepted argument may be invalid, and the popularly accepted value may be irrelevant to the argument.⁴⁵

*Sigalas v. Lido Maritime, Inc.*⁴⁶ concerned a wrongful death action brought by the wife of a seaman whose death resulted from the incompetence of the ship's surgeon. The court upheld both the trial court's decision that American law was inapplicable and the dismissal of the action on grounds of forum non conveniens.⁴⁷ In arguing for the application of American law and a hearing in an American court, the plaintiff offered a plea for the safety of the American passengers aboard the ship on which her husband died, stressing the need to protect them from medical incompetence.⁴⁸ The court noted that the victim was not an American passenger and, therefore, rejected the plaintiff's argument as an *ad populum*.⁴⁹

*Kobell v. Suburban Lines*⁵⁰ provides another example of an *ad populum* argument. Judge Aldisert, concurring in *Kobell*, disputed the majority's claim that the district court had found anti-union animus by the employer.⁵¹ The concurrence particularly objected to the majority's *ad populum* in

unnecessarily and gratuitously inject[ing] into its analysis an inflammatory hypothetical—not present or suggested in this case: “Posting a sign, for example, that reads ‘No Blacks Need Apply’ or that reads ‘No Union Members Need Apply’ and that succeeds in its objectives is just as effective (and just as offending) a method of discrimination as a point-blank refusal to hire”⁵²

Sometimes values other than those enacted into law play a role in legal analysis. In the line of privacy cases, such as *Griswold v. Connecticut*⁵³ and its progeny, courts have overturned legislative decisions on the basis of nontextual rights. Even those who would criticize judicial activism recognize

45. See also BERTRAND RUSSELL, MARRIAGE AND MORALS 58 (1929) (“The fact that an opinion has been widely held is no evidence whatever that it is not utterly absurd; indeed in view of the silliness of the majority of mankind, a wide-spread belief is more likely to be foolish than sensible.”), quoted in COPI & COHEN, *supra* note 1, at 104.

46. 776 F.2d 1512 (11th Cir. 1985).

47. *Id.* at 1518-19.

48. *Id.* at 1518.

49. *Id.* at 1518-19.

50. 731 F.2d 1076 (3d Cir. 1984).

51. *Id.* at 1100 (Aldisert, J., concurring).

52. *Id.* at 1100 n.6 (quoting majority opinion).

53. 381 U.S. 479 (1965).

that grounds exist for such noninterpretive review when those grounds are based on strongly held societal values.⁵⁴ The argument to the values of the people is only a fallacy when no legitimate relationship between the debate and those values exists. In the privacy context, the argument that the legislature's decision runs counter to the will of the people depends heavily on identifying the values held by the people.

D. Argumentum ad Vericundiam

The *argumentum ad vericundiam* is an appeal to authority.⁵⁵ Logicians recognize that such an appeal is not always fallacious.⁵⁶ For example, the position held by a noted scientist is entitled to great weight if the question at issue is within the scientist's field of expertise; however, according similar weight to the same scientist's political views would be a fallacy. Whether an appeal to authority is a fallacy may depend on both the type of argument offered and the amount of weight given to the authority. When empirical issues are involved, the views of an expert who has devoted much effort to relevant empirical studies are probably entitled to great weight. In purely rational argument, however, an appeal to authority should carry less weight. For example, a reference to the position of a noted philosopher is hardly dispositive in philosophical debate even though the allusion introduces the views of an individual who has spent some time thinking about the issue.

In legal argument the *argumentum ad vericundiam* might not appear to be a fallacy at all. Although recitation of Plato's views may not end a philosophical argument, citation to the Supreme Court certainly goes a long way toward resolving a legal debate. Indeed, a lower court will be bound by the Supreme Court's opinion, and even the Supreme Court itself may be reluctant to reject its prior position. Despite the acceptable role in legal argument of an appeal to authority, courts have recognized instances in which such an appeal is fallacious.

In *United States v. Howard*⁵⁷ the court found the following statements in the prosecutor's final rebuttal to be an "unwarranted appeal to the

54. See AMERICAN ENTERPRISE INSTITUTE, AN IMPERIAL JUDICIARY: FACT OR MYTH? 36 (1979) (comment of then Professor Scalia) ("I am not saying the Court always has to go along with the consensus of the day. The Court may find that the traditional consensus of the society is against the current consensus. If that is the case, then the Court overrides the present beliefs of society on the basis of its historical beliefs. I can understand that.").

55. See COPI & COHEN, *supra* note 1, at 95-96.

56. See *id.* at 95.

57. 774 F.2d 838 (7th Cir. 1985).

authority and prestige of the United States Attorney's Office":⁵⁸

"We have not tried to deceive you, ladies and gentlemen. We have tried to bring out the truth, and I can tell you . . . when I stood up, took my oath to be an Assistant United States Attorney, it was one of the proudest days of my life, and I am not going to jeopardize it with misconduct or deception. My job is to bring out the truth and see that justice is done in this case, and that is what we have been doing in this case."⁵⁹

The court was troubled by the prosecutor's appeal to the authority of the prosecutor's office, and perhaps of the United States, to add force to his argument. However, the court concluded that the statements were understandable in light of defense counsel's *ad hominem* attacks on the prosecutor.⁶⁰

The dissent in *Cresap v. Pacific Inland Navigation Co.*⁶¹ presented an interesting suggestion of an *argumentum ad vericundiam*. Justice Neill suggested that including in the jury instructions references to the cases and statutes from which the instructions were derived might at times be an illegitimate appeal to authority. Justice Neill opined:

I am reluctant to accept as harmless the additions of source references where the statute, rule or regulation has no dispositive effect, as in this case. There is danger inherent in the very nature of such additions. When the source of the law is not significant per se, the only effect of citation is rhetorical. In formal logic the device is known as *argumentum ad vericundiam*, playing upon the prestige of the source. At best, its use in instructions needlessly injects a misleading element into the legal search for truth. At worst, the balance of images created by such additions may be unduly prejudicial to one of the parties.⁶²

The fallacy is difficult to see here. The jury is supposed to accept the judge's statement of the law. An *argumentum ad vericundiam* leads only to greater likelihood of acceptance of that which is supposed to be unquestioned, not to the acceptance of a statement on the authority of a nonexpert.⁶³

58. *Id.* at 847.

59. *Id.* (quoting prosecutor's final rebuttal argument).

60. *Id.*

61. 478 P.2d 223 (Wash. 1970) (en banc) (Neill, J., dissenting).

62. *Id.* at 228 (Neill, J., dissenting) (citation omitted).

63. Another possible recognition of the fallaciousness of the *argumentum ad vericundiam* might be embodied in the old rule of not allowing an expert witness to

E. Ignoratio Elenchi

The *ignoratio elenchi*, or the fallacy of proving an irrelevant conclusion, is sometimes known as a “straw man” argument.⁶⁴ The fallacy consists of constructing an argument differing from the opponent’s and then, instead of attacking the opponent’s argument, attacking the argument of the straw man.⁶⁵

Judge Aldisert, concurring in *Kobell v. Suburban Lines*,⁶⁶ accused the majority of employing an *ignoratio elenchi* when it asserted that the district court had found anti-union animus on the part of the bus line and then attacked that finding. According to Judge Aldisert, the conclusion that the district court found such animus was “artificial[] and self-constructed by the majority.”⁶⁷ He explained: “At the very best, the technique is known as the fallacy of irrelevance, often referred to as irrelevant conclusion or *ignoratio elenchi*: the material fallacy of attacking something that has not been asserted. In the vernacular, this is known as erecting a strawman and then striking it down.”⁶⁸

In *State v. Bruens*⁶⁹ the defendant appealed his conviction for sexual assault on a child, claiming that the testimony of the victim’s mother about a statement of the victim should not have been admitted.⁷⁰ As the court characterized it, the defendant attacked the statement’s admission by contesting the application of the “constancy of accusation” exception⁷¹ to the hearsay rule.⁷² In his concurring opinion, Judge Borden noted that the constancy of accusation exception was inapplicable because the victim had

testify on ultimate issues, *see, e.g.*, EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 12, at 30 (3d ed. 1984). While the rule may be fading, *see, e.g., id.*, it serves to prevent the jury from being swayed by the authority of the expert in the resolution of the ultimate issues.

64. *See Kobell v. Suburban Lines*, 731 F.2d 1076, 1100 (3d Cir. 1984) (Aldisert, J., concurring).

65. The *ignoratio elenchi* may be broader than the straw man argument, as the former is any argument to an irrelevant conclusion. *See COPI & COHEN, supra* note 1, at 105.

66. 731 F.2d 1076 (3d Cir. 1984) (Aldisert, J., concurring).

67. *Id.* at 1100 (Aldisert, J., concurring).

68. *Id.*

69. 557 A.2d 1290 (Conn. App. Ct.), *cert. denied*, 561 A.2d 946 (Conn. 1989).

70. *Id.* at 1291.

71. *Cf.* FED. R. EVID. 801(d)(1) (“A statement is not hearsay if . . . [t]he declarant testifies at the trial . . . and . . . the statement is . . . (B) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . .”).

72. *Bruens*, 557 A.2d at 1292.

not testified before her mother did—in fact, the victim never testified.⁷³ However, as the State claimed, the mother’s testimony had actually been offered under the excited utterance exception.⁷⁴ Thus, the defendant’s attack was on a straw man.⁷⁵

Professors Dershowitz and Ely⁷⁶ accused the Supreme Court of employing an *ignoratio elenchi* in *Harris v. New York*.⁷⁷ In *Harris* the Court determined that a confession obtained in violation of the *Miranda* rules was nonetheless admissible for impeachment purposes. The *Harris* majority argued: “Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.”⁷⁸ In response, Professors Dershowitz and Ely explained:

[T]he entire argument is a straw man. Of course a defendant has no “right to commit perjury.” But this was hardly [Harris’s] argument. Neither does a defendant have the right to commit murder, and yet the Government may not prove that crime by means of an illegally obtained statement. Nor, indeed, could it introduce such a statement as part of its case in chief in a perjury prosecution. Whether it should be permitted to use it to prove perjury in the context of a trial for a different crime is the question, and it is not answered by denying that there is a right that no one asserted.

The real issue, never addressed by the Court, is where to strike the balance between the state’s interest in challenging the defendant’s credibility and the defendant’s interest in excluding illegally secured evidence.⁷⁹

An apparent straw man argument may not always be a fallacy. Because courts are concerned with the consistency of the law, they are interested in how a principle argued for in one context carries over to other contexts. At oral argument in *Thompson v. Oklahoma*,⁸⁰ counsel for the petitioner

73. *Id.* (Borden, J., concurring).

74. *See id.*; cf. FED. R. EVID. 803 (“The following are not excluded by the hearsay rule . . . (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”).

75. *Bruens*, 557 A.2d at 1292 (Borden, J., concurring).

76. Alan M. Dershowitz & John H. Ely, Comment, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971).

77. 401 U.S. 222 (1971).

78. *Harris*, 401 U.S. at 225.

79. Dershowitz & Ely, *supra* note 76, at 1222-23.

80. 487 U.S. 815 (1988) (plurality opinion).

argued that execution of a person who had committed murder while under eighteen years of age was per se cruel and unusual punishment because eighteen is the dominant traditional age of adulthood. When Justice O'Connor turned the questioning to the rule concerning abortions, which requires minors to be treated as adults upon proving individual maturity,⁸¹ she was not raising a straw man; instead, she was questioning whether the ruling requested by the petitioner in *Thompson* could be reconciled with the abortion cases or whether the Court was being led into an inconsistency.

F. *Petitio Principii*

A *petitio principii* is a circular argument, sometimes known as begging the question.⁸² The proponents of such arguments assume the conclusion of the argument offered—they take the proposition for which they are arguing and use it as a premise in the argument. *Petitio principii* arguments are usually disguised because the proposition that serves as both the premise and the conclusion is phrased differently.⁸³

Judge Aldisert, dissenting in *United States v. Jannotti*,⁸⁴ found a *petitio principii* in the majority's analysis. The crime of conspiracy, for which the defendant was charged, required an effect on interstate commerce for the federal court to have jurisdiction. The majority noted the defense's claim of factual impossibility, but recognized that factual impossibility was not a defense to a conspiracy.⁸⁵ However, as Judge Aldisert noted, whether such impossibility denies federal courts jurisdiction is a separate issue.⁸⁶ Judge Aldisert captured the essence of the majority's circular argument as a dialogue between Socrates and Crito:

Soc.: Is there federal jurisdiction?

Cr. : Yes, there is federal jurisdiction.

Soc.: How is there federal jurisdiction?

Cr. : There is federal jurisdiction because factual impossibility of performing a conspiracy is no defense to a charge of conspiracy which may be brought when there is federal jurisdiction.⁸⁷

81. Transcript of Oral Argument at 6, *Thompson v. Oklahoma*, 487 U.S. 815.

82. COPI & COHEN, *supra* note 1, at 102.

83. *Id.*

84. 673 F.2d 578 (3d Cir.) (en banc) (Aldisert, J., dissenting), *cert. denied*, 457 U.S. 1106 (1982).

85. *Id.* at 591-92.

86. *See id.* at 626 (Aldisert, J., dissenting).

87. *Id.*

Furthermore, Judge Aldisert noted:

[T]he reasoning “cooks the books,” to use Professor Neil MacCormick’s phrase, or more popularly, it puts the bunny in the hat by begging the question in a classic *petitio principii*: Instead of *proving* the conclusion (presence of federal jurisdiction), the argument *assumes* it and then argues substantive law: factual impossibility as a defense to the conspiracy charge.⁸⁸

In *Ungar v. Dunkin’ Donuts of America, Inc.*⁸⁹ Judge Aldisert presented another lesson on the *petitio principii*. The issue in *Ungar* was whether franchisees had been coerced to accept burdensome tie-in sales arrangements for real estate, supplies, and equipment. Judge Aldisert characterized as circular the district court’s willingness to base its finding of coercion on the fact that a large number of franchisees accepted the burdensome or uneconomic ties in question. Judge Aldisert observed:

[I]f the question is whether there is a “tie”, proof that large numbers of buyers accepted a burdensome or uneconomic “tie” is not helpful. The “proof” assumes the answer rather than proving it. We understand the argument that proof of acceptance of a burdensome or uneconomic offer of a secondary (“tied”) product is some evidence of coercion. We cannot, however, accept the proposition that such proof, alone, would suffice to establish, *prima facie*, the coercion element of an illegal tie-in claim.⁹⁰

The *petitio principii* is an interesting “informal fallacy” because it is a formally valid argument. Any proposition logically follows from itself, so certainly when a premise is propositionally identical to the conclusion, the premise is relevant to the conclusion. The problem with a *petitio principii* argument is that it is no argument at all, other than the degenerate form of “*p*, therefore *p*.” Although the *petitio principii* purports to be an argument—a premise or set of premises from which the conclusion follows—it does no more than restate the conclusion as a premise. It provides no new information concerning the relationship between the conclusion and any other proposition.

88. *Id.* (citing NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 72 (1978)).

89. 531 F.2d 1211 (3d Cir.) (Aldisert, J.), *cert. denied*, 429 U.S. 823 (1976).

90. *Id.* at 1225.

G. Post Hoc Ergo Propter Hoc

A person who commits the false cause fallacy, generally known as *non causa pro causa*, “mistake[s] what is not the cause of a given effect for its real cause.”⁹¹ *Post hoc ergo propter hoc*, a special version of the false cause fallacy, is an assertion that, because one event occurred before another, the first was the cause of the second.⁹² Although the *post hoc* argument seems to be an easy fallacy to avoid, it appears with some regularity in legal argument. However, its regular appearance is not due solely to the logical shortcomings of attorneys and judges. Some legal opinions explicitly recognize the fallacy, but offer good reasons for concluding that causation exists.⁹³

*Isaksen v. Vermont Castings, Inc.*⁹⁴ presents an example of the *post hoc ergo propter hoc* fallacy. *Isaksen* concerned an antitrust action by a dealer in wood-burning stoves against the supplier of the stoves. The plaintiff’s only proof of damages was a comparison of his average profits for several years before the unlawful activity with his profits during the period of unlawful activity. Judge Posner, writing for the court, noted that oil prices had fallen during that time span and that the wood stove market had become saturated, both of which would negatively affect wood stove sales. He identified the plaintiff’s “proof” as a *post hoc ergo propter hoc* and as an unacceptable method for calculating damages, especially when other factors were involved.⁹⁵

Another example of false cause is found in the plaintiff’s argument in *Public Law Education Institute v. United States Department of Justice*.⁹⁶ The Public Law Education Institute (PLEI) sought, under the Freedom of Information Act (FOIA), certain Department of Justice documents regarding Department guidelines for prosecuting persons failing to register with the Selective Service. When the Department refused to furnish the documents, PLEI filed suit. While the suit was pending, the Department of Justice released two of the documents in an unrelated criminal case. The Depart-

91. COPI & BURGESS-JACKSON, *supra* note 1, at 122; *accord* COPI & COHEN, *supra* note 1, at 101. One may commit the fallacy of false cause by concluding that the correlation of two events shows that one caused the other. The two events could be coincidental, although that becomes less likely as the correlation is shown to be more regular. Alternatively, the events could be correlated because they are both caused by a third, unexamined event, although neither caused the other. Fallacies of this type are *non causa pro causa*.

92. COPI & BURGESS-JACKSON, *supra* note 1, at 122.

93. *See infra* notes 99-101 and accompanying text.

94. 825 F.2d 1158 (7th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988).

95. *Id.* at 1165.

96. 744 F.2d 181 (D.C. Cir. 1984).

ment then informed the court hearing the FOIA complaint that the Department would release only those two documents to PLEI. Thereafter, PLEI requested attorneys' fees and litigation costs as the prevailing party in its FOIA action. Judge Starr, writing for the D.C. Circuit, recognized the fallacy in PLEI's position:

An inference purely from the timing of the release would be an adoption of a *post hoc, ergo propter hoc* analysis and would be contrary to this Court's decisions While the temporal relation between an FOIA action and the release of documents may be taken into account in determining the existence *vel non* of a causal nexus, timing, in itself or in conjunction with any other particular factor, does not establish causation as a matter of law.⁹⁷

The court denied PLEI's claim for fees because it found no indication that the Department's decision to release the documents was influenced by PLEI's action.⁹⁸

In *Bradshaw v. State Accident Insurance Fund Corp.*⁹⁹ the court recognized the *post hoc ergo propter hoc* character of the argument offered, but nevertheless accepted the reasoning. The issue in *Bradshaw*, a workers' compensation appeal, was whether the claimant had demonstrated that her disabling headaches were caused by a work-related foot injury. The claimant rarely had headaches before the injury, but she began having severe headaches while hospitalized with her infected foot. Specialists could not find the cause of the headaches, leaving the court with only the chronological relationship. The court stated:

We have always been hesitant to infer causation from chronological sequence. *Post hoc ergo propter hoc* is a classic logical fallacy. Yet, as Sherlock Holmes noted, when one has excluded all other explanations, whatever remains, no matter how improbable, must be true. . . .

. . . .

The headaches must have some cause. The close connection between their onset and claimant's physical condition, combined with the inability to find any specific cause for them, lead us to agree with claimant's physician's application of Sherlock Holmes' principle. We find it more probable than not that the headaches were caused by the direct effects of claimant's injury and, therefore, that they are compensable.¹⁰⁰

97. *Id.* at 184 n.5 (citations omitted).

98. *Id.* at 184.

99. 687 P.2d 165 (Or. Ct. App. 1984).

100. *Id.* at 166 (citations omitted).

Because the headaches must have had some cause and because all other suggested causes had been eliminated, the court concluded that the antecedent foot injury was the cause of the headaches.¹⁰¹

Reasoning *post hoc ergo propter hoc* will never establish causation with certainty.¹⁰² However, as *Bradshaw* indicates, such reasoning sometimes may be acceptable in the legal context. Because the ordinary civil case requires proof only by a preponderance of the evidence, a court may accept a suggested cause that occurred prior to the effect at issue if all other plausible causes are examined and found wanting. However, greater proof of causation may be required. The *post hoc* inference is best reserved for cases in which experience teaches that such an effect proceeds from the suggested cause with at least some regularity.¹⁰³ The amount of regularity required should vary with the level of proof required. Although the *Bradshaw* court found the inference acceptable in a civil action, courts should treat such an inference with greater suspicion when proof beyond a reasonable doubt is required.

H. Argumentum ad Ignorantiam

The *argumentum ad ignorantiam*, or the appeal to ignorance, is the inference of a proposition's truth from the fact that it has not been proved

101. *Id.* at 166-67. However, the argument that the headaches were caused by neither the foot injury nor the other suggested factors may itself be an informal fallacy because the actual cause might never have been considered. See *infra* notes 104-108 and accompanying text.

102. But, as Hume demonstrated, one can never establish causation with certainty. See 1 DAVID HUME, A TREATISE OF HUMAN NATURE pt. III (L.A. Selby-Bigge ed., 1973); DAVID HUME, AN INQUIRY CONCERNING HUMAN UNDERSTANDING pt. VII (Charles W. Handel ed., 20th prtg. 1980).

103. As Judge Aldisert has noted:

The line between a reasonable inference that may permissibly be drawn by a jury from basic facts in evidence and an impermissible speculation is not drawn by judicial idiosyncracies. The line is drawn by the laws of logic. If there is an experience of logical probability that an ultimate fact will follow a stated narrative or historical fact, then the jury is given the opportunity to draw a conclusion because there is a reasonable probability that the conclusion flows from the proven facts. As the Supreme Court has stated, "the essential requirement is that mere speculation be not allowed to do duty for probative facts [sic] after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Tose v. First Pa. Bank, N.A., 648 F.2d 879, 895 (3d Cir.) (Aldisert, J.) (quoting *Galloway v. United States*, 319 U.S. 372, 395 (1943)), *cert. denied*, 454 U.S. 893 (1981).

false, or the inference of its falsity from a failure to establish its truth.¹⁰⁴

In *Board of Trustees of the Fire & Police Employees Retirement System v. Powell*¹⁰⁵ the court's reasoning apparently rested on the fallacy of *argumentum ad ignorantiam*. In *Powell* the trustees of a fire department retirement system challenged the award of disability retirement to a fire fighter who had contracted hepatitis-B. The hearing examiner awarded the fire fighter the disability retirement, accepting the fire fighter's argument:

"[S]ince he . . . was . . . free of the disease when he was hired as a firefighter . . . and since there is no indication or explanation of how he might have acquired the disease other than through his contacts with victims who he was required to treat as part of his emergency medical technician duties, his incapacity should be held to arise out of and in the course of the actual course of his job."¹⁰⁶

On appeal the court held that the fire fighter failed to establish that his hepatitis had been caused by events related to his employment. As the court acknowledged:

"The law requires proof of probable, not merely possible, facts, including a causal relationship. Reasoning *post hoc, propter hoc* is a recognized logical fallacy, a *non sequitur*. But sequence of events, plus proof of *possible* causal relation, may amount to proof of *probable* causal relation, in the absence of evidence of any other equally probable cause."¹⁰⁷

The *Powell* court recognized that more is required to indicate a probable causal relation than simply eliminating other suggested causes. In this case, inferring that the cause stemmed from a work-related event by eliminating other possible causes would have been an *argumentum ad ignorantiam*. The failure to demonstrate the actual cause, which is also a failure to prove that a work-related event was *not* the cause, does not license the inference that the work-related event was the cause.

The reasoning rejected in *Powell* is similar to the reasoning accepted in *Bradshaw*,¹⁰⁸ but significant differences between the two cases exist. In *Bradshaw* medical experts eliminated the few identifiable potential causes of the claimant's headaches. In *Powell* the range of possible causes was probably wider, and not every possible cause could be identified and

104. COPI & COHEN, *supra* note 1, at 93.

105. 554 A.2d 440 (Md. Ct. Spec. App. 1989).

106. *Id.* at 441-42 (quoting hearing examiner's decision).

107. *Id.* at 443 (quoting *Paul Constr. Co. v. Powell*, 88 A.2d 837, 843 (Md. 1952)).

108. *See supra* notes 99-101 and accompanying text.

examined, and hence eliminated. However, this difference indicates only the quality of the *argumentum ad ignorantiam* the proponents presented; both cases contain informal fallacies. The relevant difference is that in *Bradshaw* the court found causation probable, rather than merely possible, because of the close temporal proximity of the ailments and because of the lack of other identifiable possible causes. In contrast, the *Powell* court found only possible causation; the inference to probable actual causation would have rested too heavily on the failure to prove that a work-related event was not the cause—a clear *argumentum ad ignorantiam*.

I. Argumentum ad Terrorem

The *argumentum ad terrorem*, or appeal to fear,¹⁰⁹ also known as the list of horrors, is an appeal to all of the unacceptable consequences claimed to flow from the proposition opposed. The difficulty in identifying instances of this fallacy is that, when a policy decision is required, an examination of the consequences of that decision is certainly reasonable. The following case exemplifies the role a list of horrors can play in a policy decision.

In *Borer v. American Airlines, Inc.*¹¹⁰ nine children sought to recover for loss of parental consortium from the manufacturer of a lighting fixture that fell on their mother. The court denied recovery, rejecting the theory that recovery should be available when a foreseeable injury occurs to a legally recognized relationship.¹¹¹ The court recited a list of horrors to show that a line must be drawn:

Patricia Borer . . . foreseeably has not only a husband (who has a cause of action . . .) and the children who sue here, but also parents whose right of action depends upon our decision in the companion case . . .; foreseeably, likewise, she has brothers, sisters, cousins, inlaws, friends, colleagues, and other acquaintances who will be deprived of her companionship.¹¹²

Because an action on behalf of all such persons related to the accident victim could not be allowed, the court had to make a policy decision to determine where to draw the line. Children ended up on the nonrecovery side of that line.¹¹³

109. COPI & BURGESS-JACKSON, *supra* note 1, at 131.

110. 563 P.2d 858 (Cal. 1977) (en banc).

111. *Id.* at 861.

112. *Id.* at 861-62.

113. *See id.* at 866.

Justice Mosk, in dissent, recognized the fallacious nature of the majority's argument:

I cannot subscribe to the majority's *ad terrorem* argument for determining the proper place to draw such a line. The majority raise the spectre of liability not only to the victim's spouse but also to a Gilbert and Sullivan parade of "his sisters and his cousins, whom he reckons up by dozens," then dismiss that possibility with the unimpeachable observation that no one is suggesting the latter be compensated. The implication lingers, however, that such demands will become irresistible if the rights of the victim's children are recognized in the case at bar.

. . . [T]he rights of a proposed new class of tort plaintiffs should be forthrightly judged on their own merits, rather than by indulging in gloomy speculation on where it will all end.¹¹⁴

While Justice Mosk concluded that the decision should be made on the merits rather than on gloomy speculation, the majority also recognized that a policy decision was required. Certainly such a policy decision must take into account the question of sisters and cousins, and the list of horrors may simply indicate that a line must be drawn. This *ad terrorem* is a fallacy only because it reaches the conclusion that the children at issue must not be allowed to recover. If children can be distinguished from the other relatives and friends, the list of horrors is characterized, as Judge Aldisert suggests, by the appeal to *exaggerated* consequences.¹¹⁵

The *ad terrorem* may take on a constitutional cloak when First Amendment rights are involved. In *United States v. John Doe 819 (Model Magazine) (In re Grand Jury Subpoena: Subpoena Duces Tecum)*¹¹⁶ the Fourth Circuit found unreasonable and oppressive subpoenas duces tecum requiring videotape distributors to furnish videotapes that allegedly depicted sexually explicit conduct.¹¹⁷ The concurrence noted:

When the grand jury subpoenas the films or cassettes sold by a distributor, it does more than require the distributor to deliver one copy of these items; it puts the distributor and everyone in the community on notice that if they continue to sell such matter, they will be investigated and prosecuted. So long as the objects of the subpoena power are patently obscene, such *ad terrorem* tactics may escape constitutional censure. But the border zones of constitutional liberty must remain free of encroachment. Faced with sufficiently broad subpoenas and sufficient-

114. *Id.* at 870 (Mosk, J., dissenting).

115. See ALDISERT, *supra* note 4, at 11-18.

116. 829 F.2d 1291 (4th Cir. 1987).

117. *Id.* at 1301.

ly serious threats of indictment, not only distributors—but the general community of artists, sculptors, painters and photographers may be reluctant to render erotic or sensual depictions of any sort, including those that would not be found obscene. Subpoenas of this kind could deal a terrible blow to the vitality of artistic life, for the artist’s imagination should not be chained to what conventional tastes deem polite and acceptable.¹¹⁸

As Judge Wilkinson’s observation demonstrates, the “chilling effect” tactics sometimes used in First Amendment controversies often take the form of an *argumentum ad terrorem*. But again, for such an argument to be an informal fallacy, the list of horrors must be exaggerated.

J. Argumentum ad Antiquitatem

Judge Aldisert defines the *argumentum ad antiquitatem*, or appeal to the old or the ages, as “the fallacy that holds that determinations and customs of our fathers and forebears must not be changed.”¹¹⁹ This is the fallacy Justice Holmes was addressing when he said:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹²⁰

Despite Justice Holmes’s comment, this appeal to the ages is common in constitutional debate, in which the framers’ intent plays such a central role.

*Marsh v. Chambers*¹²¹ provides a good example of an appeal to the ages and to history. *Marsh* involved a challenge to the constitutionality of the Nebraska legislature’s practice of opening each session with a prayer by a chaplain paid with public funds. The Supreme Court chose not to rely on the analysis of *Lemon v. Kurtzman*,¹²² then the current test for Establishment Clause violations, but instead turned to history for its justification:

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of

118. *Id.* at 1304 (Wilkinson, J., concurring).

119. ALDISERT, *supra* note 4, at 11-17. Judge Aldisert also includes in his list of fallacies an *argumentum ad novitatem*, or appeal to novelty, *id.* at 11-18. But, not surprisingly, such an appeal is infrequent to nonexistent in legal argument.

120. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

121. 463 U.S. 783 (1983).

122. 403 U.S. 602 (1971).

this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.¹²³

The Court continued its trek through history, noting the Continental Congress's practice of opening its sessions with prayer offered by a paid chaplain and the first Congress's similar practice. The Court also noted that Congress reached the final agreement on the language of the Bill of Rights only three days after authorizing the appointment of paid chaplains. This coincidence indicates that Congress did not view the practice to be in conflict with the Establishment Clause.¹²⁴

The Court recognized the general fallacy of resting on history alone to resolve anything other than a historical debate, but appreciated that constitutional law provides a special role for history. As the court stated:

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent. An Act “passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.”¹²⁵

If the Constitution means what the framers intended it to mean, then history is the key to finding that intent;¹²⁶ therefore, the *argumentum ad antiquitatem* may not be a fallacy in constitutional law.

Even outside the area of constitutional law, legal argument regularly employs the *argumentum ad antiquitatem* in a nonfallacious manner. The common-law system relies on courts taking a consistent position for an extended period of time. In a system that depends on stare decisis, an established view has strength based solely on its having been held in the past, and only a strong argument will lead a court to depart from that view. Although stare decisis appears to rest on an *argumentum ad antiquitatem* fallacy, the consistency of the doctrine has sufficient value to justify reliance on a jurisdiction's legal history.

123. *Marsh*, 463 U.S. at 786.

124. *Id.* at 787-88.

125. *Id.* at 790 (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

126. Insistence that the Constitution means what the framers intended it to mean may itself be a form of *argumentum ad antiquitatem*, at least to the extent that the position is based on a belief that the wisdom of that era is entitled to special deference.

K. Accident and Hasty Generalization

The fallacy of accident, also known as *dicto simpliciter*, and the fallacy of hasty generalization, also known as converse accident, are fallacies found in the application and formulation of rules.¹²⁷ The fallacy of accident occurs in applying a general rule to a specific situation in which the rule is inappropriate because of the situation's "accidents," or individual facts; the mistake is in taking general rules as too general.¹²⁸ General rules are developed from consideration of general, common situations. When a situation is exceptional because of its accidents, an exception to the rule must exist.

The fallacy of hasty generalization is the converse of the fallacy of accident. It is the formulation of a general rule from an examination of situations that are, in fact, special.¹²⁹ For example, such an error occurs in statistical studies when the sample is not representative of the population. Hasty generalization occurs in argument, including legal argument, when the cases under consideration share some accident or accidents, and a general rule is formulated from those cases. A rule is a hasty generalization if it does not recognize the accidental features of the cases and is stated as a rule of general application. Legal arguments contain fallacies of both kinds.

In *Shook v. Crabb*¹³⁰ the dissent recognized a *non sequitur*¹³¹ in the majority opinion, but did not identify the mistake more specifically. In *Shook* a wife's estate brought a wrongful death action against the estate of her husband. The majority held that the trial court should not have applied the doctrine of interspousal immunity to grant summary judgment for the defendant.¹³² The majority dismissed the argument that allowing negligence suits between spouses is inimical to the trust and harmony so important to a marriage. The court quoted Professor Prosser for the conclusion that the damage to the marriage had already been done by the commission of the tort.¹³³

The dissenting opinion indicates the relationship between the fallacies of accident and hasty generalization:

127. See ALDISERT, *supra* note 4, at 11-20 to -21.

128. See *id.* at 11-20.

129. See *id.* at 11-21.

130. 281 N.W.2d 616 (Iowa 1979) (en banc).

131. See *infra* part II.Q.

132. *Shook*, 281 N.W.2d at 620.

133. See *id.* at 619 (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 863 (4th ed. 1971)).

If Prosser's opinion is limited to *intentional* torts, it has some validity. If Prosser means to say that an isolated act of negligence—on the highway or in the home—destroys the faith, trust, and tranquility of the marriage, his statement is simply incredible.

. . . Although it may be heresy to disagree with the gospel according to Prosser, nevertheless if the good professor is actually suggesting that such statement justifies the abolition of interspousal immunity in negligence cases as distinguished from intentional torts I must confess my admiration at the sine qua non of non sequiturs. The glaring fallacy in the majority's utilization of Prosser . . . , is the illogical leap from intentional tort to negligence.¹³⁴

If, after an examination of intentional torts, Prosser concluded that no interspousal immunity should exist for *any* torts, then he committed the fallacy of hasty generalization. Alternatively, to take Prosser's general rule and apply it to a situation in which the accidents of the situation make the rule inapplicable is to commit the fallacy of accident.

*Leake v. Casati*¹³⁵ presents a purer example of the fallacy of hasty generalization. At issue in *Leake* was whether a local subdivision ordinance applied to a division of real property ordered by the court. The county argued that if the subdivision ordinance was inapplicable, then all local ordinances were also inapplicable.¹³⁶ The generalization that *all* local ordinances are inapplicable because *one* specific ordinance is inapplicable is an exceptionally hasty generalization.¹³⁷ The court recognized the fallacy and concluded: "[I]t does not follow that those who become owners of the resulting parcels will be immune to valid laws regulating land use."¹³⁸

*Holt Civic Club v. City of Tuscaloosa*¹³⁹ presents a good example of the fallacy of accident. At issue was whether residents of an unincorporated community on the outskirts of the city must be granted city voting rights; their community was already subjected to the city's police and sanitary

134. *Id.* at 621 (LeGrand, J., dissenting) (quoting *Rogers v. Yellowstone Park Co.*, 539 P.2d 566, 574 (Idaho 1975) (Shepard, C.J., dissenting) (citation omitted)) (alteration in original).

135. 363 S.E.2d 924 (Va. 1988) (en banc).

136. *Id.* at 927.

137. The county followed with the *argumentum ad terrorem*, see *supra* part II.I, that chaos would result from the inapplicability of zoning, soil erosion, and other development-oriented ordinances, and raised the possibility of collusive suits to circumvent those ordinances. *Leake*, 363 S.E.2d at 927.

138. *Leake*, 363 S.E.2d at 927.

139. 439 U.S. 60 (1978).

regulations, criminal court jurisdiction, and business, trade, and professional licensing power. The Court held that the residents of the unincorporated area did not have to be granted voting rights because such rights could be reserved for city residents.¹⁴⁰ Justice Brennan, in dissent, recognized that “[t]he criterion of geographical residency is . . . entirely arbitrary when applied to this case.”¹⁴¹ While, as a general rule, voting rights may be limited to residents, the accidents of the particular situation—imposition of the city’s police, sanitary, and licensing powers on the unincorporated community—rendered the general rule inapplicable.

It is important to remember that the application of a general rule to a specific situation is a fallacy only when the rule is inappropriate because of the accidents of the specific situation. Similarly, the formulation of a general rule is a hasty generalization only when the situations leading to the formulation of the general rule are special, not general. When a court applies a general rule to a specific situation, however, it does not always commit a fallacy. To avoid the fallacy of accident, a court must consider whether the facts of the case *sub judice* can be distinguished from the situations that gave rise to the general rule. Courts regularly extend rules to encompass a wider variety of situations, thereby creating a more general rule. Such generalization is hasty only if the original rule was based on specifics not present in the case to which the rule is being extended.

Wariness of the fallacies of accident and hasty generalization should not handcuff the courts or prevent the evolution of the law. Rather, an understanding of the fallacies aids in the identification of situations in which a court could stumble into a fallacy and counsels caution and insistence on a full exploration of relevant similarities and differences when a general rule is applied.

L. Composition

The fallacy of composition includes two distinct, though similar, fallacies. The first is the inference that the properties of the parts of a whole are also properties of that whole.¹⁴² The second fallacy is the inference that the properties of the members of a collection are also properties of the collection itself.¹⁴³ Judge Aldisert also divides fallacies of composition into two types: The first is the same as Copi’s first category, but the second

140. *See id.* at 70.

141. *Id.* at 87 (Brennan, J., dissenting).

142. COPI & COHEN, *supra* note 1, at 117.

143. *Id.* at 118. A distinction exists between a whole made up of parts organized in specific ways and a collection made up of members with no particular relationships or organizational structure. *Id.*

differs from Copi's.¹⁴⁴ Judge Aldisert gives as an example of the second class an inference from the statement "that cop lied on the stand" to the conclusion "all cops are liars."¹⁴⁵ The inference is clearly a fallacy, but it might be viewed more appropriately as an instance of hasty generalization. The fallacy of composition is best reserved for inferences from the premise that *each* member of a class (not simply one member) possesses a property to the conclusion that the class as a whole has that property.

In *Falk v. City of Whitewater*¹⁴⁶ the plaintiff alleged that the defendant intentionally made a fist and negligently struck him in the face. The defendant argued that the plaintiff's stated cause of action was contradictory, claiming that if the making of the fist was intentional, then the striking also must have been intentional.¹⁴⁷ The court rejected the argument:

Even assuming that the making of a fist is necessarily an intentional act, to reason that the striking of someone with that fist is therefore necessarily likewise intentional is a *non sequitur*. Almost all negligent conduct is composed of individual intentional components; to constitute an intentional tort, however, the actor must intend the consequences of his acts, or believe that they are substantially certain to follow.¹⁴⁸

The court treated the argument as an inference from each part of an event being intentional to the whole act being intentional and, therefore, rejected the inference as a fallacy of composition.

M. Division

The fallacy of division is the reverse of the fallacy of composition, and similarly includes two distinct, but related, types of fallacies.¹⁴⁹ The first is the inference that the properties of a whole are also properties of the parts making up that whole. The second is the inference that the properties of a collection are also properties of the members of that collection.¹⁵⁰ Judge Aldisert does not distinguish varieties of the fallacy of division; he defines the fallacy as "reason[ing] falsely from a quality of a group to a quality of a member of the group."¹⁵¹

144. See ALDISERT, *supra* note 4, at 11-43.

145. *Id.*

146. 221 N.W.2d 915 (Wis. 1974).

147. See *id.* at 916.

148. *Id.* at 916-17 (citing RESTATEMENT (SECOND) OF TORTS § 8A (1965)).

149. COPI & COHEN, *supra* note 1, at 118-19.

150. *Id.* See *supra* note 143 for the difference between the parts of a whole as opposed to the members of a collection.

151. ALDISERT, *supra* note 4, at 11-45.

*State Department of Environmental Protection v. Jersey Central Power & Light Co.*¹⁵² contains an example of the fallacy of division. A malfunction at the defendant's nuclear power plant caused a large quantity of cold water to be discharged into an adjoining creek, killing a large number of fish.¹⁵³ The defendant argued that the cold water discharged from the plant was not a hazardous substance under the statutory definition. According to the defendant, the statute "must be construed to prohibit only those substances which by their chemical composition are hazardous, deleterious, destructive or poisonous, no matter how small the amount discharged."¹⁵⁴

In essence, the defendant committed the fallacy of division by arguing that hazardous substances include only those substances such that if the whole is hazardous, then any quantity of the substance must be hazardous. Using this interpretation, the defendant then attacked the statutory definition with the fallacy of composition: because a small amount of cold water is not hazardous, neither is a large amount.¹⁵⁵ The court rejected the defendant's interpretation as fallacious.¹⁵⁶

N. Complex Question

A complex question is one that "presuppose[s] the truth of some conclusion buried in that question."¹⁵⁷ Complex questions may be divided into two types. A familiar example of the first type is: "Have you stopped beating your wife?" This question clearly presupposes an affirmative answer to a prior unasked question: "Did you regularly beat your wife?" Because complex questions require a "yes" or "no" answer, they imply an affirmative answer to the unstated question. To make that inference is to commit the fallacy of the complex question.

An example of the second type is: "Are you against abortion and for the importance of life, or not?" Again, this question requires a "yes" or "no" answer—it presupposes that opposing abortion in all instances and valuing life are logically, or otherwise, tied together. The second type of complex question does not present quite the logical difficulty of the first. The question about abortion and life is simply a conjunction, and one who values life but does not support the prohibition of abortion can, under the

152. 336 A.2d 750 (N.J. Super. Ct. App. Div. 1975), *rev'd*, 351 A.2d 337 (N.J. 1976).

153. *Id.* at 753.

154. *Id.* at 755.

155. *See id.*

156. *Id.* The court actually labelled the defendant's argument a "*non sequitur*." *Id.*

157. COPI & COHEN, *supra* note 1, at 96.

rules governing the truth of conjunctions, simply answer “no.” No such simple answer is available for the first class of complex questions.

Judge Aldisert and most courts use the label “compound question” rather than “complex question.”¹⁵⁸ Case law provides examples of both classes of fallacy. *State v. Debold*¹⁵⁹ illustrates the second, simpler class. The defendant in *Debold* was convicted of robbery. At trial the victim did not testify about when the defendant took his money except in response to the question, “‘At that point, [defendant] didn’t have a gun to your head and say, ‘Give me your money’; did he?’”¹⁶⁰ The appellate court objected to the form of the question:

Initially, we note that the question is a negative compound and is in improper form because it asks for two answers: (1) At that time he didn’t have a gun to your head, did he?; (2) At that time he didn’t say, “give me your money,” did he? The vice of compound questions is generally recognized. They are clearly misleading and confusing both to the witness being asked the question and to the jury listening to the answer. Here, [the witness] answered the question, “no, [defendant] didn’t.” No, defendant didn’t do what at that point. No, he did not point the gun at [the witness’s] head; or, no, he did not demand that [the witness] give him the money.¹⁶¹

The court ruled that the negative answer did not establish anything about the temporal relationship between when the money passed hands and the use or threat of force.¹⁶²

*Austria v. Bike Athletic Co.*¹⁶³ presents an example of the first and more difficult type of complex question. In *Austria* the parents of a football player who was severely injured by a blow to the head during football practice successfully sued the designer and manufacturer of the football helmet on a design defect claim. On appeal the appellant claimed that the verdict form submitted to the jury was in error. The verdict form asked: “‘Was Defendants’ [sic] Bike and Kendall’s helmet worn by Richard Austria unreasonably dangerous in one or more of the particulars alleged by plaintiffs which caused Richard Austria’s injury[?]’”¹⁶⁴

The question presented is a complex question of the first type because it assumes an affirmative answer to another, unasked question: “Did the

158. See ALDISERT, *supra* note 4, at 11-30.

159. 735 S.W.2d 23 (Mo. Ct. App. 1987).

160. *Id.* at 26 (quoting victim’s testimony on cross-examination).

161. *Id.* (citation omitted) (second alteration in original).

162. *Id.*

163. 810 P.2d 1312 (Or. Ct. App.), *review denied*, 816 P.2d 610 (Or. 1991).

164. *Id.* at 1314-15 (quoting verdict form) (alterations in original).

helmet cause the injury?" Either a "yes" or a "no" answer to the verdict form question implies an affirmative response to the hidden question. Nonetheless, the court held that in the context of the other instructions, which would have kept the jury from presuming causation, no error existed.¹⁶⁵

O. Tu Quoque

The *tu quoque*, literally "you're another," is offered in response to an accusation and accuses the accuser of the same practice.¹⁶⁶ It is a fallacy because two wrongs, even when one is committed by the accuser, do not make a right or excuse each other. However, as Judge Aldisert correctly notes, in law the *tu quoque* is sometimes a valid argument.¹⁶⁷ He lists comparative negligence and the "unclean hands" doctrine as examples of acceptable *tu quoque* arguments.¹⁶⁸ In some cases the *tu quoque* may be a valid legal argument, however, in other instances it is a fallacy.

In *Revere Camera Co. v. Masters Mail Order Co.*¹⁶⁹ the plaintiff, a Delaware corporation whose principal place of business was in Illinois, brought suit against a Maryland corporation, whose place of business was in the District of Columbia. The defendant moved for a change of venue to the District of Columbia, suggesting that the plaintiff was forum shopping because Maryland had a fair trade law but the District of Columbia did not.¹⁷⁰ The court stated: "As to this plaintiff's counsel seem[ed] to reply that in similar vein the same comment could be made with respect to the defendant's motion to transfer the case to Washington or, to borrow a closely equivalent Latin phrase 'et tu quoque'."¹⁷¹ After recognizing the nature of the *tu quoque*, the court found the plaintiff's response irrelevant.¹⁷²

The equity doctrine of clean hands is an example of a *tu quoque* argument valid in law.¹⁷³ The equity rule of clean hands provides that "when the plaintiff's improper conduct is the source, or part of the source,

165. *Id.* at 1315.

166. See COPI & COHEN, *supra* note 1, at 99. The *tu quoque* is a circumstantial variety of the *ad hominem*. *Id.*; see *supra* note 11 and accompanying text.

167. See ALDISERT, *supra* note 4, at 11-36.

168. *Id.*; see *infra* notes 173-175 and accompanying text.

169. 127 F. Supp. 129 (D. Md. 1954).

170. *Id.* at 132.

171. *Id.*

172. See *id.* The court also found the defendant's arguments for a change of venue irrelevant because the choice of district would not have affected the federal constitutional and statutory law issues on which the case turned. *Id.*

173. See ALDISERT, *supra* note 4, at 11-36.

of his equitable claim, . . . he is to be barred because of this conduct. ‘What is material is not that the plaintiff’s hands are dirty, but that he dirties them in acquiring the rights he now asserts.’”¹⁷⁴ The requirement of clean hands, although perhaps a form of *tu quoque*, is not fallacious. The doctrine is not available to a defendant who simply shows similarly evil behavior by the plaintiff in some past, unrelated case—that showing would be a pure *tu quoque*, “you do it too,” argument. Rather, the equity court is asked to do justice between the plaintiff and the defendant. If the plaintiff has dirty hands in acquiring the right asserted, those dirty hands are relevant to a just outcome.

Similarly, the doctrines of contributory and comparable negligence are not true *tu quoque* fallacies. These doctrines provide that a plaintiff’s conduct contributing to the harm suffered will defeat or reduce plaintiff’s recovery for injuries caused in part by the defendant’s negligence.¹⁷⁵ Obviously, the defendant in a negligence suit cannot offer as a defense a loss by the plaintiff as a defendant in a previous negligence suit involving behavior similar to the current defendant’s—that defense would be a true *tu quoque*. Rather, when the issue is who should bear the costs of injuries resulting from negligence, the fault of both parties in the accident giving rise to the action is relevant.

P. Ambiguity

The fallacy of ambiguity rests on the use of ambiguous words or phrases. The fallacy does not consist in simply using such a word or phrase and leaving the meaning of a statement unclear; rather, the fallacy occurs when a word or phrase changes meaning within the course of an argument.¹⁷⁶ Fallacies of ambiguity are characterized by the change in meaning of an expression that appears both in a premise and in the conclusion of an argument. The logical flaw is often undetectable because the “same” terms are used in both the premise and conclusion, but the shift in meaning prevents the argument from being valid. Equivocation and amphiboly are two types of fallacies based on ambiguity.

174. DOBBS, *supra* note 40, at 46 (quoting Republic Molding Corp. v. B. W. Photo Utils., 319 F.2d 347 (9th Cir. 1963)).

175. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 65, 67 (5th ed. 1984).

176. COPI & COHEN, *supra* note 1, at 113. Professor Copi includes the fallacy of accent as a fallacy of ambiguity. *See id.* at 115-17. The fallacy of accent rests on shifting the meaning of an expression by changing the word or part of the phrase that is stressed or accented. *Id.* at 115. Since such a shift in stress often does not appear in print, the fallacy is unlikely to occur in briefs or opinions. It may, however, occur in the courtroom, for example, when counsel repeats a witness’s testimony.

1. *Equivocation*

Equivocation is the fallacy of employing an argument in which the meaning of a word or phrase shifts.¹⁷⁷ For example, in *People v. Samuels*¹⁷⁸ the defendant was convicted of aggravated assault and conspiracy to violate a statute forbidding the preparation and distribution of obscene material. The aggravated assault conviction was based on a film showing the defendant whipping an unidentified individual.¹⁷⁹ The defendant claimed on appeal that the victim's consent was a defense to a charge of aggravated assault and that the judge erred in instructing the jury to the contrary.¹⁸⁰ The court questioned whether consent was a defense and addressed whether consent could have been given:

It is also the rule that the apparent consent of a person without legal capacity to give consent, such as a child or insane person, is ineffective.

It is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury. Even if it be assumed that the victim in the . . . film did in fact suffer from some form of mental aberration which compelled him to submit to a beating which was so severe as to constitute an aggravated assault, defendant's conduct in inflicting that beating was no less violative of a penal statute obviously designed to prohibit one human being from severely or mortally injuring another. It follows that the trial court was correct in instructing the jury that consent was not a defense to the aggravated assault charge.¹⁸¹

This is a particularly subtle example of equivocation because the word whose meaning shifts is not repeated in the argument. One premise of the argument is that consenting to the use of force against oneself that is likely to produce injury is not normal. That premise seems clearly acceptable, if "normal" means "conforming to the norm"—certainly most persons do not so consent. The second premise is that a person who is insane cannot give effective consent. To conclude from these premises that the victim in *Samuels* could not consent, the second premise must be rephrased as "a person who is not normal cannot give effective consent." That premise is acceptable if "not normal" means "insane"; however, the premise is not acceptable if "not normal" means "not conforming to the norm in some

177. *Id.* at 113.

178. 58 Cal. Rptr. 439 (Ct. App. 1967), *cert. denied*, 390 U.S. 1024 (1968).

179. *Id.* at 446.

180. *Id.* at 447.

181. *Id.* (citation omitted).

way” because many people who do not conform to norms can give effective consent. Thus, although a person who enjoys sexual deviance is not normal, *i.e.*, does not conform to the norm, such a person may not be insane and, hence, still may be able to give effective consent.

2. *Amphiboly*

An amphiboly is an ambiguity resulting from the grammatical structure of a statement such that the statement can be interpreted to have different meanings. The fallacy of amphiboly results when the statement under one interpretation is used as a premise of an argument whose conclusion is drawn from the premise under a different interpretation.¹⁸² The ambiguity may be obvious or it may be so subtle that it appears contrived.

*Young v. Community Nutrition Institute*¹⁸³ provides an example of a nonobvious ambiguity. The main issue in *Young* was the meaning of the following phrase of section 346 of the Food, Drug, and Cosmetic Act: “the Secretary shall promulgate regulations limiting the quantity of any poisonous or deleterious substance therein or thereon to such extent as he finds necessary for the protection of public health.”¹⁸⁴ The FDA interpreted the phrase “to such extent as he finds necessary for the protection of public health” as modifying the word “shall.”¹⁸⁵ Under that interpretation, the FDA would not be required to promulgate regulations if the Secretary believed that they were not necessary to protect public health.¹⁸⁶ Community Nutrition Institute argued that the phrase “to such extent as he finds necessary for the protection of public health” modifies the phrase “limiting the quantity therein or thereon,” not the word “shall.”¹⁸⁷ Under that interpretation, the Secretary must promulgate regulations setting tolerance levels, and his discretion is limited to setting the particular tolerance level.¹⁸⁸

The Court found the phrase ambiguous:

As enemies of the dangling participle well know, the English language does not always force a writer to specify which of two possible objects is the one to which a modifying phrase relates. A Congress more precise or more prescient than the one that enacted § 346 might, if it wished petitioner’s position to prevail, have placed “to such extent as he finds

182. COPI & COHEN, *supra* note 1, at 114-15.

183. 476 U.S. 974 (1986).

184. 21 U.S.C. § 346 (1988).

185. *Young*, 476 U.S. at 979.

186. *See id.*

187. *Id.* at 980.

188. *Id.*

necessary for the protection of public health” as an appositive phrase immediately after “shall” rather than as a free-floating phrase after “the quantity therein or thereon.” A Congress equally fastidious and foresighted, but intending respondents’ position to prevail, might have substituted the phrase “to the quantity” for the phrase “to such extent as.” But the Congress that actually enacted § 346 took neither tack. In the absence of such improvements, the wording of § 346 must remain ambiguous.¹⁸⁹

Despite Justice Stevens’s dissent,¹⁹⁰ the Court held that, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹⁹¹ the FDA’s interpretation controlled.¹⁹²

The willingness to admit varying interpretations affects the number of ambiguities, and hence the opportunities for amphiboly, to be found. Given the Court’s demonstrated ready acceptance of ambiguity, federal statutes and regulations must be rife with potential for amphiboly. Nonetheless, the *fallacy* of amphiboly is generally rare in legal argument, perhaps because a proponent is less likely to shift from one grammatical construct to another than to shift from one meaning of a word to another.¹⁹³

189. *Id.* at 980-81.

190. *Id.* at 984-88 (Stevens, J., dissenting). Justice Stevens found the meaning of the provision to be clear. He also noted what is required for an ambiguity to exist and the role of the Court in interpreting a statute:

The task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference. A statute is not “unclear unless we think there are decent arguments for each of two competing interpretations of it.” Thus, to say that the statute is susceptible of two meanings, as does the Court, is not to say that either is acceptable.

Id. at 988 (quoting RONALD M. DWORKIN, *LAW’S EMPIRE* 352 (1986)).

191. 467 U.S. 837 (1984).

192. *See Young*, 476 U.S. at 980-81.

193. Cases that purport to identify amphibolies generally attach the label to instances of equivocation rather than to instances of amphiboly. *See, e.g.*, *Kassel v. Gannett Co.*, 875 F.2d 935, 949 n.13 (1st Cir. 1989); *Wood v. General Motors Corp.*, 865 F.2d 395, 422 (1st Cir. 1988) (Selya, J., dissenting), *cert. denied*, 494 U.S. 1065 (1990); *United States Fire Ins. Co. v. Producciones Padosa, Inc.*, 835 F.2d 950, 956 n.6 (1st Cir. 1987); *Irons v. FBI*, 811 F.2d 681, 688 (1st Cir. 1987); *Seaboard World Airlines, Inc. v. Transport Workers Union*, 425 F.2d 1086, 1089 & n.3 (2d Cir. 1970); *Oman Int’l Fin. Ltd. v. Hoiyong Gems Corp.*, 616 F. Supp. 351, 365 (D.R.I. 1985); *Boutwell v. State*, 719 S.W.2d 164, 169 (Tex. Crim. App. 1985) (en banc).

Neither do the cases using the term “amphibology” concern grammatical ambiguities. *See United States v. Gooding*, 477 F.2d 428, 442 (D.C. Cir. 1973) (Robinson, J., concurring in the result), *aff’d*, 416 U.S. 430 (1974); *Chang v. University of R.I.*, 606 F. Supp. 1161 (D.R.I. 1985). A possible exception is *Bank Bldg. & Equip. Corp. of America v. Georgia State Bank*, 209 S.E.2d 82 (Ga. Ct. App. 1974). In *Bank*

Q. Non Sequitur

Non sequitur simply means “does not follow.”¹⁹⁴ In its broadest sense the term *non sequitur* encompasses all of the informal fallacies, since in each fallacy the conclusion does not follow from the premises offered in its support. Judge Aldisert distinguishes the *non sequitur* from the *post hoc ergo propter hoc* fallacy by noting that the former lacks a logical connection between premise and conclusion, while the latter lacks a causal connection.¹⁹⁵ He also distinguishes the fallacies of relevance, such as *ad hominem* and *ad misericordiam*, from the *non sequitur*: in the *non sequitur* the premises may be relevant to the conclusion, but the conclusion does not follow logically from the premises.¹⁹⁶

Various courts have attached the label *non sequitur* to three distinct types of fallacy. The first two types, “denying the antecedent” and “affirming the consequent,” involve arguments containing a conditional— a statements of the form “if *p*, then *q*”—as a premise, but use the conditional and another premise improperly to infer a conclusion.¹⁹⁷ The third type, the pure *non sequitur*, asserts an “if *p*, then *q*” relationship between two propositions that have no logical relationship.

1. Denying the Antecedent

The fallacy of denying the antecedent involves a misunderstanding of the nature of a conditional. The conditional “if *p*, then *q*” asserts that when *p* (the antecedent) is true, *q* (the consequent) is also true.¹⁹⁸ The conditional allows no inference about the truth of *q* when *p* is false. The fallacy of denying the antecedent is a failure to recognize that limitation on the information contained in the conditional. The fallacy occurs in asserting that, since the antecedent is false, the consequent must also be false.¹⁹⁹

Bldg. the court considered the use of “and/or,” calling it both equivocal and an amphibology. However, “and/or” might be viewed as a grammatical ambiguity concerning a statement’s status as a conjunction or a disjunction, and thus an amphiboly.

194. See BLACK’S LAW DICTIONARY 1057 (6th ed. 1990).

195. ALDISERT, *supra* note 4, at 11-28.

196. *Id.*

197. See COPI & COHEN, *supra* note 1, at 240-41. Denying the antecedent and affirming the consequent are perhaps more properly viewed as formal fallacies. See *supra* notes 1-2 and accompanying text. However, since they are usually classified by the courts as *non sequiturs*, a category of informal fallacy, they are included here.

198. See COPI & BURGESS-JACKSON, *supra* note 1, at 140.

199. See *id.* at 142.

*Harry Levitch Jewelers, Inc. v. Jackson*²⁰⁰ illustrates the fallacy of denying the antecedent. The respondents in *Jackson* treated incorrectly the valid rule that if a statement is excluded under the dead man's statute, then it is inadmissible to prove a claim against the decedent's estate. The respondents insisted that, because the statute did not exclude the statement at issue, the statement was automatically admissible. The court recognized the fallacy, labelled it a *non sequitur*, and noted that other reasons existed for excluding the statement.²⁰¹

A similar example is found in *Everette v. City of New Kensington*.²⁰² The plaintiff in *Everette* brought a wrongful death action on behalf of a person who, while being arrested for armed robbery, was accidentally shot and killed by a police officer. The trial court entered judgment against the city, and an equally divided appellate court affirmed. The affirming opinion attacked what it labelled a *non sequitur* in the opinion to reverse:

It may be noted in passing that the cases cited by the opinion in support of reversal as having to do with police officers are all inapposite, for they all involved the question whether the police officer defendant had used such force as constituted a crime, not civil negligence. If one's conduct *does* constitute a crime, it may be negligence. But to suggest, as the opinion in support of reversal does, that if one's conduct does *not* constitute a crime, it *cannot* be negligence, is a *non sequitur*, and is not the law.²⁰³

In this case the conditional, "if one's conduct does constitute a crime, it may be negligence," is employed incorrectly because it relies on the logical fallacy that, because the antecedent of a conditional is false, the consequent must therefore be false.

2. Affirming the Consequent

The fallacy of affirming the consequent, like the fallacy of denying the antecedent, involves the misunderstanding of a conditional. As discussed previously, the conditional "if *p*, then *q*" asserts that when *p* is true *q* is true. It also allows the inference that if *q* is false, *p* is false, since if *p* were not false, *q* would be true. While it is proper to infer the falsity of *p* from the falsity of *q*, the fallacy of affirming the consequent is the attempt to infer

200. 573 S.W.2d 746 (Tenn. 1978).

201. *Id.* at 747.

202. 396 A.2d 467 (Pa. Super. Ct. 1978) (per curiam).

203. *Id.* at 470 n.1 (citations omitted).

the truth of *p* from the truth of *q*.²⁰⁴ It is the converse of the fallacy of denying the antecedent.

*Wright v. Royse*²⁰⁵ provides a good example of affirming the consequent. In *Wright* the appellees relied on a legal dictionary definition of the word “motion” for the proposition that motions are applications. Accordingly, the appellees argued that, if a submission is a motion, then it is an application.²⁰⁶ They then argued that, because the submission in question was an application, it was a motion and, therefore, had to be written. The court simply styled the argument a *non sequitur*,²⁰⁷ but it is a clear example of affirming the consequent that the submission was an application and attempting to infer the antecedent that the submission was a motion.

Another example is found in *State v. Pinch*,²⁰⁸ in which the dissent noted a *non sequitur* in the majority opinion. The defendant was convicted of first-degree murder and was sentenced to death. The North Carolina Supreme Court affirmed both the conviction and the sentence. The dissent characterized a portion of the majority’s argument as resting on the rule that if the jury recommends death, then the jury must “sign a writing which shows its affirmative, unanimous findings that one or more statutory aggravating circumstances exist beyond a reasonable doubt, that they are sufficiently substantial to make the death penalty appropriate and that the mitigating circumstances do not outweigh the aggravating circumstances.”²⁰⁹ The dissent continued: “To hold, as does the majority, that if affirmative answers in writing to these three issues are prerequisite to a jury’s recommendation of death, then death *must* be recommended when the prerequisites are met is, logically, a *non sequitur*.”²¹⁰ The reasoning criticized by the dissent is a classic case of affirming the consequent that the jury made the three required findings and attempting to infer the antecedent that the jury must recommend death.

3. *The Pure Non Sequitur*

The pure *non sequitur*, unlike affirming the consequent or denying the antecedent, is not a faulty inference from a conditional. Rather, it is the assertion of a logical relationship between two propositions when no such

204. See COPI & BURGESS-JACKSON, *supra* note 1, at 140.

205. 193 N.E.2d 340 (Ill. App. Ct. 1963).

206. *Id.* at 343.

207. *Id.*

208. 292 S.E.2d 203 (N.C.), *cert. denied*, 459 U.S. 1056 (1982), and *overruled by* *State v. Benson*, 372 S.E.2d 517 (N.C. 1988).

209. *Id.* at 231 (Exum, J., dissenting).

210. *Id.* at 232.

relationship exists.²¹¹ A *non sequitur* is not a misunderstanding of a logical relationship existing between propositions—it is the mistaken assertion that such a relationship even exists. Examples of *non sequiturs* are legion.

In *Papadakis v. Zelis*²¹² one party complained that judgment should not have been entered in the action under appeal because other suits were pending between the parties. The court labelled the contention a *non sequitur* because the pendency of the other actions did not affect the finality of the action appealed.²¹³ In effect, the assertion was a conditional of the form, “if other actions are pending, judgment may not be entered in the action under appeal.” The court responded that there was no such relationship between the action on appeal and the pending actions.

*Rhein v. City of Frontenac*²¹⁴ provides another example. In *Rhein* property owners sought a declaratory judgment that the zoning classification of their property was unreasonable. One of the city’s arguments on appeal was that, because the city had complied with state-mandated procedural requirements, the refusal to rezone could not be unreasonable. The assertion is a conditional: “If proper procedure is followed, then the decision reached is reasonable.” The court had no difficulty in identifying the claim as a *non sequitur*.²¹⁵

III. CONCLUSION

Informal fallacies occur in legal argument as well as in other areas. Because fallacies lead one astray, it is important to be vigilant in avoiding them. It is also important to recognize, however, that argument forms which seem to be informal fallacies, and which would be informal fallacies in other

211. See COPI & BURGESS-JACKSON, *supra* note 1, at 117 (“A *non sequitur* is an argument whose conclusion simply fails to follow from its premiss or premisses.”); COPI & COHEN, *supra* note 1, at 123 (“It is when the gap between premisses and conclusion is great, the error in reasoning blatant, that we are most likely to call the blunder a *non sequitur*.”). Given the weakness in propositional logic’s treatment of conditionals, one can never actually say that no logical relationship exists between any two propositions. Because the conditional in propositional logic asserts only that when *p* is true *q* is true, given any two propositions one will imply the other: if both are true or both are false, each implies the other; if one is true and the other false, the false proposition implies the true one. These relationships between propositions demonstrate the failure of the conditional in propositional, truth-functional logic to capture the ordinary language meaning of “if-then” statements. An ordinary-language statement usually requires some relevant semantic relationship between the antecedent and the consequent, rather than simply a relationship between their truth values.

212. 282 Cal. Rptr. 18 (Ct. App. 1991).

213. *Id.* at 21.

214. 809 S.W.2d 107 (Mo. Ct. App. 1991).

215. See *id.* at 109.

fields, may not be fallacious in legal argument. Legal argument is complex because it involves debate over logical extension of principles, questions of empirical fact, and concerns with justice. This complexity renders appropriate a wider variety of arguments in the legal arena than in most others. Arguments that may be informal fallacies in most areas may be acceptable forms of legal argument.