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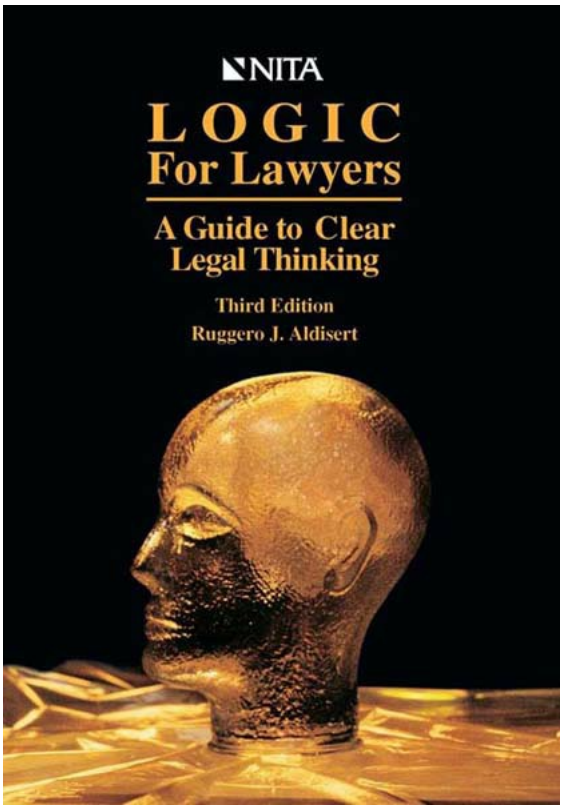
LOGIC For Lawyers

A Guide to Clear Legal Thinking

Third Edition

Ruggero J. Aldisert



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By Ruggero J. Aldisert

Senior United States Circuit Judge
The United States Court of Appeals
for the Third Circuit

National Institute for Trial Advocacy

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About the Author

Ruggero J. Aldisert, Senior United States Circuit Judge, is the former Chief Judge of the United States Court of Appeals for the Third Circuit. Prior to his appointment to the federal appellate bench in 1968, Judge Aldisert had extensive experience in Pittsburgh as a trial lawyer and as a judge on the Pennsylvania Court of Common Pleas. Since taking senior status in 1987, Judge Aldisert has continued to sit frequently with the Third Circuit and, by designation, with other federal courts of appeals.

Judge Aldisert is a prominent author and teacher. In addition to Logic for Lawyers: A Guide to Clear Legal Thinking, he has written other books in the law: Opinion Writing (West 1990), Winning on Appeal: Better Briefs and Oral Argument (1992) (revised 1st ed. NITA 1996), The Judicial Process: Readings, Materials and Cases (West 1976) and The Judicial Process: Text, Materials and Cases (2d ed. West 1996). The judge has also written for numerous legal journals in the United States and Europe. He has published over 30 articles on jurisprudence, civil procedure, federal jurisdiction, federal-state relations, the doctrine of precedent, antitrust law, comparative law, logic for lawyers and judges, the judicial process, the role of the courts in a democratic society and other topics.

Judge Aldisert served for 20 years as an adjunct professor at the University of Pittsburgh Law School and is a highly respected leader of seminars for newly selected United States Circuit judges and state supreme court justices. He has lectured at law schools and before bar, judicial and academic groups in eight countries, on subjects ranging from constitutional law to comparative judicial process, and served as visiting professor at the University of Augsburg (Bavaria).

The judge lives in Santa Barbara, California, with his wife, Agatha. The Aldiserts have three grown children.

The First and Second Editions were dedicated to
Agatha DeLacio Aldisert,
my caring and loving wife.
She is responsible for every good thing that I now enjoy.

I add a dedication of this Third Edition to the memory of my parents, John S. Aldisert, 1888-1968, and Elizabeth M. Aldisert, 1895-1995, who were continuing sources of inspiration and wisdom during their lifetimes.

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Foreword

This is a book about legal reasoning or legal logic. While not challenging Justice Holmes' classic statement that "The life of the law has not been logic; it has been experience," it offers telling arguments that legal reasoning or legal logic may play an equal or even more significant role in the life of the law.

The book is written particularly for judges, lawyers, and law students. It may seem strange that it is apparently the first book to address that subject purposely directed to judges, lawyers, and law students. Judge Aldisert does not suggest the need for any mandatory rules governing a particular form of opinion writing by judges or advocacy by lawyers. His emphasis is upon the need to develop guidelines, and he offers some. He brings to his proposals thirty years of judicial experience as a federal and state judge and twenty years experience as a law teacher. I am sure that he welcomes debate as to the soundness of the elements of his proposed guidelines—his aim is to advance understanding by bench and bar of the significance of legal reasoning in opinion writing and in advocacy. He believes his message is of special importance to beginning law students whom he cautions "from your first day in law school, that day of profound bewilderment, continuing through your career as a lawyer or judge … you are enveloped by that misty, murky phenomenon we call legal reasoning …. It is taught through a ritual of fire, charitably called the Socratic Method. The bane of all law students, the method is especially wrenching during the first year. It is a confusing experience because most students, frankly, do not know what the professor is driving at …. Let's face it, the system causes frustration, insecurity, embarrassment and many unpleasant hours." He strongly believes that legal reasoning is a subject in critical need of explanation during the abrupt transition in the reasoning process required of a college graduate upon entering law school. But he also believes his message can be of great assistance to judges and practicing lawyers.

Judge Aldisert deals comprehensively and thoroughly with every aspect of legal reasoning. He explains in his broad strokes the basics of logic and its application to legal thinking in order to have us understand the mental processes we use in "thinking like a lawyer." His axiom is "that for the law to be respected it must embody reason, and that no legal argument can be accepted unless based on the canons of legal thinking." He introduces us to the differences between deductive and inductive reasoning, and the Socratic Method; he also discusses at length reasoning and the common-law tradition, elements of legal thinking, fallacies to avoid, and much else. He particularly urges that we recognize the importance of legal reasoning by analogy, for, he insists, the "importance of legal reasoning by analogy cannot be overstated. It is the heart of the study of law; it lies at the heart of the Socratic Method."

A distinguished authority has cogently observed that:

> For centuries mankind has discussed the nature of the law. In one way or another, it touches every citizen of every nation. The contract may be pleasant or unpleasant, tangible or intangible, direct or indirect, but it is nonetheless a constant force in the lives of people everywhere on the globe. It is essential that we have some understanding of its nature and

the human beings who interpret and administer it.[1]

This book is a major contribution to appreciation of that truth. All judges, lawyers and law students will profit greatly by reading it.

William J. Brennan, Jr.
Associate Justice
Supreme Court of the United States

Washington, D.C.
June 1989

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1. Henry J. Abraham, The Judicial Process 4 (4th ed. 1980).

Preface to Third Edition

Six years have passed since the first edition, and it is time for a revision, a revision that reflects additional research as well as what I have learned from readers and from using the text as a teaching tool. I have received positive feedback from judges in courses at the National Judicial College and numerous judicial workshops across the country. I have also learned much from lawyers who encountered the book in various seminars and workshops. The text has been used in orientation programs for first year law students and I have profited from their reactions as well. In this edition I have incorporated many of my readers' suggestions, and I think the book is now more informative and reader-friendly.

Although I have revised every chapter, the major additions appear in Chapter 5, Deductive Reasoning, and Chapter 6, Inductive Reasoning. I have also made substantial changes in Chapter 8, The Socratic Method, and added a new section, "Preparing for the Socratic Method," that should be extremely valuable to law students. Where early editions had two chapters on fallacies, this edition has three—Chapters 10, 11 and 12.

I have added new illustrative cases and deleted some that appeared in earlier editions; in addition, I have augmented principal cases with footnote references to other cases. Some new features are included: a "Table of Cases By Subject Matter," and an Appendix that contains answers to exercises set forth in the text. This edition is slightly more comprehensive than its predecessors, and I am satisfied that the explanations and illustrative cases are now more understandable.

I have been delighted with the positive reception of the first two editions. In the Preface to the First Edition, I remarked that there was "no, repeat no, book strictly devoted to legal reasoning for law students, lawyers or judges." This book was an effort to fill that void, and I believe it has more than achieved its goal. The previous editions have been adopted by many law schools and by other university programs including a unique course at the U.S. Air Force Academy.

Knowing that a critical part of law school is teaching law students "to think like lawyers," I am somewhat disappointed that very little writing on legal logic has appeared on the scene since the first edition. There are some writers, however, who have made significant contributions. Professor Kevin W. Saunders of the University of Oklahoma authored a magnificent essay, "Informal Fallacies in Legal Argumentation," to which I have made generous references. Professor Anita Schnee of the University of Arkansas has written a delightful article describing the interaction of deductive and inductive reasoning for the Journal of Legal Writing Institute, "Logical Reasoning: Obviously."

I wish to recognize Professor Irving M. Copi of the University of Hawaii, who deserves the title of dean of writing logicians. Together with his new collaborators, Professor Carl Cohen of the University of Michigan and Professor Keith Burgess-Jackson of the University of Texas at Arlington, he continues to publish extremely readable texts that are widely quoted as references in these pages.

Professor Douglas Lind of the University of Idaho served as my assistant at the National Judicial College, and upon my retirement, succeeded me in teaching the popular course, Logic for Judges. He has developed an unusual expertise in wedding academic viewpoints with the pragmatism of the courtroom. He is highly regarded by the judges in his classes, and deservedly so.

Legal reasoning is an important subject that transcends the ivory tower environment of academia. Certainly it requires more extensive and intelligent understanding by the members of the legal profession. One has only to read a sampling of appellate briefs directed to the United States Courts of Appeals or to listen to the dialogue between judges and lawyers at oral arguments to perceive the necessity of improving logical presentations, both written and oral. Logic for lawyers is a specialty of general logic that must be emphasized more formally and intensely in the law school curriculum and in lawyers' continuing legal education programs.

To know the law is the consummate objective of the practicing bar. The maximum value of that knowledge will never be achieved unless and until the lawyer can effectively present his or her knowledge in a persuasive logical argument. What was said years ago about logicians' textbooks is still apropos today: these books seem mired "in exotic formulae, symbolic logic, quantification theories, diagram techniques and probability calculus, certainly not designed to captivate law students, let alone the typical lawyer or judge." What is needed is not a mastery of the esoterica of logic, but only a basic familiarity of its rudiments. All lawyers must understand basic concepts of deductive reasoning, especially the categorical and hypothetical syllogisms. They must understand inductive reasoning, with its twin facets of induced generalization and analogy. And they should have a mental blueprint on how to recognize formal and material fallacies. That is what members of the legal profession need. And that is what this book provides.

I am indebted to many for advice in preparing this edition and greatly acknowledge the assistance of family and friends. My sons keep me close to the realities of the law practice and keep a tight tether on me when I tend to stray from the pragmatic to the obscure. Rob is with Perkins Coie in Portland, Oregon, and Greg is with Kinsella, Boesch, Fujikawa and Towle in Los Angeles. My daughter Lisa, a corporation consultant, has provided valuable insights into the realities of persuasion in the New York business world. My brother-in-law, Jim Brophy of Ryley, Carlock & Appelwhite of Phoenix, was generous with practical insights when I bounced logical theories to get the reactions of a veteran lawyer. My first edition introduced me to the membership of the Appellate Lawyers Association of Illinois, and I am grateful for their participation at several workshops over the years and the good counsel of their leadership, including Michael T. Reagan and Judge Robert L. Carter of Ottawa, Illinois, and Mike Pollard and Nancy J. Arnold of Chicago. I thank Mimi Hildbrand for her loyalty and profound dedication to this project through its many drafts; and Linda E. Schneider, Curt Cutting and Renée Bunker for research assistance.

And especially there is my wife, Agatha, who provided a happy home in which to write it. The work, performed essentially in evenings and weekends, intruded into time which we could have spent together doing things that "retired" couples do in the land of palm trees, sea and mountains. In accepting this effort with magnificent patience, she continues to inspire and support me with love and affection, now well into five decades.

Ruggero J. Aldisert
Senior U.S. Circuit Judge

Santa Barbara, California
June 1997

Excerpts of First Edition Preface

I'm still not sure what triggered my research into the elements of legal reasoning. Certainly, by the time I became a Pennsylvania trial judge in 1961, I had begun to structure a method to analyze briefs and oral arguments, and had defined and refined some ideas for writing opinions. Pennsylvania required trial judges to write an opinion in every case that was appealed, a practice still not required for federal judges some thirty years later.

As I read through the briefs, I sought to find the squeaky clean order that was drummed into us in undergraduate writing classes: theme, topic sentence for each point and supporting data. But alas, a gigantic slip appeared between the college courses' lip and the brief writers' cup. In too many cases, the much desired logical order was elusive or nonexistent.

At about the same time, while teaching at the University of Pittsburgh's law school, I discovered that students did not fare much better than lawyers. In class they were adept at asserting conclusions, yet unable to explain step-by-step how they reached those conclusions.

When I became a federal appellate judge and realized that the Courts of Appeals' written opinions are the final word in 99 percent of all federal cases, my interest in legal reasoning intensified. At the same time, I was crushed to discover that appellate briefs were not the pristine models of logical order I had hoped for.

However, I did not begin a serious study of legal logic until the early seventies, when I led a seminar in judicial opinion writing at the Institute of Judicial Administration's Senior Judge Seminars at New York University. It was then that I realized that there was no, repeat no, book strictly devoted to legal reasoning for law students, lawyers or judges. Even more unfortunate, logicians' textbooks seemed mired in exotic formulae, symbolic logic, quantification theories, diagram techniques and probability calculus, certainly not designed to captivate law students, let alone the typical lawyer or judge.

So, I trudged along, photocopying an article or a book excerpt here and there, collecting materials, and relating my academic research to ideas accumulated from my experience as a lawyer, trial judge and appellate judge. I gradually developed some satisfactory presentations for the NYU seminars, my Pitt law school classes and also for the Federal Judicial Center's seminars for new circuit judges, a project that I chaired for about five years. At last, I was able to distill my materials and collate what I believed served as a guide to legal reasoning. I should not have been surprised that my interest in learning the rudiments of legal logic was shared by the profession's two extremes—judges and law students. The judges sought to avoid having dissenters or commentators criticize their opinions as "flawed reasoning"; the students wanted some help in surviving the trauma caused by drenching exposures to the Socratic method.

After I stepped down from my administrative chores as the Third Circuit's Chief Judge, I found the time to prepare a formal lecture on legal logic. The lecture became too cumbersome, so I started a law review article, but that also became unmanageable. This book is the result.

Whom is it for? It's for students. It covers a subject in critical need of explanation during

the abrupt transition in the reasoning process required of a college graduate upon entering law school. Law students of the first through third years will benefit from the book. So will undergraduates who plan to enter law school or take graduate courses which involve problem solving by the case method.

Certainly, the book should assist law professors as they strive to produce reasoned thinking in their students. The benefits in every course utilizing the Socratic method are obvious. Moreover, it should be important in all orientation to legal methods and legal writing courses.

The book's advantage to the practicing lawyer is self-evident. It is as much a checklist for clear legal thinking as it is a guide for the conduct of a case. Courtroom dynamics dictate that when a judge rules, there are winners and losers. When based solely on the facts and the law—matters beyond the control of the lawyers—a loss, though never pleasant, can be acceptable to both lawyer and client. But when the loss is based on a court's public declaration that a lawyer's argument flies in the face of reason, the result can never be acceptable. Even though principled and sound in logic, an argument can still be wrong, but an unprincipled and unsound argument can never be right. This book proceeds from the axiom that for the law to be respected, it must embody reason, and that no legal argument can be acceptable unless based on the canons of logical thinking. It is designed to be a lawyer's tool—to ensure soundness in one's own arguments and to expose structural or material flaws in those of adversaries.

The book should also prove extremely helpful to judges. It addresses the concerns expressed by Illinois Chief Justice Walter V. Schaefer "that an opinion which does not within its own confines exhibit an awareness of relevant considerations, whose premises are concealed, or whose logic is faulty is not likely to enjoy either a long life or the capacity to generate offspring." It will enable judges to examine precedents, briefs and oral arguments more precisely and to write leaner and crisper opinions, those critically important "performative utterances" that promulgate case law and affect today's society so very much.

I am indebted to many. Through their writings, I have become acquainted over the years with our great logicians. I make generous reference to their works: Joseph G. Brennan, John C. Colley, Irving M. Copi, James Edwin Creighton, Ralph M. Eaton, W. Jevons, Raymond J. McCall, William S. and Mabel Lewis Sahakian, L.S. Stebbing and Paul E. Treusch. In my early days at the law, I became exposed to the wisdom of John Dewey, Professor of Philosophy at Columbia. I continue to read and reread him. David H. Fischer has proved that you can have a sense of humor and still be a great historian. I have learned much in the field of legal reasoning from Dean (and former Attorney General) Edward H. Levi of the University of Chicago and have studied the fine contributions of Steven J. Burton, Martin P. Golding and Neil MacCormick.

Ruggero J. Aldisert
Senior United States Circuit Judge

Santa Barbara, California
June 1989

Chapter 1

INTRODUCTION

From your first day in law school, that day of profound bewilderment, continuing through your career as a lawyer or judge, and I suppose, until the last day that you serve as a United States Supreme Court Justice, you are enveloped in that misty, murky phenomenon we call legal reasoning. Law students, at least most of those who graduate, learn this process—learn it, that is, with varying degrees of comprehension. It is taught through a ritual of fire, charitably called the Socratic method. Professor Kingsfield's line in The Paper Chase properly intimidates the first year law student on the first day: "You come here with your skull full of mush and our job is to make you think like a lawyer."

Some never master "thinking like a lawyer" even though they graduate, pass the bar exam and become financially successful attorneys. Even those who master the technique of legal reasoning are not always certain what it is. Certainly, they learn how to do it, some of it. They pick up the idiosyncratic signals of a given professor and learn his or her playbook. They learn how to go through the process, and occasionally, they learn why we do it. Often students, and unfortunately, lawyers and judges, do not know exactly what is being done. They learn the exercise. They go through the motions. But most are a little shy on theory.

I know this from much personal experience—over 35 years as a state trial and federal appellate judge, planning and teaching seminars for state and federal appellate courts, and 20 years as an adjunct law professor with administrative responsibilities at a prominent law school. Moreover, my views are shared by the few commentators who have written in this field. Professor Steven I. Burton observes that "it is remarkable how few books have been written to explain directly how lawyers reason. It is more remarkable how few such efforts are directed at beginning law students, who find it so frustrating to learn how to 'think like a lawyer.'"[1] Professor Jack L. Landau complains:

> The idea of teaching traditional logic to law students does not seem to be very popular. Not one current casebook on legal method, legal process or the like contains a chapter on logic. Only one text on legal writing, by Brand and White, contains even a list of common informal fallacies.[2]

This book is a modest attempt to fill that void. It is directed to "the what" of legal reasoning, or, if you will, legal logic, a term I use interchangeably with legal reasoning. Our purpose here is to explain, in very broad strokes, the basics of logic and its application to legal thinking, to describe the mental processes we utilize in "thinking like a lawyer." The purpose, quite frankly, is to get you thinking about thinking.

We have sought to illustrate the components of legal logic with excerpts from published judicial opinions. Alas, it is the happenstance that not many judges place a label on the particular element of logic involved. Too often, judges—like lawyers, law professors and law review writers—use the cop-out phrase "flawed reasoning." This trite phrase means nothing. It does not indicate whether the criticism relates to the choice of a controlling legal precept, its interpretation, its application of the facts or is a statement that a formal or material fallacy is present. I hope that in time this will change and also in time that briefs and opinions will be more specific.

This book is not an introduction to logical theory. Its scope is quite limited, for we discuss only a few concepts in the field of logic and we limit the discussion of them to those basics present in legal argument. The book defines and describes components of inductive reasoning, its main ramparts of specific instances—inductive generalization and the method of analogy. It will trace the role of these components in creating legal rules and transforming a series of rules into a broader legal precept, which we sometimes call a legal principle. The book will explain their relationship to the common law doctrine of precedent.

The book will describe deductive reasoning and how the selection of the major premise in the deductive syllogism is critical, whether that premise comes to us from a statute or is developed as judge-made law. It will outline the rules of the syllogism and describe what happens when they are breached, that is, when fallacies of form creep up on the best of us. But adherence to formalities is not enough. We must also learn how to avoid informal or material fallacies.

There is no academy award for knowing or adhering to formal or informal correctness. We all may reason well without knowing a single rule of the syllogism or, conversely, we may know all the details of logic and still be an inept lawyer or judge. The payoff in any given case is whether you win or lose. The payoff is not measured by style or grace as with a prima ballerina or a gold medal ice skater. Instead you get prizes for winning, like in the 100-yard dash or the quarter-mile or the marathon.

We are aware of the criticisms suggesting that logic has no place in legal reasoning because logic is concerned with form and not truth, and because the same set of facts may yield any number of perfectly logical conclusions. But these are only superficial observations. No one is suggesting that briefs can be written, arguments made and cases decided solely by reference to the canons of logic. Were this so, the legal profession would simply move to analysis by computer, because the computer is the paradigm of formal logic. Value judgments reflecting the views of advocates and judges form the critical decisional points in the law. Rules of logic do not make these decisions; they are simply means to implement them. When these judgments are made, the formal reasoning process sets in to test the validity of the propositions constituting the argument. Criticisms of fealty to logical order "are not designed in large measure to remove logic from legal reasoning but to remove *bad* logic from legal reasoning."[3]

Our thesis is that we might all be better lawyers (and, of course, better students) if we understood the rules of logic instead of simply memorizing some of the steps. Judges, too, could judge more fairly, and therefore better, and publish more convincing opinions. It's great to play the piano without being able to read music, but unless you're an Irving Berlin, you're not going to reach your full potential by merely memorizing tunes that you've heard somewhere before.

A specific knowledge of the canons of reasoning enables one to discover more readily where the fallacy of a misleading argument lies. Without professing to guard us infallibly from error, the study of logic familiarizes us with the rules and canons to which correct reasoning processes must conform, and with the hidden fallacies and pitfalls to which such processes are commonly exposed. Among the obvious benefits to be derived from a careful study of logic is a facility in studying law, in detecting error in the reasoning process, in learning how to avoid errors and in thinking about difficult matters with clearness and consistency—a capacity much rarer, even among we members of the legal profession, than is commonly suspected.[4] The

function of logical legal reasoning goes beyond the efficient application of legal precepts; it goes to the very formation of those precepts in the common-law tradition.

We all know "the why" of logic in the law. Justice Felix Frankfurter said it best on his retirement after twenty-three years on the Supreme Court: "Fragile as reason is and limited as law is as the expression of the institutionalized medium of reason, that's all we have standing between us and the tyranny of mere will and the cruelty of unbridled, unprincipled, undisciplined feeling."[5]

We also know the test for a good legal argument or brief. It comes from what I call the Harry Jones/Roscoe Pound test for a "good" opinion: "[H]ow thoughtfully and disinterestedly the Court weighed the conflicting social interests involved in the case and how fair and durable its adjustment of the interest-conflicts promised to be."[6] You cannot advocate or pronounce a position that is "fair and durable" unless formal rules of logic go into the process. We cannot have decisions by judicial fiat alone. Nor, in our common-law system, can we have court decisions like a double special super-saver airline ticket, good for passage on this flight on this date only.

What we propose in these pages is to describe the formal logic processes used in the common-law tradition. We will explain the difference between reasons and reasoning. We will identify the twin processes of inductive and deductive reasoning, and how they are used and sometimes abused. We will discuss logical forms. We will show how major premises in categorical syllogisms are identified or created either properly as universals or improperly as particulars; how this process becomes critical in solving problems; how fragile becomes the legitimacy of such premises when they are improperly fashioned by the fallacy of hasty generalization and the converse fallacy of accident; how major or minor premises sometimes become illicit; how in hypothetical propositions the conclusion sometimes becomes skewed by not properly affirming the antecedent and affirming the consequent instead; and how the end may sometimes be legitimate but the means, most tainted. We will draw upon many cases to demonstrate either fealty to, or disrespect of, logical form.

But form is only part of the problem. We will also take a look at those informal fallacies that somehow sneak up on us. Certainly, we will address the familiar non sequitur, post hoc ergo propter hoc and petitio principii (begging the question), but there are also other swamp lands into which we are tempted—hasty generalizations and faults in analogy where positive resemblances are not strong enough or negative resemblances are ignored.

We make no pretense that this book purports to be a comprehensive survey of logic, or even to provide a comprehensive introduction to the subject. Here you will find none of the "complicated symbolic perambulations"[7] so characteristic of the esoteric world of modern logicians. This book is merely a guide—a guide for students and practitioners of the law. It seeks to tread only limited terrain. It traverses only the high peaks of logical reasoning without endeavoring to describe the very slippery slopes of the peaks, or the valleys and crevices that form the wilderness of the logician's world. Only elementary concepts with illustrations from case law are necessary for our purposes.[8] The book touches only the surface of deduction and induction, of formal and informal (material) fallacies.

It does not purport to be a basic text on the introduction to logic, let alone a logician's treatise. Rather, it is a snapshot of the logic of the law taken by a student of the judicial process,

with many years of experience on both sides of the bench and at the classroom lectern. My view is not intended to be comprehensive. It focuses only on certain features that may be helpful to those who study and practice law. Although much current teaching in logic classes is entirely too cumbersome for our purposes here, certain techniques—deduction, induction (with its concomitants, analogy and generalized induction) and avoidance of formal and material fallacies—can be explained without a prerequisite of having previously studied formal logic. These techniques directly bear on the legal reasoning process. As one experienced in teaching both students and newly commissioned appellate judges, I am convinced that these techniques can improve the quality of reasoning by developing important thinking skills.

A word of advice. Nomenclature used by logicians may be a little strange to those who have not studied logic. The reader who is new to logic should consider rereading the materials as often as is necessary. Although the text has been designed to be "reader-friendly," this is not the stuff of airport waiting room reading materials. Take your time in reading it, and always keep the book handy as a reference source.

But before entering upon the specifics of logic in the law, we must start with the rudiments of our common-law tradition.

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1. Steven I. Burton, An Introduction to Law and Legal Reasoning 1 (1985).

2. Jack L. Landau, Logic for Lawyers, 13 Pac. L. J. 59, 60 (1981) citing Brand & J. White, Legal Writing: The Strategy of Persuasion (1976).

3. Jack L. Landau, Logic for Lawyers, 13 Pac. L. J. 59, 63 (1981).

4. *See* Comment, "Logic and Law," 3 Marq. L. Rev. 203, 204 (1919).

5. As quoted in Time Magazine, Sept. 7, 1962 at 15.

6. Harry W. Jones, An Invitation to Jurisprudence, 74 Colum. L. Rev. 1023, 1029 (1974).

7. Jack L. Landau, Logic for Lawyers, 13 Pac. L. J. 59, 61 (1981).

8. Much good writing in introductory logic exists in the literature. See, e.g., Joseph Gerard Brennan, A Handbook of Logic (1957); John C. Cooley, A Primer of Formal Logic (1942); Irving M. Copi & Carl Cohen, Introduction to Logic (9th ed. 1994); Irving M. Copi & Keith Burgess-Jackson, Informal Logic (1996); James Edwin Creighton, An Introductory Logic (1898); Ralph M. Eaton, General Logic, An Introductory Survey (1931); W. Stanley Jevons, Elementary Lessons in Logic: Deductive and Inductive (1965); R. McCall, Basic Logic (2d ed. 1952); William S. & Mabel Lewis Sahakian, Ideas of the Great Philosophers (1966); L.S. Stebbing, A Modern Introduction to Logic (6th ed. 1948).

Chapter 2

REASONING AND THE COMMON-LAW TRADITION

What is the common law, the basis of the Anglo-American system of justice? Popularly, it is known for its case law, its jurisprudence, for a system of legal precepts that emerge from court decisions. In the common-law countries today it is an important source of the substantive law that governs society. Law emanates primarily from statutes enacted by legislatures and from clauses in written constitutions in those countries that have them, as does the United States and its constituent states; but equally important, law takes the form of rules of law distilled from judicial decisions in cases and controversies in courts of record.

This judge-made law is what is familiarly referred to as the common law. It materializes as the by-product of a judicial opinion and has an experience traceable to either the Battle of Hastings in 1066 or the signing of the Magna Carta by King John at the Runnymede in 1215. Aside from its longevity, its universal acceptance derives from two characteristics of our tradition: first, the judicial opinion is published, eventually bound in permanent books and given a caption containing both a volume and page number and a name (indicating the parties) so that it may be readily retrieved and cited as authority; second, the rule of law emerging from the opinion is the conclusion reached by a publicly expressed reasoning process. It is the reasoning process—the fealty to the rules of logic—that gives legitimacy to judge-made law.

Even when the original source of the law is statute or constitution text, the method of interpreting these legislatively-enacted precepts follows the same methodology. The interpretations appear in publicly recorded volumes of court decisions containing a rational process supporting the conclusion reached in the decision.

At work then are two concepts: judge-made law which we know as “the common law” and a method of deciding cases which is known as “the common law tradition.” In our discussion of legal reasoning, we shall address common law in the sense of the common-law tradition.

Common-law countries differ from the civil-law countries of Europe and Latin America where, in theory, the source of law is limited to Codes and written constitutions. In theory, on the Continent and in those jurisdictions that follow the civil-law tradition, the judge does not refer to a previous decision of a court, but uses the text of the Code as the starting point for legal analysis. The body of court decisions that we common-law countries know as precedents does not exist in the civil-law tradition, because the authoritative source for each decision (in theory) is the Code enacted by the legislative branch. Unlike the common-law tradition, inferior courts are not bound by decisions of courts superior in the judicial hierarchy. And it is only in recent years that some of the courts on the Continent are beginning to publish computerized abstracts and some bound volumes of their opinions. The civil-law tradition is traced to the experience of France. Forged in the French Revolution that overthrew an absolute monarchy and subsequently copied by other jurisdictions on the Continent and in Latin America, the civil-law model reflects an antipathy to a strong court system. It is an historical French reaction to the abuses of the royal courts that they overthrew. The civil-law countries have not vested in their courts the power conferred in common-law courts. These countries do not accord to their judges the profound respect of our tradition. “Your honor” is an expression foreign to the civil-law jurisdictions.

The heart of the common-law tradition is adjudication of specific cases.[1] Case-by-case

development allows experimentation because each rule is reevaluated in subsequent cases to determine if the rule did or does produce a fair result. If the rule operates unfairly, it can be modified. The modification does not occur at once, "for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated."[2] The genius of the common law is that it proceeds empirically and gradually, testing the ground at every step, and refusing, or at any rate evincing an extreme reluctance, to embrace broad theoretical principles.

The common-law method has been described as one of "Byzantine beauty," a method of "reaching what instinctively seem[s] the right result in a series of cases, and only later (if at all) enunciating the principle that explains the patterns—a sort of connect-the-dots exercise."[3] Adherence to the rules of formal logic and legal reasoning are absolutes in this exercise. "Connecting the dots" is but a shorthand way of describing inductive reasoning. The "dots" represent holdings of individual cases, each announcing a specific consequence for a specific set of facts. They are "connected" by techniques of induction for the purpose of fashioning broader precepts. Those techniques, which we will study in depth, include the use of enumeration of specific instances of like situations, and the use of analogy, where resemblances and differences in the cases are meticulously compared.

Precepts that are broader than narrow rules are called legal principles. These principles—precepts covering more generalized factual scenarios—are assembled from publicly stated reasons justifying rules formulated in previously decided cases. Formulation of a principle is a gradual process, shaped from actual incidents in social, economic and political experience. It is a process in which countervailing rights are challenged, evaluated, synthesized and adjudicated on a case-by-case basis, in the context of an adversary proceeding before a fact-finder in a court of law. For every rule at common-law there is a publicly stated reason, the *ratio decidendi.* And for each principle that slowly emerges, there is a solid base of individual rules from particular cases and from the reasons given to support the conclusions in those cases. The formation of a principle in case law emerges in that process of legal reasoning known as inductive generalization.

Logical reasoning lies at the heart of the common-law tradition. For the common-law methodology to have been accepted in the first instance and later developed into the most respected legal system in the world, there had to be consent and endorsement by the people and institutions affected by judicial decisions. Without this acceptance, the tradition would not have endured. And without a logical explanation for its decisions, there would never have been the initial and continuing acceptance of our tradition. Without a reasoning process adhering to rules of logic to support conclusions, judicial decisions would have been nothing more than decrees, orders and judicial fiat. This would have been anathematic to the spirit of our democracy. With the reasoning process driving the engine, the common-law tradition was able to develop unity of law throughout a jurisdiction and yet a flexibility to incorporate developing legal precepts. But our tradition is more than unity and the capacity to assimilate. Also at work is gradualness. Holmes noted that the great growth of the common law came about incrementally.[4] The common law, like progress, "creeps from point to point, testing each step,"[5] and is, most characteristically, a system built by gradual accretion from the resolution of specific problems. The sources of decision are *rules* of law in the narrow sense—rules of specific cases, "precepts attaching a definite detailed legal consequence to a definite, detailed state of facts."[6] These precepts provide

"fairly concrete guides for decision geared to narrow categories of behavior and prescribing narrow patterns of conduct."[7] The courts fashion *principles* from a number of rules of decision, in a process characterized by experimentation. At common law rules of case law are treated not as final truths, "but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice."[8]

Common-law reasoning should not be characterized as merely inductive. It is more than a congeries of fact patterns converging to compel an induced conclusion either by analogy or inductive generalization. Rather, the reasoning process is both inductive and deductive. It resembles the ebb and flow of the tide. A principle is induced from a line of specific, reasoned decisions and, once identified, becomes the major premise from which a conclusion may be deduced in the cause at hand. The problem of common-law adjudication, in John Dewey's formulation, is that of finding "statements of general principle and of particular fact that are worthy to serve as premises."[9] By means of a value judgment, the common-law judge makes a choice from competing legal precepts or interprets or applies them, and then structures the premises that lead to conclusions in the case at hand. To do this, he uses "a logic relative to consequences rather than to antecedents."[10] Use of this logic in the common-law tradition facilitates the gradual development of legal principles.

Another important characteristic of the common-law tradition is that it is fashioned by lawyers and judges from actual events that have raised issues for decision. It emerges as a by-product of the major function of the courts—dispute settling, the adjustment of a specific conflict among the parties. Harlan Fiske Stone emphasized that a "[d]ecision [draws] its inspiration and its strength from the very facts which frame the issues for decision."[11] By contrast, legislative lawmaking is not a subordinate effort. To a legislator, the law is not a by-product; it is the primary endeavor. Statutes are enacted as general rules to control future conduct, not to settle a specific dispute from past experience.

The common-law decisional process starts with the finding of facts in a dispute by a fact-finder, be it a jury or a judge in a bench trial or an administrative agency. Once the facts are ascertained, the court compares them with fact patterns from previous cases and decides whether there is sufficient similarity to warrant applying the rule of an earlier case to the facts of the present one. The judicial process culminates in a narrow decision confined to the facts before the court. Any portion of a judicial opinion that concerns an issue beyond the precise facts of the case is *obiter dictum.*

Although the common law is judge-made, we are reminded by Harlan Fiske Stone that it is "the law of the practitioner rather than the philosopher."[12] The judge deciding the individual case is the centerpiece of the common-law tradition. As Stone emphasizes, the judge, "not the legislator or the scholar, creates the common law."[13]

The difference between the common-law tradition and the civil-law tradition of the European continent and Latin America must be repeated for emphasis. We must be aware of the distinctive methodology and hierarchical disciplines of the two systems. In the civil-law countries, the legislative Codes (and written constitutions) are the sole sources of decision; theoretically, in every case, recourse must be made to the language of the Code. And in every civil-law jurisdiction the relevant provision of the Code becomes the major premise in the categorical deductive syllogism. In common-law countries, however, the concept of *stare decisis*

governs. *Stare decisis* commands that lower courts follow decisions of higher courts in the same judicial hierarchy. The tradition also demands that the most recent higher court decision be followed, whether the original precept stems from statutory or case law. In the United States, unity of judicial action within a given jurisdiction is ensured by the rule that a court may not deviate from precedents established by its hierarchical superior.

Cardozo's 1921 observations in The Nature of the Judicial Process[14] described the fundamental characteristics of the common-law tradition. They remain true today and provide an excellent summary of what we have been discussing. First, the tradition seeks and generally produces uniformity of law throughout the jurisdiction. Second, it produces decisions announcing a narrow rule of law covering a detailed and real fact situation. Third, principles develop gradually as the courts reconcile a series of narrow rules emanating from prior decisions. Fourth, the common-law tradition produces judge-made law for the practitioner, not for the philosopher or academician. Fifth, lower courts operating in the tradition are bound by decisions of hierarchically superior courts.

Common law is case law of the specific instance. It is law created by a process of both inductive and deductive reasoning. It is an exercise that combines legal philosophy, a constantly expanding body of case law, statutes comprising the jurisprudence of a given state or the federal government and a profound respect for logical form and critical analysis.

PRECEDENT

Precedent is the basic ingredient of the common-law tradition. It is a narrow rule that emerges from a specific fact situation. One court has defined a precedent as follows:

> The essence of the common-law doctrine of precedent or *stare decisis* is that the rule of the case creates a binding legal precept. The doctrine is so central to Anglo-American jurisprudence that it scarcely need be mentioned let alone discussed at length. A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.[15]

A legal rule forms the basis of a precedent. Precedent, therefore, is a normative legal precept containing both specific facts and a specific result. In contrast, a principle emerges from a line of legal rules as a broad statement of reasons for those decisions. It is important to understand that a single court decision cannot give birth to an all-inclusive principle.

Formulation of a broad principle from a single case decision exemplifies the material fallacy of hasty generalization, as we will discuss later in detail. Dean Pound warned of the danger of hasty generalization:

> You cannot frame a principle with any assurance on the basis of a single case. It takes a long process of what Mr. Justice Miller used to call judicial inclusion and exclusion to justify you in being certain that you have hold of something so general, so universal, so capable of dealing with questions of that type that you can say here is an authoritative starting point for legal reasoning in all analogous cases.
>
> A single decision as an analogy, as a starting point to develop a principle, is a very different thing from the decision on a particular state of facts which announces a rule. When the court has that same state of facts before it, unless there is some very controlling reason, it is expected to adhere to the former decision. But when it [goes] further and endeavors to formulate a principle, *stare decisis* does not mean that the first tentative gropings for the principle … by this process of judicial inclusion and exclusion, are of binding authority.[16]

Much difficulty results from a confusion between "principled decision-making" and decision-making that purports to prescribe law for circumstances far beyond the facts before the court. When a specific holding of a case is suddenly anointed with the chrism of "principle," it has a very real effect on the doctrine of *stare decisis.* There is always the danger that a commentator or a subsequent opinion writer, either in the same court or another, will elevate the decision's naked holding to the dignity of a legal "principle," and attribute to that single decision a precedential breadth never intended. Such an act may confuse the court's dispute-settling role with its responsibility for institutionalizing the law. The common-law tradition, as stated before, is preeminently a system built up by the gradual accretion of special instances. The accretion is not gradual if an improper dimension is given to a specific instance.

Every holding of every decision does not deserve the black-letter law treatment that some judges or commentators wish to give it. If case law is to develop properly in the common-law tradition, the effect of specific instances, the rules of law in the narrow, Poundian sense, must be given proper weight—but only proper weight. Describing a rule of law as a principle or a doctrine interferes with that proper weight. It puts a jural butcher's thumb on the scale. Thus, the expression, "It is settled that," in a treatise, brief or court opinion, should indicate a line of decisions supporting the statement, not simply a single decision from a favorite jurist.

THE ROLE OF LOGIC

It is essential to understand the sophisticated nuances of logic in the law employed in this tradition. Rules of logic are only a means to the end in the law. They are implements. They are techniques to encourage, if not guarantee, acceptable supporting reasons for the final conclusion in a case, a decision that constitutes a legal rule. Putting aside constitutional law, in our tradition legal precepts spring from two sources: legislative statutes and court decisions. These precepts are currency of equal value, but there is an important distinction. The legislature may promulgate a statute without offering one word of explanation or reason for it, and the statute will be respected until it is repealed. The same is not true of case law. Case law stands or falls solely on the reasons articulated to justify it. There can be legislative fiat, but not judicial fiat. Reason justifies the legal rule emanating from a court decision. Where stops the reason, there stops the rule.

Certainly, Holmes was correct when he told us that "The life of law has not been logic; it has been experience."[17] Although formal logic is one of the important means to the ends of law, formal logic is not the end itself. Professor Harry W. Jones has observed: "[T]he durability of a legal principle, its reliability as a source of guidance for the future, is determined far more by the principle's social utility, or lack of it, than by its verbal elegance or formal consistence with other legal precepts."[18] But the statements of Holmes and Jones must not be taken out of context. They were stated as appeals that the law adjust to changing social conditions—that we should not be bound by rigid legal precepts that were once justified by good reasons but are no longer viable in a changing society. The appeals did not go unheeded. From what was once a rigid jurisprudence of conceptions fixed in a kind of jural cement has emerged a relatively new phenomenon in the American legal tradition.

As the last century came to a close, Roscoe Pound decried excessive rigidity in American decision-making processes. He described our system at the time as one of conceptual jurisprudence, a slavish adherence to *elegantia juris,* the symmetry of law, and suggested that it too closely resembled the rigid German *Begriffsjurisprudenz,* which Rudolph Von Jhering styled as a jurisprudence of concepts.[19] In his classic lecture, "The Causes of Popular Dissatisfaction with the Administration of Justice,"[20] Pound sounded a call for the end of mechanical jurisprudence: "The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules."[21] He attacked blind adherence to precedents—and to the rules and principles derived there from—as "mechanical jurisprudence" and "slot machine justice." Pound advocated "pragmatism as a philosophy of law."[22] He vigorously stated: "The nadir of mechanical jurisprudence is reached when conceptions are used, not as premises from which to reason, but as ultimate solutions. So used, they cease to be conceptions and become empty words."[23]

Pound was trumpeting a theme more softly played by Oliver Wendell Holmes a decade earlier—that the social consequences of a court's decision are legitimate considerations in decision-making.[24] This is precisely what Professor Jones meant in 1974.[25]

If Roscoe Pound's 1908 warning against mechanical jurisprudence did not create a new

American school of jurisprudence, at least it spawned widespread respectability for social utilitarianism. It added a new dimension to law's traditional objectives of consistency, certainty and predictability—namely, a concern for society's welfare. A few years after Pound's warning, Cardozo delivered his classic 1921 Storrs lectures at Yale. He stated his theme: "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."[26] A half century later, in many legal disciplines, the once desired objective of *elegantia juris* in legal precepts, institutions and procedures had become subordinated to the objective of social utility.

In 1974, Professor Jones eloquently stated the new spirit of legal purpose: "A legal rule or a legal institution is a *good* rule or institution when—that is, to the extent that—it contributes to the establishment and preservation of a social environment in which the quality of human life can be spirited, improving and unimpaired."[27]

Typical of judicial utterances that had disturbed Holmes, Pound and Cardozo was one by the Maryland Court of Appeals in 1895: "Obviously a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results."[28] In contrast, in the same year he delivered the Storrs Lecture at Yale, Cardozo seized the opportunity to put his theory into practice by publicly rejecting blind conceptual jurisprudence in Hynes v. New York Central Railway Co.[29] A sixteen-year-old boy had been injured while using a crude springboard to dive into the Harlem River. The trial court had stated that if the youth had climbed on the springboard from the river before beginning his dive, the defendant landowner would have been held to the test of ordinary care, but because the boy had mounted the board from land owned by the defendant railroad company, the court held the defendant to the lower standard of care owed to a trespasser. Cardozo rejected this analysis, describing it as an "extension of a maxim or a definition with relentless disregard of consequences to 'a dryly logical extreme.' The approximate and relative become the definite and absolute."[30]

Cardozo's opinion in *Hynes* is a prototype, and his classic lecture, "The Nature of the Judicial Process," an apologia, for decision-making based on sociologically-oriented judicial concepts of public policy. The philosophical underpinnings of what Cardozo described as the sociological method of jurisprudence ran counter to the widely held notion that public policy should be formulated and promulgated only by the legislative branch of government. When judges utilize this organon, laymen and lawyers label them "activists," "liberals," "loose constructionists" and a host of other epithets, gentle and otherwise. The debate continues today and will probably continue well into the future.

But to recognize that formal logic is not an end in itself does not mean that logical form and logical reasoning have ever been subordinated in the judicial process. Certainly, in all but a few areas of static law, mechanical jurisprudence is more historical than operational. Yet the common-law tradition demands, indeed requires, respect for logical form in our reasoning. Without it we are denied justification for our court decisions. Adhering to logical form and avoiding fallacies, we repeat for emphasis, is only a means to the ends of justice, but logical form and avoiding fallacies are nonetheless critical tools of argument. They are the implements of persuasion. They form the imprimatur that gives legitimacy and respect to judicial decisions. They are the acid that washes away obfuscation and obscurity.

Professor Edward H. Levi has offered a thoughtful analysis of our subject. He has outlined a

basic pattern of legal reasoning and suggested the following characteristics:

- The basic pattern is reasoning by example.
- It is reasoning from case to case.
- The process involves the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and applied to a similar situation.
- The process involves three steps:
    - Similarity is seen between cases.
    - A rule of law is announced in the first case.
    - This rule of law is then made applicable to the second case.[31]

These three steps describe only one phase of legal reasoning—the process of analogy, which we will study in depth later.

But there is more to logic in the law than analogy. Logic in the law involves the processes of both induction and deduction. To be sure, legal reasoning has some resemblance to the logic of mathematics, but in the common-law tradition, major premises are constantly undergoing change, or are susceptible to change, sometimes in minor detail and at other times as dramatic as a sea change. This is because judge-made law, in the sense of either creating precepts or interpreting statutes and regulations, is affected by the facts of particular cases, as well as by social and philosophical considerations. Professor Levi says that "this change in the rules is the indispensable dynamic quality of law. It occurs because the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process."[32]

Although the applicability of a rule of law to a given case may often depend on the degree of analogy that can be drawn, the "dynamic quality" of law is affected by more than the presence of novel facts in new cases. Often more than one rule suggests itself as precedent; more than one principle arguably applies. Here, value judgments play a major part in the development of the common law.

CRITICAL IMPORTANCE OF VALUE JUDGMENTS

To understand the role of value judgments, we must first identify the types of conflicts facing the courts. Cardozo taught that there are three:

- Where the rule of law is clear and its application to the facts is equally plain.
- Where the rule of law is clear and the sole question is its application to the facts at bar.
- Where neither the rule is clear, nor, *a fortiori*, is its application clear.

Cardozo described the third category as the "serious business" of judges, "where a decision one way or another, will count for the future, will advance and retard, sometimes much, sometimes little, the development of the law."[33] If the controversy is in the third category, it is imperative to recognize with specificity where lies the conflict between the litigants. Here, too, three categories, or flash points of conflict, are at work in the judicial process:

- Choice of the controlling legal precept. This involves choosing among competing precepts or fashioning one inductively. The choice becomes the major premise of the deductive reasoning syllogism.
- Interpretation of the legal precept. Here there are no competing precepts. The parties agree on the controlling major premise. They differ only as to what it means. Statutory interpretation is the classic example.
- Application of the chosen legal precept, as interpreted, to the facts found or to be found by the fact-finder. The facts comprise the minor premise; here is where many sparks fly in the pleading or trial stages.

Early recognition of the specific conflict can immediately sharpen the issues. If it is a category-one case, the lawyer and the judge must also proceed into a consideration of categories two and three; in a category-two case, it is necessary to consider category three as well.

We emphasize this aspect of the judicial process here because formal rules of logic do not inform the choice for the judge at this stage. Judges constantly strive to seek an accommodation between competing sets of principles. There are times, however, when the scales seem evenly balanced, and it is difficult to determine exactly where the weight does lie. It is here when the judge makes a value judgment. At these times, the jural philosophy of the individual judge comes into play, consciously or otherwise, by means of a value judgment that places a greater weight on one competing principle than another. "Indeed, the most important attributes of a judge are his value system and his capacity for evaluative judgment," writes Professor Robert S. Summers. "Only through the mediating phenomena of reasons, especially substantive reasons, can a judge articulately bring his values to bear."[34]

Consider the observations of Professor Paul Freund:

> Much of law is designed to avoid the necessity for the judge to reach what Holmes called his "can't helps," his ultimate convictions or values. The force of precedent, the close applicability of statute law, the separation of powers, legal preemptions, statutes of limitations, rules of pleading and evidence, and above all the pragmatic assessments of fact that point to one result whichever ultimate values be assumed, all enable the judge in most cases to stop short of a resort to his personal standards. When these prove unavailing, as is more likely in the case of courts of last resort at the frontiers of the law, and most likely in a supreme constitutional court, the judge necessarily resorts to his own scheme of values. It may therefore be said that the most important thing about a judge is his philosophy; and if it be dangerous for him to have one, it is at all events less dangerous than the self-deception of having none.[35]

United States v. Standefer
610 F.2d 1072, 1105 (3d. Cir. 1979)

(Aldisert, J., dissenting)

The issue before us constitutes a classic example of how one's jural philosophy may predetermine a decision. When confronted by a close case in criminal law, necessitating the expression of a value judgment, I cast my lot in favor of the individual and not the society that seeks to regulate his conduct. To me this is an *a priori* proposition distilled not only from the Constitution but from the philosophical foundation of Anglo-American common law. "Administration of a technical and often semantical criminal justice system is the price we pay for the balance struck in the Constitution between the federal government and the individual defendant." … The balance is struck because, in Dean Rostow's words, "[t]he root idea of the Constitution is that man can be free because the state is not."

The expression of this value judgment is not confined to the fashioning of a rule for a particular case. It begins with the choice of a controlling legal precept, continues through the interpretation of that choice and persists finally in the application of the precept as interpreted to the facts at hand. Value judgments inhere throughout; it is not a mechanical process. Values do not form in a vacuum; their range depends always on factual limitations. Thus, judges' decisions are governed by their beliefs about facts as well as abstract rules; the act of deciding involves both the determination of material facts and the determination of what rules are to be applied to the facts. Jerome Frank observed, cynically perhaps, that a judge "unconsciously selects those facts which, in combination with the rules of law which he considers to be pertinent, will make 'logical' his decision."

From counsel's trial memorandum or brief, or from experience and independent research, the judge recognizes that a weighing process or assigning of priorities precedes his or her embarkation on a journey of legal reasoning. The judge thus begins by choosing from among competing legal precepts or competing analogies. Often there is no choice. Often the judge must formulate a rule of law because no rule or principle appears visible for the choosing. In either event, this formulation must be fortified by persuasive reasoning.

Two guidelines aid both the choice or formulation and its ultimate acceptance: first, the judge should avoid arbitrary or aleatory choices; second, the judge has a duty of "reasoned elaboration in law-finding." Julius Stone says this is necessary so that the choice seems, to the entire legal profession, "if not right, then as right as possible. The *duty* of elaboration indicates that reasons cannot be *merely* ritualistic formulae or diversionary sleight of hand."[36]

Max Weber, the important European social theorist, suggested that the term "value judgment" refers "to practical evaluation of a phenomenon which is capable of being … worthy of either condemnation or approval." He distinguished between "logically determinable or empirically observable facts" and "the value judgments which are derived from practical standards, ethical standards or … views."[37] We draw the same distinction here. Judges each have

their own preferences among a sea of legal standards, any one in principle respectable, and they make selections. Sometimes judges must resort to extralegal standards, making a choice from ethical, moral, social, political or economic concepts offered by diverse teachers or philosophers. Because a value judgment figures in the choice of competing precepts, interpretations and applications, how can a judge arrive at this decision without being arbitrary?

Roger J. Traynor suggested an answer. The great California judge reminded us that "one entrusted with decision, traditionally above base prejudices, must also rise above the vanity of stubborn preconceptions, sometimes euphemistically called the courage of one's convictions. He knows well enough that he must severely discount his own predilections, of however high grade he regards them, which is to say he must bring to his intellectual labors a cleansing doubt of his omniscience, indeed even of his perception."[38]

In the law, as well as in life itself, judging is the act of selecting and weighing facts and suggestions as they present themselves, as well as of deciding whether the alleged facts are really facts and whether an idea suggested is a sound idea or merely a fancy. A good judge, dealing with relative values, can estimate, appraise and evaluate with discernment. No hard-and-fast rules can be given for this operation of selecting and rejecting, or fixing upon significant evidentiary facts. It all comes down to the good judgment, and the good sense, of the one judging. To be a good judge is to perceive the relative or significant values of the various features of a perplexing situation. It is to know what to eliminate as irrelevant and what to retain as relevant. In ordinary matters, we call this power knack, tact or cleverness. In the law, as in other important affairs, we call it insight or discernment.

What we should expect from our judges, at a minimum, is a willingness to consider alternative solutions to a problem. A "result-oriented" judge, in the sense condemned, is one who consistently resists considering arguments contrary to an initial impression or preexisting inclination. We cannot expect judicial minds to be untainted by their first impressions of a case. What we can expect is that the initial impression will be fluid enough to yield to later impressions. We can also expect that judges will be intellectually interested in an outcome based on sound reason. What we can demand is that judges employ logically sound techniques of intellectual inquiry and reflection when making value judgments, and then explain both their premises and their conclusions to us in clear language evidencing impeccable logical form.

A PAUSE TO RECAPITULATE: AN INTERMEZZO

Let us now attempt to synthesize what has gone before.

We have explained the distinction between rules and principles. We have described the role of value judgments and precedents. We have briefly introduced concepts of formal logic. These seemingly diverse subjects are critically interrelated. Now we can put that relationship into proper perspective. A rule of law (1) is viewed in combination with other rules by a process of inductive reasoning, (2) to form the major premise for a process of deductive reasoning in the next case, (3) leading to the conclusion of the deductive syllogism which forms the decision in the case, (4) which in turn takes the form of a new legal rule. Such is the common-law tradition of adjudication.

We have also warned that although reasoned exposition traditionally takes the form of a logical syllogism, there is much more to the common-law process than dry logical progression. We have recognized that judges do not always use formal logic to choose or formulate legal premises, interpret them and apply the rule as chosen to the facts found by the fact-finder. In this aspect of the judicial process, courts do not necessarily appeal to any rational or objective criteria; essentially they exercise a value judgment and should be recognized outright as doing so.

Moreover, because courts have the power to alter the content of rules, no immutability attaches to their major premises. The desirability of *elegantia juris*, with its concomitants of stability and reckonability, is often subordinate to the desirability of rule revision in the light of claims, demands or expectations asserted in the public interest. Once a controlling rule or principle has been selected or modified, however, it must be applied in a manner that follows the canons of logic, with respect for formal correctness. The process requires fealty to logical order, to the formal consistency of concepts with one another. At this stage, our concern is with the relations between propositions rather than the content of the propositions themselves. Thus, the reasoning process dictates formal correctness, rather than material desirability. It is to the concept of formal correctness that we now turn.

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1. For a discussion of the role of rationality in adjudication, see Lon Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 365-72 (1978). Fuller explains that adjudication is a device that gives formal and institutional expression to reasoned argument in human affairs. It assumes a burden of rationality not borne by other social processes. A decision that is the product of reasoned argument must be prepared to meet the test of reason.

2. Munroe Smith, Jurisprudence 21 (1909).

3. John Hart Ely, The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values, 92 Harv. L. Rev. 5, 32 (1978) (citing Amsterdam, Perspectives of the Fourth Amendment, 58 Minn. L. Rev. 349, 351-52 (1974)); see also Holmes, Codes and the Arrangement of the Law, 5 Am. L. Rev. 1 (1870), reprinted in Early Writings of O.W. Holmes, Jr., 44 Harv. L. Rev. 725, 725 (1931).

4. Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 468 (1897).

5. Alfred North Whitehead, Adventures of Ideas 24 (1956).

6. Roscoe Pound, Hierarchy of Sources and Forms in Different Systems of Law, 7 Tul. L. Rev. 475, 482 (1933).

7. Graham Hughes, Rules, Policy, and Decision Making, 77 Yale L. J. 411, 419 (1968).

8. Munroe Smith, Jurisprudence 21 (1909).

9. John Dewey, Logical Method and Law, 10 Cornell L. Q. 17 (1924).

10. *Id.*

11. Harlan Fiske Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 6 (1936).

12. *Id.*

13. Id.

14. Benjamin N. Cardozo, The Nature of the Judicial Process (1921).

15. Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969-70 (3d Cir. 1979).

16. Roscoe Pound, Survey of Conference Problems, 14 U. Cin. L. Rev. 324, 330-31 (1940).

17. Oliver Wendell Holmes, The Common Law 1 (1881).

18. Harry W. Jones, An Invitation to Jurisprudence, 74 Colum. L. Rev. 1023, 1025 (1974).

19. Rudolf Von Jhering, Der Geist Des Rominischen Rechts (1877).

20. Address by Roscoe Pound to the American Bar Association, Aug. 29, 1906, *printed in* 40 Am. L. Rev. 729 (1906), *reprinted in* 8 Baylor L. Rev. 1 (1956).

21. *Id.* at 731; *see* 8 Baylor L. Rev. at 8.

22. *See generally* Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605, 609 (1908).

23. *Id.* at 608, 620-21.

24. Oliver Wendell Holmes, The Common Law 468-474 (1881).

25. Harry W. Jones, An Invitation to Jurisprudence, 74 Colum. L. Rev. 1023, 1025 (1974).

26. Benjamin N. Cardozo, The Nature of the Judicial Process 66 (1921).

27. Harry W. Jones, An Invitation to Jurisprudence, 74 Colum. L. Rev. 1023, 1025 (1974).

28. Gluck v. Baltimore, 81 Md. 315, 325, 32 A. 515, 517 (1895).

29. 231 N.Y. 229, 131 N.E. 898 (1921).

30. *Id.* at 231, 131 N.E. at 900. *See* discussion of this case in Rupert Cross, Precedent in English Law 187-88 (1968).

31. Edward H. Levi, An Introduction to Legal Reasoning, 15 U. Chi. L. Rev. 501, (1948).

32. *Id.* at 502.

33. Benjamin N. Cardozo, The Nature of the Judicial Process 168-170 (1921).

34. Robert S. Summers, Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification, 63 Cornell L. Rev. 707, 710 (1978).

35. Paul Freund, Social Justice and the Law, *printed in* Social Justice 93, 110 (R. Brandt, Ed. 1962).

36. Julius Stone, Man and Machine in the Search for Justice, 16 Stan. L. Rev. 515, 530, 536-537 (1964).

37. Max Weber, Value Judgments in Social Science, *printed in* Weber Selections 69 (W. Runciman, Ed. 1987).

38. Roger J. Traynor, Reasoning in a Circle of Law, 56 Va. L. Rev. 739, 751 (1970).

Chapter 3

ELEMENTS OF LEGAL THINKING

REFLECTIVE THINKING

To study logic is to study methods and principles that distinguish correct reasoning from incorrect reasoning. The case method study of law is the study of the logical methods and principles used to make decisions. This case method is all-important because a law school education is designed to teach you how to solve complex problems. Even if you never practice law a day in your life, upon graduation you will be equipped for a galaxy of positions in both the private and public sectors for here there is a constant demand for skilled problem solvers. The case method of study is designed to develop and hone skills of analysis. An intense exposure, it is the premier educational method to learn principles of clear reflective thinking.

This does not mean that you can reason correctly only if you have studied logic. That an all-pro wide receiver may be highly gifted does not mean that he has studied the physics of a football's travel through the air or the physiology involved in running, jumping, leaping and catching. He just does it. He does it because he is possessed of what is called natural ability. Similarly, many individuals have natural logical instincts or have been sufficiently exposed to logical precepts, formally or informally, at home or in school. Taught today by the Socratic method, the study of logic in the law is similar to the study, concentration and drills that are required to develop coordination in an athletic team. But there is a difference. The study of logic is an individual endeavor.

The thesis of this book can be stated simply: the person who studies logic—law student, lawyer or judge—and who has become familiar with the principles of logical thinking, is more likely to reason correctly than one who has not thought about the general concepts of reasoning. Logical thought in the law does not embrace all types of thinking. It does not include everything that passes through our heads. As Copi explains, "[a]ll reasoning is thinking, but not all thinking is reasoning."[1] When you say, "I think I'll go swimming," you are engaging in a mental process, but it is not a process of reasoning. When you say, "I think that the Steelers will win today," your thinking may be based on reasoning if you first studied the teams' records, checked the disability list or heard the weather report, but it can also mean, "I have a hunch the Steelers will win. I feel it in my bones."

Judge Joseph C. Hutcheson, Jr., of the Fifth Circuit, was the judiciary's expert on "hunching":

> I knew, of course, that some judges did follow "hunches"—"guesses" I indignantly called them…. [I]n my youthful, scornful way, I recognized four kinds of judgments; first the cogitative, of and by reflection and logomachy; second, aleatory, of and by the dice; third, intuitive, of and by feeling or "hunching"; and fourth, asinine, of and by an ass; and in the same youthful, scornful way I regarded the last three as only variants of each other, the results of processes all alien to good judges.[2]
>
> … I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch —that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds

its light along the way.[3]

Logical thought is a progression of thought based on the logical relation between truths. It is unlike daydreaming, which is the development of a chain of images from a train of thought, commonly derived from what we call idle reverie, wool gathering or free association. The professor drones on in a dull lecture. You see that he wears a red tie. This reminds you of the red dress worn by Sally Mae, a friend, who recalls to mind, Jim, her brother, who works in security and uses a paper shredder, which in turn makes you think of spaghetti. Then suddenly, the professor calls upon you and you immediately think: "Where am I?"

Logical thought is reflective thinking. It consists of solving a problem by pondering a given set of facts in order to perceive their connection. For the purposes of our inquiry, reflective thinking may be understood as an "operation in which present facts suggest other facts (or truths) in such a way as to induce belief in what is suggested on the ground of real relation in the things themselves, a relation between what suggests and what is suggested."[4] What we call clear legal thinking is the application of reflective thinking to problem solving in the law. We must not establish our conclusions by intense personal desire, keenly felt emotional belief, folklore, superstition or dogmatic unquestioning acceptance. Rather, we must state grounds for our conclusion. A conclusion cannot stand on its own direct account, but only on account of something else which stands as "witness, evidence, voucher or warrant." We have to see an objective connection leading from that which we know to that which we don't know. We have to see a "link in actual things, that makes one thing the ground, warrant, evidence, for believing in something else."[5] Reflective thinking, therefore, is moving from the known to the unknown by an objective logical connection. The ability to think reflectively depends upon the power of seeing those logical connections. The ability to study law depends upon the power of seeing logical connections in the cases, of recognizing similarities and dissimilarities.

Simple formulas are always treacherous, but our common-law tradition comes down to a recognition of a simple basic concept: If *p* then q; here is p; therefore, here is q. Thus, the perennial question: are the facts *p* or not-p? There is much more to it than this, to be sure, and we will learn it, but this simplistic formula is offered now only to indicate that reflective thinking goes to the heart of logic in the law and that this mode of thinking concentrates on determining connections between statements.

Logical reasoning may be tested by objective criteria. We will set forth these standards so that you may test your own reasoning. Moreover, these criteria help to you evaluate the reasoning of others. It is the purpose of logic to discover and make available those criteria that can be used to test arguments for correctness.

The logician is concerned primarily with the correctness of the complicated process of reasoning. The logician asks: "Does the problem get solved? Does the conclusion reached follow from the premises used or assumed? Do the premises provide good reason for accepting the conclusion?" If the problem gets solved, if the premise provides adequate grounds for affirming the conclusion, if asserting the premises to be true warrants asserting the conclusion to be true also, then the reasoning is correct. Otherwise, it is incorrect. The law student soon learns that these are the questions presented by the Socratic method. Lawyers learn that their adversaries ask the same questions in response to a brief. Indeed lawyers ask these questions of their adversaries' briefs. Judges will ask the same questions when briefs are read and oral arguments are heard.

THE LANGUAGE OF LOGIC

The study of law involves the use of technical words of art used by logicians. You must understand some basic expressions that are important in the discussions that follow. Learn them now.

- *Proposition:* A proposition is any statement or assertion which is either true or false, and can be asserted or denied. In these respects propositions differ from questions, exclamations and commands. A proposition consists of *terms,* words or a group of words, which express a concept or simple apprehension. In the law, propositions come from many sources. We may draw them from constitutional texts or statutes, or from case law. Other propositions may come from a controlling fact, a fact that is either uncontested or has been found by a fact-finder. Examples of propositions:

  All men are mortal.

  All oral contracts for the sale of real estate are invalid.

- *Term:* A term is the simplest unit into which a proposition, and later a syllogism, can be logically resolved. When we discuss the elements of a syllogism, you will be introduced to *middle term, major term* and *minor term.* Examples of terms:

  All men: *middle term.*

  Mortal: *major term.*

  Propositions are divided into two terms (often Middle-Major, Minor-Middle and Minor-Major) and a copula or a connecting link between the terms.

- *Inference:* An inference is a process in which one proposition (a conclusion) is arrived at and affirmed on the basis of one or more other propositions, which were accepted as the starting point of the process. Stebbing observes that inference "may be defined as a mental process in which a thinker passes from the apprehension of something given, the datum, to something, the conclusion, related in a certain way to the datum, and accepted only because the datum has been accepted."[6] It is a process where the thinker passes from one proposition to another that is connected with the former in some way. But for the passage to be valid, it must be made according to the laws of logic that permit a reasonable movement from one proposition to another. Inference, then, is "any passing from knowledge to new knowledge."[7] The passage cannot be mere speculation, intuition or guessing. The key to a logical inference is the reasonable probability that the conclusion flows from the evidentiary datum because of past experiences in human affairs. A nickel-plated revolver was used in the bank holdup by a ski-masked robber who got away with $10,000 in marked money. A nickel-plated revolver, a ski-mask and $10,000 in marked money is found in the apartment of Dirty Dan, its sole occupant. The inference is permissible that our friend Dan was the bank robber. A moment is necessary to discuss the difference between *inference* and *implication.* These terms are

obverse sides of the same coin. We *infer* a conclusion from the data; the data *implies* the conclusion. Professor Cooley explains: "When a series of statements is an instance of a valid form of inference, the conclusion will be said to *follow* from the premises, and the premises to *imply* the conclusion. If a set of premises implies a conclusion, then, whenever the premises are accepted as true, the conclusion must be accepted as true also …."[8] As Brennan put it, "In ordinary discourse, [implication] may mean 'to give a hint,' and [inference], 'to take a hint.' Thus when my hostess yawns and looks at her watch, I *infer* from her behavior that she would like me to go home. Her yawn and look *imply* that this is her desire."[9] Drawing a proper inference is critical in the practice of law:

> 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 idiosyncrasies. 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 after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."[10]

- *Argument:* An argument is any group of propositions where one proposition is claimed to follow from the others, and where the others are treated as furnishing grounds or support for the truth of the one. An argument is not a mere collection of propositions, but a group with a particular, rather formal, structure.
- *Conclusion:* The conclusion of an argument is the *one* proposition that is arrived at and affirmed on the basis of the *other* propositions of the argument.
- *Premise:* The premises of an argument are the *other* propositions which are assumed or otherwise accepted as providing support or justification for accepting the *one* proposition which is the conclusion. Thus, in the three propositions that follow, the first two are *premises* and the third, the *conclusion:*

  All men are mortal.

  Socrates is a man.

  Socrates is mortal.

- *Premise and conclusion are relative terms:* Because many arguments contain more than one syllogism *(polysyllogisms)* any premise can serve as a premise in one argument after having been the conclusion of a previous argument. Premises and conclusions require each other. A proposition standing alone is neither premise nor conclusion. Only when it occurs as an assumption in an argument is a proposition a premise; it is a conclusion only when it is the proposition that is arrived at and claimed to follow other premises in the argument.
- *Deductive and inductive reasoning distinguished:* For purposes of legal reasoning, we suggest that whether an inference is deductive or inductive depends upon the nature of the relationship between the given proposition and the inferred proposition. What is

recommended here is a simplified, convenient formula for use by the legal profession, a clean cut approach that should satisfy all our needs, even though certain distinguished logicians, who teach to a broader census, may quarrel with the neatness or over-simplification of our formula. Here's how we approach the dichotomy at this time (subject to further explanations and qualifications in later chapters): When conclusions are reached from the general to the particular we call it deductive reasoning; conclusions reached by reasoning from a number of particulars to the general or from a particular to another particular, we call it induction.[11] The two types of reasoning will be treated in depth in subsequent chapters.

The value of this inferential reasoning has been described by John Stuart Mill:

> To draw inferences has been said to be the great business of life. Every one has daily, hourly and momentary need of ascertaining facts which he has not directly observed; not from any general purpose of adding to his stock of knowledge, but because the facts themselves are of importance to his interests or to his occupations. The business of the magistrate, [of the lawyer,] of the military commander, of the navigator, of the physician, of the agriculturist, is merely to judge of evidence and to act accordingly… [A]s they do this well or ill, so they discharge well or ill the duties of their several callings. It is the only occupation in which the mind never ceases to be engaged.[12]

Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.
637 F.2d 105, 116 (3d Cir. 1980)

The court's role is especially crucial when, as here, the plaintiff's case, and therefore the defendant's liability, is based solely on circumstantial evidence. The illegal action must be inferred from the facts shown at trial. Inferred factual conclusions based on circumstantial evidence are permitted only when, and to the extent that, human experience indicates a probability that certain consequences can and do follow from the basic circumstantial facts. The inferences that the court permits the jury to educe in a courtroom do not differ significantly from inferences that rational beings reach daily in informally accepting a probability or arriving at a conclusion when presented with some hard or basic evidence. A court permits the jury to draw inferences because of this shared experience in human endeavors …. Perhaps the only distinction between extracting factual conclusions from circumstantial evidence in daily life and in the courtroom is that a jury's act of drawing or not drawing an inference is preceded by a judge's instruction. The instruction serves to guide the jury through some process of ordered consideration. The court informs the jury that it must weigh the narrative or historical evidence presented, making credibility findings when appropriate, and then draw only those inferences that are reasonable in reaching a verdict.

When a trial court grants a directed verdict in a circumstantial evidence case, the court makes a legal determination that the narrative or historical matters in evidence allow no permissible inference of the ultimate fact urged by the opposing party. It decides that no reasonable person could reach the suggested conclusion on the basis of the hard evidence without resorting to guesswork or conjecture. To permit a jury to draw an inference of the ultimate fact under these circumstances is to substitute the experience of logical probability for what the courts describe as "mere speculation."

United States v. Villegas
911 F.2d 623, 628 (11th Cir. 1990)

In a criminal case, although certain portions of evidence may be introduced to present *permissible* inferences, the sum total must amount to a *reasonable* inference of the ultimate fact of defendant's guilt. Thus, the ultimate issue in a civil case based on circumstantial evidence is the ability to draw a reasonable inference, and not a speculation, of liability. In a criminal case, the ultimate burden on the government is the ability to draw a reasonable inference, and not a speculation, of guilt.

Espeland v. Green
54 N.W.2d 465 (S.D. 1952)

Plaintiff admittedly a "guest" in the automobile of defendant under the "guest statute" obtained a judgment in circuit court for injuries received in an automobile accident. Plaintiff's claim of "willful and wanton misconduct" on the part of defendant is predicated on the premise that defendant deliberately transported plaintiff notwithstanding defendant suffered momentary periods of unconsciousness due to the malady "petit mal" and thereby knowingly exposed plaintiff to injury that would quite naturally follow an attack. We resolve the case on the decisive issue of the sufficiency of such evidence to support the verdict. It is our opinion that the evidence considered most favorably from plaintiff's viewpoint together with all the inferences that may reasonably be drawn therefrom in support of plaintiff's cause of action fail to establish wilful and wanton misconduct on the part of defendant under the language of our statute as previously interpreted by this court and according to the standards laid down in prior decisions involving the statute. We therefore reverse the judgment entered by the circuit court.

The facts, stated most favorably to respondent, are substantially [paraphrased] as follows:

Appellant, the owner and driver of the automobile was 74 years old, driving a new 1950 automobile on a wide, graveled, country highway about 5:30 p.m. at approximately 30 to 35 miles per hour. The day was clear and the road was dry. His wife and the respondent, a neighbor and friend of appellant and his wife, were passengers. Appellant had made a trip from his farm to another farm where his wife and respondent were in order to return them to their homes.

For about 15 years appellant suffered from spells of dizziness and momentary loss of consciousness, none lasting more than about two minutes. These spells were referred to in the record as "black-outs." They occurred with increasing frequency; the most severe occurred approximately once a month. They came without warning, without a fixed pattern and left no ill effects. The mildest attacks could be experienced with other persons unaware that anything was occurring to appellant. In the most severe attacks appellant fell to the ground….

The ultimate and decisive question in the case at bar has to do with the degree of danger to which this appellant subjected respondent. We [have] said the hazard must be so great that the injury will *probably* result and that liability does not exist if the injury may only *possibly* result. The standards are stated in all their essentials in somewhat different language in Restatement of the Law where it is said that liability under this type of statue "involves a high degree of probability that substantial harm will result." Restatement, Torts § 500. In Comment g. it is pointed out that the reckless disregard of the safety of others necessarily present under our type of statute differs "from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves *a risk substantially greater in amount* than that which is necessary to make his conduct negligent." The most that the ordinary, reasonable man could say of the conduct of the appellant in the case at bar is that he intentionally did an act knowing that it contained a risk of harm to respondent. Reasonably prudent men cannot say that appellant was conscious or should have been conscious of the effect that his act in transporting respondent was of a highly dangerous character. Therefore appellant's conduct does not partake to an

"appreciable extent … of the nature of a deliberate and intentional wrong" as required and as a matter of law is not wanton and wilful under the statute. If we were to hold otherwise we would "draw the line too near to due care" and would almost certainly be opening a door leading to impossible confusion and eventual disregard of the legislative intent back of this statute designed to give relief from liability for negligence.

Missouri v. Southerland
1992 WL 292493 Mo. App. E.D.

Defendant argues that the trial court erred in refusing to submit the circumstantial evidence instruction requested by defendant. We agree. The trial judge must instruct on circumstantial evidence if the defendant so requests and the evidence is wholly circumstantial. However, this instruction does not need to be given where both direct and circumstantial evidence exists. Whether direct evidence exists is the dispositive issue in this case. The state argues that defendant's false statement "I'm Greg Heath …" is an admission constituting direct evidence.

Numerous Missouri cases have treated a defendant's admissions as direct evidence negating the need for a circumstantial evidence instruction. State v. Bannister, 680 S.W.2d 141, 148 (Mo. 1984). In *Bannister,* a circumstantial evidence instruction was unnecessary because Bannister told police about the crime, his flight and where they might find evidence. In State v. Sherrill, 657 S.W.2d 731, 738-39 (Mo. App. 1983), Sherrill admitted that he robbed and then caused his victim to fall to his death. Similar cases abound where the defendant's admission of guilt negated the need for a circumstantial evidence instruction. The common element in these cases is that the defendant admitted his complicity in these crimes. That element is not present here.

In State v. Regazzi, 379 S.W.2d 575, 578 (Mo. 1964), our Supreme Court set out the applicable definitions of direct and circumstantial evidence for determining whether the evidence presented is wholly circumstantial:

> Direct evidence is said to be evidence which if believed proves the existence of the fact in issue without inference or presumption; while circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist.

Cases like *Bannister*, where the defendant admits the crime, fit within this definition of direct evidence. The state argues that by giving a false name to the police the defendant demonstrated a consciousness of guilt which constitutes an admission and that, because admissions are direct evidence, it was not necessary to give the circumstantial evidence instruction. The fallacy of the state's argument lies in its major premise that admissions are direct evidence. Some admissions are, such as where the defendant admits the commission of the crime. Some admissions, such as the making of a false statement, only raise an inference of guilt.

EEOC v. Greyhound Lines, Inc.
635 F.2d 188, 194 (3d Cir. 1980)

We are to decide whether the plaintiff met the necessary burden of proving that Greyhound Lines' facially neutral no-beard job qualification policy had a discriminatory effect against black workers. The EEOC challenged the legality of Greyhound's policy that prohibits the wearing of beards by employees holding public contact jobs. It brought the action on behalf of an employee who has a skin condition known as pseudo folliculitis barbae (PFB) which predominantly affects black males who shave.

A legitimate or permissible inference must be deduced as a logical consequence of facts presented in evidence.

There must be a logical and rational connection between the basic facts presented in evidence and the ultimate fact to be inferred. EEOC's evidence, relating to the incidence of the skin condition, showed only that some black males are likely to grow beards because of this disease. It may be inferred from this that some black males would be eligible for public contact positions if they did not suffer from PFB. That is the only necessary or even permissible inference that can be drawn from this data. The evidence was insufficient to support the next inference, the ultimate fact essential to EEOC's case: that proportionately fewer blacks than whites were eligible for public contact positions and therefore that Greyhound's policy had a racially discriminatory impact. We cannot draw this inference because no evidence was introduced demonstrating that there is no skin condition or disease affecting white males—other than PFB—that makes shaving difficult or painful and requires them to grow beards. Without this evidence EEOC proved only that the employee was disadvantaged because he had PFB, not that he was disadvantaged because he was black.

Sunward Corp. v. Dunn & Bradstreet, Inc.
811 F.2d 511, 520-521 (10th Cir. 1987)

While all competing inferences do not have to be negated in order to make an asserted inference reasonable, reasonableness itself can be tested by the facts and possibilities in each situation…. By electing not to call any of the scores of identified recipients of the reports to ask them what extrinsic facts they knew, and what they understood the reports to mean, Sunward offers little more than debater's suppositions instead of reasonable inferences. This is especially true considering the brief and general testimony about the existence of rumors concerning Sunward's business. This vacuum of proof is further emphasized by pure guesswork as to which of the claimed defamatory meanings was supposedly understood by recipients: financial distress, incompetence or inability to produce and stand behind its product because of small size alone? It would have been impossible for a jury to make that determination on the evidence presented.

Although a jury is entitled to draw reasonable inferences from circumstantial evidence, reasonable inferences themselves must be more than speculation and conjecture. Galloway v. United States, 319 U.S. 372 (1943). For example, in Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321 (11th Cir. 1982), the court rejected as too speculative inferences that a nursing home was negligent and therefore liable for a resident's wrongful death when he wandered off while under the nursing home's care. Upholding the district court's grant of judgment n.o.v., the court stated that, "a jury will not be allowed to engage in a degree of speculation and conjecture that renders its finding a guess or mere possibility. Such an inference is infirm because it is not based on the evidence." The line between "reasonable inferences" and mere speculation is impossible to define with any precision. However, the Third Circuit has effectively described the process of distinguishing between reasonable inferences and impermissible speculation …. [quoting] Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 895 (3d Cir.).

In this case, we are not confronted with difficult line-drawing determinations. Inferences that the reports were understood as defamatory and that they caused or contributed to Sunward's financial difficulties are here supported only by speculation and conjecture. The record is devoid of evidence that anyone ever understood the credit reports in the defamatory manner inferred by the plaintiff.

BELIEFS

In general logic as well as legal logic, a belief must refer to something beyond itself if we are to determine its value. A belief is simply an assertion about a fact or law that we accept. It is something that we affirm, or at least acquiesce in, even though it is a matter of which we have no sure knowledge or proof. But it is something of which we are sufficiently confident to act upon. It is something we now accept as true. Unsupported beliefs become demolished in the crucible of advocacy. Experienced judges have seen many eager lawyers, young and old, crusading with maximum passion and boundless energy, strident believers in their clients' causes, hopelessly shot down because their propositions were totally bereft of support in law or in logic. To passionately feel or believe is one thing; to prevail in the court, quite another. Those who put passion in place of reason seldom survive conflicts in the courtroom. Similarly, we cannot base our major proposition on the basis that we think it self-evident, that we think that its truth is obvious. Propositions that have been accepted by many careful thinkers as self-evident have finally been found not to be indubitable. Columbus did prove that the world was not flat. In legal argument our major premises must not be based on emotion or instinct.

Scott v. Commanding Officer
431 F.2d 1132, 1141 (3d Cir. 1970)

(Aldisert, J., concurring)

Professor James included as "movement consequent upon cerebromental change" expressions of emotions and instinctive and impulsive performances. "An emotion," he said, "is a tendency to feel, an instinct is a tendency to act, characteristically, when in the presence of a certain object in the environment." Instinct to him was "the faculty of acting in such a way as to produce certain ends without foresight of the ends, and without previous education in the performance," and he declared that every instinct is an impulse. Bertrand Russell believed it possible for there to be a spontaneous belief. C. J. Adcock suggests that it is sometimes difficult to decide whether behavior based on emotionality results because "the immediate drive strength is overvalued and so difficult to control. The same result will obtain if the control function itself is too weak. It is very important to notice that while low ego control and high emotionality have similar effects they are functionally very different." And no discussion of a comparison between reason and uncontrolled action would be considered complete without a reference to Freud's analysis: "The ego represents what may be called reason and common sense, in contrast to the id, which contains the passions."

John Quincy Adams once said, "I told him it was law logic—an artificial system of reasoning, exclusively used in the courts of justice, but good for nothing anywhere else."[13] We disagree. But we are willing to concede that there are idiosyncratic aspects to legal logic not necessarily found in other disciplines. Unlike reflective reasoning in everyday life, the statement of belief in our major proposition in law must come from some authority. We cannot start with a proposition simply because we have always believed it. (Everybody knows this; it's common knowledge.)

In the law, our major proposition—called the *major premise*—must usually have the hallmark of legal authority, constitutional text, statute or case law. In this respect, legal logic differs from everyday logic or reflective thinking in ordinary life. Here, too, although legal logic follows the laws of general logic present in mathematics, it differs from the logic of an exact science. In law there are no absolute truths like those established in mathematics. Lacking absolute truths, logical propositions merely express that which is likely to be true or false. In the process of *induction*, reasoning from a group of particulars to a generalization, we do not purport that our concluding proposition is a truth. We represent only that it is more probable than not. Because the law develops with the times, and changes as community values change, the major premise may change with the times. The proposition "separate but equal" with respect to racial segregation was deemed appropriate in 1896,[14] and later applied to school segregation for decades. In 1954, however, the Supreme Court ruled that as a matter of fact schools for black children were not "equal"; and in subsequent per curiam opinions, the Court jettisoned the "separate but equal" doctrine as a matter of law.[15] Professor Edward H. Levi has explained the process:

Therefore it appears that the kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules change as the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them. But this kind of reasoning is open to the charge that it is classifying things as equal when they are somewhat different, justifying the classification by rules made up as the reasoning or classification proceeds. In a sense all reasoning is of this type, but there is an additional requirement which compels the legal process to be this way. Not only do new situations arise, but in addition peoples' wants change. The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas. And this is true even where legislation or a constitution is involved. The words used by the legislature or the constitutional convention must come to have new meanings. Furthermore, agreement on any other basis would be impossible. In this manner the laws come to express the ideas of the community and even when written in general terms, in statute or constitution, are molded for the specific case.[16]

REASONABLE, REASONING, REASONS

Consider now an interrelationship between four words that sound alike, but whose meanings diverge in our study of logic: “reasonable,” “reasoning,” “reason” and “reasons.”

Aylett v. Secretary of Housing and Urban Dev.
54 F.3d 1560, 1567-1568 (10th Cir. 1995)

Because heightened scrutiny requires an analysis of the reasoning process of an administrative review that rejects a hearing officer's credibility findings, it is necessary to remind ourselves of some elementary, yet indispensable, concepts of the logical process in adjudication. Involved in the judicial process is an interrelationship among four terms that sound alike, but whose meanings diverge in the decisional process: "reasonable," "reasoning," "reasons" and "reason."

A judge's decision on the choice, interpretation and application of a legal precept involves a value judgment justifiable in his or her mind because the decision is "reasonable," in the sense that it is fair, just, sound and sensible. One judge may believe that it is "reasonable" to maintain the law in harmony with existing circumstances and precedents, and accede to the magnetic appeal of consistency in the law; another may assert that the issue should be considered pragmatically, and will respond only to its practical consequences. What is "reasonable" in given circumstances may permit endless differences of opinion. And this is how it should be. The inevitable varying views found in mult iperson reviewing agencies or courts is one of the most vitalizing traditions animating the growth of common law.

Determining what is "reasonable" is closely related to the overarching process we call "reasoning," a progression of thought based upon the logical relation between truths. Logical thought is reflective thinking, which may be understood as an "operation in which present facts suggest other facts (or truths) in such a way as to induce belief in what is suggested on the ground of real relation in the things themselves, a relation between what suggests and what is suggested." Reasoning involves recognizing a "link in actual things, that makes one thing the ground, warrant, evidence, for believing in something else." The ability to adjudicate cases—or in this instance, to review a decision of a tribunal inferior in the administrative agency hierarchy —depends upon the power to see logical connections in the cases, to recognize similarities and dissimilarities. This means solving a problem by pondering a given set of facts to perceive the relationship among those facts and reaching a logical conclusion.

In this process we resort to "reasons," which constitute the various premises utilized in the reasoning process. In the judicial review process, deductive reasoning is the centerpiece: "Reasons" constitute the major and minor premises of the categorical syllogism.

Finally, "reason" is often used as a shorthand expression involving an inquiry into the validity or cogency of "reasoning" and the truth of the factual component of "reasons." The application of "reasonableness" to "reason" is an ever-recurring scenario.

As judges of a trial tribunal or as reviewing judges or agency officials, we can always appraise a specific argument from the sole vantage of its reasoning to determine whether it is, in the language of the logician, valid or cogent, without at the same time troubling ourselves over the truth and falsity of its premises. Similarly, we can always appraise a specific argument from the sole vantage of the truth and falsity of its premises, without troubling ourselves over the validity or cogency of its reasoning. Whenever we appraise an argument to determine whether

we ought to accept it and its conclusion, we must do both of these things. Arguments that have both valid or cogent reasoning and true premises are sound arguments. Thus, an argument fails to be sound if either (a) the reasoning it employs from premises to conclusion is not acceptable, or (b) one or more of its premises is false.

We conclude that the reasons stated by the Secretarial Designee in rejecting the credibility findings of the ALJ in this case are woefully deficient. In some instances, without troubling ourselves over the truth or falsity of the premises utilized, his reasoning is neither valid nor cogent, and constitutes what the logicians describe as a formal fallacy, or a failure to subscribe to the six rules of a categorical syllogism. In other instances, the factual content of his premises find no support in the record and hence must be regarded as false or untrue.

CONCLUSION TESTING

Our conclusion can be true only when (1) the other propositions (premises) are true, and (2) these propositions imply the conclusion (in other words, the conclusion is inferred from these propositions).

Major Premise: All men are mortal.

Minor Premise: Socrates is a man.

Conclusion: Therefore, Socrates is mortal.

How do we test this reasoning? Our approach will outline certain techniques, easily applied methods for testing the correctness of any reasoning in the law. Our study here will go a step further than do other current guides to legal reasoning. We will define, explain and give examples of the main tests for determining the correctness of an argument—its examination and analysis for *fallacies.* Fallacies are arguments that appear to be valid but are incorrect methods of reasoning.

Not all means of persuasion are based on reflective thinking or formal logic. As we shall learn in our study of fallacies, some forms of persuasion do not qualify. For example, rhetoric is a means of persuasion. Seekers of public office, columnists, television commentators, editorial writers and advertising experts are masters of persuasion, who often appeal to emotions rather than to reason. Their aim is to induce belief, not to demonstrate a conclusion by pure logical means. These presentations may be works of art, but they do not always demonstrate the logic that distinguishes legal argument in all but one important area (as we will demonstrate in our study of fallacies): impassioned closing speeches to courtroom juries.

Moreover, not all good reasoning is stated in the order of formal correctness. Often, the conclusion is stated first: “Socrates is a mortal because all men are mortal and Socrates is a man.” Or, in a Supreme Court case: “It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax imposed by this ordinance is, in substance, just that.”[17]

At times, the argument is compressed to a single sentence. Thus, in Roe v. Wade, Justice Blackmun declared:

> This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.[18]

Implicit in this statement was the following syllogism:

> *Major Premise:* The right of privacy is guaranteed by the Fourteenth (or Ninth) Amendment.
>
> *Minor Premise:* A woman’s decision to terminate her pregnancy is protected by a right of privacy.
>
> *Conclusion:* Therefore, a woman’s decision whether to terminate her pregnancy is

protected by the Fourteenth (or Ninth) Amendment.

From this, we also learn that a premise may be omitted from an argument: “All men are mortal, therefore, Socrates is mortal”; or “Socrates is a man, therefore, he is mortal”; or “All men are mortal. Socrates is a man.”

Thus, in examining the cases and studying the syllogisms, keep in mind:

- The conclusion may follow the premises.
- The conclusion may precede the premises.
- The conclusion may come in between the premises.
- The conclusion may be stated explicitly.
- The conclusion may be implied.

In these pages we explain that not all thinking is logical thinking, nor all reasoning good reasoning. We seek to teach the basics of well-constructed argument, to exhibit the characteristics of clearness, correctness and relevance, to provide consistency, absence of contradiction, demonstrativeness and cogency.

“People do take judicial reasoning seriously,” Professor Charles A. Miller has observed, “and they are not fools nor being fooled in doing so, at least no more than in other forms of communication or with respect to other strands that form the web of a political culture.” Legal reasoning cannot be artificial, esoteric or understandable only to an elite legal priesthood; it must be capable of public comprehension.[19]

An argument that is correctly reasoned may be wrong, but an argument that is incorrectly reasoned cannot be right.

We must be careful to distinguish between the form of an argument and its content. Sound logical reasoning requires both truth in the premises as well as validity in the relationship of the premises. A sound argument is any deductive argument which is valid and which has only true premises. A sound argument must have a true conclusion.

There may be some statements, however, that cannot be redacted, because deleting references to the polygraph examination would significantly alter their meaning. For example, when confronted with information about the polygraph examination indicating deception, two different defendants might react by making the following statements: (1) "I knew I shouldn't have agreed to take this polygraph test; I guess I can't trick that machine after all; I committed this crime." (2) "I still can't remember a thing, but I know that polygraph examinations are never wrong; this polygraph examination showed that I was deceptive when I denied committing the crime; therefore, even though I don't remember, I suppose I committed the crime." While the last four words of both statements are identical ("I committed the crime"), the meaning of those four words is different and is determined by the context. Before attempting to redact each statement, it must be determined whether the statement may be properly found to express a defendant's belief or recollections as to an independently relevant fact or to support an inference as to such a belief or recollection.

The first response is a confession; the second, is instead, a statement of a belief in the general accuracy of polygraph examinations and, implicitly, a repetition of the information from or about the polygraph examination. The second response says nothing independent of its major premise (polygraph information is always accurate) about whether the defendant committed the crime.

Of course, we are not suggesting that the major premise (stated simply, polygraph information is always accurate) and the minor premise (stated simply, deception was shown by this polygraph examination) in this defendant's deductive reasoning process (essentially, a syllogism) are accurate or reasonable, only that they necessarily lead to and totally explain the defendant's conclusion. *See generally* Landau, Logic for Lawyers, 13 Pac. L. J. 59 (1981) (discussing deductive reasoning); Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking (1992).

The meaning of the first response is still conveyed when references to information from or about the polygraph examination are omitted; the meaning of the second is not. The meaning of the second statement is so inextricably tied to the fact of, or information from or about, the polygraph examination that the meaning cannot be retained when the context and explicit reference to the polygraph are excluded. The fact that the defendant is permitted under our precedents to explain that information from or about the polygraph examination motivated him or her to make the statements does not dilute the requirement that redacting a statement must not alter significantly the meaning of the defendant's actual statement in order to be introduced over an objection based on OEC 402 or OEC 403.

… A LAGNIAPPE

Yes, Virginia, you can have some fun playing games with legal reasoning. Here are the exercises. The object is to use your present understanding of drawing preliminary inferences from the stated facts and reaching various subconclusions as you work out the answers. It will help if you draw up lists or cross charts, or boxes. The game is to construct logical arguments to prove that your answers are correct. To be sure, there are answers set forth in Appendix "A" at the end of book, but answers are not as important as the reasoning process to take you to them.

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1. Six professors at the University of Pittsburgh School of Law are named Mr. Able, Ms. Baker, Ms. Charlie, Mr. Dogge, Mr. Easy and Ms. Foxx. Not necessarily in any particular order they are graduates of the following law schools: two from Wisconsin and one each from Virginia, Pitt, Penn and Harvard. They teach the following subjects: administrative law, contracts, evidence, torts, crimes and civil procedure.

Your assignment is to identify each professor with the subject he or she teaches and the law school from which each graduated.

The civil procedure class is taught by a Harvard graduate who lives in the same apartment house as does Mr. Easy, who does not teach evidence, torts, administrative law or crimes.

Ms. Charlie, who teaches evidence, and the contracts professor recently attended a reunion of their same law school class.

Because he teaches at his alma mater and has acquired seniority, Mr. Dogge earns more money than Ms. Foxx does. Additionally, he earns more than does Professor Able, who teaches administrative law. Ms. Foxx has never attended a class reunion, does not teach torts, and did not go to Harvard or to any law school located in Pennsylvania. Neither Mr. Able nor the torts professor attended Harvard. Mr. Able did not go to Pitt, and the torts professor did not go to Penn.

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2. Six members of the first year law school class are Ms. Mike, Mr. Nancy, Mr. Oliver, Ms. Peter, Ms. Queen and Mr. Roger. They formed a study group.

The occupations of the six, not necessarily in the order of their names, are: paralegal, airline pilot, housewife, bishop, television producer and retired army colonel.

Two received A's; two B's; one a C and one a D.

Tell us the occupation of each member and the grade each received.

Ms. Mike is single, lives in Pasadena and received a higher grade than the airline pilot did and the same grade as the housewife did.

Her next-door neighbor, a white-haired gentleman who is ten years older than Mr. Nancy, is a retired army colonel who also belongs to the study group. He received a grade

higher than that of the paralegal, who is single and received a C.

The housewife has the longest commute; she lives in Long Beach with her oil executive husband.

Ms. Queen is the daughter of one member of the group and lives with him in the same city as does the television producer, and received a grade which was two letter grades lower than that of her neighbor, one letter grade lower than that of the bishop and one letter grade above that of Mr. Roger.

The television producer had the same grade as the housewife, which was three letter grades higher than that of the airline pilot.

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3. Six men recently had a twenty-fifth school reunion: Jiggs, King, Love, Sugar, Victor and Tare. Their present occupations, not necessarily in the order of their names, are a federal judge, an assistant secretary of state, a professor, a banker, a New York City corporate counsel and an insurance company vice president. Again, not necessarily in the order in which they are named, they live as follows: two in New York City; one each in San Francisco, California; Washington, D.C.; Phoenix, Arizona; and Chicago, Illinois.

Name the occupation and city of residence of each.

The judge is older than either his former roommate, who is the assistant secretary of state, or Jiggs. The judge's present wife is King's daughter; his former wife is now married to the New York corporate counsel, who lives in the same city as Jiggs does.

The judge lives farther west than do the banker and the insurance company vice president, each of whom lives farther west than Tare does. King uses a monthly pass on the Metropolitan subway system in the nation's capital.

Tare's annual income is $100,000, exactly twice that of the professor. Sugar has an annual income of $49,800; he is the judge's cousin and Victor's stepbrother.

The insurance company vice president lives in a hotter climate than that of any of his classmates.

Sugar lives east of Love but west of Victor who lives west of either Tare or the professor or the assistant secretary of state.

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1. Irving M. Copi, Introduction to Logic 4 (7th ed. 1986).

2. Joseph C. Hutcheson, Jr., The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions, 14 Cornell L. Q. 274, 275-76 (1929).

3. *Id.* at 278.

4. John Dewey, How We Think 12 (2d ed. 1933) (emphasis omitted).

5. *Id.*

6. L.S. Stebbing, A Modern Introduction to Logic 211-212 (6th ed. 1948).

7. Joseph Gerard Brennan, A Handbook of Logic 1 (1957).

8. John C. Cooley, A Primer of Formal Logic 13 (1942).

9. Joseph Gerard Brennan, A Handbook of Logic 2-3 (1957).

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

11. For example, Professor Copi teaches:

"Deductive inferences, it is sometimes said, move from the general to the particular, while inductive inference moves from the particular to the general. On analysis, this way of distinguishing them proves unsatisfactory….The difficulty lies in the fact that a valid deductive argument may have universal propositions for its conclusion as well as for its premises…. The fundamental difference between these two types of argument lies in the claims that are made about the relations between premises and the conclusions…. In deductive arguments, the conclusion is claimed to follow from its premises with absolute necessity; in inductive arguments, the conclusion is claimed to follow from its premises only with some degree of probability." Irving M. Copi & Carl Cohen, Introduction to Logic 58-59, 61 (9th ed. 1994).

As will be discussed in depth in subsequent chapters, we emphasize that in deductive reasoning, if the premises are true, then the conclusion is equally true. No such similar representation is made in inductive reasoning, for as Professor Copi explains, the conclusion is only more probable than not. Moreover, our approach to inductive reasoning includes inductive generalization as well as analogy, although some logicians seem to classify analogy as a *sui generis* form of reasoning.

12. John Stuart Mill, A System of Logic Ratiocinative and Inductive 5 (8th ed. 1916).

13. Jeffrey G. Murphy, Law Logic, 77 Ethics 193 (1966).

14. Plessy v. Ferguson, 163 U.S. 537 (1896).

15. Brown v. Board of Education, 347 U.S. 483 (1954). See discussion of the per curiam opinions in Chapter 13, *post.*

16. Edward H. Levi, An Introduction to Legal Reasoning, 15 Chi. L. Rev. 501, 503 (1948).

17. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943).

18. 410 U.S. 113, 153 (1973).

19. United States v. Standefer, 610 F.2d 1076, 1105 (3d Cir. 1979) (Aldisert, J., concurring, citing Charles A. Miller, The Supreme Court and the Uses of History 12 (1969)).

Chapter 4

INTRODUCTION TO DEDUCTIVE AND INDUCTIVE REASONING

The logic of the law is neither all deductive nor all inductive. To be sure, where the law is clear and the application of the facts to the law equally plain, the argument often sounds solely in deductive reasoning. Where the law is clear and the sole question is application of facts to the law, both inductive and deductive reasoning are used. And where the law is not clear, in Cardozo's phrase, where the courts "work for the future," both types of reasoning are very much involved.

Any development of the law becomes a recursive process. First, as cases are compared and their resemblances and differences noted, a judicial decision is made and a legal precept is created. Next there is a period when that newly minted precept becomes more or less fixed. A further stage takes place when the "new" precept becomes "old" and breaks down, or evolves, as new cases are decided. Inductive reasoning usually dominates the first stage—the creation of the precept. Deductive reasoning is used in refining the created precept and in applying it to the facts before the court. Inductive reasoning appears again at a later stage when efforts are made in subsequent cases to break down the precept.

This being so, what form of reasoning do we discuss first? Here we have a chicken-or-the-egg question. As we have explained, the common law develops from specific narrow rules to broader precepts, a classic process of inductive reasoning. Yet, to understand induction, it is best to first learn deduction. Hence we put the deductive cart before the inductive horse with some introductory observations on deductive reasoning.

DEDUCTIVE REASONING

Deductive reasoning is a mental operation that a student, lawyer or judge must employ every working day. Formal deductive logic is an act of the mind in which, from the relation of two propositions to each other, we infer, that is, we understand and affirm, a third proposition. In deductive reasoning, the two propositions which imply the third proposition, the *conclusion*, are called *premises.* The broad proposition that forms the starting point of deduction is called the *major premise;* the second proposition is called the *minor premise.* They have these titles because the major premise represents the *all;* the minor premise, something or someone included in the all.

Logical argument is a means of determining the truth or falsity of a purported conclusion. We do this by following well established canons of logical order in a deliberate and intentional fashion. In law we must think and reason logically. We must follow a thinking process that emancipates us from impulsively jumping to conclusions, or frees us from argument supported only by strongly felt emotions or superstitions. That which John Dewey said for school teachers in generations past is still vital and important today: Reflective thought "converts action that is merely appetitive, blind and impulsive into intelligent action."[1]

The classic means of deductive reasoning is the *syllogism.* Aristotle, who first formulated its theory, offered this definition: "A syllogism is discourse in which, certain things being stated, something other than what is stated follows of necessity from their being so."[2] He continued: "I mean by the last phrase that they produce the consequence, and by this, that no further term is required from without to make the consequence necessary."[3] From this definition we can say that a syllogism is a form of implication in which two propositions jointly imply a third.[4]

Special rules of the syllogism serve to inform exactly under what circumstances one proposition can be inferred from two other propositions. Consider the classic syllogism:

All men are mortal.

Socrates is a man.

Therefore, Socrates is mortal.

This is a *categorical syllogism,* an argument having three propositions—two premises and a conclusion. A categorical syllogism contains exactly three terms or class names, each of which occurs in two of the three constituent propositions. A few definitions from the Socrates-is-a man syllogism:

- The major term is the predicate term of the conclusion, and of the major premise.
- The minor term is the subject term of the conclusion, and of the minor premise.
- The middle term does not appear in the conclusion, but must appear in each of the two other propositions.
- The major premise is the premise containing the major term.

- The minor premise is the premise containing the minor term.

Because the first proposition contains the major, or larger term, it is named the *major premise,* the larger precept laid down. Because the second contains the minor, or smaller term, it is called the *minor premise,* the lesser statement laid down. Because it follows from the major to the minor premise, the third proposition is called the *conclusion.* In the standard form categorical syllogism as used in the law, the major premise is stated first, the minor premise second and finally the conclusion. Returning to our classic example:

Major Premise: All men are mortal
Major Term: Mortal
Middle Term: All men
Minor Premise: Socrates is a man
Minor Term: Socrates
Middle Term: Man
Conclusion: Therefore, Socrates is mortal
Minor Term: Socrates
Major Term: Mortal

Let us parse this syllogism identifying its parts:

Major Premise: The subject, "All men" (middle term); the copula "are" that connects the middle term with "mortal" (major term).

Minor Premise: The subject, "Socrates" (minor term); the copula "is" that connects the minor term with "man" (the middle term).

Conclusion: Therefore, "Socrates" (the minor term); the copula "is" that connects the minor term with "mortal" (the major term).

Some helpful hints derive from the foregoing rules: the middle term ("All men") may always be known by the fact that it does not occur in the conclusion. In law, the major term ("mortal") often is the predicate of the conclusion. The minor term ("Socrates") is always the subject of the conclusion.

INDUCTIVE REASONING

Deductive reasoning and adherence to the Socrates-is-a-man type of syllogism is only one of the major components of the common-law logic tradition. Inductive reasoning is equally important. In legal logic, it is often used to fashion either the major or the minor premise of the deductive syllogism. Often, a statute or specific constitutional provision unquestionably qualifies as the controlling major premise. It is the law of the case, with which the facts (minor premise) will be compared, so as to reach a decision (conclusion). Where no clear rule is present, however, it is necessary to draw upon the collective experience of the judiciary, to use Lord Diplock's felicitous phrase, to fashion a proper major premise from existing legal rules, the specific holdings of other cases. This is done by inductive reasoning.

As we now proceed to explain the difference between deductive and inductive reasoning, we do so with a pronounced caveat. This is a book on *legal* reasoning. It is not a book on *general* reasoning, nor an introduction to the general study of logic. Our formulations of definitions are guided by Max Radin's comment that the test of a definition is whether it is useful. We therefore acknowledge that our explanations may be considered by some logicians to be simplistic, if not precisely accurate when viewed against the universal cosmos of logic.

General logic, as well as law logic, deals with universal and particular propositions. And within this specialty it is possible in deductive logic to reason from a universal to another universal. For example:

All animals are mortal.

All men are animals.

Therefore, all men are mortal.

But the law is made up of particulars. In litigation, it is the particular facts found by the fact-finder that is the objective of any trial. In a commercial or business transaction it is the particulars of the conduct, deal, arrangement, agreement, bargain or understanding that create the conflict between the parties. Tight particulars are controlling in the law. And although in a series of syllogisms (polysyllogisms) we may reason deductively from the universal to a less broad universal before reaching the conclusion of the last of a series of syllogisms, the ultimate conclusion sought in deductive reasoning in the law is a particular.

Thus, for our purposes in this study, we can say that deductive reasoning moves by inference from the general ultimately to the particular; inductive reasoning moves from the particular to the general, or from the particular to the particular.

In law, as in general logic, there are fundamental differences between the two types of reasoning:

- In deduction, the connection between a given piece of information and another piece of information concluded from it is a *necessary* connection. A deductive argument is one whose conclusion is claimed to follow from its premises with absolute necessity. If its premises are

valid, the conclusion is valid. If the conclusion is valid, the premises are valid.

- In a valid deductive argument, if the premises are true, the conclusion *must* be true.
- An inductive argument is one whose conclusion is claimed to follow from its premises only with *probability* and not absolute necessity. All that is represented is that the conclusion is more probable than not.
- In induction, the connection between given pieces of information and another piece inferred from them is *not* a logically necessary connection. Its premises do not provide *conclusive* support for the conclusion; they provide only *some* support for it. Inductive arguments may be evaluated, for better or for worse, by the degree of likelihood or probability which their premises confer upon the conclusion.
- In a valid inductive argument, the conclusion is not necessarily an absolute truth; by induction, we reach a conclusion that is only *more probably* true than not.
- Thus, the core of the difference between deductive and inductive reasoning lies in the strength of the claim that is made about the premises and its conclusion. In the deductive argument, the claim is that if the premises are true and valid, then the conclusion is true and valid. In the inductive argument, the claim is merely that if the premises are true, the conclusion is more probably true than not.[5]
- In the law deductive reasoning moves from the general (universal) to the particular.
- In the law inductive reasoning moves:
  —from the particular to the general (universal) (induced generalization by enumeration of instances), or

  —from the particular to the particular (analogy).

INDUCTIVE GENERALIZATION

For an introductory look at the process of induction, let us start with the all-men-are-mortal major premise. The premise, in general form, resulted from the process of enumeration; it was created by enumeration of billions of particulars to create a general statement. It is an example of inductive generalization:

Adam is a man and Adam is a mortal.

Moses is a man and Moses is a mortal.

Tiberius is a man and Tiberius is a mortal.

George Washington is a man and George Washington is a mortal.

John Marshall is a man and John Marshall is a mortal.

Pope John Paul II is a man and Pope John Paul II is a mortal.

Therefore, all men are mortal.

It should be clear that the truth of the conclusion drawn from this inductive process is not guaranteed by the form of the argument, not even when all the premises are true, and no matter how numerous they are. We always run the risk of the fallacy of hasty generalization, about which we will learn more later. We can say, however, that the creation of a major premise in law by the technique of *inductive enumeration,* although not guaranteed to produce an absolute truth, does produce a proposition more likely true than not. This is the classic reasoning from a group of particulars to the general. This premise (which is the conclusion reached by inductive reasoning) is then, of course, always subject to modification as new cases are decided. Formulating a generalization in the law, that is, enumerating a series of tight holdings of cases (legal rules) to create a generalized legal precept (legal principle), is at best a logic of probabilities. We accept the result, not because it is an absolute truth, like a proposition in mathematics, but because it gives our results a certain hue of credibility. The process is designed to yield workable and tested premises, rather than truths.

From this you can see the interrelationship in the law between inductive and deductive argument. We use inductive enumeration to reach a conclusion that embodies a general class. The inductive conclusion then becomes the major premise in a deductive argument to reach the conclusion urged upon the court.

ANALOGY

Closely akin to reasoning by generalization is reasoning by *analogy*, which is the heart of the Socratic method used in teaching law and in the dialogues between judges and lawyers at oral argument. Although we find it convenient to classify analogy as a type of inductive reasoning, not all logicians agree, many suggesting that there is a difference between argument by enumeration and argument by analogy.[6] We place both processes under the heading of inductive reasoning because each process begins with an examination of particular instances. Moreover, as we shall see later, the strength of analogy in legal analysis is sometimes measured by an enumeration of relevant resemblances. In both forms the conclusion from the premises is represented as more probable than not. No further representation is made.

For our purposes, the specific room to which analogies should be assigned in the house of logic is not as important as understanding the criteria to be applied to analogies. Pursuant to the method of analogy, the courts do not generalize from a series of holdings, but proceed from certain relevant resemblances and differences between the case at bar and another single case or a relatively small group of cases. The relation between enumeration and analogy is close. Both use probability in reasoning. The force of an induced generalization by enumeration is measured by the *quantity* of instances. The force of analogy depends upon the *quality* of the positive and negative resemblances.

Lawyers and judges are often vulnerable to attacks on their reasoning by analogy. A proper analogy should identify the number of respects in which the compared cases, or fact scenarios, resemble one another (let us call these resemblances positive analogies) and the number of respects in which they differ (negative analogies). In analogy, unlike the method of enumeration, the quantity of cases is not significant. Instead, what is important is *relevancy*—whether the compared facts resemble, or differ from, one another in relevant respects. John Stuart Mill asked the question: "Why is a single instance, in some cases, sufficient for a complete induction, while in others myriads of concurring instances, without a single exception known or presumed, go such a very little way towards establishing an universal proposition? Whoever can answer this question knows more of the philosophy of logic than the wisest of the ancients, and has solved the problem of Induction."[7]

To refer again to the all-men-are-mortal syllogism, we can also use the process of analogy to conclude that Plato is a man:

> Socrates is a man and possesses physiological characteristics X, Y and Z.
>
> Plato possesses physiological characteristics X, Y and Z.
>
> Therefore, Plato is a man.

Let us turn to more practical examples of the process of analogy:

> Able Chevrolet Company is liable for violating the antitrust laws by requiring a tie-in purchase of a refrigerator manufactured by Mrs. Able if you want to buy a Camaro.

It is not difficult to analogize that liability also would follow from these facts:

Baker Pontiac Company requires a tie-in purchase of a refrigerator manufactured by Mrs. Baker if you want to buy a Firebird.

What about other circumstances? Must the resemblances be relevant? Absolutely. Consider the following:

State College had a championship basketball team last year. Team members came from high schools A, B, C, D, E and F.

State College has recruited new players from high schools A, B, C, D, E and F for this year's team.

Therefore, State College will have a championship basketball team this year.

Are the resemblances relevant? We must ask if the resemblance (players from the same high schools) is relevant, i.e., critical to the conclusion we seek to draw—a championship basketball team. An irrelevant similarity cannot provide the proper basis for an analogy.

An appreciation of these methods of reasoning will both sharpen your power of analysis and facilitate your study of law. We have outlined here only an introduction to deductive and inductive reasoning. We will describe the methods in depth in the following chapters.

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1. John Dewey, How We Think 17 (1933).

2. L.S. Stebbing, A Modern Introduction to Logic 81(6th ed. 1948) (quoting *Anal. Priora* 24b).

3. *Id.* (quoting *Anal. Priora*, 18).

4. *Id.*

5. *See* discussion in Irving M. Copi & Carl Cohen, Introduction to Logic 57-61 (9th ed. 1994).

6. *See e.g.*, Joseph Gerard Brennan, A Handbook of Logic 154 (1957) ("Current logicians, however, tend to regard all inductions as following the first pattern, that is, as inferences to generalizations [rather than from particular to particular].") *But see* Irving M. Copi, Introduction to Logic 433 (7th ed. 1986). ("Because of the great similarity between argument by simple enumeration and argument by analogy, it should be clear that the same types of criteria apply to both.")

7. John Stuart Mill, A System of Logic Ratiocinative and Inductive 206 (8th ed. 1916).

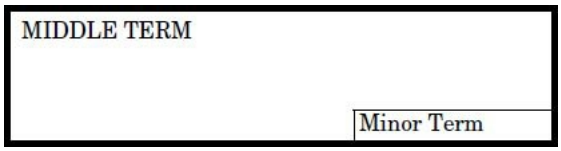
Chapter 5

DEDUCTIVE REASONING

We are now ready to take a closer look at deductive reasoning. Here we should look from two viewpoints. When we participate in the reasoning process we naturally begin with the premises and arrive at a conclusion. When we analyze or evaluate reasoning, however, we reverse the process; we begin with the conclusion, for it is in the conclusion that, as brief writers, brief readers, oral advocates and judges, we examine the quality of the reasoning and evaluate the soundness of the arguments. To do this properly, it is essential to understand the *terms* of the categorical deductive syllogism:

A "term" is defined as a word or group of words contained in a premise or conclusion. Understand this concept completely, because logicians use this expression to identify certain fallacies of form, or formal fallacies. Learn to identify the three terms of a categorical syllogism:

Major Term:	Usually the predicate of the major premise and also of the conclusion.
Minor Term:	The subject of the minor premise and also of the conclusion. It is called minor because it is less inclusive than the middle term, which is often the subject of the major premise. It is usually part of the class represented by the middle term. In most arguments, the minor term is the fact found or to be found by the fact-finder in the case.
Middle Term:	Appears in the two premises, but not in the conclusion. It is the medium of comparison between the major and minor term. In the categorical syllogism, it usually appears as the subject of the major premise and the predicate of the minor premise.



The syllogism traces its ancestry to mathematics. Euclid's first axiom lies at the heart of the modern syllogism: Things which are equal to the same thing are equal to each other. Three canons or fundamental principles of the syllogism build on Euclid:

> Two terms agreeing with one and the same third term agree with each other.
>
> Two terms, of which one agrees and the other does not agree with one and the same third term, do not agree with each other.
>
> Two terms both disagreeing with one and the same third term may or may not agree with each other.[1]

To recapitulate, by definition the categorical syllogism consists of (a) a proposition called the major premise, in which the major and middle terms are compared together; (b) a minor premise, which compares the minor and middle terms; and (c) a conclusion, which contains the major and minor terms only.

Deductive reasoning is a mental operation that a lawyer must employ every working day in his or her life. Formal deductive logic is the act of the mind in which, from the relation of two

propositions to each other, we infer, that is, we understand and affirm, a third proposition. In deductive reasoning, the two propositions which imply the third proposition, the conclusion, are called premises.

The broad proposition that forms the starting point of the deduction is called the major premise; the second proposition is called the minor premise.

They have these titles because the major premise represents the all, and the minor premise, something or someone included in the all.

Major Premise: All men are mortal.
Minor Premise: Socrates is a man.
Conclusion: Socrates is mortal.

All oral real estate conveyances are invalid.

Alpha's real estate conveyance is oral.

Alpha's real estate conveyance is invalid.

All persons in police custody must be given

***Miranda* warnings if their statements are used.**

Mr. Bravo is in police custody.

He must be given *Miranda* warnings.

Understand the nomenclature used by logicians in identifying the quantity of propositions or terms. Unfortunately, logicians use two different expressions when discussing these quantities.

Propositions: If the proposition is broad or general it is called a *universal* proposition. If it is narrow or specific, it is called a *particular.*

Terms: If a term is broad or general it is called a *distributed* term; if narrow or particular, it is called *undistributed.*

Thus, a universal proposition (All offers in contract law) is described as containing a "distributed" subject term. A particular proposition (Some offers in contract law) has an "undistributed" subject term. In each case the subject term is the Middle Term of the syllogism. We explain this in detail in the pages that follow.

CATEGORICAL SYLLOGISM

The categorical syllogism lies at the heart of all legal argument. Learn these fundamental concepts:

Syllogism: A syllogism is an argument containing premises and a conclusion.

Categorical Syllogism: A categorical syllogism is a deductive argument which consists of

1. Three categorical propositions,
2. Containing exactly three terms,
3. In which each of the three terms occurs in exactly two of the propositions.

Categorical Propositions and Classes

A class is a collection of objects that have in common some specified characteristic. “Categorical propositions” are statements about classes. There are four ways classes can be said to relate to one another:

1. Relationship of Containment: Every member of one class is said to be a member of (included or contained in) another class.
2. No relationship: No member of one class is said to be a member of a second class.
3. Relationship of Partial Containment: Some, but perhaps not all, members of one class are said to be members of (included or contained in) another class.
4. Relationship of Partial Non-Containment: Some, but perhaps not all, members of one class are said not to be members of (included or contained in) another class.

Four Standard Forms of Categorical Propositions

Categorical propositions affirm or deny these relationships between classes. There are four standard forms of categorical propositions as illustrated by the following:

1. All judges are honest.
2. No judges are honest.
3. Some judges are honest.
4. Some judges are not honest.

Each standard form categorical proposition has a name and a letter (A, E, I or O) which logicians traditionally use to identify each standard form. We can represent each standard form categorical proposition by way of a statement using the letters S and P to represent the Subject and Predicate of the proposition. The four standards forms are as follows:

A: Universal Affirmative Proposition

All S is P: Every member of the first class is also a member of the second class.

All oral contracts for the sale of real estate are invalid.

E: Universal Negative Proposition

No S is P: No member of the first class is also a member of the second class.

No oral contract for the sale of real estate is valid.

I: Particular Affirmative Proposition

Some S is P: Some members (at least one) of the first class are also members of the second class.

The oral contract for the sale of the Three Rivers Stadium, Pittsburgh, to the New York Yankees is invalid.

O: Particular Negative Proposition

Some S is not P: Some members (at least) of the first class are not members of the second class.

The oral contract for the sale of the Three Rivers Stadium, Pittsburgh, to the New York Yankees is not valid.

The letters **A, E, I, O** emanate from the Latin **A**ff**i**rmo (affirm) and **N**eg**o** (deny). Logicians describe the three propositions in the all-men-are-mortal syllogism as AII.[2]

Categorical Propositions: Quality and Quantity

Every standard form categorical proposition is said to have both a quality and a quantity:

Quality: Affirmative or Negative
Quantity: Universal or Particular
Universal Quantifiers: “All,” “No”
Particular Quantifiers: “Some”

Categorical Propositions: Distribution

A proposition distributes a term (subject class or predicate class and middle, major or minor term) if it refers to all members of the class designated by the term.

Universal Affirmative (A) Propositions:

Subject Term: Distributed
Predicate Term: Undistributed

Universal Negative (E) Propositions:

Subject Term: Distributed
Predicate Term: Distributed

Particular Affirmative (I) Propositions:

Subject Term: Undistributed
Predicate Term: Undistributed

Particular Negative (O) Propositions:

Subject Term: Undistributed
Predicate Term: Distributed

There are two rules of thumb for distribution:

Quantity of a proposition determines whether its subject term is distributed.

Quality of a proposition determines whether its predicate term is distributed.

Distributed-Undistributed Terms: Universal-Particular Propositions

Let us look at the syllogisms set forth in Judge Cardozo's majority opinion and Chief Judge Bartlett's dissenting opinion in the landmark case of MacPherson v. Buick Motor Co.[3]

Judge Cardozo

Major Premise:	Any manufacturer who negligently constructs an article that may be inherently dangerous to life and limb when so constructed is liable in damages for the injuries resulting.
Minor Premise:	A manufacturer who constructs an automobile so that the spokes on a wheel are defective is such a manufacturer.
Conclusion:	Therefore, a manufacturer who constructs an automobile so that the spokes on a wheel are defective is liable in damages for the injuries resulting.

Chief Judge Bartlett

Major Premise:	The vendor of a carriage is not liable in an action for negligence to anyone save his immediate vendee.
Minor Premise:	This plaintiff was not the immediate vendee of the vendor defendant.
Conclusion:	Therefore, defendant vendor is not liable in an action for negligence to this plaintiff.

One may not fault the logic contained in either opinion. Although the results differ, the reasoning is not flawed. The results differ because the major premise of each opinion differs.

In each argument, the major premise is a broad legal concept that qualifies as a universal proposition. By *universal* we mean that the proposition applies to all members of its class without restriction *("Any* manufacturer who … is liable"). Had the assertion applied only to a restricted, or partial, class it would be called a *particular* proposition. The subject term of a universal proposition is said to be *distributed.* In our example, we speak of "any manufacturer" or "the vendor." In each case, the assertion concerns all manufacturers and vendors in the stated class without restriction. Hence, the subject is distributed. Had the proposition stated "*some* manufacturers, who … are liable," the proposition would not have been universal; it would have been particular. We would not know which of such manufacturers would be liable.

The subject term (usually the minor term) of a particular proposition is said to be *undistributed.* There are buzz words to help distinguish a universal proposition (or a distributed term) from a particular proposition (or undistributed term).

- Those suggesting a universal proposition (or distributed term) include "every," "any," "all," "each," "the," "always," "everywhere," "In every instance," "no," "never," "nowhere," "under no circumstances."
- Those suggesting a particular proposition (or undistributed term) include "some," "certain," "a," "one," "this," "that," "sometimes," "not everywhere," "sometimes not," "occasionally," "once," "somewhere."

The predicate term of a proposition is, likewise, either distributed or undistributed. Determining whether the predicate is distributed or undistributed is easy; understanding why it is so is not so easy.

- If the proposition is an affirmative statement ("All manufacturers … are liable"), then the predicate (liability) is undistributed.
- If the proposition is a negative statement ("The vendor … is not liable"), then the predicate (liability) is distributed.

Consider Judge Cardozo's major premise: "Any manufacturer who negligently constructs an article … is liable …." The subject, "Any manufacturer," is distributed; it tells us that the proposition will apply to all manufacturers who fit the given definition. Because the proposition is affirmative, we know that the predicate (liability) is undistributed. That means that the proposition tells us something about a limited group of liable persons: the group that coincides with the subject group of manufacturers. The group of liable persons is undistributed. It is undistributed because there can be persons other than manufacturers who can be liable.

Now look at Chief Judge Bartlett's major premise: "The vendor of a carriage … is not liable …." The subject, carriage vendors, is distributed; it refers to all carriage vendors. In this negative proposition, the predicate is distributed, because the proposition tells us something about all liable persons.

In each of these examples, the subject is distributed. But it could be undistributed and the same rules would apply. Let's look at another example: "Some manufacturers are liable." Here, the subject is undistributed. The proposition refers to only a limited group of manufacturers. Because the proposition is affirmative, the predicate (liability) must be undistributed. In this case, both groups are limited, so both terms are undistributed. The proposition does not tell us about all manufacturers, or about all liable persons. It can't help us very much in a deductive argument.

An undistributed subject can also appear in a negative proposition: "Some vendors are not liable." The subject here, as in the preceding example, is undistributed because it limits the group of vendors to whom the proposition will apply. The proposition is negative, so the predicate (liability) is distributed. It is distributed because it tells us something about all liable persons: none of them will ever coincide with the limited group of vendors in the subject class, because those vendors are not liable.

To summarize, yet extend this discussion slightly beyond the perimeters of the *MacPherson* case:

1. The first inquiry is whether the subject or the predicate term refers to the whole class, or part of the class.
2. If the reference is to the whole class, the subject or predicate term is said to be distributed.
3. If the reference is to part of the class, the subject or the predicate term is said to be

undistributed.

4. The subject of a universal proposition is distributed because a universal proposition applies to the whole class.
5. The subject of a particular proposition is undistributed because the proposition applies to only part of the class.
6. The predicate of an affirmative proposition is undistributed. In “All men are mortal,” the predicate mortal is not distributed because the proposition does not mean that only men are mortal. Women are also mortal.
7. The predicate of a negative proposition is distributed. “No federal judges are elected officials.” By excluding all federal judges from the class of elected officials, we necessarily exclude all members of the class of elected officials from the class of federal judges.

The *MacPherson* majority opinion and the dissent both demonstrate deductive logic, a movement of the mind from an object as a whole to some point therein; a movement from the general to the particular; an inference from the all to anyone included in the all. Each takes the form of a syllogism.

ENTHYMEMES

In ordinary writing and speaking, the formal three propositions (two premises and a conclusion) arrangement is seldom observed, except perhaps in teaching children. Good girls get a star on their forehead; Lisa is a good girl; Lisa gets a star on her forehead. Normally, we would say that Lisa got a star on her forehead because she was a good girl. We would omit the major premise completely because it would be generally understood. A large body of propositions can be presumed to be common knowledge, and many writers or speakers save themselves time and energy by not repeating well known and perhaps trivially true propositions that their hearers or readers can well be expected to supply for themselves.

In formal argument, when one of the premises or the conclusion is not expressed, the argument is called an enthymeme. Such an argument is said to be stated incompletely, part being "understood" or "only in the mind." Many legal briefs and judicial opinions are enthymematic because either premise or the conclusion is obvious and is understood (or is believed to be obvious and understood). Most often the omitted premise is the major premise (All good girls get a star on their forehead) and is called an enthymeme of the First Order. Less commonly the minor premise is unexpressed and the enthymeme is of the Second Order (All good girls get stars; Lisa gets a star).

As stated before, often the argument is compressed to a single sentence. Thus, in writing for the Court in Roe v. Wade, Justice Blackmun declared:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[4]

Implicit in this enthymematic statement of reasons was the following syllogism:

Major Premise: The right of privacy is guaranteed by the Fourteenth (or Ninth) Amendment.

Minor Premise: A woman's decision to terminate her pregnancy is protected by the right of privacy.

Conclusion: Therefore, a woman's decision whether to terminate her pregnancy is protected by the Fourteenth (or Ninth) Amendment.

To be sure, much written or oral legal argument takes the form of enthymemes. Sometimes, there is a tendency to make improper assumptions (by omitting critical propositions) which may be caught by your opponent in a written brief under circumstances dictated by procedural rules which deny you the opportunity to respond. At other times, at oral argument, a judge may ask you to state the formal categorical syllogism on which your enthymematic argument is based (for example, when you omit both premises and emphasize only the conclusion). Often, in the "split second" or "moment's notice" time allocated for oral argument, especially before appellate courts, you are unable to formulate the reconstruction. And you lose points.

Wisdom dictates that you always test an enthymeme for validity, supply the missing parts of the argument and then test the resulting formal syllogism. Keep in mind that enthymemes will

only constitute effective arguments if both the assumed and stated propositions are correct. In all syllogisms, the effectiveness of the conclusion depends upon the validity of the propositions and the accuracy of the premises.

EVALUATING A PROPOSED INFERENCE

We are ready to look at a case that tests the logical validity of a proposed deductive inference.

Leliefeld v. Johnson
104 Idaho 357, 659 P.2d 111, 118 (1983)

[Issue: Does evidence of repairs subsequent to an accident gives rise to an inference of negligence?]

In analyzing an example from Wigmore concerning subsequent repair of machinery involved in an accident, Professor James utilized a transmutation of a proposed direct inference into its deductive form to demonstrate its invalidity as suggested: "In the case of the repaired machinery we're told: "'People who make such repairs (after an accident) show a consciousness of negligence; A made such repairs; therefore, A was conscious of negligence.'" Before this deductive proof can be evaluated, ambiguity must be eliminated from the major premise. By "people" shall we understand "some people" or "all people"? If the argument is intended to read, "Some people who make such repairs show consciousness of negligence; A made such repairs; therefore, A was conscious of negligence," it contains an obvious logical fallacy. If intended to read, "All people who make such repairs show consciousness of negligence; A made such repairs; therefore, A was conscious of negligence," it is logically valid. However, few could be found to accept the premise that all persons who repair machinery after an accident show consciousness of guilt; that is, that no single case could be found of one who, confident of his care in the past, nevertheless made repairs to guard against repetition of an unforeseeable casualty or to preserve future fools against the consequence of their future folly. Here the result of transmuting a proposed direct inference into deductive form is discovery that it is invalid—at least in the terms suggested." James, Relevancy, Probability and the Law, 29 Calif. L. Rev. 689, 696-97 (1941).

See Adv. Comm. Note to Fed. R. Evid. 407 ("(subsequent remedial measure) is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence"); G. Lilly, An Introduction to the Law of Evidence § 48, at 150-51 (1978) ("An after-the-incident precautionary measure may reflect merely the exercise of extraordinary caution … and may not indicate the actor's belief that the condition in question was really hazardous"). It would be unfair to penalize such an individual by permitting his conduct to be introduced as evidence of his negligence because it is clear that his act could be that done by a supercautious man and not that required of a reasonable man. As Professor Lilly has written: "In negligence cases, liability attaches if the defendant acted unreasonably in view of the facts known (or which should have been known) to him before the incident in question. An after-incident remedial measure is usually taken on the basis of the additional facts revealed by the accident or injury. There is a risk that the trier, particularly a jury, might not keep this important distinction clearly in mind and might too easily infer prior knowledge from the subsequent remedial acts, which were generated by the knowledge learned from the incident itself." *Id.* at 152. *See also* 2 Wigmore, Evidence § 283, at 174-75 (Chadbourn rev. 1979).

POLYSYLLOGISMS

A polysyllogism is a series of syllogisms in which the conclusion of one is a premise of the next. In such a series the syllogism whose conclusion becomes a succeeding premise is called a *prosyllogism;* a syllogism in which one premise is the conclusion of a preceding syllogism is called an *episyllogism.* If the series contains more than one syllogism, then every syllogism except the first and the last will be both a prosyllogism and an episyllogism.

Inter-Tribal Council of Nevada, Inc. v. Hodel
856 F.2d 1344, 1349-50 (9th Cir. 1988)

For the plaintiff to prevail on the question of standing to seek a forfeiture under 25 U.S.C. § 293(a), it must prove that it is the former beneficial owner of the Stewart School site. We have concluded, as did the district court, that the Council lacks standing because it has not proved that it is the former beneficial owner of the property.

The Council's best case scenario is drawn primarily, if not exclusively, from section 8 of the 1887 Nevada statute, which provides:

> All lands purchased under the provisions of this Act shall be conveyed to said Indian School Commission in *trust for the benefit of such school*…. 1887 Nev. Stat. ch. XII.

This provision forms the major premise of the Council's first syllogism. From this premise, the Council argues that it represents the majority, if not the entirety, of the Indian population of Nevada for whose benefit the school was established. From these two premises, the Council draws the conclusion that the land was conveyed in trust for the benefit of its member tribes, as contemplated in the 1887 Nevada statute.

The conclusion of this first syllogism then becomes a building block for the Council's second syllogism, which is based on 25 U.S.C. § 293(a). The major premise here is that the Secretary of the Interior may not convey the property without the consent of the "former beneficial owner." The minor premise is that, as concluded above, the Council (in its representative capacity) is the former beneficial owner of the land. Therefore, the Council concludes, the Secretary may not convey the property without its consent.

The difficulty with the prosyllogism based on the 1887 Nevada statute, and the resulting episyllogism based on section 293(a), is the Council's initial conclusion that the land was conveyed in trust for the benefit of the tribes it represents. The appellees argue that the tracts in question were never conveyed to the Indian School Commission in trust for anyone. Rather the tracts were conveyed directly to the federal government by the private owners in fee simple. Moreover, appellees assert, the Nevada statute's language does not support the suggestion that a trust was to be implied if the land was conveyed directly to the United States, instead of to the Commission. Furthermore, appellees contend, even if a trust had been implied, the Nevada statute did not contemplate a trust for the benefit of the Council, or a particular Nevada tribe, or the Nevada Indian population in general.

The Nevada statute explicitly described the limitation of any trust: "for the benefit of such school." It is not without significance that when Congress decided to close the Stewart Indian School, only 27 students enrolled in the school came from Nevada. The remainder of the 400-student population came from other states, the majority from Arizona and California. This raises the question of whether Nevada Indians, whose children represented 6.75% of the school's population, could properly be considered the sole beneficiaries of any trust established for the benefit of the school. We think not.

A key premise of the Council's argument anchored in the Nevada statute, therefore, has no

support in the statute itself. The land was not conveyed to the Indian School Commission in trust for anyone; it was conveyed to the federal government in fee simple. The only trust that was expressed or implied was (a) if the conveyance was to the Commission and (b) "for the benefit of such school," and not to any Indian tribe, band or group. Accordingly, because the premise has no basis, the argument is not sound and its conclusion is flawed. This flawed conclusion may not then serve as the minor premise in the Council's critical contention that it is the former beneficial owner as contemplated by section 293(a).[5]

VALUE JUDGMENTS—CHOICE OF PREMISES

A "performative utterance" is an expression that is not only articulated but is also operative.[6] Because judicial decisions fit this description, we can say that a court's public performance in reaching a conclusion is at least as important as the conclusion. If we evaluate a decision in terms not of "right" or "wrong," nor of subjective agreement or disagreement with the result, but rather in terms of thoughtful and disinterested weighing of conflicting social interests, it becomes critical that the "performative utterance" include a societally acceptable explanation, set forth in logical form.

But in the formulation of major and minor premises in the law, there is more at work than rules of logic. The selection of a major premise, as we have emphasized before, is a *value judgment.* The advocate or the judge makes this value judgment. A choice is made. No unerring rules of logic dictate this important decision, which is the critical threshold, the prelude to the operation of the rules of logic.

In his classic essay, "The Nature of the Judicial Process," Cardozo explained that sometimes the source of the law to be embodied in a value judgment, which we relate to selection of our *premises,* is obvious, as when the Constitution or a statute applies. In these situations, the judge simply obeys the constitutional or statutory rule. But when no constitutional or statutory mandate controls, the judge must "compare the case before him with the precedents, whether stored in his mind or hidden in the books."[7] If the comparison yields a perfect fit, if both the law and its application are clear, the task is simple. If the law is unclear, it is necessary to "extract from the precedents the underlying principle [and] then determine the path or direction along which the principle is to move and develop, if it is not to wither and die."[8]

Cardozo cautioned that decisions "do not unfold their principles for the asking. They yield up their kernel slowly and painfully."[9] He discussed what he called the "organons" of the judicial process—the instruments by which we fix the bounds and tendencies of that principle's development and growth. He discussed also the use of history and custom, and what in 1921 was considered a revolutionary technique of decision-making—the method of sociology, a method extremely legitimate and prevalent today known not by the name "sociology," but public policy and social welfare.

By describing the elements at work in the caldron, Cardozo was performing the valued task of a traditional common-law judicial analyst. That he ranks with Oliver Wendell Holmes, Jr., as one of our greatest common-law judges is scarcely now debatable. However, to the extent that he developed, persuasively and gracefully, a legitimation for result-oriented jurisprudence, Cardozo became more a legal philosopher than a common-law judge. He sought what *ought* to be the law, in contrast to what *is.* For Cardozo, the preferred gap-filler in addressing novel questions of law was the social welfare, defined as "public policy, the good of the collective body," or "the social gain that is wrought by adherence to the standards of right conduct, which find expression in the *mores* of the community."[10] To him "the power of social justice," among all organons of the decision-making process, was the force which was becoming the greatest directive force of the law.[11]

Professor Wisdom suggests that the process of selecting a controlling legal precept, which we relate to the selection of the syllogism's premises, "becomes a matter of weighing the cumulative effect of one group of severally inconclusive items against the cumulative effect of another group of severally inconclusive items."[12] In exercising this choice, courts do not necessarily appeal to any rational or objective criteria. Essentially they exercise a value judgment and should be candidly recognized as doing so. Moreover, because courts have the power to alter the content of rules, no immutability attaches to their major or beginning premises. The desirability of *elegantia juris*, with its concomitants of stability and reckonability, often must be subordinated to the desirability of rule revision in the light of claims, demands or desires asserted in the public interest in changing societal conditions.

Once the controlling rule or principle has been selected or modified, however, we must use canons of logic to reach a formally correct conclusion. Dewey described the process as "formal consistency, consistency of concepts with one another."[13] Logical validity is concerned with the relation between propositions, rather than with the content of the propositions themselves. Thus, the reasoning process can be said to require formal correctness, rather than material desirability.

Legal analysis is a three-step procedure: (1) selecting or choosing the legal precept, (2) interpreting that precept and (3) applying it, as interpreted, to the case at hand. The procedure may be viewed also from the perspective of the relations between logical propositions. Thus, steps 1 and 2, selecting and interpreting the legal precept, refer to the major premise of a syllogism. Step 3, applying the selected and interpreted legal precept, figures largely in the minor premise. If one accepts the value judgment expressed in the major premise, and if the minor premise is valid, then, theoretically, one must accept the conclusion. But we know that it is not always that neat, for the process often fails. One may accept a conclusion as a valid legal norm and use it as a precedent, although one disagrees with the beginning premise which "logically" led to the conclusion.

PREMISES: VALIDITY AND SOUNDNESS

As we have emphasized before, to understand fully the categorical syllogism, we must remember that the rules of formal logic deal only with its "validity" or "soundness" in terms of the six rules of the syllogism. There is a distinction between the validity of a syllogism and the truth of its contents. Assume we said this:

All middle terms are major terms.

Minor term is a part of middle term.

Therefore, all minor terms are major terms.

Or consider this formally correct, but truly ridiculous, syllogism we set forth here to emphasize that proper content must be poured into the syllogism's terms:

All federal judges have green blood.

Judge Aldisert is a federal judge.

Therefore, Judge Aldisert has green blood.

The major premises in both these examples lack truthfulness.

The bottom line: The validity of a syllogism and the soundness of the argument's structure deal only with relations between the premises. Validity deals only with form. It has absolutely nothing to do with content. Arguments, therefore, may be logically valid, yet absolutely nonsensical. Assuming valid form, the essence of argument must always be a search for the truth or falsity of the premises. Where inductive reasoning is used to determine the major premise, the search is for a result that is more likely true than not. Once this determination is made in constructing the premise in a deductive syllogism, however, we do not say that the conclusion *probably* will follow; the conclusion *must* follow. Remember, in deductive logic, the conclusion *must* follow from the premises. Watch out for *GIGO:* garbage in, garbage out.

Hogan v. Florida
427 So. 2d 202, 203 (1983)

Appellant was convicted of attempting sexual battery and kidnapping, and sentenced in two consecutive thirty-year terms in prison. Initially appellant contends that the trial court erred in requiring him to be tried by a six person jury instead of a jury of twelve. His argument is that sexual battery committed by one over 18 years upon a victim 11 years or younger is a capital felony. Section 913.10, Florida Statutes (1981), and Florida Rule of Criminal Procedure 3.270 are identical and provide that: "Twelve persons shall constitute a jury to try all capital cases." Therefore, since he was being tried for a capital crime, appellant was entitled to the benefits of a twelve person jury.

The argument is logical, but fallacious, because the major premise is invalid. Although the statute cited does provide that the sexual battery of a victim eleven years or younger by one over eighteen years is a capital felony, case law demonstrates that is no longer correct. As the Supreme Court of Florida said: … A capital offense is one that is punishable by death. In Florida, murder in the first degree is the only existing capital offense.

Lamon v. McDonnell Douglas Corp.
19 Wash. App. 5-15 576 P.2d 426, 437 (1978)

(Anderson, J., dissenting)

[An airline stewardess brought a products liability case based on strict tort liability theory against an aircraft manufacturer for injuries sustained when she stepped into an open emergency hatch of a DC-10 airplane. Her expert witness stated the hatch was unreasonably dangerous. The Superior Court entered summary judgment for the manufacturer, and the stewardess appealed. The Court of Appeals held that the testimony of plaintiff's expert witness created a substantial fact issue as to whether design of the escape hatch was defect-free, precluding summary judgment.]

In its final analysis, the fallacy of letting an expert witness's unsupported opinion create a fact issue in a case is perhaps better answered by logic than by legal precedent. Illustrative of this is a story told of Abraham Lincoln during his trial lawyer days. Lincoln is said to have cross-examined a witness as follows:

"How many legs does a horse have?"

"Four," said the witness.

"Right," said Abe.

"Now, if you call the tail a leg, how many legs does a horse have?"

"Five," answered the witness.

"Nope," said Abe, "callin' a tail a leg don't make it a leg."

So it is here that merely calling a product unreasonably dangerous does not, without more, make it so.

Legal reasoning is subject to more scrutiny than any other aspect of the judicial process. Forming the very fiber of argument and persuasion, it is the heart of both the written brief and the court's opinion, the essence of the process of justification. It constitutes the foundation of the case system by which law students are trained. Formal criticism of the "reasoning" of courts seems, at times, to form the *raison d'etre* for law review publications. Yet there is little analysis of reasoning *qua* reasoning. Often an alleged attack on the "reasoning" of the court is really a disagreement with the value judgment implicit in the court's major premise—a disagreement with the court's selection and interpretation of the applicable legal precept. This disagreement with the selection of legal precepts, "the authoritative starting points for judicial reasoning" in Dean Pound's formulation, is, in reality, a quarrel with the acceptance of the legal norm or, in many cases, a philosophical difference with the values reflected in the choice. Criticism of court opinions would be more professional, briefs more clear, points of friction between litigants earlier identified and accommodated, if resort to the cosmos of "reasoning" were minimized, and attention directed instead to the precise components of that cosmos. It is not too much to ask

whether one disagrees with the choice of the "authoritative starting point" and, if so, why; or whether one's quarrel is with the formal correctness of the syllogism used and, if so, where. The facts in the minor premise might not be subsumed in the major, or the conclusion might lack elements common to the major and minor premises. As Professor Levi explains, there might be a "logical fallacy … the fallacy of the undistributed middle or [in hypothetical syllogisms] the fallacy of assuming the antecedent is true because the consequent has been affirmed." We will describe these particular fallacies in our discussion of fallacies of form.

To adequately evaluate the reasoning in a legal argument, we must strip away extraneous detail and verbiage. We must reduce the argument to the components of the syllogism. Do not look for spare, laconic briefs or judicial opinions setting forth only the bare bones of a syllogism. Very few do. Lawyers and judges write and talk too much. Arguments are loaded with declarative sentences that are not the necessary propositions of our argument. They are not the necessary premises of the syllogism. Rather, they are inserted to convince the reader to accept the argument in an adversarial environment. But the argument eventually stands or falls on the bare bones of the syllogism. Thus, a fifty-page brief in the United States Court of Appeals is soon reduced to a fifteen minute oral presentation that features a lively colloquy between the judges and the lawyers. In the judges' conference following argument, a decision is often reached by mere recitation of the naked syllogism. This is because experienced judges are familiar with the subject matter. They soon cut through to the basic structure of the argument because they are familiar with most, if not all, of the reasons supporting the propositions. Fortunately, or unfortunately, when the statement of reasons appears in print, however, judicial opinions are filled with countless pages giving reasons for (1) selecting the major premise, (2) interpreting the major premise, (3) interpreting the minor premise, (4) applying the premises to the facts found by the fact-finder and (5) stating the conclusion. Too often judicial opinions are overwritten and it becomes necessary always to identify the precise structure of the argument by stripping away explanatory materials. It is important not to confuse these materials with the critical framework of the argument.

RULES OF THE CATEGORICAL SYLLOGISM

All logicians refer to six rules for categorical syllogisms.[14] They vary in language only slightly. These rules are traceable to definitions first articulated by Aristotle, now summarized by the principle *dictum de omni et nullo* because it is an axiom concerning *all* or *none* of a class. For our purposes, I will use the formulations of Professor Copi.

Rule One: A valid categorical syllogism must contain exactly three terms, each of which is used in the same sense throughout the argument.

Three terms (major, middle and minor) must be involved in every valid syllogism. Any categorical syllogism that contains more than three terms is said to commit the formal Fallacy of Four Terms *(quaternio terminorem)* (see Chapter 10). If a term is used in different senses in the argument, it is being used equivocally, and the informal fallacy of equivocation results (see Chapter 12).

Rule Two: In a valid categorical syllogism, the middle term must be distributed in at least one premise.

Any syllogism that violates Rule Two is said to commit the formal Fallacy of the Undistributed Middle (see Chapter 10). For the two terms of the conclusion (minor and major) to be connected through the third (middle) term, at least one of them must be related to the whole of the class designated by the third or middle term. Otherwise each may be connected with a different part of that class, and not necessarily connected at all. This is what happens in the following:

All dogs are mammals.

All cats are mammals.

Therefore, all cats are dogs.

Dogs are included in part of the class of mammals and cats are included in part of the class of mammals. But different parts of the class may be (and, in this case, are) involved so that the middle term does not connect the major and minor terms. Because it is through the middle term that the connection between the extreme terms is secured, it is essential that the same part of the middle term should be related to both extreme terms.

In the law, the fallacy may occur when the middle term is not broad enough to encompass the entire class of which the minor term is a part. Thus, we cannot proceed too far in the following major premise in a contest over a will's validity:

In some non-holographic wills, the testator's signature must be witnessed.

The middle term "In some non-holographic wills" is not distributed. It does not represent the whole of a class. For the argument to proceed properly, the term must read "In all non-holographic wills."

Rule Three: In a valid categorical syllogism, no term can be distributed in the conclusion which is not distributed in the premise.

Because to distribute a term is to take in its whole extent, a distributed term refers to every member contained under the term. If a term is undistributed in one of the premises (Some defendants found guilty of the crime of mopery must go to jail under the Sentencing Guidelines), the conclusion must not be distributed (and refer to all such defendants) because the conclusion would go beyond the data. The rule rests upon the fundamental principle that if the data refer to some only of a class, no conclusion referring to every member of the class can be deduced. Violation of this rule is known as a formal Fallacy of Illicit Major or Illicit Minor as set forth in Chapter 10.

In the law, this rule is closely related to Rule Two, depending on how the lawyer or judge structures the argument.

Rule Four: No categorical syllogism is valid which has two negative premises.

This rule proceeds from the same consideration as in Rule Three, i.e., that both premises must refer to the same part of the middle term, whether by inclusion in one case or exclusion in the other. If all that were given were the exclusion of the minor and the major term from the middle in the form of negative premises, no connection between the minor and the major would be established.

No U.S. Circuit Judges are infallible.

No Russian citizens are U.S. Circuit Judges.

From this no connection between those who are infallible and Russians can be deduced.

Rule Five: If either premise of a valid categorical syllogism is negative, the conclusion must be negative.

An affirmative conclusion asserts that one class is either wholly or partly contained in a second. This can be justified only by premises that assert the existence of a third class that contains the first and is itself contained in the second. To entail an affirmative conclusion both premises must assert class inclusion.

All oral real estate contracts are invalid.

This contract is an oral real estate contract.

This contract is invalid.

The middle term “All oral real estate contracts” is included the class of the major term, invalid contracts. The minor term, “This contract” is included in the class of the middle term, “All oral real estate contracts.”

But class inclusion can be stated only by affirmative propositions. Because an affirmative conclusion can only follow from affirmative premises, if either premise is negative, the conclusion cannot be affirmative; it must be negative, too. Because it is so obvious, in the law we seldom encounter the Fallacy of Drawing an Affirmative Conclusion from a Negative Premise.

Rule Six: No valid categorical syllogism with a particular conclusion can have two universal premises.

This is but to say that an undistributed term, usually the minor term, must appear in one of the premises. Otherwise, it may not properly appear in the conclusion for the first time.

As we shall see in Chapters 9 and 10, a departure from these rules results in a fallacy of form, or formal fallacy. Unfortunately, such fallacies occur frequently in oral arguments, written briefs and judges' opinions.

A MISSION:
LOCATE THE SYLLOGISMS IN THE FOLLOWING CASES

We are now ready to examine excerpts from leading United States Supreme Court cases. Read them not for their substantive content, but for their syllogisms. Identify the major and minor premises. In what order do the premises appear? Does the conclusion appear first? Look out for enthymemes and polysyllogisms, and decide if the court leaped to conclusions or followed logical order. Test your knowledge of the foregoing materials by locating the syllogisms in the following excerpts. After completing the exercise, test your results against the analysis set forth in Appendix "B" at the end of the book.

Marbury v. Madison
5 U.S. (1 Cranch) 137, 177-78 (1803)

[In the Judiciary Act, Congress had authorized the Supreme Court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States." The ultimate question in this case was whether the Court had the power to issue mandamus directed to Secretary of State James Madison, because he was "such a person holding office." The Court concluded that it had no jurisdiction to issue the writ and declared the statute giving the Court jurisdiction to be repugnant under Article III, section 2 of the Constitution. Chief Justice Marshall reasoned:]

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject.

It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

McCulloch v. State of Maryland
17 U.S. (4 Wheat.) 316, 435-36 (1819)

[This case required interpreting the Supremacy Clause. Speaking through John Marshall, the Court held that Maryland could not tax the operations of a branch of the bank of the United States.]

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

Dred Scott v. Sandford
60 U.S. (19 How.) 393, 403, 408, 416, 426, 454, 572, 576, 582 (1856)

Mr. Chief Justice Taney delivered the opinion of the Court:

The question is simply this: can a Negro whose ancestors were imported into this country and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen. One of these rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a Negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen Colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different Colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

The legislation of the different Colonies furnishes positive and indisputable proof of this fact….

The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen states by which that instrument was framed; and it is hardly consistent with the respect due to these states to suppose that they regarded at that time, as fellow citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the state sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens….

What the construction was at that time, we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different states, before, about the time, and since the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we not give to the word “citizen” and the word “people.”

Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it….

Mr. Justice Curtis, dissenting.

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those states, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.

I can find nothing in the Constitution which, *proprio vigore,* deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any state after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any state, who is a citizen of that state by force of its Constitution or laws, is also a citizen of the United States.

It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that in five of the thirteen original states, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was of those persons who were qualified by its laws to act thereon, in behalf of themselves and all other citizens of that state. In some of the states, as we have seen, colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of “the people of the United States,” by whom the Constitution was ordained and established, but in at least five of the states they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange, if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.

Youngstown Sheet & Tube Co. v. Sawyer
343 U.S. 579, 582-83, 585-87 (1952)

We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. The mill owners argue that the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government's position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States.

On April 4, 1952, the Union gave notice of a nation-wide strike called to begin at 12:01 a.m. April 9. The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel.

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure.

The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "The executive power shall be vested in a President;" that "he shall take Care that the Laws be faithfully executed"; and that "he shall be Commander-in-Chief of the Army and Navy of the United States."

The order cannot properly be sustained as an exercise of the President's military power as Commander-in-Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

Brown v. Board of Education
347 U.S. 483, 492-95 (1954)

There are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

To separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority [Famous footnote 11 setting forth titles of books and articles showing deleterious effects of segregation in education]. Any language in Plessy v. Ferguson contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated from whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws, guaranteed by the Fourteenth Amendment.

Griswold v. Connecticut
381 U.S. 479, 484-86 (1965)

[A Connecticut statute made it a crime to use any drug, medicinal article or instrument to prevent conception and that any person who assists, abets, counsels or causes another to commit any offense may be prosecuted as if he were the offender. Griswold was convicted for giving medical advice to married persons and prescribing contraceptive devices. On appeal the Court declared the statute unconstitutional.]

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law, which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means of having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms" [citation omitted]. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

Roe v. Wade
410 U.S. 113, 129, 152-53, 172-73 (1973)

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras… or among those rights reserved to the people by the Ninth Amendment.

The Constitution does not explicitly mention any right of privacy. In a line of decisions the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment … in the Fourth and Fifth Amendments … in the penumbras of the Bill of Rights … in the Ninth Amendment … or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment …. These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," … are included in this guarantee of personal privacy [and thus requiring strict scrutiny rather than the less stringent test of examining whether the legislation has a rational relation to a valid state objective]. They also make it clear that the right has some extension to activities relating to marriage … procreation … contraception … family relationships … and child rearing and education ….

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Rehnquist, J., dissenting.

I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy.

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of MR. JUSTICE STEWART in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state

objective…. The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective…..But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

Bowers v. Hardwick
478 U.S. 186, 190-91, 195-96 (1986)

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was … described as dealing with child rearing and education; … with family relationships; … with procreation; … with marriage; … with contraception; and … with abortion. [Certain] cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child.

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, [we have] asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far.

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language.

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection.

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots…. Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults…. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home. He relies on Stanley v. Georgia, 394 U.S. 557 (1969), where the Court held that the First Amendment prevents conviction for possessing and reading obscene material in the privacy of his home: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch."

Stanley did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment. Its limits are also difficult to discern. Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs do not escape the law where they are committed at home. *Stanley* itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods. And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Miller v. Johnson
115 S.Ct. 2475 (1995)

The constitutionality of Georgia's congressional redistricting plan is at issue here. In Shaw v. Reno, 509 U.S. 630 (1993), we held that a plaintiff states a claim under the Equal Protection Clause by alleging that a state redistricting plan, on its face, has no rational explanation save as an effort to separate voters on the basis of race. The question we now decide is whether Georgia's new Eleventh District gives rise to a valid equal protection claim under the principles announced in *Shaw*, and, if so, whether it can be sustained nonetheless as narrowly tailored to serve a compelling governmental interest.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Its central mandate is racial neutrality in governmental decision-making. Though application of this imperative raises difficult questions, the basic principle is straightforward: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination …. This perception of racial and ethnic distinctions is rooted in our nation's constitutional and demographic history." This rule obtains with equal force regardless of "the race of those burdened or benefited by a particular classification."

In Shaw v. Reno, we recognized that these equal protection principles govern a State's drawing of congressional districts, though, as our cautious approach there discloses, an application of these principles to electoral districting is a most delicate task. Our analysis began from the premise that "[l]aws that explicitly distinguish between individuals on racial grounds fall within the course of [the Equal Protection Clause's] prohibition." This prohibition extends not just to explicit racial classifications, but also to laws neutral on their face but "unexplainable on grounds other than race." Applying this basic Equal Protection analysis in the voting rights context, we held that "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race,'… demands the same close scrutiny that we give other state laws that classify citizens by race."

To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest. There is a "significant state interest in eradicating the effects of past racial discrimination." The State does not argue, however, that it created the Eleventh District to remedy past discrimination, and with good reason. There is little doubt that the State's true interest in designing the Eleventh District was creating a third majority-black district to satisfy the Justice Department's preclearance demands. Whether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here. As we suggested in *Shaw*, compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.

Adarand Constructors, Inc. v. Pena
115 S.Ct. 2097 (1995)

Petitioner Adarand Constructors, Inc., claims that the Federal Government's practice of giving general contractors on government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals," and in particular, the government's use of race-based presumptions in identifying such individuals, violates the equal protection component of the Fifth Amendment's Due Process Clause.

In 1989, the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation (DOT), awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the contract. Adarand, a Colorado-based highway construction company specializing in guardrail work, submitted the low bid. Gonzales Construction Company also submitted a bid.

The prime contract's terms provide that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals." Gonzales is certified as such a business; Adarand is not. Mountain Gravel awarded the subcontract to Gonzales, despite Adarand's low bid, and Mountain Gravel's Chief Estimator has submitted an affidavit stating that Mountain Gravel would have accepted Adarand's bid, had it not been for the additional payment it received by hiring Gonzales instead. Federal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts, and it also requires the clause to state that "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C. §§ 637(d)(2), (3). Adarand claims that the presumption set forth in that statute discriminates on the basis of race in violation of the Federal Government's Fifth Amendment obligation not to deny anyone equal protection of the laws.

Adarand's claim arises under the Fifth Amendment of the Constitution, which provides that "No person shall … be deprived of life, liberty, or property, without due process of law." Although this Court has always understood that Clause to provide some measure of protection against *arbitrary* treatment by the Federal Government, it is not as explicit a guarantee of *equal* treatment as the Fourteenth Amendment, which provides that "No *State* shall… deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). Our cases have accorded varying degrees of significance to the difference in the language of those two Clauses. We think it necessary to revisit the issue here.

Cases continued to treat the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable; one commentator observed that "[i]n case after case, Fifth Amendment equal protection problems are discussed on the assumption that Fourteenth Amendment precedents are controlling: The Equal Protection Clause demands that racial classifications be subjected to the 'most rigid scrutiny.' Thus, in 1975, the Court stated

explicitly that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n. 2 (1975); *see also* Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); United States v. Paradise, 480 U.S. 149, 166, n. 16 (1987) (plurality opinion of Brennan, J.) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth"). We do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to be appropriate.

The Court resolved the issue, at least in part, in 1989. Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), concerned a city's determination that 30% of its contracting work should go to minority-owned businesses. A majority of the Court in *Croson* held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," and that the single standard of review for racial classifications should be "strict scrutiny."

With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. But *Croson* of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government. *Croson* observed simply that the Court's "treatment of an exercise of congressional power in Fullilove v. Klutzniock, 448 U.S. 448 (1980), cannot be dispositive here," because *Croson's* facts did not implicate Congress' broad power under § 5 of the Fourteenth Amendment.

Our action today makes explicit: federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.

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1. W. Stanley Jevons, Elementary Lessons in Logic: Deductive and Inductive 121-22 (1965).

2. For a detailed discussion of A, E, I and O and how they are applied to propositions, *see* Irving M. Copi and Carl Cohen, Introduction to Logic 210, 214 (9th ed. 1994).

3. 227 N.Y. 382, 11 N.E. 1050 (1960).

4. 410 U.S. 113, 153 (1973).

5. *See also* Hernandez v. Denton, 861 F.2d 1421, 1438-39 (9th Cir. 1988).

6. John Langshaw Austin, Philosophical Papers 233-41 (1961).

7. Benjamin N. Cardozo, The Nature of the Judicial Process 19 (1921).

8. *Id.* at 28.

9. *Id.* at 29.

10. *Id.* at 71-72.

11. *Id.* at 65-66.

12. John Wisdom, Philosophy and Psycho-Analysis 157 (1953).

13. John Dewey, How We Think 20 (1933).

14. Irving M. Copi & Carl Cohen, Introduction to Logic 261-268 (9th ed. 1994); W. Stanley Jevons, Elementary Lessons in Logic 127-129 (2d ed. 1952); L.S. Stebbing, A Modern Introduction to Logic 87-88 (6th ed. 1948); James Edwin Creighton, An

Introductory Logic 139 (1898); Ralph M. Eaton, General Logic, An Introductory Survey 95-100 (1931); John C. Cooley, A Primer of Formal Logic 306 (1942).

Chapter 6

INDUCTIVE REASONING

If we can say that deductive reasoning moves from the general to the particular, we can also say that inductive reasoning moves either from the particular to the general, or from the particular to the particular. Although all logicians do not agree with this characterization, for the purposes of legal reasoning, however, this approach is appropriate because it is useful.[1]

An induced generalization in mathematics is a truth or certainty. In the law, there is no pretense that the product of inductive reasoning is a certainty. All that we represent is that the result is more probably true than not. If in mathematics we take a series of consecutive odd numbers beginning with 1, the sum of these numbers will be equal to the number of terms multiplied by itself. Thus, the sum of the numbers 1-3-5-7-9-11 is 36 or 6 times 6. We reach the generalization—that the sum will equal the number of terms multiplied by itself—only after experience in adding sets of particular numbers. This produces a generality that is certain.

The absence of complete certainty, however, does not dilute the importance of induction in the law. Inductive reasoning is critical in the common-law tradition. It lies at the heart of the judicial process and is the most distinctive characteristic of that process. More than any other technique, it is responsible for a legal tradition that began in England at the beginning of the eleventh century and continues today. Because it is reasoning by example, it is the key to many things. It undergirds the doctrine of precedent or *stare decisis:* Like things must be treated alike. In the law, the circumstances or phenomena that constitute the particulars in inductive reasoning are the holdings in previous similar cases. These are our putative precedents. Recall the definition of precedent outlined in Chapter 2: "A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts …."[2] In part this indicates the hold which the legal process has over litigants. Professor Levi has emphasized this:

> [The litigants] have participated in the law making. They are bound by something they helped to make. Moreover, the examples or analogies urged by the parties bring into the law the common ideas of the society. The ideas have their day in court, and they will have their day again. This is what makes the hearing fair, rather than any idea that the judge is completely impartial, for of course he cannot be completely so. Moreover, the hearing in a sense compels at least vicarious participation by all the citizens, for the rule which is made, even though ambiguous, will be law as to them.[3]

The principle that underlies all inductive argument is that nature is sufficiently regular to permit the discovery of causal laws having general application. The laws of nature will operate today as they did yesterday because in basic ways nature is uniform. Therefore, we may rely on past experience to guide our conduct in the future. Applying these concepts, two forms of inductive reasoning are vitally important in the law:

> *Inductive generalization:* Also known as induction by enumeration, this is the process of arriving at general or universal propositions from the particular facts of experience, relying on the principle of induction. The premises are instances of certain facts with accompanying legal consequences which repeatedly accompany one another (legal rules)

from which it is concluded that the legal consequence will always accompany the facts (legal principle). By inductive generalization, we may infer that *every* instance of the one attribute will also be an attribute of the other.

Analogy: This is reasoning from the particular to the particular, and this is technically distinguished from reasoning from the particular to the general. To draw an analogy between at least two entities is to indicate one or more respects in which they are similar. It is to argue that the legal consequence attached to one set of particular facts may apply to a different set of particular facts because of similarities in the two sets of facts. By analogy we may infer that a different particular instance of one attribute will also exhibit the other attribute.

It becomes apparent, however, that an induction by enumeration is very similar to an argument by analogy. They differ only in the breadth of their conclusions. By enumeration, you induce a generalization; by analogy, you induce a particular.

INDUCTIVE GENERALIZATION

It bears repetition that in the law when we reason from the particular to the general we call it inductive generalization. It is the method of arriving at a general, or perhaps, a universal, proposition (a principle or doctrine) from the particular facts of experience (legal rules or holdings of cases). We borrow this process from the certainty of laboratory science experiments.

If nine particular pieces of blue litmus paper turned red when dipped in acid, we may draw a general conclusion about what happens to *all* blue litmus paper dipped in acid. We use the technique of enumeration to reach an inductive generalization. Unlike in science, however, in law we do not assert that our conclusion is true; we represent only that it is more probably true than not.

Inductive generalization is used in all aspects of the legal profession—in studying law, in practicing law and in judging cases. Thus, it looms large in the common-law tradition in the development of legal precepts in the case by case experience.

Instance 1 of fact A is accompanied by legal consequence B.

Instance 2 of fact A is accompanied by legal consequence B.

Instance 3 of fact A is accompanied by legal consequence B

...

Instance 25 of fact A is accompanied by legal consequence B.

Therefore, every instance of fact A is accompanied by legal consequence B.

Apply this to a precise example in the law:

A's oral conveyance of real estate is invalid.

B's oral conveyance of real estate is invalid.

C's oral conveyance of real estate is invalid.

Z's oral conveyance of real estate is invalid.

Therefore, all oral conveyances of land are invalid.

All inference proceeds on the assumption that the new instances will exactly resemble the old one in all material circumstances. This is purely hypothetical, of course, and sometimes we discover we are mistaken. Thus, for years the Europeans proceeded along the following induction:

A is a swan and it is white.

B is a swan and it is white.

C is a swan and it is white.

...

Z is a swan and it is white.

Therefore, all swans are white.

But then Australia was discovered and it was learned that there are swans which are black.

Inductive generalization underlies the development of the common law. From many specific case holdings, we reach a generalized proposition. From many cases deciding that individual oral conveyances of real estate were invalid, we reached the conclusion that all such conveyances were invalid. We arrived at that point by what Lord Diplock described as "the cumulative experience of the judiciary." In generalization by enumeration, we can say that the larger the number of specific instances, the more certain is the resulting generalization. This is simple fealty to the concept of probability. We must beware of the converse fallacy of accident (also known as the fallacy of hasty generalization), a fallacious reasoning that seeks to establish a generalization by the enumeration of instances, without obtaining a representative number of instances. We call it also "jumping to conclusions." It is a practice in which a conclusion is drawn before all the particular instances have been taken into consideration. Thus, "Lawyer A lost a case last year; he lost another six months ago, and another just yesterday. Lawyer A loses all his cases."

In 1988, the Supreme Court decided a narrow issue. The Veterans' Administration characterized primary alcoholism as "willful misconduct" for the purpose of a statute which grants veterans extensions of time in which to use educational benefits, if they are prevented from using their benefits by a physical or mental disorder that did not result from their own "willful misconduct." The Court held that this characterization did not violate section 304 of the Rehabilitation Act, which prohibits discrimination against handicapped individuals solely because of their handicap. This was an extremely narrow decision, and even though the Court said that "[t]his litigation does not require the Court to decide whether alcoholism is a disease whose course its victims cannot control," most press accounts and television reports of the case leaped to a hasty generalization that the Court had decided that alcoholism is a disease within the control of the individual.[4]

Some arguments by enumeration may establish their conclusions with the more persuasive degree of probability than others. The greater the number of cases in the cumulative experience, the higher the degree of probability in the conclusion. The various instances of fact A and legal consequence B are called confirming instances of the causal relationship between fact A and legal consequence B. The greater number of confirming instances, the higher the probability of the conclusion.

ANALOGY

Closely related to induced generalization is the process of analogy. Analogy is reasoning from the particular to the particular, instead of from the particular to the general. If, from the experience of nine pieces of blue litmus paper, we conclude only that the tenth piece will turn red, we reach a particular, not a general conclusion. We do not represent that all pieces will turn red, only that the tenth will do so.

Analogy does not seek proof of an identity of one thing with another, but only a comparison of resemblances. Unlike the technique of enumeration, analogy does not depend upon the quantity of instances, but upon the quality of resemblances between things.

J. S. Mill reduced it to a formula: Two things resemble each other in one or more respects; a certain proposition is true of one; therefore it is true of the other.[5] In legal analogies, we may have two cases which resemble each other in a great many properties, and we infer that some additional property in one will be found in the other. Moreover, the process of analogy is used on a case-by-case basis. It is used to compare factual or procedural resemblance in a prior case or cases to the case at bar.

Thus, we can reduce an analogical argument to the following schematic where A, B, C and D are facts, and X, Y and Z are attributes or "respects" of these facts (or legal consequences attached to them):

> Facts A, B, C and D have legal consequences X and Y.
>
> Facts A, B and C have legal consequence Z.
>
> Therefore, Fact D probably has legal consequence Z.

Schematics aside, the success of this or any other analogical arguments lies in demonstrating the *resemblances* or *similarities* in the facts. Take a very simple analogical argument showing facts and consequences:

> My old shoes were purchased at the same store as my new shoes.
>
> My old shoes wore very well.
>
> Therefore, my new shoes will probably wear very well.

Copi and Burgess-Jackson offer the following analysis of this argument:

> The two things said to be similar are the two pairs of shoes. Three points of analogy are involved: The respects in which the two entities are said to resemble each other are, first in being shoes; second, in being purchased at the same store; and third, in wearing well. The three points of analogy do not play identical roles in the argument, however. The first two occur in the premises, whereas the third occurs both in the premises and the conclusion. In general terms, the given argument may be described as having premises that assert first, that two things that are similar in two respects, and second, that one of those things has a further characteristic, from which the conclusion is drawn that the other thing also has that characteristic.[6]

There are buzz words and phrases that indicate analogical arguments: same (as); in comparison; alike; resembles; as (in); analogously; analogue; similar(ly); like; in like manner; by the same token; just as p, so q; by analogy.

If reaching a conclusion by enumeration has the benefit of experience, reaching a conclusion by analogy has the benefit of the high degree of similarity of the compared data. The degree of similarity is always the crucial inquiry. Clearly, you cannot conclude that a partial resemblance between two entities is equal to an entire and exact correspondence. Here the skill of the advocate will often be the determining factor. Plaintiff's lawyer may argue that the historical event or entity "A"—in law, a putative precedent—bears many resemblances to the case at bar, "B." The opponent will argue that although the facts in "A" and "B" are similar in some respects, this does not mean that those similarities are material and therefore relevant, or that the cases are similar in other respects; he or she will argue that a false analogy is present.

What is one person's meat is another person's poison. What is one attorney's material and relevant fact in analogical comparisons is the other attorney's immaterial and irrelevant fact. Often the art of advocacy resolves itself into convincing the court which facts in previous cases are indeed positive analogies, and which are not. The judge is required to draw this distinction. The successful lawyer is one who is able to have the judge draw the distinction in the manner most favorable to the advocate.

But effective advocacy in determining positive/negative analogies must at all times be kept within the perimeters of objectivity. Students and lawyers must not fall in love with pet theories by opening their eyes only to instances that corroborate a favorite belief more readily than those that contradict it. In the process of analogy you must always have a full view of all that relates to the question. Do not be the type of person who sincerely believes that he or she thinks that reason is being followed, but in the words of John Locke: "They converse but with one sort of man, they read but one set of books, they will not come in the hearing but of one set of motions. They have a pretty traffic with known correspondents in some little creek, but will not venture out in the great ocean of knowledge."[7]

It should now be understood that points of unlikeness are as important as likeness in the cases examined. In examining the cases, as does a scientist in a laboratory, the lawyer should not look for the rigid fixity of facts. Seldom are there perfectly identical experiences in human affairs. The lawyer must recognize also the problems of those facts, which when compared, prove to be the rare experience in human affairs. And in order to understand completely what is being compared, always be aware of subtleties and minuteness.

Analogies can be considered the most important aspect of the study and practice of law. It is the method by which putative precedents are subjected to the acid test of searching analysis. It is the method to determine whether factual differences contained in the case at bar and those of the case compared are material or irrelevant. This requires counsel to be intellectually responsible at all times, to consider the consequences of projected steps when they reasonably follow from any position taken or about to be taken. Intellectual responsibility means integrity; it means recognizing the true consequences of any proposition or belief. It is irresponsible to cling to a proposition without acknowledging those consequences that will logically flow from it. If it is necessary to abandon the idea, do it, then move to another theory. If you don't, your opponent will kill it for you.

Arthur L. Goodhart has written:

> Having established the material and immaterial facts of the case as seen by the court, we can then proceed to state the principle of the case. It is to be found in the conclusion reached by the judge on the basis of the material facts and on the exclusion of the immaterial ones. In a certain case the court finds that A, B and C exist. It then excludes fact A as immaterial, and on facts B and C it reaches conclusion X. What is the *ratio decidendi* of this case? There are two principles: (1) In any future case in which the facts are A, B and C, the court must reach conclusion X, and (2) in any future case in which the facts are B and C the court must reach conclusion X. In the second case the absence of fact A does not affect the result, for fact A has been held to be immaterial. The court, therefore, creates a principle [makes a value judgment?] when it determines which are the material and which are the immaterial facts on which it bases its decision.[8]

The importance of legal reasoning by analogy cannot be overstated. It is the heart of the study of law; it lies at the heart of the Socratic method in the classroom and the courtroom. It is important for professors to use the Socratic method, because the method of analogy goes to the fundamentals of the common-law tradition. Cardozo has taught us that "[t]he common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive and it draws its generalizations from particulars."[9]

One must always appraise an analogical argument very carefully. Several criteria may be used:

- The acceptability of the analogy will vary proportionally with the number of circumstances that have been analyzed.
- The acceptability will depend upon the number of positive resemblances (similarities) and negative resemblances (dissimilarities).
- The acceptability will be influenced by the relevance of the purported analogies. An argument based on a single relevant analogy connected with a single instance will be more cogent than one which points out a dozen irrelevant resemblances.

Here, the keystone is materiality or relevance. Professor Wigmore gives us an example:

> To show that a certain boiler was not dangerously likely to explode at a certain pressure of steam, other instances of non-explosion of boilers at the same pressure would be relevant, provided the other boilers were substantially similar in type, age and other circumstances affecting strength.[10]

United States v. Grey
56 F.3d 1219, 1224-25 (10th Cir. 1995)

[The defendant was prosecuted under the federal statute for money laundering. The evidence was that he paid a club official $200 in cash to "sweeten the pot" for a payout from a video poker machine. The defense argued that there was no nexus between the cash that was paid and the necessary proof that the cash had traveled in interstate commerce in order to justify federal jurisdiction.]

We are left only with the contention that the nexus is somehow met by concluding, without any proof in the record, that the particular $200 handed to Mr. Toman had traveled in interstate commerce. However, the government can garner no support from the money laundering cases they cite because, in each of those cases, the prosecution successfully, in the Watergate idiom, "followed the money" both before and after the incident and introduced appropriate evidence demonstrating how the money affected interstate commerce. *See* United States v. Kelley, 929 F.2d 582, 586 (10th Cir. 1991)(money laundering proceeds used to buy car made in Michigan but sold in Oklahoma affected interstate commerce), *cert. denied*, 502 U.S. 926, 112 S.Ct 341, 116 L.Ed.2d 280 (1992); United States v. Gallo, 927 F.2d 815, 823 (5th Cir. 1991) (evidence showed that Gallo received $300,000 in proceeds from drug sale and transported it in a shoebox by car on an interstate highway, the court emphasizing interstate highway use but "reserving judgment on a case in which the connection between the money and the drugs or illegal activity is not so clear as it is here"); United States v. Peay, 972 F.2d 71, 74 (4th Cir. 1992)(nexus satisfied because money derived from drug sale was deposited in FDIC insured bank, and because reports sent to FDIC deal with money deposited from many sources, including those outside the state); United States v. Eaves, 877 F.2d 943 (11th Cir. 1989) (effect on interstate commerce shown where developers sent option payments for purchase of property from Atlanta, Georgia, to a bank in Jacksonville, Florida).

We find no proper analogy between these cases and the one at bar. In the language of the logicians, the positive resemblances in the facts do not outweigh the negative resemblances in the compared factual scenarios.

Here the government did not introduce a shred of evidence showing the origin or destination of the specific $200 in Federal Reserve Notes that constituted the single alleged money laundering transaction, no proof of the circumstances or location under which Huey Grey came into their possession or how they were eventually distributed by the two Halstead American Legion employees—Finance Officer Gilbert Toman or the bartender.

Dole v. Local
427 894 F.2d 607, 612 (3rd Cir. 1990)

[Pursuant to the Labor-Management Reporting and Disclosure Act, the government sought to enjoin a local union from refusing to permit one of its members to review collective bargaining agreements between the unions and employers other than her own. The district court dismissed the action on the basis of a six months statute of limitations borrowed from § 10 of the National Labor Relations Act. On appeal the court reversed, holding that the United States is not bound by any statute of limitations brought by it as a sovereign to enforce a public right. The concurrence relied on the holding in United States v. Beebe, 127 U.S. 338 (1888), to justify a limitations provision. In response the majority argued that the analogy was not well taken.]

The concurrence draws an analogy between the present action by the Secretary on behalf of Ms. Colmenares, and the problems of the Philbrook heirs [in *Beebe]* in a land dispute and concludes that the issue here merely involves the "assertion of Colmenares' private rights." To rely on the *Beebe* case as the foundation of one's analysis, and to assume that the Government is a "nominal complainant" who has "no real interest in the litigation" is to rely on an analogy which does not possess a high degree of similarity between the situations compared. Analogy does not seek proof of an identity of one thing with another but only a comparison of resemblances. J. S. Mill reduced it to a formula: Two things resemble each other in one or more respects; a certain proposition is true of one; therefore, it is true of the other …. [R]eaching a conclusion by analogy has the benefit of the high degree of similarity of the compared data. The degree of similarity is always the crucial inquiry in analogies. Clearly, you cannot conclude that a partial resemblance between two entities is equal to an entire and exact correspondence.

The concurrence seeks to compare the relationship between the Attorney General and the Philbrook heirs in *Beebe* (a private action with no public interest) to the relationship between the Secretary of Labor and Ms. Colmenares in the instant case (a public action with a substantial public interest), concluding that since the relationship is the same, the result (the applicable statue of limitations) is the same. But the degree of similarity is always crucial in analogies. Here the degree of similarity in the concurrence's analogy is very low. In fact, the concurrence's argument might be a *non sequitur.*

We differ completely with the concurrence's minimization of such an important aspect of union democracy and its reduction of the issue here to merely one of a private right.

The use of analogy is graphically illustrated by Judge Cardozo's opinion in MacPherson v. Buick Motor Car Co.[11] which we discussed in Chapter 5 in another context. Buick sold an automobile to a retail dealer who in turn sold it to *MacPherson.* While MacPherson was in the car it suddenly collapsed and he was thrown out and injured. One of the wheels was made of defective wood and the spokes crumbled into fragments. Buick had bought the wheel from another manufacturer. There was evidence, however, that its defects could have been discovered by reasonable inspection and that Buick had not inspected the wheel.

The question to be determined was whether Buick owed a duty of care to anyone but its

immediate purchaser, in this case the dealer. Until MacPherson was decided, it was settled New York law that liability in negligence was limited to the immediate purchaser, except where the manufacturer's negligence "put human life in imminent danger." The leading case was Thomas v. Winchester,[12] in which a poison was falsely labeled and sold to a druggist, who in turn sold it to a customer.

The *Winchester* rule of "imminent danger" had been applied in a very limited fashion over the years. The defense in *MacPherson* was that an automobile was at best an "inherently dangerous" instrument and that there is a difference between things "inherently dangerous" (no liability) and things "imminently dangerous" (liability).

Cardozo outlined a series of cases in an effort to determine which facts in the previous cases were similarities and which were dissimilarities relevant to establishing or denying liability on the part of a manufacturer, where the injury was sustained by one who was not the immediate purchaser.

Case 1.	*Winchester:* Manufacturer falsely labeled poison. Held: Manufacturer liable.
Case 2.	Manufacturer's defect in a small balance wheel used in a circular saw. Wheel lasted five years before defect surfaced. Held: Manufacturer not liable.
Case 3.	Boiler exploded after testing by manufacturer and owner. Held: Manufacturer not liable.
Case 4.	Contractor built scaffold for painter. An employee of painter was injured when it collapsed. Held: Contractor liable.
Case 5.	Large coffee urn installed in a restaurant exploded and injured a customer. Held: Manufacturer liable.
Case 6.	Bottle of aerated water exploded. Held: Manufacturer liable.
Case 7.	Builder built a defective structure. Held: Builder liable.
Case 8.	Otis built a defective elevator. Held: Manufacturer liable.
Case 9.	Contractor furnished a defective rope. Held: Contractor liable.
Case 10.	Cadillac produced a defective car. The car was then in an accident. Held: Manufacturer not liable.
Case 11.	(Leading English case) Action by driver of mail coach against a contractor who had agreed with the postmaster general to provide and keep the vehicle in repair for the purpose of conveying the royal mail over a prescribed route. The coach broke down and the driver was injured. Held: Contractor not liable.
Case 12.	Dock owner put up a staging outside a ship. Servants of shipowner injured. Held: Dock owner liable.

Case 13. Defendant sent out a defective truck laden with goods which he had sold. Buyer's servants injured.
Held: Seller liable.

Case 14. Defendant made contract to keep van in repair.
Held: Repairman not liable.

Case 15. A livery stable sent out a vicious horse. A guest of the customer was injured.
Held: Stable owner liable.

Case 16. Master bought a tool for a servants' use. The servant was injured by the defective tool.
Held: Master not liable.

In determining that there was liability in *MacPherson,* Judge Cardozo reasoned:

- A relevant resemblance that established liability in the cases was whether the defendant was a manufacturer.
- A relevant resemblance that established liability in the cases was where injury was almost certain.
- A relevant difference in the older cases, especially case 10, the leading English case, is the change in methods of locomotion. Precedents drawn from days of travel by stagecoach do not fit the conditions of travel today.
- The "inherent/imminent" distortions are inapplicable. "[T]he case does not turn upon these restricted niceties. If danger was to be expected as reasonably certain, there was a duty of negligence, and this whether you call the danger inherent or imminent."

Thus, cases 1, 5, 6 and 8 all involved manufacturers and imposed liability. Cases 2, 3 and 10 involved manufacturers and imposed no liability. Cases 4, 7, 9, 13 and 15 imposed liability but did not involve manufacturers. Cases 11, 14 and 16 denied liability but did not involve manufacturers.

The *MacPherson* case was a landmark decision that produced a major change in the law. Its success as an example of reasoning by analogy can be attributed to the large number of circumstances that were analyzed, the number of positive resemblances in the cited cases and the admitted relevances of the purported analogies. *MacPherson* announced a legal rule by the method of analogy, but because of the number of enumerated resemblances it soon became known as enunciating a legal principle through the method of inductive generalization.

Whether using enumerated instances to reach a generalized conclusion to frame a broad legal precept, or selected instances to bring about a convenient analogy, it is well to keep in mind the object of bringing into consideration a multitude of cases. It is to facilitate the selection of the evidential or significant features upon which to base inference in some single case.

To do this effectively, you will be well served to: (1) jettison any pet beliefs or theories if the research is not supportive; do not be dogmatic; (2) not hesitate to confront the novel situation and (3) remember that the study and practice of law has no room for mental inertia and laziness. Be aware always that the analysis you have failed to pursue will often be performed by your adversary, and if not by him or her, by the judge or the chambers' law clerks.

Jeffrey G. Murphy observes:

> Most of us, in claiming analogies between various things, rely on perception. That is, we "just see" that Mary is mighty like a rose. And, if pressed to give reasons for making such a claim, we will direct our questioner to certain features of the case that he too can "just see." But there are no decision procedures for "just seeing." There is no logic of perception. However, the legal use of analogy is more like the scientific use than the ordinary use in the following sense: that the claim that X and Y are analogous is made with respect to some theoretical basis. The appeal is not (at least wholly) to perception. Rather the theoretical basis (in law, certain conventional rules of relevance established as precedents) gives us a decision procedure for determining whether or not cases X and Y are indeed analogous.[13]

We must be very careful to make sure that "Mary is mighty like a rose." We must look at Mary with all her warts and blemishes.

UNDERSTANDING INDUCTIVE REASONING

We repeat again for emphasis that the conclusion reached by inductive reasoning is not considered a truth; rather, it is a proposition that is more probably true than not. We must also understand that often in inductive reasoning the two processes of enumeration and analogy are often used simultaneously. If the conclusion is reached by simultaneously using the twin processes, there is a greater probability that truth will lie in the conclusion. Jevons described this process: "The things usually resemble each other only in two or three properties, and we require to have more instances to assure us that what is true of these is probably true of all similar instances. The less, in short, the intention of the resemblance the greater must be the extension of our inquiries."[14]

There must be open-mindedness, whole-heartedness and responsibility.[15] From my own experiences as a lawyer, with juices running fast because of intense sympathy for my client's cause—yes, a cause, not a case—I know how strong the tendency is to be close-minded. This is a mistake. The consummate advocate must look at things free from bias, partisanship and traits and habits that close the mind and make it unwilling to consider new problems and entertain new ideas. In analyzing previous cases for resemblances and differences in the facts, give full attention to facts from whatever source they come; give full attention to alternative propositions. It is difficult, to be sure, to abandon a pet notion and recognize the possibility of error. But the true advocate realizes that self-conceit is not always the best attitude and that to do your job properly for your client you must be prepared to undergo troublesome hours to alter beliefs held very strongly at the beginning of research, but which, upon analysis find little or no support in the law.

To do this there must be whole-heartedness, the ability to work long hours to test both old and new theories. Remember, your responsibility is to advance your client's interest, even if it means dumping the client's original theories and embarking upon fresh consideration of new points of view and new ideas.

But reasoning by induction is more than a mere tool in the logical process. It permits the law to move with the times, as aptly illustrated by Cardozo's comparison of the automobile wheels to those of the stagecoach. It is the counter-agent of attempts to embalm legal precepts. It permits the elasticity necessary in order to hearken to the adage: "The law must be stable, but it must not stand still." In a given year, a concept may be introduced in an argument suggesting differences from or similarities to precedents, but fail to win the court's acceptance. Although rejected, the idea achieves a standing in society, or at least in the legal community, because it has been offered in a public brief and discussed in the official reports of the court either in the majority opinion rejecting it or in a concurring or dissenting opinion endorsing it. Later, in another case, the idea is suggested again. This time the court may interpret the previous case, perhaps suggesting slight differences in the facts, but this time deciding to adopt the once rejected idea. In future cases, the idea may be given further definition and tied to other ideas. In this manner, ideas of the community and the social, behavioral or political sciences now bear the imprimatur of the law. And the process continues. In time the "new idea," once so fresh and novel, itself becomes encrusted and, perhaps, undesirable because new social, economic and

political concepts have been accepted by society. New ideas are then suggested to the court, in a given case. Again, there may be a rejection by the court, but as time goes on and new cases are presented, the new "new idea" comes to replace the old "new idea."

In this respect, Cardozo quoted Munroe Smith:

> In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the law-finding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.[16]

New ideas may take an extensive period of time to germinate and reach acceptance. They do not simply appear one day; they emerge by means of attorneys' use and judges' adoption of analogies to older, well-established ideas, legal precepts and public policies to which society has grown accustomed. A classic example is the following concurring opinion of Justice Roger J. Traynor, of the California Supreme Court, suggesting the new concept of strict products liability. The opinion was written in 1944.

Escola v. Coca-Cola
24 Cal. 2d 453, 150 P.2d 436, 440-41 (1944)

(Traynor, J., concurring)

I concur in the judgment, but I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696, Ann.Cas.1916C, 440, established the principle, recognized by this court, that irrespective of privity of contract, the manufacturer is responsible for an injury caused by such an article to any person who comes in lawful contact with it. Sheward v. Virtue, 20 Cal.2d 410, 126 P.2d 345; Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, 34 P.2d 481. In these cases the source of the manufacturer's liability was his negligence in the manufacturing process or in the inspection of component parts supplied by others. Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is in the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is in the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

Notwithstanding the logic of his opinion, Justice Traynor had to wait 19 years, from 1944 to 1963, to see his individual views accepted by the California Supreme Court in Greenman v. Yuba Power Prod., Inc., 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Justice Traynor persisted, his views survived and he eventually wrote the opinion of the court adopting the concept of strict products liability that he had introduced almost two decades before. In the law, new ideas sometimes take many years to gain acceptance and the primary method through which attorneys and judges can facilitate this process is by analogy to older, already accepted ideas and principles.

It must be emphasized that the acceptance or rejection of a new idea is a question of law and this is for the judge, not the jury. It is for the judge to delineate the scope of the rule of law. Often

this depends on what facts in the later case will be considered similar to those present when the rule was first announced. The key step in the process of analogy is the finding of similarity or difference, or, if you will, positive resemblances and negative resemblances. In a given case, a judge may find as relevant the existence or absence of facts which prior judges thought unimportant. The judge attempts to see the law as a fairly consistent whole, and in our tradition, he or she must always confront the problem: when is it just to treat different cases as though they were the same? And conversely, when is it just to treat seemingly similar cases as different? This is the ever-present challenge for the advocate and the judge alike.

The system works because reasons must be given to justify the determination of resemblances and differences in the relevant facts. The fairness and durability of a judicial decision will always be directly dependent upon how thoughtfully and disinterestedly the court has first identified and then weighed the conflicting social interests involved.

The system works also because there is a large measure of predictability or reckonability in the law. These qualities will be present to the extent that there is correlative logical processes by which conclusions are reached. After many years as a judge and teacher, I can quickly recognize the illogical lawyer or student. This person wanders aimlessly. He or she shifts the topic without being aware of it, skips about at random, not only jumps to a conclusion, but fails to retrace steps to see whether the conclusion to which he or she has jumped is supported by evidence. The illogical person makes contradictory, inconsistent statements without being sensitive to what he or she is doing.

The system works because the good lawyers and most judges function as logical persons. They are persons who carefully regulate processes of perception, comparison, suggestion, inference and constant testing, all of this, to determine what consequence will flow from that being perceived, compared, suggested, inferred and tested. But this does not mean that an analysis, loud with good reason, and presented in logical order will command the same results. Consider these cases that address whether steamboat owners owe the same care to their passengers as innkeepers to their guests.

Clark v. Burns
118 Mass. 275, 277 (1875)

The liabilities of common carriers and innkeepers, though similar, are distinct. No one is subject to both liabilities at the same time, and with regard to the same property. The liability of an innkeeper extends only to goods put in his charge as keeper of a public house, and does not attach to a carrier who has no house and is engaged only in the business of transportation. The defendants, as owners of steamboats carrying passengers and goods for hire, were not innkeepers. They would be subject to the liability of common carriers for the baggage of passengers in their custody, and might perhaps be so liable for a watch of the passenger locked up in his trunk with other baggage. But a watch, worn by a passenger on his person by day, and kept by him within reach for use at night, whether retained upon his person, or placed under his pillow, or in a pocket of his clothing hanging near him, is not so intrusted to their custody and control as to make them liable for it as common carriers.

Whether the defendants' regulations as to keeping the doors of the state rooms unlocked, the want of precautions against theft, and the other facts agreed, were sufficient to show negligence on the part of the defendants, was, taking the most favorable view for the plaintiff a question of fact, upon which the decision of the court below was conclusive.

Adams v. New Jersey Steamboat Co.
151 N.Y. 163, 45 N.E. 369 (1896)

The principle upon which innkeepers are charged by the common law as insurer of the money or personal effects of their guests originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subjected to a high degree of responsibility in cases where an extra-ordinary confidence is necessarily reposed in them, and where great temptation to fraud and danger of plunder exists by reason of the peculiar relations of the parties…. The relations that exist between a steamboat company and its passengers, who have procured staterooms for their comfort during the journey, differ in no essential respect from those that exist between the innkeeper and his guests.

The passenger procures and pays for his room for the same reasons that a guest at an inn does. There are the same opportunities for fraud and plunder on the part of the carrier that was originally supposed to furnish a temptation to the landlord to violate his duty to the guest.

A steamer carrying passengers upon the water, and furnishing them with rooms and entertainment is, for all practical purposes, a floating inn, and hence the duties which the proprietors owe to their charge ought to be the same. No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest since the same considerations of public policy apply to both relations.

The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern. We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff, without any proof of negligence.

Hixson v. Arkansas
266 Ark. 773, 587 S.W.2d 70, 75-76 (1979)

(Newbern, J., dissenting)

[Defendant was convicted of unlawfully, feloniously and knowingly obtaining an aggregate sum of money in excess of $2,500 by deception, with the purpose of depriving owners, members of churches, of their funds by promising to deliver church directories to the churches. Defendant appealed and the majority affirmed. Judge Newbern dissented.]

Assuming there was substantial evidence of deception here, however, I believe this record is devoid of evidence that the Appellant obtained property in excess of a value of $2,500.00 as a result of the offenses charged. As the majority opinion points out, the churches were to pay nothing for the directories. Those institutions were out the value of whatever their services (no pun intended) might have been worth, but there was no attempt whatever to produce evidence of the value of the efforts they expanded in getting their constituent families rounded up for the photography sessions. Nor was any attempt made by the State to show the difference between the value of what the church members received (the photographs) and what they were promised (the photographs plus the "free" directories).

The argument could be made that regardless of the fact that many if not most of the church members received photographs for their money, … all that was paid to Appellant for photographs and directories was obtained by deception. The logical extension of that argument, and its fallacy, is perhaps best demonstrated by these illustrations which bear degrees of analogy:

1. X promises A a one-carat diamond in exchange for $1,000.00. A gives X $1,000.00, but X then delivers to A a chunk of glass which is completely without value and which X intended all along to deliver to A instead of a diamond.

2. X promises A a one-carat diamond in exchange for $1,000.00. A gives X $1,000.00, but X then delivers to A a diamond weighing three-quarters of a carat which X intended all along to deliver to A, knowing of the deficiency. The lesser stone is worth $750.00.

3. X promises A a one-carat diamond in exchange for $1,000.00. A gives X $1,000.00, but X then delivers to A a diamond weighing one and one-quarter carats which X intended all along to deliver to A, knowing it to be larger than the one promised. The stone delivered is worth $1,200.00.

If no account is taken of the value received by A, then in each of these illustrations X could be convicted of theft of property of a value in excess of $1,000.00. I simply cannot believe our statute contemplates that result in illustrations 2 and 3.

The record here shows many church members received accepted photographs in exchange for their money. The most that can be said for certain is that Appellant took those parts of their payments which could fairly be attributed to the value of the "bonus" directories. We have no idea what that value was.

The record here is indeed “replete” with testimony as to other churches which had entered agreements with the Appellant. Even if that evidence was relevant to show a scheme or Appellant’s intent, it was completely irrelevant to show the value of the property obtained in the theft alleged here.

A FABLE FOR OUR TIME

Once upon a time in a galaxy far, far away, certain tribunals held forth to say what was just or what was unjust. The judges who did sit on the tribunals, those who wore beards and long robes, were said to be strong and brave. So brave were they that they feared not the beast of the forest nor man who walked tall and strong in the field and in the town. Yet they had one fear, and its name was woman. The judges feared the rolls of papyrus upon which was written the proclamation of civil righteousness. And when the causes came to be heard before the tribunal, the judges consulted the moon and the stars and the oracles who divined to discover in the entrails that which they called resemblances in life to serve as implements of decisions that they called analogies. And the analogies of an ancient time—as in the eighth decade of the century nineteenth—did showeth how benighted were those cultures and practices from which the solons and the soothsayers summoned to draw forth the laws that they did bestow upon the multitudes.

Joyner v. Joyner
59 N.C. 322, 324-26 (5 Jones 331, 333-35) (1862)

It is said on the argument that the fact that a husband, on one occasion "struck his wife with a horse-whip, and on another occasion, with a switch, leaving several bruises on her person," is, of *itself*, a sufficient cause of divorce, and consequently the circumstances which attended the infliction of these injuries are immaterial, and need not be set forth. This presents the question in the case:

The wife must be subject to the husband. Every man must govern his household, and if by reason of an unruly temper, or an unbridled tongue, the wife persistently treats her husband with disrespect, and he submits to it, he not only loses all sense of self-respect, but loses the respect of the other members of his family, without which he cannot expect to govern them, and forfeits the respect of his neighbors. Such have been the incidents of the marriage relation from the beginning of the human race. Unto the woman it is said, "Thy desire shall be to thy husband, and he shall rule over thee," Genesis, chap. 3, v. 16. It follows that the law gives the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place. Why is it that by the principles of the common law if a wife slanders or assaults and beats a neighbor the husband is made to pay for it? Or if the wife commits a criminal offense, less than felony, in the presence of her husband, she is not held responsible? Why is it that the wife cannot make a will disposing of her land? and cannot sell her land without a privy examination, "separate and apart from her husband," in order to see that she did not do so voluntarily, and without compulsion on the part of her husband? It is for the reason that the law gives this power to the husband over the person of the wife, and has adopted proper safeguards to prevent an abuse of it.

We will not pursue the discussion further. It is not an agreeable subject, and we are not inclined, unnecessarily, to draw upon ourselves the charge of a want of proper respect for the weaker sex. It is sufficient for our purpose to state that there may be circumstances, which will mitigate, excuse, and so far justify the husband in striking the wife "with a horse-whip on one occasion and with a switch on another, leaving several bruises on the person," so as not to give her a right to abandon him and claim to be divorced. For instance: suppose a husband comes home and his wife abuses him in the strongest terms—calls him a scoundrel, and repeatedly expresses a wish that he was dead and in torment! and being thus provoked in the *furor brevis*, he strikes her with the horse-whip, which he happens to have in his hands, but is afterwards willing to apologize, and expresses regret for having struck her: or suppose a man and his wife get into a discussion and have a difference of opinion as to a matter of fact, she becomes furious and gives way to her temper, so far as to tell him he *lies*, and upon being admonished not to repeat the word, nevertheless does so, and the husband taking up a switch, tells her if she repeats it again he will strike her, and after this notice she again repeats the insulting words, and he thereupon strikes her several blows; these are cases in which, in our opinion, the circumstances attending the act, and giving rise to it, so far justify the conduct of the husband as to take from the wife any ground of divorce for that cause, and authorize the Court to dismiss her petition with the admonition, "if you will amend your manners, you may expect better treatment," see Shelford on Divorce. So that there are circumstances under which a husband may strike his wife with a horse-

whip, or may strike her several times with a switch, so hard as to leave marks on her person, and these acts do not furnish sufficient ground for a divorce. It follows that when such acts are alleged as the causes for a divorce, it is necessary in order to comply with the provisions of the statute, to state the circumstances attending the acts and which gave rise to them.

In re Goodell
39 Wisc. 232, 244 (1875)

So we find no statutory authority for the admission of females to the bar of any court of this state. And, with all the respect and sympathy for this lady which all men owe to all good women, we cannot regret that we do not. We cannot but think the common law wise in excluding women from the profession of the law. The profession enters largely into the well being of society; and, to be honorably filled and safely to society, exacts the devotion of life. The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all lifelong callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. The cruel chances of life sometimes baffle both sexes, and may leave women free from the peculiar duties of their sex. These may need employment, and should be welcome to any not derogatory to their sex and its proprieties, or inconsistent with the good order of society. But it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours. There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the courtroom, as for the physical conflicts of the battle field. Womanhood is molded for gentler and better things. And it is not the saints of the world who chiefly give employment to our profession. It has essentially and habitually to do with all that is selfish and malicious, knave and criminal, coarse and brutal, repulsive and obscene, in human life. It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man's reverence for womanhood and faith in woman, on which hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds it way into courts of justice; all the unclean issues, all the collateral questions of sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publications, libel and slander of sex, impotence, divorce: all the nameless catalogue of indecencies, *la chronique scandaleuse* of all the vices and all the infirmities of all society, with which the profession has to deal, and which go towards filling judicial reports which must be read for accurate knowledge of the law. This is bad enough for men. We hold in too high reverence the sex without which, as is truly and beautifully written, *le commencement de la vie est san secours, le millieu sans plaisir, et le fin sans consolation,* voluntarily to commit it to such studies and such occupations. *Non tali auxilio nec defensoribus istis,* would juridical contests be upheld. Reverence for all womanhood would suffer in the public spectacle of women so instructed and so engaged. This motion gives appropriate evidence of this truth. No modest woman could read without pain and self abasement, no woman could so overcome the instincts of sex as publicly to discuss, the case which we had occasion to cite [previously]. And when counsel was arguing for this lady that the word, person, in § 32 ch. 37, would subject woman to prosecution for paternity of a bastard, and in secs. 39, 40, ch. 164, to prosecution for rape.

Discussions are habitually necessary in courts of justice, which are unfit for female ears. The habitual presence of women at these would tend to relax the public sense of decency and propriety. If, as counsel threatened, these things are to come, we will take no voluntary part in bringing them about.

By the Court—The motion is denied.

And five score years came to pass and the tribunals and the lawgivers and man who walked the field and town no longer had the fear in the heart that had made them tremble and shake as a quaking aspen. They no longer feared woman; woman who now, too, walked head high in the forest and in the field and in the town; woman who now had wreaked profound change in the cultures and practices from which the solons and the soothsayers drew analogies; woman who now served as solon and soothsayer as well as judge herself.

New ideas and new legal precepts are perpetually emerging, but the emergence is slow as our parables tell us—sometimes five score years as the subsequent cases disclose. As Munroe Smith stated, "The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice." Societal fear and outdated understandings (in the words of the parable, "customs and practices") that informed the legal precepts defining the role of women in the home and the workplace have been largely rejected today. Rules that continued to work injustices against women have been replaced by new community values, social mores and corresponding legal precepts about the role of gender in a modern society.

Eslinger v. Thomas
476 F.2d 225, 227 (4th Cir. 1973)

The South Carolina Senate adopted Resolution S.525, establishing new classifications and duties of part-time employees formerly known as pages. Under this resolution, females may be employed as "clerical assistants" and "committee attendants," but not at "Senate pages."

When we apply the [proper] test… we are compelled to conclude that S.525 denied equal protection. The "public image" of the South Carolina Senate and of its members is obviously a proper subject of state concern. Apparently, the South Carolina Senate felt that certain functions performed by pages on behalf of senators, e.g., running personal errands, driving senators about in their autos, packing their bags in hotel rooms, cashing personal checks for senators, etc., were "not suitable under existing circumstances for young ladies and may give rise to the appearance of impropriety."… In their brief, defendants argue that "[i]n placing this restriction upon female pages, the Senate is merely attempting to avoid placing one of its employees in a conceivably damaging position, protecting itself from appearing to the public that an innocent relationship is not so innocent, and maintaining as much public confidence while conducting the business of the people of South Carolina as possible."

We find this rationale unconvincing. It rests upon the implied premise, which we think false, that on the one hand, the female is viewed as a pure, delicate and vulnerable creature who must be protected from exposure to criminal influences; and on the other, as a brazen temptress, from whose seductive blandishments the innocent male must be protected. Every woman is either Eve or Little Eva—and either way, she loses …. We have only to look at our own female secretaries and female law clerks to conclude than an intimate business relationship, including traveling on circuit, between persons of different sex presents no "appearance of impropriety" in the current age, graduated as we are from Victorian attitudes. We note also that South Carolina has had female senators. While the record does not reflect their ages, the association of female senator with male page has not given rise to a sufficient "appearance of impropriety" to require legislative regulation which is the reverse of S.525. In short, present societal attitudes reject the notion that in most forms of business endeavor free association between the sexes is to be limited, regulated and restricted because of a difference in sex.

The 1973 *Eslinger* case shows how far we have come since the former reprehensible treatment of women by the highest courts of the states. The Wisconsin and North Carolina cases have been set forth as recorded examples of the plight of women as recent as the era of our great-grandparents. Those cases purport to draw analogies—improper, to be sure—from the set of mores allegedly present in nineteenth-century communities. It is worthwhile to keep these cases in mind if for no other reason than as a reminder, or perhaps an impetus, to say, "Never again!" In 1996, the Supreme Court held that states could not constitutionally exclude women from educational opportunities at what have traditionally been state-supported all-male military institutions.[17] This ruling came in the midst of contentious debates that challenged what were for many age-old attitudes and fundamental understandings about the role of women, the military and higher education in our society. Notwithstanding the formidable traditions of all-male

military institutions in our society, the Court retested those traditions and, in light of the continued injustice to women many believed resulted from rules upholding those traditions, found that state support of such a tradition violates the Equal Protection Clause. The Court reached its conclusion in part by considering analogies to historical struggles of women entering higher education institutions, other single-gender educational facilities, male-only bartender licensing policies, property laws now held to bias women and, of particular relevance here, prior legal challenges to policies excluding women from the practices of medicine and the law. *Eslinger* is a modern day epitome of effective use of analogy and inductive reasoning by counsel and the Court to facilitate the emergence of new ideas and legal principles.

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1. As previously explained in Chapter 3, this book concentrates on legal reasoning, a limited area in the general cosmos of reasoning. In general deductive reasoning, one can deduce from the general to the general, but in the law we use deductive reasoning to favor or attack a "particular," not a "universal." In the law, the particular is a litigant, a witness or a participant in a transaction. We consider also induced generalization and analogy as aspects of inductive reasoning because the beginning point for analysis is the same.

2. Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969 (3d Cir. 1979).

3. Edward H. Levi, Introduction to Legal Reasoning, 15 U. Chi. L. Rev. 501, 504 (1948).

4. Traynor v. Turnage, 485 U.S. 535 (1988).

5. *See* John Stuart Mill, A System of Logic Ratiocinative and Inductive 98-142 (8th ed. 1916).

6. Irving M. Copi & Keith Burgess-Jackson, Informal Logic 166 (3d ed. 1996).

7. John Locke, The Conduct of Understanding (1690).

8. Arthur L. Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L. J. 161, 179 (1930).

9. Benjamin N. Cardozo, The Nature of the Judicial Process 22-23 (1921).

10. John H. Wigmore, Wigmore's Code of the Rules of Evidence in Trials at Law 118 (3d ed. 1942).

11. 217 N.Y. 382, 111 N.E. 1050 (1916).

12. 6 N.Y. 397 (1852).

13. Jeffrey G. Murphy, Law Logic, 77 Ethics 193, 197 (1966).

14. W. Stanley Jevons, Elementary Lessons in Logic: Deductive and Inductive 208 (1965).

15. *See e.g.*, John Dewey, How We Think 30-33 (1933).

16. Munroe Smith, Jurisprudence 21 (1909).

17. United States v. Virginia, 116 S.Ct. 2264 (1996); Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995).

Chapter 7

THE PARADIGMATIC COMMON-LAW CASE

This chapter discusses how theoretical concepts of issue-identification and the processes of inductive and deductive reasoning apply to a live case. The opinion of Lord Diplock in the House of Lords in Dorset Yacht Co. v. Home Office[1] is used to illustrate these concepts. The case was one of first impression in the Court of Appeal and the House of Lords. Seven Borstal boys (British juvenile detention residents) were working on an island under the control and supervision of three officers from the Home Office. During the night, the boys left the island, boarded, cast adrift and damaged the plaintiffs' yacht, which was moored offshore. The plaintiffs brought an action for damages against the Home Office which charged negligence. They alleged that the officers, knowing of the boys' criminal records and records of previous escapes from Borstal institutions, and knowing that crafts such as the plaintiffs' yacht were moored offshore, had failed to exercise effective control and supervision of the boys. The Home Office conceded that they were vicariously liable for the torts of their servants (the officers), but denied that they, or their servants or agents, owed the plaintiffs any duty of care with respect to the detention, supervision or control of the boys.

Lord Diplock stated the issue:

> Is any duty of care to prevent the escape of a Borstal trainee from custody owed by the Home Office to persons whose property would be likely to be damaged by the tortious acts of the Borstal trainee if he escaped?

Lord Diplock (a good friend of happy memory whom I first knew as Sir Kenneth when he was a justice of the Law Courts) then explained that the first task of the court was to decide among several competing legal precepts. He noted that this was a case of first impression and that some subjective input, a value judgment, would go into the decision of choosing between the two legal precepts: denying or extending liability.

This is the first time that this specific question has been posed at a higher judicial level than that of a county court. Your Lordships in answering it will be performing [the] judicial function of deciding whether the English law of civil wrongs should be extended to impose legal liability to make reparation for the loss caused to another by conduct of a kind which has not hitherto been recognized by the courts as entailing any such liability.

This function, which judges hesitate to acknowledge as lawmaking, plays at most a minor role in the decision of the great majority of cases, and little conscious thought has been given to analysing its methodology. Outstanding exceptions are to be found in the speeches of Lord Atkin in Donoghue v. Stevenson and of Lord Devlin in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. It was because the former was the first authoritative attempt at such an analysis that it has had so seminal an effect upon the modern development of the law of negligence.

It will be apparent that I agree with the Master of the Rolls that what we are concerned with in this appeal "is at bottom a matter of public policy which we as judges, must resolve." He cited in support Lord Pearce's dictum in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465, 536:

> How wide the sphere of the duty of care in negligence is to be laid depends ultimately

upon the courts' assessment of the demands of society for protection from the carelessness of others.

The reference in this passage to "the courts" in the plural is significant, for as Lord Devlin in the Court of Appeals had put it:

> As always in English law, the first step in such an inquiry is to see how far the authorities have gone, for new categories in the law do not spring into existence overnight.

In the next section, Lord Diplock combines the processes of enumeration and analogy to justify the court's use of public interest in a negligence case. He also describes how the process of inductive reasoning is used to arrive at the major premise.

The justification of the courts' role in giving the effect of law to the judges' conception of the public interest in the field of negligence is based upon the cumulative experience of the judiciary of the actual consequences of lack of care in particular instances. And the judicial development of the law of negligence rightly proceeds by seeking first to identify the relevant characteristics that are common to the kinds of conduct and relationships between the parties which are involved in the case for decision and the kinds of conduct and relationships which have been held in previous decisions of the courts to give rise to a duty of care.

The method adopted at this stage of the process is analytical and inductive. It starts with an analysis of the characteristics of the conduct and relationship involved in each of the decided cases. But the analyst must know what he is looking for, and this involves his approaching his analysis with some general conception of conduct and relationships which ought to give rise to a duty of care.

A generalization "based on the cumulative experience of the judiciary," is simply an elegant way of describing an enumeration of instances. And "seeking … to identify the relevant characteristics that are common [among cases]" is no more than analogy. You will also note that the process described in the paragraph above is a classic description of inductive reasoning.

As we read on, Lord Diplock will carefully craft the logical form that the preliminary conclusion will take. This is very important because the conclusion *of the inductive reasoning process will become the* major premise *of the subsequent deductive reasoning process.*

This analysis leads to a proposition which can be stated in the form:

> In all the decisions that have been analysed a duty of care has been held to exist wherever the conduct and the relationship possessed each of the characteristics A, B, C, D, etc., and has not so far been found to exist when any of these characteristics were absent.
>
> For the second stage, which is deductive and analytical, that proposition is converted to: "In all cases where the conduct and relationship possess each of the characteristics A, B, C, D, etc., a duty of care arises." The conduct and relationship involved in the case for decision is then analysed to ascertain whether they possess each of these characteristics. If they do the conclusion follows that a duty of care does arise in the case for decision.

Note well the presence of the elements we discussed in the anatomy of the Socrates-is-a-man syllogism. The subject (middle term) of the proposition is distributed because it encompasses all. ("In all *cases where the conduct, etc.") The proposition is affirmative. The major premise is thus both categorical and distributed.*

In the next excerpt Lord Diplock explains that because the present case is lacking at least one of the characteristics, A, B, C or D, etc., a reasoned judgment must be made by the House of Lords, a judgment that goes beyond the formal logical structure of any argument. It is a value judgment informed by the judges' concept of public policy: Do we hold the line on liability here, or, do we redefine the characteristics in more general terms, so as to extend the law of liability beyond what has gone before.

To preserve the logical form in the process of analogy, however, it is necessary to exclude those cases not relevant to the case at bar. This is extremely critical because (if you will pardon an Aldisert aphorism that has become a cliché to my students and colleagues): "We must separate that which is important from that which is merely interesting." You will note how the emphasis is now on relevant *resemblances:*

But since *ex hypothesi the* kind of case which we are now considering offers a choice whether or not to extend the kinds of conduct or relationships which give rise to a duty of care, the conduct or relationship which is involved in it will lack at least one of the characteristics A, B, C or D, etc. And the choice is exercised by making a policy decision as to whether or not a duty of care ought to exist if the characteristic which is lacking were absent or redefined in terms broad enough to include the case under consideration. The policy decision will be influenced by the same general conception of what ought to give rise to a duty of care as was used in approaching the analysis. The choice to extend is given effect to by redefining the characteristics in more general terms so as to exclude the necessity to conform to limitations imposed by the former definition which are considered to be inessential. The cases which are landmarks in the common law, such as Lickbarrow v. Mason (1787) 2 Term Rep. 63, Rylands v. Fletcher (1868) L.R. 3 H.L. 330, Indermaur v. Dames (1866) L.R. 1 C.P. 274, Donoghue v. Stevenson [1932] A.C. 562, to mention but a few, are instances of cases where the cumulative experience of judges has led to a restatement in wide general terms of characteristics of conduct and relationships which give rise to legal liability.

Inherent in this methodology, however, is a practical limitation which is imposed by the sheer volume of reported cases. The initial selection of previous cases to be analysed will itself eliminate from the analysis those in which the conduct or relationship involved possessed characteristics which are obviously absent in the case for decision.

Lord Diplock then restates the conclusion previously reached by inductive reasoning, which now becomes the major premise of the formulation of the deductive syllogism.

The proposition used in the deductive stage is not a true universal. It needs to be qualified so as to read:

> In all cases where the conduct and relationship possess each of the characteristics A, B, C and D, etc., but do not possess any of the characteristics Z, Y or X etc., which were present in the cases eliminated from the analysis, a duty of care arises.

But this qualification, being irrelevant to the decision of the particular case, is generally left unexpressed.

A survey of cases then followed (about which more later). His research completed, Lord Diplock stated:

The result of the survey of previous authorities can be summarized in the words of Dixon, J. in Smith v. Leurs, 70 C.L.R. 256, 262:

> The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature.

From the previous decisions of the English courts, in particular those in Ellis v. Home Office [1953] 2 All E.R. 149 and D'Arcy v. Prison Commissioners, "The Times," November 17, 1955, which I accept as correct, it is possible to arrive by induction at an established proposition of law as respects one of those special relations, viz.:

> A is responsible for damage caused to the person or property of B by the tortious act of C (a person responsible in law for his own acts) where the relationship between A and C has the characteristics (1) that A has the legal right to detain C in penal custody and to control his acts while in custody; (2) that A is actually exercising his legal right of custody of C at the time of C's tortious act and (3) that A if he had taken reasonable care in the exercise of his right of custody could have prevented C from doing the tortious act which caused damage to the person or property of B; and where also the relationship between A and B has the characteristics (4) that at the time of C's tortious act A has the legal right to control the situation of B or his property as respects physical proximity to C and (5) that A can reasonably foresee that B is likely to sustain damage to his person or property if A does not take reasonable care to prevent C from doing tortious acts of the kind which he did.

Upon the facts which your Lordships are required to assume for the purposes of the present appeal the relationship between the defendant, A, and the Borstal trainee, C, did possess characteristics (1) and (3) but did not possess characteristic (2), while the relationship between the defendant, A, and the plaintiff, B, did possess characteristic (5) but did not possess characteristic (4).

What your Lordships have to decide as respects each of the relationships is whether the missing characteristic is essential to the existence of the duty or whether the facts assumed for the purposes of this appeal disclose some other characteristic which if substituted for that which is missing would produce a new proposition of law which *ought* to be true.

Lord Diplock then decided:

I should therefore hold that any duty of a Borstal officer to use reasonable care to prevent a Borstal trainee from escaping from his custody was owed only to persons whom he could reasonably foresee had property situate in the vicinity of the place of detention of the detainee which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and recapture.

The major premise thus being narrowed and restated through an analysis of the relevant cases, Lord Diplock proceeded to set out the framework for determining the minor premise:

If, therefore, it can be established at the trial of this action (1) that the Borstal officers in failing to take precautions to prevent the trainees from escaping were acting in breach of their instructions and not in bona fide exercise of a discretion delegated to them by the Home Office as to the degree of control to be adopted and (2) that it was reasonably foreseeable by the officers that if these particular trainees did escape they would be likely to appropriate a boat moored in

the vicinity of Brownsea Island for the purpose of eluding immediate pursuit and to cause damage to it, the Borstal officers would be in breach of a duty of care owed to the plaintiff and the plaintiff would, in my view, have a cause of action against the Home Office as vicariously liable for the “negligence” of the Borstal officers.

The minor premise then becomes obvious:

Minor Term Middle Term

The Borstal officers did or did not act as described in (1) and (2).

As does the conclusion:

Minor Term Major Term

Therefore, the Borstal officers are or are not liable.

LORD DIPLOCK'S METHOD OF ANALOGY

It may be useful now to summarize the facts considered by Lord Diplock when he utilized the method of analogy. His inquiry was decided into two stages. The first was to decide if the plaintiffs' interpretation of the leading case of Donoghue v. Stevenson[2] was correct.

In *Donoghue* Lord Atkin had warned, "it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary." Lord Diplock pointed out that the plaintiff, Dorset Yacht Co., disregarded the warning by seeking "to treat as a universal not the specific proposition of law in Donoghue v. Stevenson which was about a manufacturer's liability for damage caused by his dangerous products but the well known aphorism used by Lord Atkin to describe a 'general conception of relations giving rise to a duty of care.'":

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Lord Diplock explained that this aphorism is to be "[u]sed as a guide to characteristics which will be found to exist in conduct and relationships which give rise to a legal duty of care," but "misused as a universal it is manifestly false." He went on to demonstrate that in English law there are many instances in which no legal liability would be incurred where an act or omission by one party causes loss or damage to another, even though that loss or damage might have been anticipated. His examples included:

> You may cause loss to a tradesman by withdrawing your patronage even though the goods supplied are entirely satisfactory;
>
> You may damage your neighbour's land by intercepting the flow of percolating water to it even though the interception is of no advantage to yourself;
>
> You need not warn him of a risk of physical danger to which he is about to expose himself unless there is a special relationship between the two of you such as that of occupier of land and visitor;
>
> You may watch your neighbour's goods being ruined by a thunderstorm though the slightest effort on your part could protect them from the rain and you may do so with impunity unless there is some special relationship between you such as that of bailor and bailee.

Lord Diplock then noted that the propositions of law in *Donoghue* were not applied in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., which involved careless words rather than careless deeds. He proceeded to formulate the inquiry for stage two of his analysis:

> In the present appeal, too, the conduct of the defendant which is called in question differs from the kind of conduct discussed in Donoghue v. Stevenson in at least two special characteristics. First, the actual damage sustained by the plaintiff was the direct consequence of a tortious act done with conscious volition by a third party responsible in

law for his own acts and this act was interposed between the act of the defendant complained of and the sustention of damage by the plaintiff. Secondly, there are two separate "neighbour relationships" of the defendant involved, a relationship with the plaintiff and a relationship with the third party. These are capable of giving rise to conflicting duties of care.

This appeal, therefore, also raises the lawyer's question: "Am I my brother's keeper?" A question which may also receive restricted reply.

I start, therefore, with an examination of the previous cases in which both or one of these special characteristics are present.

It bears mention that here Lord Diplock had to make a value judgment as to what facts are really relevant, that is to say, what are the relevant resemblances in the facts and the relevant differences.

Case 1, 2	(Ellis v. Home Office & D'Arcy v. Prison Commissioners) The legal custodian of a prisoner detained in a prison owed a duty of care to prevent that prisoner from injuring another. Difference from the case at bar: the prisoner was in actual custody of the defendant, giving the custodian a continuing power of physical control over the acts of the prisoner. Lord Diplock: "But I do not think that, save as a deliberate policy decision, any proposition of law based on the decisions in these two cases would be wide enough to extend to a duty to take reasonable care to prevent the escape of a prisoner from actual physical custody and control owed to a person whose property is situated outside the prison premises and is damaged by the tortious act of the prisoner *after his escape."*
Case 3	New York and California cases. Lord Diplock did not find them helpful because American law was developing differently from that in England.
Case 4	Damage to plaintiff by mental patient released on a visit. Doctors were sued. Jury found for plaintiff.
Case 5	Four-year-old child ran out into the highway from a school maintained by defendant and caused an accident to a driver trying to avoid him. Defendant held liable for not taking reasonable care to keep the gate shut. Lord Diplock: Cases 4 and 5 do not control because the acts were not committed by mature responsible human beings.

LORD DIPLOCK'S CONCLUSION

From the previous decisions, particularly cases 1 and 2 above, Lord Diplock concluded it is possible to arrive by induction at an established proposition of law as respects special relations which give rise to a duty in one man to control another to prevent his doing damage to a third. Because the relationship in the Borstal boys case did not exactly match that in the prior cases, Lord Diplock had to decide whether the resemblances were sufficient or the differences significant. By examining several overarching common-law principles relating to the acts of public authorities, he was able to show how the resemblances outweighed the differences.

> So to hold would be a rational extension of the relationship between the custodian and the person sustaining the damage which was accepted in Ellis v. Home Office (1953) 2 All E.R. 149 and D'Arcy v. Prison Commissioners, "The Times," November 17, 1955, as giving rise to a duty of care on the part of the custodian to exercise reasonable care in controlling his detainee. In those two cases the custodian had a legal right to control the physical proximity of the person or property sustaining the damage to the detainee who caused it. The extended relationship substitutes for the right to control the knowledge which the custodian possessed or ought to have possessed that physical proximity in fact existed.

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1. 1970 App. Cas. 1004, 1057-1071 (Lord Diplock). All quotations in this chapter are excerpted from Lord Diplock's opinion in *Dorset Yacht Co.*

2. 1932 App. Cas. 562, 589.

Chapter 8

THE SOCRATIC METHOD

We can now discuss the Socratic method of teaching law. The bane of all law students, the method is especially wrenching during the first year. It is a confusing experience because most students do not know what the professor is driving at. The answer is simple. The professor is giving the student a double-barreled learning exercise—teaching the fundamentals of substantive law, to be sure, but doing it in such a way that the student is exposed to daily drills in legal logic. Let's face it, the system causes frustration, insecurity, embarrassment and many unpleasant hours.

This book has been designed to eliminate some of the bewilderment and help students to understand the nature of the Socratic beast. And, lest lawyers might say at this point, "That stuff is all behind me—I need read no further," we must emphasize that the Socratic method is utilized every day by thinking lawyers to analyze written and oral arguments, by senior partners in discussing young associates' memoranda and, especially, by judges who use the method on lawyers. It is not an exaggeration to say that many lawyers appear as befuddled as first-year law students when judges use the Socratic method in open court to test the soundness of oral argument. Judges use the method for two purposes—to clarify arguments that appear muddled in the briefs or as offered in court, and in multi-judge courts, as a sort of internal advocacy by which a judge may inform colleagues of his or her views on a case. The failure of many lawyers to be prepared for piercing questions has led me to state often, "Cases are not won in oral argument, they are only lost there."

The Socratic method may be defined as a dialectical method of teaching or discussion made popular by Socrates. It involves asking questions that guide the answerer to a logical conclusion. It is the art or practice of forcing arguments to be examined with an unrelenting logical process in order to test their soundness and validity.

The Socratic method follows a specific ritual in today's law schools. The centerpieces are previously assigned cases from in casebooks covering a specific legal discipline, e.g., contracts, torts, crimes, property, constitutional law, civil procedure. These cases consist of excerpts from publicly recorded opinions of a court—usually an appellate court, but sometimes a trial court. Prior to class, the student is required to read each assigned case and be familiar with (a) the facts, (b) the issue posed for decision, (c) the conclusion and (d) the reasons stated to support the conclusion. Comments supplementing the leading case and references to other cases are often included in the casebook. It is critical for the student to read the case in advance and to outline (to brief) its elements. It is also important to consider each case in conjunction with other cases in the present or past assignments. Otherwise, the student will be lost in the discussion. The cases are selected by the book's author for their excellent reasoning content; yet sometimes, for the exact opposite, as examples of poor reasoning.

Preparing for class is only a threshold endeavor. It is simply the beginning point of the lesson. The professor takes off from there and seeks to draw from the students whether the reasoning stated in the case is sound or unsound. The professor does this by posing questions, not only to the student called upon to recite, but to other students as well. The professor will be prepared to follow up each answer with further questions. The students soon understand that there is usually no quick "yes/no" answer in the law. The professor will introduce hypothetical

fact situations that differ from those in the assigned case and inquire whether added or subtracted facts would make a difference in the result. This is an exercise in analogy, designed to sharpen the students' perception by requiring them to evaluate resemblances and differences in the fact patterns of the compared cases. Students are constantly tossed in an unrelenting sea change of analogy. They are then required to understand and evaluate stated reasons in the deductive syllogism to evaluate whether the particular rationale supporting the case can legitimately support the same result in other fact patterns, and if so, why. An understanding of the principles of deduction and induction will significantly assist the student in this daily exercise. To lack this understanding is to be substantially, if not totally, disadvantaged.

Aside from understanding logical form, the student must be able to perceive the relative truth or falsity of legal propositions to determine if there is any material fallacy of content (of which more later) in both the case and the hypothetical posed by the instructor, and here is where advance study of the substantive law is critical. The student's knowledge of legal propositions comes from previous cases studied, because the case books are arranged to show the development of the relevant legal precepts.

With an understanding both of rudimentary substantive law and rules of logic, the student should be able to grasp the sense of the professor's questions if the student knows (a) the truth or falsity of the premises (reflected in the study of legal precepts and supporting rationales), (b) the rules of deduction and induction and (c) how to spot material resemblances and differences in fact situations put by the professor in the questions. Reduced to its essence, the study of law is twofold: to learn the high points of substantive and procedural law, subject by subject, and to develop logical skills to solve problems.

PREPARING FOR THE SOCRATIC METHOD

As a present or prospective law student, if you have yet to be confronted with or assaulted by the Socratic method, the following pointers may be useful in meeting head-on this method of thought-instruction commonly used by law professors. We start with some basics of preparation and then proceed to the Socratic method in practice.

- First, read through the whole assignment without getting bogged down in the intricacies of each case. Merely identify the parties and the issues presented and a run-through of the reasoning. Perhaps, look up some terms in Black's dictionary if they are new to you. Do not brief any case yet. After giving the assignment the once over, read each case again, but this time very carefully. You are still not ready for briefing. Read the case carefully and follow an informal check list of which the following is an example.
- *Your reading check list:*

  What did the plaintiff ask for at trial and on what grounds?

  What position did the defendant take?

  How did the trial judge decide the case?

  Who took the appeal and on what grounds?

  What is the question or issue in the case?

  What are the relevant facts?

  What is the court's decision?

  What are the stated grounds for the decision?

  What is the rule of law of the case? (Recall the definition of a legal rule in Chapter 2: A specific legal consequence attached to a detailed set of facts.)

  Does the case follow or depart from precedent?

  What practical consequences are likely to result if the case is followed?

  Do you think that the decision is reasonable? (Recall our earlier definition of reasonable in Chapter 3: "fair, just and sound.")

  Could the decision have gone the other way if the lawyer had emphasized different facts or relied on different precepts or cases?

  How would you have presented the case had you been the losing party?[1]

- Before you start briefing the case, understand the subject matter of the assignment. Cases (and supplementary notes and comments) are put there by the casebook author for a specific purpose. They are there for several reasons. Ask yourself why they are there. Do the individual cases demonstrate developments in the law or divergent

points of view? Or is a case included because the opinion writer has chosen to summarize existing case law? “No case is an island.” It must considered always in relation to others. Know the cases individually, to be sure, but it is critical that you know the context and why it is there.

- Now brief the case. The technique has not changed since the author attended law school almost 60 years ago:

  Procedural posture/action: States form of action (damages, injunctive, declaratory judgment). What went on in trial court? Jury verdict? Summary judgment?

  Relevant facts: This section becomes smaller as the student gains experience. Keep in mind always the definition of the rule of law, and keep to the adjudicative facts, i.e., those material to the disposition. You are assisted in determining what facts are material by reading all the cases in your assignment before starting to brief the individual cases. And by understanding the facts you are preparing for the questions the professor will put to you in class.

  The issue: The issue and the rule/holding are interrelated. Issues should be stated so that the holding could be expressed as a “yes” or a “no.” To prepare for Socratic permutations, it might be well to practice expressing the issue in narrow and broad terms. The narrow approach is the safer for class room discussions: *e.g.*, “Are maps consisting of lines drawn of preexisting 1:24,000-scale USGS maps depicting the proposed location of a natural gas pipeline copyrightable under the Copyright Act of 1976?” The broader stated issue should suggest the most expansive rule of law possible under the facts: *e.g.* “Are maps depicting cross-country construction projects copyrightable under the Copyright Act of 1976?” To teach argumentation technique, professors often push students to state rules broadly and then challenge the formulation.

  Holding: Yes or no.

  Rule of law: Affirmative declaratory statement of stated issue keeping in mind the definition of a legal rule discussed in Chapter 2.

  Rationale: This should be stated in categorical syllogistic style. Be sure to understand how the major premise was formed. The rationale is very important in understanding the progression of the law in the overall assignment.

  Policy: Glean the policy considerations underlying the rationale; *e.g.*, The copyright laws were designed to encourage creativity while fostering competition. Thus, any author may copyright the expression of an idea fixed in a tangible form, but not the idea itself regardless of the form it takes. *Identifying the policy may be very important because the professor will ask about it, perhaps several times during the class period.*

- Reread all your briefs in the assignment immediately before class.
  - *Class discussion:* Your preparation for the Socratic method discussion has concentrated on three considerations:

    - A case has little significance in itself.

- The importance of a case derives from its relationship to other cases in the continuous process of decision-making.
- Ask yourself continuously how each case is related to the others.

Know the rule of law in each case, but most important to the Socratic method, know the distinguishing facts of each case. Sounds like common sense, but to be able to reason and analyze logically, students must first weed out tangential matters and weed in key facts and relevant rules of law in each case.

- *Think inductively!* With a grasp of the details of the case in isolation, put the case in context. Your professor may urge a generalization on you. Think before you reply. Don't be afraid to take the cautious road: "I'm not prepared to say that there should be a general rule, but I am confident that analogizing from the case under discussion to your hypothetical, we need not establish a general rule. We only need to decide if the rule of the case applies to the facts in the hypo." Avoid the fallacy of hasty generalizations and inform your professor of your attempt to do so, while acknowledging the need to engage in some generalizing. Remember the twin facets of inductive reasoning: induced generalization and analogy. Inductive reasoning grounds a lawyer's reliance on precedent. Look at the holdings in cases already read. Identify relevant resemblances, relevant distinctions and irrelevant red herrings. Remember that similar facts generally must be treated similarly. Tell your professor how or why by analogizing the holdings in previous cases apply or do not apply to the hypothetical. Or if the policy considerations are so profound, a general rule should apply to all cases similarly situated. Remember always the difference between induced generalizations and analogies set forth in Chapter 6.

- *In preparing for class always anticipate the hypothetical!* Slightly alter selected facts in your case to determine whether a new perspective, a different rule of law or result are required.

- *Think deductively!* When your professor hypothetically changes a fact in the case under discussion or in a previous case, will the holding and rule of law still apply? To blurt out a conclusion is not enough. You must marshal arguments why the same conclusion will apply and why not. (It may be a good idea to articulate these arguments before you announce your conclusion.) Think of the major premise that should control. In all cases in which "X" set of facts appeared, courts applied "Y" rule of law and drew "Z" conclusion. Tell your professor how this case fits your premise and how you deduce your conclusion. This case does have "X" set of facts; therefore, the court should apply "Y" rule of law and conclude "Z." Or the modification, the "A" set of facts in the professor's hypothetical closely resemble "X" set of facts and the same conclusion should result, or the "A" set of facts are remarkably dissimilar, and a different conclusion should result.

- When in doubt and often even when certain about the correct answer to the professor's question, just say: "It depends." Remember, unlike science and math, the law involves a substantially influential element of uncertainty and few, if any,

absolute truths. The answer to your professor's hypothetical questions posed in the Socratic method will depend upon choices (i.e., which major premise the attorneys, judge or jury adopt), value judgments (i.e., Is society, or are the courts, prepared to impose tort liability in strict-products liability cases on those most able to pay regardless of proof of wrongdoing?), personal biases in interpreting rules of law and identifying relevant facts (i.e., Is race a relevant fact in this case?). Of course, simply asserting, "It depends," will not relieve you of the pressure posed by your professor's question. Be prepared to discuss the variables upon which the outcome of your case may pivot.

- *Memorize the following and you won't go wrong in the Socratic method—as law student or lawyer:*

  1. Identify the categorical deductive syllogism used by the opinion writer—the major premise, the minor premise, conclusion.

  2. Where did the major premise come from? If not from a fat precedent, statute or constitutional clause, did it emerge from inductive reasoning—induced generalization or analogy?

  3. The subject of the minor premise is usually the facts found by the fact-finder. Is it identical to or properly a part of the class represented by the middle term (usually the subject) of the major premise? Here often you will be resorting to analogy. How do the resemblances in the material facts stack up? The differences?

- *A final word:* In law school, you can make it, and indeed do well, by studying alone. But you will probably do better by joining or organizing a study group. To be sure, the group experience is invaluable for review purposes, but getting your group in action early on will give you valuable practice and seasoning in the Socratic method in the group interaction. And here you can gain confidence before being exposed to the stage fright of first year classroom dialogue between you and the professor.

Good luck in preparing for the Socratic method. Remember, it does not stop in the classroom. It continues in law offices when defending your position to associates or partners. And *always* in the courtroom.

SOCRATIC DIALOGUE (LAW SCHOOL STYLE)

A contracts to sell and B to buy 20 dressed hogs and 20 live hogs at stated prices for each quantity. A is to deliver the dressed hogs first and the live hogs 15 days later. B is to pay for each delivery within 30 days after it is made. If either party breaches the agreement, the other party is released from an obligation to perform.

Socrates: Assume A delivers the dressed hogs, but 15 days later refuses to deliver the live hogs. A demands payment for the dressed hogs 30 days after their delivery. Can A recover from B for the dressed hogs?

Student: Yes, because B now has 20 hogs and should pay for them.

Socrates: But A is in the wrong, isn't he? He won't deliver the live hogs. Why should he be able to recover for the dressed hogs? He's breached the agreement. Why should he get anything?

Student: Because A delivered the dressed hogs. B should pay A the value of the dressed hogs.

Socrates: But under the contract, if A breached, B doesn't have any obligation to perform.

Student: A didn't totally breach. He just breached the part about the live hogs.

Socrates: You're saying there's total breach, and there's partial breach—is that it?

Student: Yes, it looks that way.

Socrates: Then a person could just perform part of any contract and not suffer in any way. Only perform what he wants to perform and expect to get paid anyway. Like painting half a house.

Student: But here it's as if there were two pieces of the contract. One for live hogs and one for dressed hogs. An agreed upon amount of money for an agreed upon amount of hogs of each kind. That's not like painting half a house.

Socrates: Assume B was to pay $5,000 for 20 dressed hogs and $5,000 for 20 live hogs. Now assume A delivered 10 dressed hogs and 10 live hogs. Can A recover $5,000 from B?

Student: No. It's not the same thing.

Socrates: Well, isn't A entitled to $2,500 for half the order of dressed hogs and $2,500 for half the order of live hogs? You just said we could parse out the contract. After all, it's $5,000 for 20 hogs. And money's money.

Student: But hogs aren't hogs. There's nothing in the contract about a grouping of 10 hogs. Maybe B can't use only 10 of either kind of hog. This kind of exchange wasn't agreed upon.

Socrates: But the other kind was?

Student: Yes, $5,000 for twenty of each kind. That was the agreed exchange.

Socrates: So how can we describe the agreed relationship between the $5,000 and 20 dressed hogs. They are agreed what?

Student: Equals.

Socrates: Equal? That's exactly the same. Can we be more precise?

Student: Equivalent. Agreed equivalents.

Socrates: Good. That's a legal concept. Now what if A did deliver the 10 hogs of each kind. There's no agreed equivalent of 10 hogs. But B now has 20 hogs. Is she obliged to pay? Where do we stand under the contract?

Student: A has really breached the contract this time. We don't know if each hog is worth $250 or if B was getting a special deal. We have no agreed equivalents. So, B has no obligation to pay.

Socrates: No obligation to pay? A is out 20 hogs and has gotten no payment. Does A have no rights under the contract?

Student: Probably not under the contract. But B still has a moral obligation to pay.

Socrates: Moral obligation? Should the law enforce moral obligations?

Student: I suppose not always. But here.

Socrates: Then, where? How do we decide?

Student: Well, B has received something that she didn't pay for.

Socrates: She's been enriched.

Student: Yes, but she hasn't paid for it. That's not fair.

Socrates: If she doesn't pay, she's been unjustly enriched. Could we put it that way?

Student: Yes.

Socrates: Now let's assume A has delivered 19 dressed hogs to B. Must B pay?

Student: We can't parse out their value.

Socrates: Should we throw an entire contract out the window when one party has given 95% performance. Where would that leave us in the world of contract?

Student: We could make B pay the $5,000, but then B has overpaid.

Socrates: What could B do?

Student: Sue A for the 20th hog.

Socrates: How could we justify enforcing contracts on this basis? Can we formulate a theory?

Student: Yes, we could say if someone has performed almost to the full extent of the contract, they have met their obligation enough to be entitled to their rights under the contract. But the other party will be entitled to damages for the missing degree of performance.

Socrates: Suppose in the law we were to call this substantial performance. As a matter of fact, we do call it substantial performance. Where would we draw the line? 95%, 90%, 80% performance? What if A were to deliver 19 dressed hogs. Is that substantial performance?

Student: Yes. It's almost everything B wanted.

Socrates: What about 13 hogs?

Student: Of course not. That's barely over half.

Socrates: How about 16 hogs?

Student: Well …

As can be seen, the Socratic method is to reach conclusions through an analytical discussion led by a dialectician. This enables the student to grasp the major precepts of a given legal discipline, while gaining exposure to the process used to arrive at these precepts. The open dialogue serves as a repetitive laboratory demonstration of how solutions to legal problems must

be logically justifiable, and not reached by predetermined or ingrained belief, impression, hunch, instinct or impulse.

For our purposes, at this point of our study, the Socratic method vividly demonstrates how the logical components of reflective thinking are applied to particular cases. Reflective thinking makes us look at links. It requires that we see a connection from the known to the unknown. We reach a conclusion in one set of facts by deciding what inferences may be drawn from other sets. We seek to determine whether legal consequences applicable on the facts of a previously decided case may or may not be applied to the facts before us. We experiment with inferences. We inquire as to the probability that certain consequences can and do follow from changing factual scenarios as tested by previous experience in human affairs.

Throughout the Socratic dialogue, without being conscious of labels, we employ aspects of inductive and deductive reasoning. To analyze different factual scenarios is to engage in inductive reasoning, a reasoning based on probabilities. The conclusion emerging from induction then serves as a premise—major or minor—in the deductive process that follows. If the premises are properly formulated, one conclusion must logically follow.

To be sure, our summary of the Socratic method is just that, a summary. All of the elements we have studied thus far appear at one time or another in the myriad versions of Socratic teaching that take place in each course, in each law school year, by each professor. And they also take place in every oral argument before a law and motion judge or appellate court and every interrogation by a senior partner to an associate who has written a memo.

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1. *See* Joseph O'Meara, An Introduction to Law and How to Study It, (University of Notre Dame 1973) *reprinted in* 51 Notre Dame Lawyer Supplement 1976.

Chapter 9

INTRODUCTION TO FALLACIES

I love you
Therefore, I am a lover;
All the world loves a lover
You are all the world to me—
Consequently
You love me.
—J. G. Vivian[1]

In ordinary speech, the word fallacy is used in many ways. A perfectly proper use of the word is to designate any mistaken idea or false belief: “Any team that Mike Ditka coaches will be a winning team.” “All lawyers are thieves, all doctors, quacks.”

In ordinary usage then, fallacy can be used to describe a false or erroneous idea. In the law, the term often becomes a term of art; it refers to the logical form or content of a syllogism. Nevertheless, the terms “fallacy” or “fallacious” are often used to describe a premise in a syllogism as false or untrue. Thus, you will find judges and lawyers sometimes using the expressions in the lay sense to describe something that is not supported by the facts:

State v. Moore
641 A.2d 804, 808 (Conn. 1984)

We now turn to the defendant's claim that the Chip Smith charge [Connecticut's version of the Allen or dynamite charge] was particularly coercive because it was given twice. The fallacy in the defendant's argument is that the record does not show that the trial court gave the Chip Smith charge more than once.

Hashimoto v. Dalton
870 F.Supp. 1544 (D. Hawaii 1994)

This court finds that the undisputed evidence established that Hinman is married to an Asian-American woman who was described as being strong willed. The court finds that this fact evidences the fallacy of the Plaintiff's theory that Hinman was biased against Asian-American women and expected them to be meek and subservient.

Respondent argues this interpretation permits deduction from the obligor parent's gross income of all taxes payable on the new spouse's income. The fallacy of this argument is obvious. All taxes payable on the combined income are not deducted from the income of the obligor parent.

Jones v. Maryland
681 A.2d 1190 (Ct.Sp.App. 1996)

We reject the State's argument that a forfeiture of non-contraband property under § 297 may constitute punishment under the Eighth Amendment but not under the Double Jeopardy Clause of the Fifth. The most telling fallacy in that argument is the fact that the the Supreme Court used the definition of punishment under the Double Jeopardy Clause to define "punishment" for purposes of the Eighth Amendment.

Notwithstanding its popular or lay use, exemplified by the foregoing excerpts, logicians and the legal profession generally use the term "fallacy" in a narrower sense to describe a type of incorrect argument, rather than a description of falsity or error in a statement. As we discuss later, however, there are certain types of informal fallacies that deal with the contents of premises.

There is no uniformity as to the precise number of fallacies. The master Aristotle, the first logician, listed 13 fallacies,[2] but by 1970 the historian David Hackett Fischer identified 112.[3] Although there is often agreement as to the existence of a fallacious argument, the method of labeling or characterizing them is up for grabs. Each logician seems to have an idiosyncratic method of classification. One commentator has indicated that over 120 different types of fallacies may be identified.[4] One logician, Augustus de Morgan, has said that "there is no such thing as a classification of the ways in which men may arrive at an error: it is much to be doubted whether there ever *can be.*"[5] Common fallacies abound in all writings—speeches, commentaries, legislative debates, political oratory, TV editorials, columns, articles, household and family discussions and personal conversations. For our purposes, the most useful classification appears to be two categories—formal and informal fallacies.

FORMAL FALLACY DEFINED

A formal fallacy is any violation of any of the six rules of the categorical syllogism or the rules of the hypothetical or disjunctive-alternative syllogism. It is an argument whose conclusion could be false even if all its premises are true. It can be detected merely by examining the *form* (hence its name) or structure of the argument.

INFORMAL (MATERIAL) FALLACY DEFINED

An informal fallacy is one that cannot be detected merely by examining the form of the argument but must be detected in some other way. It is any other argument that does not properly establish the supported conclusion. An argument contains an informal fallacy when at least one of its premises is not true, or when the rules of inference are not properly respected. The Sahakians define informal fallacies as "erroneous ways of reasoning about facts."[6]

Professors Copi and Burgess-Jackson explain: "Most textbooks of logic and critical thinking contain discussions of fallacies, but their treatments differ, sometimes radically. One reason for this diversity is that there is no universally accepted classification of fallacies."[7] Although authorities may disagree on definitions and classifications, nomenclature is not important. What is important is to understand that a fallacy is a type of incorrect argument. What is equally important is to avoid fallacies in legal argument. A fallacy is not merely an error, but a way of falling into an error.

The name comes from the Latin, *fallax*, which suggests a deliberate deception. But most fallacies are not intentional and therein lies the danger. Fallacies are dangerous because they are false conclusions or interpretations resulting from thinking processes that claim or appear to be valid, but fail to conform to the requirements of logic.[8] A fallacy can, therefore, be defined as "any argument that seems conclusive to the normal mind but that proves, upon examination, not to establish the alleged conclusion,"[9] or more succinctly, a form of argument that seems to be correct but that proves upon examination not to be so.[10] They have been identified as such ever since Aristotle described these arguments: "That some reasonings are genuine, while others seem to be so but are not, is evident. This happens with arguments, as also elsewhere, through a certain likeness between the genuine and the sham."[11]

Our discussion here is limited to the violation of formal rules of inference. We do not represent that our categorization is at all complete, nor do we represent that the listed categories are mutually exclusive. Ours is a rather modest submission offered to emphasize that an understanding of these fallacies will be useful to law students, lawyers and judges.

We will use the dichotomy of formal fallacies and informal fallacies to distinguish major groupings, acknowledging that the labels "runneth over," and what certain logicians and the reported cases may describe as a particular type, may very well properly bear another name. Labels and names aside, the aim is to avoid all types of fallacious reasoning, whatever you call them.

It is necessary to add a caveat at this time. We are analyzing logical processes in the law. This is not an attempt to discuss all fallacies. Rather, we will concentrate on those fallacies that find expression in the law. Here are concise descriptions of the fallacies to be discussed in the chapters that follow.

FORMAL FALLACIES

Formal fallacies arise when there is an error in the logical form of the argument. The discussion will categorize the fallacies according to the type of syllogism asserted.

Fallacies in Categorical Syllogisms

In categorical arguments there are six possible fallacies:

1. Four terms instead of three.
2. Undistributed middle term.
3. Illicit major term.
4. Illicit minor term.
5. Negative premises.
6. Particular premises.

Fallacies in Hypothetical Syllogisms

Hypothetical propositions are conditional “if-then” statements. They are compound propositions containing two components: The antecedent proposition following “if” and a consequent proposition following “then.” The first premise and the conclusion have the same antecedent; the second premise and the conclusion have the same consequent. Two fallacies may occur in the statement of the argument’s second premise when you deny the antecedent or affirm the consequent.

Fallacies in Disjunctive Syllogisms

In disjunctive arguments the fallacy consists of the imperfect disjunctive, either in the form of missing disjuncts or non-exclusivity (when one assumes that affirming one disjunct means that the other must be false when in fact it is possible for both to be true).

INFORMAL (MATERIAL) FALLACIES

Informal fallacies can sneak up on us. They are also called material fallacies because they deal with content and context of premises. Logicians, scientists and other careful scholars are especially adept at detecting and avoiding these. Professors William and Mabel Sahakian describe them as "numerous, deceptive and elusive—so elusive that a person untrained in detecting them can easily be misled into accepting them as valid."[12] Logicians may differ as to their precise categorization, because some do resemble or relate to a type of argument rather than a type of logic. The discussion follows, in major part, the classification set forth by the Sahakians.

Fallacies of Irrelevant Evidence

Fallacies of Irrelevant Evidence are arguments that miss the central point at issue and rely principally upon emotions, feelings and ignorance, *inter alia,* to defend a thesis.

1. Fallacy of Irrelevance, often referred to as irrelevant conclusions or *ignoratio elenchi.*
2. Fallacies of Distraction
    a. *Argumentum ad misericordiam,* or the appeal to pity.
    b. *Argumentum ad verecundiam,* or the appeal to prestige.
    c. *Argumentum ad hominem,* or the appeal to personal ridicule.
    d. *Argumentum ad populum,* or the appeal to the masses.
    e. *Argumentum ad antiquitam,* or the appeal to the ages.
    f. *Argumentum ad terrorem,* or the appeal to terror.
    g. *Argumentum ad ignoratiam,* or the appeal to ignorance.

Miscellaneous Informal Fallacies

1. Fallacy of Accident, or *dicto simpliciter.*
2. Converse fallacy of accident, or the fallacy of selective instances or hasty generalizations.
3. False cause.
4. Conclusion that does not follow from the premises, or *non sequitur.*
5. Compound (or complex) questions. The fallacy of multiple questions, or poisoning the wells.
6. Begging the question, *petitio principii.*
7. *Tu quoque,* or you yourself do it, so it must be right.

Linguistic Fallacies

1. Fallacy of equivocation.
2. Fallacy of amphibology.
3. Fallacy of composition.
4. Fallacy of division.
5. Fallacy of vicious abstraction.
6. *Argumentum ad nauseum.*

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1. Quoted in Joseph Gerard Brennan, A Handbook of Logic 187 (1957).

2. I The Works of Aristotle, *De Sophistics Elenchis*, W.D. Ross, trans. (1928).

3. David Hackett Fischer, Historians' Fallacies (1970).

4. Jack L. Landau, Logic for Lawyers, 13 Pac. L. J. 59, 89 (1981).

5. Augustus de Morgan, Formal Logic 276 (1847).

6. William S. & Mabel Lewis Sahakian, Ideas of the Great Philosophers 11 (1966).

7. Irving M. Copi and Keith Burgess-Jackson, Informal Logic 97 (3d ed. 1996).

8. James Edwin Creighton, An Introductory Logic 198 (1898).

9. Ralph M. Eaton, General Logic, An Introductory Survey 332 (1931).

10. Irving M. Copi & Carl Cohen, Introduction to Logic 115 (9th ed. 1994).

11. I The Works of Aristotle, *De Sophistics Elenchis*, W.D. Ross trans. (1928).

12. William S. & Mabel Lewis Sahakian, Ideas of the Great Philosophers 11 (1966).

Chapter 10

FORMAL FALLACIES

We have previously explained in Chapter 4 that a categorical syllogism is an argument having three propositions—two premises and a conclusion. The categorical syllogism (Socrates-is-mortal) is one of the major forms of argument in the law. It is called "categorical" because its propositions are absolute and positive without qualifications or conditions. In this sense we can refer to them as simple or noncompound syllogisms.

In the law we have also compound conditional syllogisms that fall in two subclasses: hypothetical or implicative syllogisms ("if … then") and alternative-disjunctive or ("either … or") syllogisms.

Hypothetical Syllogism

If the defendant is found guilty, he will be sentenced.

The defendant was found guilty.

He will be sentenced.

Alternative-Disjunctive Syllogism

The trial judge was joking or he was serious.

The trial judge was not joking.

He was serious.

FALLACIES IN CATEGORICAL SYLLOGISMS

Our inquiry into formal fallacies begins with the categorical syllogism. We have previously set forth and discussed the six rules of the categorical syllogism in Chapter 4. We repeat them here to emphasize that they form guidelines upon which a deductive or inductive argument in proper logical form may be based. Conversely stated, to depart from any of these rules is to commit the logical fallacy of form. Because it violates the form of the syllogism, it is known as the formal fallacy.

These then are the rules that you must follow. If you follow them, there is no fallacy. If you violate any of them, you commit a fallacy of form.

Rule One:	A valid categorical syllogism must contain exactly three terms, each of which is used in the same sense throughout the argument.
Rule Two:	In a valid categorical syllogism, the middle term must be distributed in at least one premise.
Rule Three:	In a valid categorical syllogism, no term can be distributed in the conclusion which is not distributed in the premise.
Rule Four:	No categorical syllogism is valid which has two negative premises.
Rule Five:	If either premise of a valid categorical syllogism is negative, the conclusion must be negative.
Rule Six:	No valid categorical syllogism with a particular conclusion can have two universal premises.[1]

In the discussion that follows, you will learn that the logicians have fashioned particular labels for violating these rules.

THE FALLACY OF FOUR TERMS
(Quaternio Terminorum)

This is a breach of the first rule which insists that a categorical syllogism must contain only three terms, each of which is used in the same sense throughout the argument. By definition, this syllogism (All-men-are-mortal, etc.) consists of comparing two terms, the minor (Socrates) with the major (mortals) by means of a middle term (All men), to reach a conclusion. If there were four terms (All men are mortals, Socrates plays baseball) there would be no way to reach a conclusion. A fourth term (baseball) would not only be superfluous, but would destroy the comparison. When an argument has more than three terms, we call it a *logical quadruped.* When such an argument has in effect two middle terms, it lacks any basis of comparison for its minor and major terms, so that it is impossible to draw a legitimate conclusion. From the example, "Every ruminant is cloven-footed; Every cow is multi-stomached," we can't move to a logical conclusion. The proper method is to use multiple syllogisms:

All A is C	Every ruminant is cloven-footed.
B is A	Every cow is a ruminant.
Therefore, B is C	Therefore, every cow is cloven-footed.
All B is D	Every cow is multi-stomached.
E is B	This is a cow.
Therefore, E is D	Therefore, this cow is multi-stomached.

If a term is used in more than one sense in the argument, it also violates Rule One. It also constitutes the material fallacy of equivocation, as discussed in the next chapter. It is often possible to classify a fallacy under more than a single category. The following is an example:

Every good law should be obeyed.

<u>The law of gravitation is a good law.</u>

The law of gravitation should be obeyed.

Here we really have four terms. The word "law" in the first proposition means a law in the sense used in the legal profession, a command or enactment by some persons in authority. In the second proposition, "law" is an expression in physics, signifying a statement of the uniform way in which phenomena behave under certain conditions.

United States v. Berrigan
482 F.2d 171, 183 (3d Cir. 1973)

[The issue was whether the defendant violated a statute that regulated outgoing mail from a federal corrections institution. The major defense was that the regulation violated the First Amendment.]

Appellants' contention that the statute is overbroad is founded on the general rule that a statute is tainted if the conduct it prohibits includes protected activity as well as criminal conduct. "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." The minor premise proceeds that certain communications cannot constitutionally be excluded from prisons. [Cases have upheld] a prisoner's right to send and receive various types of correspondence and literature. Because prisoners enjoy the right to send and receive mail, appellants conclude that this statute is overbroad because it makes criminal certain acts protected by the First Amendment. It hardly deserves extended discussion to observe that appellants' syllogism strains to a conclusion which is invalid and illicit. Perhaps appellants' argument can best be described as a logical quadruped because it excludes the additional minor premise [not supported by the record facts] that a prisoner's mail was denied him.

THE FALLACY OF THE UNDISTRIBUTED MIDDLE

One who violates syllogism Rule Two commits the fallacy of the undistributed middle term, known simply as "undistributed middle." The rule states that in a valid categorical syllogism, the middle term must be distributed in at least one of the premises.

Professor Copi has reminded us that the conclusion of any syllogism asserts a connection between two terms. This connection is justified only if both the major and minor terms are connected with a middle term in such a way that the major and minor terms can be connected with each other through or by means of the middle term. For the two terms that become part of the conclusion to be connected through a third, at least one term must be related to the *whole* of the class designated by the middle term. Otherwise each may be connected with a different part of the class and not necessarily connected with each other at all.[2]

It is critical, therefore, that the middle term encompass a larger universe than the minor term. Compared then to the minor term which reflects only part of the class, the middle term must describe the class and thereby be considered "distributed." If the middle term does not represent the larger portion of the class being considered and represents or is equivalent to the smaller portion represented by the minor term, we can say that the middle term is "undistributed." When this occurs the connection to the conclusion cannot be justified and the fallacy of the undistributed middle results.

To put it in a formula, this fallacy occurs whenever it is argued that because *x* and *y* belong to the same class or possess a common property, they are identical. Some examples of the fallacy may help. Because business executives read the *Wall Street Journal* a man who reads the *Journal* is a business executive. The ACLU supports the Democratic ticket; therefore, all those supporting the ticket adhere to ACLU causes.

Spencer v. Texas
385 U.S. 554, 569-560 (1967)

(Warren, C.J., dissenting)

Where the probative value of prior-convictions evidence is thought to outweigh its prejudicial impact, the Court draws the legitimate conclusion that prior-convictions evidence is not so inherently prejudicial that its admission is invariably prohibited. It combines this premise with the concededly valid purpose of recidivist statutes to produce the following logic: since prior-crimes evidence may be admitted at the guilt phase of a trial where the admission serves a valid purpose and since the purpose of recidivist statutes is valid, prior crimes may be proven in the course of the guilt phase of a trial in order that the jury may also assess whether a defendant, if found guilty, should be sentenced to an enhanced punishment under recidivist statutes. I believe this syllogism is plausible only on the surface, because the Court's premises do not combine to justify its far-reaching result. I believe the Court has fallen into the logical fallacy sometimes known as the fallacy of the undistributed middle, because it has failed to examine the supposedly shared principle between admission of prior crimes related to guilt and admission in connection with recidivist statutes. That the admission in both situations may serve a valid purpose does not demonstrate that the former practice justifies the latter any more than the fact that men and dogs are animals means that men and dogs are the same in all respects.

Hernandez v. Denton
861 F.2d 1421, 1438-39 (9th Cir. 1988)

(Aldisert, J., dissenting)

Even assuming appellant's rape fantasy had some basis in rationality, his complaints are utterly devoid of any allegations establishing the personal involvement of any of the defendants. His contentions depend upon the following prosyllogisms and episyllogisms:

A.

Major Premise: Some needle marks are signs of drug injection.

Minor Premise: I awoke with some needle marks.

Conclusion: Therefore, I was drugged.

B.

Major Premise: One who is drugged can be raped without his knowledge.

Minor Premise: I was drugged.

Conclusion: Therefore, I was raped.

C.

Major Premise: Those correctional officials who are involved in or knowledgeable of inmate rapes are liable.

Minor Premise: Defendants are correctional officials.

Conclusion: Therefore, defendants are liable.

Both fallacies of form and material fallacies inhere in each of these three arguments. Rules of syllogistic logic, first identified by Aristotle, and universally acknowledged by all logicians, are involved here. Syllogism "A" represents the fallacy of the undistributed middle term. In a formally valid categorical syllogism, the middle term must be distributed in at least one of the premises. If either the minor term or the major term is distributed in the conclusion, it must be distributed in the premise in which it originates. Here, the middle term "needle marks" is undistributed in both the major and minor premises. It does not necessarily follow that all needle marks are evidence of drug ingestion simply because *some* are. *See e.g.,* Spencer v. Texas 385 U.S. 554, 569-570 (1967) (Warren, C.J., dissenting).

Syllogism "B" discloses the formal fallacy of the illicit major term. Here, the major term in the syllogism ("raped") is undistributed in the major premise ("can be raped"), but distributed in the conclusion ("was raped"). The resulting fallacy is obvious. Hundreds of physical or mental consequences can possibly follow injection or ingestion of drugs; being raped is only one possible consequence. Syllogism "C" violates a fundamental rule of categorical syllogisms: "A valid standard-form categorical syllogism must contain exactly three terms, each of which is used in the same sense throughout the argument." In this case, the middle term, "correctional officials," is used in a different sense in the minor premise than it is in the major premise, where it refers to "correctional officials who are involved or knowledgeable of inmate rapes." This syllogism also exhibits the fallacy of the undistributed middle. The middle term, "those

correctional officials who are involved or knowledgeable of inmate rapes" is undistributed in the major premise. The term "correctional officials" is also undistributed in the minor premise because it refers only to the defendant-correctional officials, not the entire universe of correctional officials.

But even if Hernandez' arguments met the requirements of formal logical form, they would still contain fatal defects. The arguments contain material fallacies, that is, errors or evasions that appear only through an analysis of the meaning of the terms, rather than an analysis of the logical form. For example, each syllogism is a *non sequitur,* an argument exhibiting the lack of a logical connection. From the mix of pleaded facts—needle marks, fecal stains on a t-shirt, sleeping later than usual on one occasion—any conclusion pinning liability on the defendants here is a paradigmatic *non sequitur*. *See* materials collected in R. Aldisert, The Judicial Process 626-57 (1976).

Amusement Equipment, Inc. v. Mordelt
595 F.Supp. 125, 130-131 (E.D. La. 1984)

There is nothing linking Mr. Mordelt's presence in New Orleans to the contract of sale. By attempting to link these two occurrences simply because of their connection to the New Orleans convention, Amusement Equipment commits the logical fallacy of the "undistributed middle." See I. Copi, Introduction to Logic 200 (4th ed. 1972). Consider the following syllogism which, like the argument of Amusement Equipment, contains the fallacy of the undistributed middle:

All dogs are mammals.

All cats are mammals.

Therefore, all cats are dogs.

It is easy to see why this syllogism is invalid. Both dogs and cats are members of the larger class of mammals. This does not mean, however, that the class of dogs is identical to, or even overlaps with, the class of cats.

Yet the argument of Amusement Equipment takes precisely the same form. Amusement Equipment argues that:

The contract related to the trade show.

Mordelt's visit related to the trade show.

Therefore, the contract related to Mordelt's visit.

The syllogism is invalid. That both the contract and Mordelt's visit pertained to the trade show does not mean that the two were connected to each other. The contract related to the trade show in respects that Mordelt's visit did not. This is apparent from the fact that Mordelt visited New Orleans after the contract had been negotiated, executed and allegedly breached.

Lucas Aerospace, Ltd. v. Unison Industries, L.P.
899 F.Supp. 1269, 1287 (D. Del. 1995)

Lucas argues that "the record requires a finding that the SL1001 exciter model is 'suitable for substantial noninfringing use'" because a substantial number of SL1001 equipped PW100 engines are not sold or used in the United States. In other words, Lucas is attempting to evade the scope of § 271(c) by setting up the following syllogism: Exciters never made, used or sold in the United States are noninfringing; a substantial number of Lucas exciters are never made, used or sold in the United States; therefore, all Lucas exciters, whether used in the United States or not, have a substantial noninfringing use. This argument begs the Court to fall into the logical fallacy of the undistributed middle. As a matter of logic, the fact that some SL1001 are noninfringing because they are made, used and sold outside the United States does not mean that all SL1001 exciters are noninfringing no matter where they are made, used or sold, any more than the fact that because fish cannot fly and penguins cannot fly, penguins must therefore be fish.

Royer v. Florida
389 So.2d 1007, 1015-16 (Fla. 1979)

Only two persons testified at the motion to suppress: the defendant Royer, and William Johnson, one of the two Dade County narcotics officers who effected the search of Royer's suitcases which revealed the cannabis. Since the state prevailed below, we must and do view the evidence in the light most favorable to its position. So considered, the record portrays a series of events which, while they fall generally within the "airport narcotics search" genre, must be considered in terms of their own particular and individual aspects.

Royer was first observed by Johnson and his partner, Magdalena, as he walked across the concourse of the Miami International Airport towards the National Airlines ticket counter, carrying two apparently heavily-laden suitcases. The officers were specifically assigned to interdict the transportation of narcotics through the airport. As Johnson stated, they based their initial decisions as to which travelers to approach upon a series of allegedly suspicious characteristics and circumstances, as contained in the now-familiar "drug courier profile," supplemented by the airport squad's own prior experiences. It may be fairly said as to all of the officers' bases of "suspicion" that, although they may indeed be characteristic of those who carry narcotics, they are at least equally, and usually far more frequently, consistent with complete innocence. The fallacy of the undistributed middle directly applies: all narcotics couriers act like parts of the profile, but most people who act like parts of the profile are not narcotics couriers. This point is well-illustrated by those aspects of Royer's behavior which attracted the attention of the officers. Johnson said that these were the facts that (a) the defendant was carrying American Tourister baggage of a type which "seemed to be standard brand for marijuana smuggling"; (b) he was "nervous in appearance, looking around at other persons as though he might be looking for possible police officers"; (c) he paid for the ticket to New York in cash (and therefore without the necessity of showing identification) from a roll of small-denomination bills and (d) rather than filling out a full name, address and phone number on the baggage tags furnished by National, he wrote only the words "Holdt" and "LaGuardia" on each of them.[3]

THE FALLACY OF THE ILLICIT PROCESS OF THE MAJOR TERM AND MINOR TERM

Rule Two of the categorical syllogism provides:

> In a valid standard-form categorical syllogism, if either term is distributed in the conclusion, then it must be distributed in the premises.

A formal fallacy occurs in the two ways in which this rule may be broken. When the major term in the major premise is undistributed but is distributed in the conclusion, this is called the Fallacy of the Illicit Process of the Major Term (or, familiarly, the Illicit Major). In this fallacy the term is applied to *all* members of a class in the conclusion even though it was limited to *some* members of the class in the major premise.

All judges are good tempered.

No poets are judges.

No poets are good tempered.

The major term "good tempered" is undistributed in the major premise. We cannot say that only judges are good tempered, yet that is what the major term in the conclusion reflects.

When the minor term is undistributed in the minor premise but distributed in the conclusion, the argument commits the Fallacy of the Illicit Process of the Minor Term (the Illicit Minor).

Those who lack good reasoning should first study logic.

Many first year law students lack good reasoning.

All first year law students should first study logic.

The problem here is obvious. The minor term "many first year students" in the minor premises is undistributed, yet the minor term in the conclusion "all first year students" is distributed.

To summarize, from violations of Rules Two and Three, we can understand the nomenclature used by logicians: Where the following terms are undistributed in the premises, but distributed in the conclusion, the formal fallacies are called:

Middle Term:	Fallacy of the Undistributed Middle
Major Term:	Illicit Major
Minor Term:	Illicit Minor

ILLICIT MAJOR

Baker v. Amoco Oil Co.
761 F.Supp. 1386, 1391-1392 (E.D. Wisc. 1991)

Although not adopting Amoco's "operative reason" argument, which presupposes acceptance of Drohans's conclusory and self-serving averment after the plaintiff brought his motion, this Court agrees with Amoco's conclusion that as long as it gave notice to Baker of a legitimate ground on which termination or nonrenewal could be predicated, "the fact that nonrenewal suggests other motives or purposes of Amoco, does not prevent Amoco from exercising its rights under the Act." If Baker's arguments on this issue are construed as asserting that Amoco pretextually terminated or nonrenewed, they fail should Amoco demonstrate a legitimate basis for its actions. If Baker's arguments seek to point out a deficiency in the notices because Amoco failed to delineate each of its possible reasons for termination or nonrenewal, Baker has failed to advance case law or a statutory basis for a requirement that a franchisor delineate each and every reason for termination or nonrenewal. Contrary to such a proposition, extant court decisions appear to require only that the franchisor be justified in terminating the franchisee on one of the grounds authorized by the [Petroleum Act].

Baker's reasoning on this point suffers from the logical fallacy of "illicit process of the major term." In this fallacy, a term is applied to all members of a class in the conclusion even though it could be limited to some members of the class in the premise. The major premise—that the petroleum company must delineate reasons for termination or nonrenewal—tells us what Amoco must do pursuant to [the Act]. Baker's argument goes further, however. He reasons that because not all of those reasons were stated in the notices, they were defective. Such a conclusion assumes that all such reasons must be related, a distribution of the delineation requirement not found in the major premise.

Hernandez v. Denton
861 F.2d 1421, 1438-39 (9th Cir. 1988)

(See Undistributed Middle, p. 149, ante)

Cheney R. Co., Inc. v. I.C.C.
902 F.2d 66, 68-69 (D.C. Cir. 1990)

Cheney next makes a structural argument. In the Staggers Act, of which § 10910 is a part, Congress addressed another, parallel situation. In § 10905 it established procedures for forced sale where a railroad has not only designated but has applied for final Commission approval for abandonment; in that context it gave directions as to how the I.C.C. should handle competing applications. See 49 U.S.C. § 10905(c) & (f)(3) (providing that "any person" may request forced sale, and allowing the seller to choose among those found "financially responsible"). Cheney makes a conventional claim that *expressio unius est exclusio alterius*— "explicit direction for something in one provision, and its absence in a parallel provision, implies an intent to negate it in the second context."

Scholars have long savaged the *expressio* canon. Max Radin called it "one of the most fatuously simple of logical fallacies, the 'illicit major,' long the *pons asinorum* of schoolboys." Statutory Interpretation, 43 Harv. L. Rev. 863, 873-74 (1930)(citation omitted). See also Reed Dickerson, The Interpretation and Application of Statutes 234-35 (1975); Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 813 (1983); cf. State of Illinois, Dep't of Public Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983) ("Not every silence is pregnant"). The Supreme Court has more charitably dubbed it "a valuable servant, but a dangerous master." Ford v. United States, 273 U.S. 593, 612, 47 S.Ct. 531, 537, 71 L.Ed. 793 (1927) (quoting Colquhoun v. Brooks, 21 Q.B.D. 52, 65). Whatever its general force, we think it an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 843-44, 104 S.Ct 2778, 2781-82, 81 L.Ed.2d 694 (1984). See also Clinchfield Coal, 895 F.2d at 779 *(expressio unius* insufficient to establish unambiguous intent under Chevron); TRT Telecommunications Corp. v. FCC, 876 F.2d 134, 146 (D. C. Cir.1989) (same). Here the contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to the agency discretion. Such a contrast (standing alone) can rarely if ever be the "direct[]" congressional answer required by Chevron. See 467 U.S. at 842-43, 104 S.Ct. at 2781-82.[4]

THE FALLACY OF NEGATIVE PREMISES

To understand this fallacy, you must first understand what it is not. The mere occurrence of a negative, “no” or “not,” in a proposition does not render it a negative fallacy. Rule Four (no categorical syllogism is valid which has two negative premises) is founded in the principle that inference can proceed only where there is *agreement.* Two differences or disagreements lead to no conclusion.

From the premises—Italians are not Iranians; Iranians are not Christians—we cannot conclude that Italians are Christians or that the Japanese are Christians, although they are not Iranians any more than Italians are Iranians.

If one premise is negative, the conclusion must be negative (Rule Five). Thus, to prove a negative conclusion, *one* of the premises must be negative. If *both* premises are negative, we cannot determine anything regarding their relation to one another. From the premises, James is not a lawyer; lawyers are not steelworkers, we cannot conclude that James is or is not a steelworker.

This type of reasoning is unacceptable because of the difficulty in sustaining a factual proposition merely by negative evidence. When an advocate determines that “there is no evidence that B is the case”; he or she is attempting to affirm or assume that non-B is the case. But all that is affirmed or assumed is that the advocate has found no *evidence* of non-B. The correct method of proceeding is to find affirmative evidence of non-B. This may be difficult, but it is absolutely necessary if logical order is to be preserved. To prove a negative is sometimes an impossible task. Not knowing that something exists is simply not knowing.

Alice’s experience with the White Knight comes to mind:

> “I see nobody on the road,” said Alice.
>
> “I only wish I had such eyes,” the King remarked in a fretful tone. “To be able to see Nobody! And at that distance!”[5]

Bailey v. Maryland
16 Md. App. 83, 294 A.2d 123, 129 (1972)

Dr. Fahrney clearly testified on both direct and cross-examination that sperm cells, inside a vagina, lose their motility at some time no less than thirty minutes nor more than six hours after ejaculation. The examination was at 5:11 A.M. The only opinion as to the later limit beyond which ejaculation, with reasonable medical certainty, did not occur was, therefore, 4:41 A.M. The appellant argues that Dr. Fahrney really placed that later limit at a much earlier time, a time which would exculpate any of the Pagans.

The appellant asked Dr. Fahrney a question based upon a hypothetical opposite to the actual factual premise at bar. He asked the doctor to assume that the sperm cells he examined had been motile instead of non-motile. In that eventuality, would not the doctor have to agree, taking the range of thirty minutes to six hours for the loss of motility, that intercourse did not occur more than six hours earlier, to wit, not earlier than 11:11 P.M. Dr. Fahrney responded, "Yes." Then, by a clever but invalid exercise of logic, the appellant assiduously sought, before the trial court and before us, to identify the earlier limit of the motile hypothetical with the later limit of the non-motile actuality. He urges the deceptively persuasive but invalid proposition that if motility establishes that ejaculation did not occur before 11:11 P.M., then non-motility establishes that ejaculation did not occur after 11:11 P.M. He chooses to ignore that between 11:11 P.M. and 4:41 A.M. the two ranges overlap and that that area of overlap is consistent with both motility and non-motility. The trial judge did not buy the appellant's logic; nor do we.

The fallacy may be articulated in the formal terms of traditional Aristotelian logic. The appellant is taking the universal negative proposition, "No motile sperm are pre-11:11 (in terms of ejaculation)—No A is B—and attempting to infer the so-called contrapositive of that proposition, to wit, No non-motile sperm are post 11:11—(in purer terms, non-pre 11:11)—No non-A is non-B. By the laws of logic, however, the inference of the contrapositive is invalid where the starting proposition, as in the case at bar, is a universal negative.[6]

Council of Organizations v. Governor of Michigan
548 N.W.2d 909, 920 (Mich. App. 1996)

(O'Connell, J., dissenting)

A court will "only determine the validity of an act in the light of the facts before it." The majority contends that when determining whether a statute is constitutional, "we must look to the statute's requirements rather than the method by which the individual schools administer their programs." The majority submits that Rassner v. Federal Collateral Society, Inc., 299 Mich. 206, 217-218, 300 N.W. 45 (1941), stands for the proposition. The Supreme Court would, no doubt, be interested in this interpretation of *Rassner*. Recently, the Court summarized the case as follows: "A valid statute is not rendered unconstitutional solely because those charged with its administration may improperly administer it." Rassner v. Federal Collateral Society, Inc., 299 Mich. 206 (1941); People v. Kirby, 440 Mich. 485, 493, 487 N.W. 2d 404 (1992). Clearly, *Rassner* says nothing of when a statute is rendered unconstitutional. The majority has committed a variation of a classic logical fallacy, the fallacy of the negative premise.

Rather surprisingly, the record contains little information concerning the only public school academy named as a defendant by plaintiffs, Noah Webster Academy. The record appears to lack the school's authorizing contract, articles of incorporation, bylaws, fiscal agent, agreement, oversight agreement and any of the other pertinent documentation necessary to a determination of the degree of control to which defendant Noah Webster Academy is subject. Therefore, because the court will not entertain constitutional questions predicated upon inadequate factual records, Taunt v. Moegle, 344 Mich. 683, 686, 75 N.W. 2d 48 (1956), the constitutionality of 1993 PA 362 is not properly addressed in the context of defendant Noah Webster Acadeny.

FALLACIES IN HYPOTHETICAL SYLLOGISMS

We have been concentrating on categorical syllogisms, so-called because they contain categorical propositions exclusively. But other kinds of propositions occur in other types of syllogisms. In law we often encounter a compound proposition called the hypothetical syllogism. This does not directly assert the existence of a fact; instead, it contains a condition, "if," "unless," "granted," "supposing," etc. These hypotheticals are the little darlings of law professors and judges. They go to the heart of the Socratic method. Learn these components:

- *Hypothetical proposition:* Hypothetical propositions are conditional "if-then" statements. They are compound propositions in that every such proposition consists of two component propositions:

    1. Antecedent: The component proposition following "if."
    2. Consequent: The component proposition following "then."

- *Hypothetical syllogism:* A syllogism with one conditional premise and one categorical premise.[7] The first premise of the syllogism and the conclusion have the same antecedent; the second premise and the conclusion have the same consequent. This syllogism takes two forms:

    1. *Modus ponens:* This form of the hypothetical syllogism is valid if and only if:

        a. The categorical premise affirms the antecedent of the conditional premise; and

        b. The conclusion affirms the consequent of the conditional premise.

    This can be represented by the following:

    First example:

    If A, then B.

    A

    Therefore, B.

    It is important not to confuse *modus ponens* with this similar, although invalid, argument form:

    Second example:

    If A, then B.

    B

    Therefore, A.

In the first example, we affirmed the antecedent "A." It is valid. In the second example, we affirmed the consequent, "B." It is invalid. We committed the fallacy of affirming the consequent.

2. *Modus tollens:* This form of the hypothetical syllogism is valid if and only if:

a. The categorical premise denies the consequent of the conditional premise; and

b. The conclusion denies the antecedent of the conditional premise.

Third example:

If A, then B.

Not B.

Therefore, not A.

Fourth example:

If A, then B.

Not A.

Therefore, not B.

The third example *(modus tollens)* is a valid argument. The categorical premise denies the consequent "B." The fourth example, although similar, is invalid, because the categorical proposition denies the antecedent. We committed the fallacy of denying the antecedent.

To summarize, to yield a correct conclusion, the minor premise must be in one of two forms. It must either:

—affirm the antecedent, or

—deny the consequent.

If the antecedent is affirmed, the conclusion, freed of the condition and stated in categorical form, becomes the conclusion:

If this statute deprives plaintiff of his property without due process, this statute is unconstitutional.

This statute deprives plaintiff of his property without due process.

Therefore, this statute is unconstitutional.

But if the consequent is denied, then a categorical denial of the antecedent forms the conclusion:

If this statute deprives plaintiff of his property without due process, this statute is unconstitutional.

But this statute is not unconstitutional.

Therefore, this statute does not deprive plaintiff of his property without due process.

If the antecedent is denied or if the consequent is affirmed, no correct conclusion will

follow. Suppose we argue:

If the testator was insane, his will is invalid.

But the testator was not insane.

Therefore, his will is not invalid.

It is entirely consistent with the major premise to suppose that there are other invalidating circumstances (other possible antecedents) which will give the same consequent, e.g., undue influence over the testator in drafting his will. Thus the denial of this particular circumstance (the insanity of the testator) does not warrant a denial of the consequent (that the will is invalid). Here the fallacy is denying the antecedent. Now suppose in arguing, the consequent is affirmed:

If the testator was insane, his will is invalid.

His will is invalid.

Therefore the testator was insane.

Here again the conclusion goes beyond the major premise by presupposing that the only condition under which a will can be invalid is that the testator was insane. Other conditions can invalidate a will, e.g., no signature, no witnesses. Thus, it is entirely in accord with the major premise to assume that the minor premise (C is D) resulted not from A is B but from any number of other possible antecedents: E is F, G is H, etc. This is the fallacy of affirming the consequent.[8]

United Telephone Co. of the Carolinas, Inc. v. FCC
559 F.2d 720, 725-726 (D.C. Cir. 1977)

The Commission properly characterized United's and Carolina's arguments as an attempt to attack the formula for dividing charges without alleging that the result of that formula is in fact unjust and unreasonable. United and Carolina insist that if the method of dividing charges is unjust and unreasonable, its result must also be unjust and unreasonable…. This exercise in sophistry miscasts the issue by reversing the logic of the inquiry. A method of determining rates, or divisions thereof, is unjust and unreasonable if the result reached does not afford a compensatory return. One cannot, as United and Carolina try to do, reverse the order of this proposition and preserve its logical validity … (fallacy of affirming the consequent).

Crouse-Hinds Co. v. InterNorth, Inc.
634 F.2d 690, 702-703 (2d Cir. 1980)

We find no basis in the present case for the district court's conclusion that InterNorth carried its burden of demonstrating self-interest or bad faith on the part of the Crouse-Hinds directors. As his starting point, the district judge gave extended consideration to the decision in Treadway, in which we found that because the Treadway directors, other than the chairman, were not to remain in office after the merger, perpetuation of their control could hardly have been their motivation for actions in furtherance of the merger…. Unfortunately, the district judge inferred from this that a quite different proposition must also be true—*i.e.*, that if the directors *are* to remain on the board after the merger, perpetuation of their control *must be presumed* to be their motivation. This inference has not basis in either law or logic. The proposition that "A implies B" is not the equivalent of "non-A implies non-B," and neither proposition follows logically from the other. The process of inferring one from the other is known as "*the fallacy of denying the antecedent.*" J. Cooley. A Primer of Formal Logic 7 (1942).

French v. Indiana
266 Ind. 276, 362 N.E.2d 834, 842-43 (1977)

(De Bruler, J., dissenting)

I likewise disagree with the majority's argument that the Fifth Amendment's due process clause recognizes the legitimacy of capital punishment as it is logically fallacious.

This argument commits the classical fallacy known as "denying the antecedent of a conditional statement." This fallacy is committed when a statement in the conditional form "if P then Q" is taken to imply "if not P, then not Q." The relevant language of the due process clause is "no person shall be … deprived of life … without due process of law." … This language may be represented in conditional form as follows: If a person is denied due process (if P) then that person shall not be deprived of life (then Q). The majority seeks to infer from this statement that if a person is not denied due process (not P) then he may be deprived of life (then not Q). This violates the rules of deduction, as may be seen in this example: If Columbia University is in California, then it is in the United States. Columbia University is not in California. Therefore, Columbia University is not in the United States. W. Salmon, Logic 28 (2d ed. 1973).[9]

FALLACIES IN DISJUNCTIVE SYLLOGISMS

- *Disjunctive Propositions.* These are "either-or" statements. They are compound in the sense that every disjunctive proposition, or disjunction, consists of two component propositions called *disjuncts.* One disjunct comes before the "or"; the other appears after it.
- *Disjunctive Syllogism.* It is a syllogism in which one premise takes the form of a disjunctive proposition and the other premise and the conclusion are categorical propositions which either deny or affirm part of the disjunctive proposition. For example:

  Either A or B Either A or B
  A Not A
  Therefore, not B. Therefore, B.

- *Moods of Disjunctive Syllogisms.* We are told that there are two forms or "moods" which these syllogisms may take. The two moods differ from one another in two respects.
  1. They differ as to the exclusivity of the disjuncts. The first mood does not assume that the disjuncts are mutually exclusive. The second mood assumes that they are.
  2. They differ in the conclusions they draw. The first mood denies the truth of the disjunct and then affirms in its conclusion the truth of the other. The second mood affirms the truth of one disjunct and then concludes that the other must be false.

- *Mood Which By Denying Affirms.* The first (so-called "pure") disjunctive syllogism mood does not assume that the disjunction asserts two mutually exclusive disjuncts. In this mood the disjunctive proposition is not taken to affirm categorically that one, but only one, disjunct is true. It says only that at least one disjunct is true, leaving open the possibility that both may be true. A valid syllogism in this mood takes the following form:

  Premise 1. (Disjunctive) A disjunctive proposition.
  Premise 2. (Categorical) A categorical proposition denying the truth of one of the two disjuncts.
  Conclusion: A categorical proposition *affirming* that the other disjunct is true.

  Example:

  A is either B or C.

  <u>A is not B.</u>

  Therefore, A is C.

National Small Shipments Traffic Conf. v. United States
887 F.2d 443, 445-446 (3d Cir. 1989)

They argue that section 11707(c)(1) expressly prohibits tariff liability disclaimers. But the plain language of that section prohibits only those tariff disclaimers that are in violation of section 11707. By implication, it would, therefore, follow in logical order that this subsection endorses tariff disclaimers that comply with section 11707. This is a classic example of a disjunctive syllogism. Either A or B; but not A; therefore, B. Or as the statute provides: a carrier may not limit liability except as permitted in this subsection; a limitation of liability in violation of § 11707 is void, therefore, a limitation of liability consistent with the regulations of § 11707 is valid.

- *Mood Which By Affirming Denies.* This mood does assume that the disjunction asserts two mutually exclusive disjuncts. In this mood the disjunctive proposition is taken to affirm categorically that one, and only one, disjunct is true. A valid syllogism in this mood takes the following form:

  Premise 1. (Disjunctive) A disjunctive proposition.

  Premise 2. (Categorical) A categorical proposition affirming the truth of one of the two disjuncts.

  Conclusion: A categorical proposition *denying* that the other disjunct is true.

  Example:

  A is either B or C.

  A is B.

  Therefore, A is not C.

  Note well: Although this second mood represents a very common argument form, it must be used with care. *It is only a valid argument form when the assumption holds that A and B are mutually exclusive of one another.*

- *Fallacies Associated With Disjunctive Syllogisms.*

  1. Fallacy of Missing Disjuncts. This can arise in either mood. It goes to the incompleteness of a disjunction and is committed whenever a disjunctive proposition asserts the truth of at least one of a pair or set of disjuncts when in fact there are other possible or alternative disjuncts not enumerated.

  2. Fallacy of Nonexclusivity. This fallacy applies only to the second mood. It occurs whenever one assumes that affirming one disjunct shows the other to be false when in fact it is possible for both to be true.

The indispensable prerequisite to a valid conclusion in the case of a disjunctive syllogism is that the major premise express a complete disjunction in the sense that its alternative terms be mutually exclusive and collectively exhaustive. They admit of no third possible alternative. Copi explains that the disjunctive proposition does not categorically assert the truth of either of its disjuncts, but says that at least one of them is true, allowing for the possibility that both may be true.[10]

Thus, the disjunctive syllogism is governed by totally different rules from the ordinary categorical syllogism, because a negative premise gives an affirmative conclusion in the former, and a negative conclusion in the latter.[11]

It is, of course, a very simple matter to draw the conclusion from the premises in the illustrations ("A is either B or C").

The real problem in law consists in creating proper premises, in discovering the relations enumerated in the major premise. Errors are most likely to arise in formulating the major premise. It is essential that the disjunctive members shall be exhaustively enumerated, and also that they shall exclude one another. In the law we all can slip into the fallacy of the missing disjuncts when we do not include all the alternatives in the major premise. In briefing and in writing opinions, it is not always easy to discover all the possibilities of a case, or to formulate them in such a way as to render them mutually exclusive. If we say "He is either a saint or a crook," we omit the possibility of his being both to some extent in the sense that in this aspect of logic "or" can be made to read as "and."

A great many statements expressed in the form of disjunctive propositions are not true logical disjunctives. Thus we might say, "Every student works either from love of learning, or from love of praise, or for the sake of some material reward." But the disjunctive does not answer the logical requirements because it is possible that two or more of these motives may influence a student's conduct at the same time, and that other motives might be at work. These disjunctive members are neither exclusive nor completely enumerated.

A true disjunctive proposition, however, becomes an excellent tool in legal argument. It is an attempt, through legal research, to determine the whole series of circumstances or conditions within which any fact or perception may fall; it is to state the conditions in such a way that their systematic relations are at once evident. Positive knowledge of all the relevant cases in the jurisdictions is an absolute necessity. Enumerating possibilities must be exhaustive; no cases may be overlooked, no circumstances left out of account. The members of the proposition must be exclusive of one another. We cannot combine disjunctively any terms we please, as "Perhaps this" *or* "Perhaps that." It is only when we understand the systematic connections of things in the case law that we are able to express these connections in the form, A is either B or C, and thus assert that the presence of one excludes the other.

Disjunctives: A Summary

- A categorical proposition expresses no condition.
- Hypothetical propositions present their conditions as hypotheses (If the conveyance of real estate is oral, it is invalid).
- Disjunctive propositions present their conditions as alternatives.

Missing Disjuncts

Fallacies arise in the missing disjuncts: failure to include all possibilities or alternatives in the major premise. Thus, “The jury will either acquit or convict him” is deficient; it does not contemplate the possibility of a hung jury. Thus, “Either the verdict at trial will be for the defendant or the defendant must pay the plaintiff” is deficient because it fails to consider post-trial motions granting a new trial, or a judgment n.o.v., or an appeal to an appellate court.

Nonexclusive Disjuncts

Fallacies also arise in the nonexclusivity of the disjuncts. “All personal injury complaints for negligence must be brought within the two years of the automobile collision or the claim will be barred,” fails to contemplate the tolling of the limitations period because of a late discovery that the injury occurred. Accordingly, the disjuncts are not mutually exclusive.

Danzig v. Superior Court
151 Cal. Rptr. 185, 188-89, 87 Cal. App. 3d 604 (1978)

The question in *Southern California Edison* was whether a defendant can depose unnamed members of the plaintiff class upon notice to counsel for the named plaintiffs, or whether such deponents must be subpoenaed. Section 2019, subdivision (a)(4) provides that service of a subpoena is not required in order to depose a party or a person for whose immediate benefit an action is prosecuted. In *Southern California Edison,* the court addressed the question of whether unnamed class members are "persons for whose immediate benefit an action or proceeding is prosecuted," and determined that unnamed class members are in that category. The court did not address the question of whether unnamed class members are "parties" within the meaning of section 2019, subdivision (a)(4), or in any other context. Petitioners argue that the court in *Southern California Edison* would not have devoted so much of that opinion to determining that unnamed class members are "persons for whose immediate benefit an action or proceeding is prosecuted" if such class members are also "parties." In effect, petitioners contend our high court impliedly held that unnamed class members are not parties.

The argument suffers from a logical fallacy. When a proposition is in the form of two alternatives, if one alternative is false, then the other alternative must be true. But, if one of the alternatives is true, nothing can be said about the truth or falsity of the other alternative except in the situation when the two alternatives are mutually exclusive.

In *Southern California Edison,* the Supreme Court holding that unnamed members of a class represented by the named plaintiffs were persons for whose benefit the action was being prosecuted tells us nothing as to whether unnamed members of a class in a class action are "parties" within the meaning of section 1019, subdivision § 189 (a)(1), unless a "party" and "a person for whose immediate benefit an action or proceeding is prosecuted or defended" are mutually exclusive concepts. Since it appears obvious that the two concepts are not mutually exclusive, we conclude that *Southern California Edison* is not authority for the resolution of the issue at bar.

Georgia S. & Fla. Ry. v. Atlanta Coast Line R.R.
373 F.2d 493, 498-99 (5th Cir. 1967)

However, we feel it proper to say that the trial court's almost exclusive reliance on *Pennsylvania R. Co. v. Reading Co.* is misplaced. That case used eight "tests," distilled from former cases construing § 1 (22). These tests have no statutory basis, and were developed for a case different from the one before us. But the present case adopts those tests as an exclusive, controlling list of the relevant considerations. We think that the tests are, at most, helpful factors to be considered, and not fiats to be bound by….

"I have heard a thoughtful woman argue against gambling thus: There are four ways to obtain money, earning, finding, receiving a gift, stealing. Gambling is neither of the first three. Therefore, it is the fourth." Chafee, Progress of the Law—Equitable Relief Against Torts, 34 Harv. L. Rev. 388, 391-392 (1921).[12]

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1. For an example of how the court may break down an argument into elements of categorical syllogism, see Mt. Zion State Bank v. Consolidated Inc., 641 N.E.2d 1228, 1231-1232 (Ill. App. 5 Dist. 1994).

2. Irving M. Copi & Carl Cohen, Introduction to Logic 293 (9th ed. 1994).

3. *See also* British Steel PLC v. United States, 929 F.Supp. 426 (CIT 1996); State of Louisiana v. Star Enterprise (1996 WL 447578 La. App. 4 Cir); Menora v. Illinois High School Assoc., 527 F.Supp. 632, 636 (N.D. Ill. 1981).

4. *See also* Caterpillar, Inc. v. United States, 941 F.Supp. 1241 (CIT 1996).

5. The Complete Works of Lewis Carroll, Modern Library ed. (New York, n.d.), p. 223.

6. *See also* Tri-Boro Bagel Co. v. Bakery Drivers Union Local 802, 228 F.Supp. 720, 724-725 (E.D.N.Y. 1963).

7. We recognize the existence of what is known as a "pure hypothetical syllogism," one that contains hypothetical propositions exclusively. Because we are concerned only with legal reasoning we will not discuss this type. In the law the two premises are usually one hypothetical and one categorical. The purists would say that what we describe as a "hypothetical syllogism" would more accurately be called a "mixed hypothetical syllogism."

8. Paul E. Treusch, The Syllogism, *printed in* Readings of Jurisprudence 554 (Hall, Ed. 1938).

9. *See also* Thompson v. Clarkson Power Flow, Inc., 254 S.E.2d 401, 402 (Ga. App. 1979).

10. Irving M. Copi & Carl Cohen, Introduction to Logic 304 (9th ed. 1994).

11. W. Stanley Jevons, Elementary Lessons in Logic: Deductive and Inductive 166-167 (1965).

12. *See also* Chevron Oil Company v. Barlow, 406 F.2d 687, 691-692 (10th Cir. 1969).

Chapter 11

INFORMAL (MATERIAL) FALLACIES: Part One

IRRELEVANCE AND DISTRACTION

In Chapter 9 we offered a brief description of what is meant by informal, also called material, fallacies. We indicated that nomenclature and classification were not as important as recognizing that in legal reasoning a fallacy is a type of argument that superficially seems to be correct, but that proves, upon examination, not to be so. We also noted that treatment of fallacies by logicians differs, sometimes radically. We explained that the description of formal fallacies was relatively simple: they are violations of form—violations of the six rules of the categorical syllogism and rules of the hypothetical and alternative-disjunctive syllogism, as discussed in detail in the preceding chapter.

Informal fallacies are many in number and we have devoted two chapters to describe them. What are informal fallacies and how do we detect them? For our purposes, perhaps the best answer comes from Professors Copi and Burgess-Jackson:

> By definition these fallacies cannot be detected merely by examining the form or structure of the argument in which they occur. How, then, can they be detected? There are two ways. One is by examining the *context* in which the argument is made. Who, for example, is trying to establish the claim, and for what purpose(s)? Who is the audience for the argument? What assumptions do the parties share? Are there any ground rules for the discussion? The context (con-text) is the complete set of circumstances in which the argument (the "text") is made.
>
> The second way is by examining the *content* or substance of the argument. This requires attention to the way the argument is expressed in language, to the meaning of words, and to such things as ambiguity, vagueness and nonliterality. Content has to do with *what* is being said and *how* it is being said, not in the form of what is said. In short, sometimes we reason fallaciously because our arguments are structurally defective (formal fallacies); sometimes we commit fallacies because we violate contextual rules of argument (the first type of informal fallacy); and sometimes we commit fallacies because we misunderstand or misuse language (the second type of informal fallacy).[1]

Although it is difficult to condense into a single definition all that is encompassed by informal fallacies, two basic tenets of logic provide keys to their understanding:

- Logical reasoning presupposes that the terms shall be clearly and unambiguously defined and, as used in the premises and the conclusion, signify a uniform, fixed and definite meaning throughout.
- Logic demands that the conclusion be not assumed, but derived from the premises.[2]

This chapter is devoted to a discussion of two groups coming generally within the ambit of irrelevance and distraction. These are arguments that miss the central point at issue or rely principally upon emotions, feelings and ignorance, *inter alia*, to defend a thesis.

FALLACY OF IRRELEVANT EVIDENCE

We begin with the fallacy of irrelevant evidence. This argument misses the central point at issue and sometimes is called the fallacy of missing the point. Over the years I have often asked counsel at oral argument to discuss an issue that interests the court. Often, lawyers treat me with the response: “But that’s not the point, your honor!” My rejoinder is: “Why don’t you assume that it is, and please discuss it.”

How you come out in a case often depends on how you go in. And too often counsel choose to “go in” with an argument favorable to them, but miss the point that is critical to the decision.

Fallacy of Irrelevance

The fallacy of irrelevance, or *ignoratio elenchi,* is an argument purporting to establish a particular conclusion but is instead directed to proving another conclusion. It occurs whenever we advance as an argument something that has nothing to do with the point at issue. The method can make appeals to emotions, but not every case of *ignoratio elenchi* involves such an appeal. An argument may be stated in cold, antiseptic, neutral language and still commit the fallacy. The psychological persuasiveness of this argument is often evident when the intended conclusion differs only subtly from the asserted conclusion. The inference rests, in other words, on confusion.[3]

Often we see the fallacy of the strawperson in which the arguer knocks down a misstated argument and concludes that the original argument was bad. The name comes from supposition that a straw person would be light and flimsy, and therefore much easier to demolish than a real person.

Not every argument of irrelevant conclusion is premeditated or deliberate. It may be the result of involuntary confusion on the part of a lawyer or judge. But it also may be consciously adopted as a strategem to deceive an adversary or the court. When so used it is usually intended to conceal the weakness of a position by diverting attention from the real point at issue. Willful perversions or confusions are the exception. More often than not, instances of irrelevancy are unintentional and result from partisan advocacy that replaces objective analysis to a problem. Many examples abide in the cases.

United States v. Standefer
610 F.2d 1079, 1106 (3d Cir. 1979)

(Aldisert, J., concurring and dissenting)

[Neiderberger, a revenue agent, was acquitted of the charge of accepting a gift from Standefer of a trip to Florida. Standefer was found guilty of aiding and abetting Neiderberger of accepting the trip. The majority held that the outcome of Neiderberger's prosecution had no effect on Standefer's conviction and affirmed the sentence and conviction. The dissent disagreed.]

Surely the public will not readily understand the court's holding that a revenue agent did not receive a gift, but a private citizen helped him receive the gift he did not receive. This is the stuff that "sidebars" in newspapers are made of, that smirking telecasters eagerly devour in thirty-second squibs. "People do not take judicial reasoning seriously," Professor Charles A. Miller has observed, "and they are not fools nor being fooled in doing so, at least no more than in other forms of communication or with respect to other strands that form the web of a political culture. Legal reasoning cannot be artificial, esoteric or understandable only to an elite legal priesthood; it must be capable of public comprehension."

Standefer is not proposing, nor do I propose, "to give him refuge in the imagined remnant of a common-law rule regarding the dependency of verdicts against aiders and abettors." But neither do I assume that "a tidy consistency" is equivalent to a foolish consistency, and I am undaunted by accusations of pursuing "scholastic quiddities." I insist that a small measure of consistency is essential, that there must be some dependency between aiding or abetting and the offense that is aided or abetted. Simply put, in our language these are transitive verbs. It is no justification for Standefer's conviction that public reaction to exclusionary rules may be unpopular. Public reaction to Standefer's conviction for aiding Niederberger to commit an offense which a previous jury had acquitted Niederberger of committing will be, and should be, equally unpopular. Regardless of the issue on which rehearing *en banc* was granted, the court is deciding *this* criminal case and no other. Instead of speculating about a string of successful prosecutions in other cases, we must focus on a relatively short string of prosecutions—the successful trial of Standefer preceded by the unsuccessful trial of Niederberger. We need not theorize about complex inchoate criminal cases with multiple and lengthy trials, multiple defendants, great variations in available and admissible evidence and a host of other factors not present in this case.

To consider consequences that might occur in other cases containing factual problems not before us is always legitimate, whether in a lawyer's brief or a judge's opinion, but it is just argument. The rules of logic inexorably limit permissible rhetoric; one risks committing the fallacy of division, erroneously reasoning that what holds true of a composite whole necessarily is true for each component part considered separately, or being seduced into the fallacy of *ignoratio elenchi*, irrelevant evidence, proving unrelated point B instead of point A, which is at issue, or disproving point D instead of point C.

Here, we are confronted with two short trials of two individual defendants on virtually identical indictments returned simultaneously by the same grand jury on essentially the same evidence involving a common set of facts. If, in this case, my analysis is an application of collateral estoppel, I do not argue that collateral estoppel is mandated by due process. But to hold that estoppel is not constitutionally required does not mean that other sound reasons do not warrant its application. I am convinced that under the facts of this case, the need for the appearance of justice demands this result.

Soto v. Texas
681 S.W.2d 602, 611 (1984)

(Miller, J., dissenting)

One redeeming feature of the opinion is the tacit acknowledgment of its internal weakness; the form of that acknowledgment, however, constitutes still another problem with the opinion—by misinterpreting the issue presented as including whether the appellant's evidence establishes that Rosalinda Cervantes was a "law enforcement agent," the opinion interjects what logicians call the fallacy of the strawman. At no time has the State in the trial court, in the Court of Appeals, or in this Court ever disputed or contested the issue that Cervantes was acting as a law enforcement agent. If this was an issue raised by the appellant, the majority would have (and has on numerous occasions) summarily dismissed this contention by citing the well-worn and well-established rule that there was "no objection at trial, thus nothing is presented for review." For some unexplained reason the majority fails to apply that same rule of law to the State, in its appeal before this Court.

Schiaffo v. Helstoski
492 F.2d 413, 436 (3d Cir. 1974)

(Concurring and dissenting)

While it may be true, as the majority states that there is "no evidence in the legislative history suggesting that Congress specifically considered the enforcement problem," this proves nothing. Enforcement is allocated to other statutes, to those statutes covering the Postal Service. The majority attempts to disprove point B (legislative history of enforcement of franking laws), instead of disproving point A (Postal Service enforcement), which is the real issue at stake. Logicians call this technique the fallacy of irrelevance, *ignoratio elenchi.*

EEOC v. Franklin and Marshall College
775 F.2d 110, 119 (3d Cir. 1985)

(Dissenting)

The cited legislative history convincingly demonstrates that Congress intended Title VII to apply to universities and colleges. No one can argue to the contrary. The majority nonetheless rest their *ratio decidendi* entirely upon an analysis of the 1972 amendment to Title VII that eliminated the exemption for academic institutions. We are thus treated to a classic fallacy of irrelevance, or *ignoratio elenchi*. The error is made by attempting to prove something that has not been denied, to-wit that the 1972 amendment to Title VII took in institutions of higher learning. The question under consideration, however, is not whether Title VII was so amended but whether, on the strength of a mere conclusory allegation of discrimination, the EEOC is permitted the kind of intrusion into the tenure review process it seeks here.

United States v. Jannotti
673 F.2d 578, 622 (3d Cir. 1982)

(Aldisert, J., dissenting)

The majority's clever approach to this very sensitive problem is a tribute to the skilled advocate's art. It is an unrelenting exhortation of major and minor premises that has an uncanny resemblance to mechanical justice. I do not fault its syllogistic structure; I quarrel only with the choice of major premises. I fault the majority's refusal to take as a beginning point the critical issue in any case where, as here, there is evidence of government inducement: Did the prosecution make out a *prima facie* case of *predisposition* on the part of the defendants beyond a reasonable doubt so as to merit submitting the entrapment question to the jury?

Instead, the majority have turned our American criminal justice system upon its head and reversed the burden of proof: Instead of requiring the government to prove that the issue was properly submitted to the jury, they demand proof from the defendants that it should not have been. Thus, the majority's approach, ringing and singing, is a classic example of the fallacy of *ignoratio elenchi*, or irrelevance. Instead of proving point A, the defendants' predisposition, their argument proves unrelated point B, a rebuttal of factors which the district court considered in setting aside the verdict. In the scholastic rhetorical sense, the majority's obligation was to present a *confirmatio* of the government's proof, not a *refutatio* of isolated contrary contentions.[4]

FALLACIES OF DISTRACTION

Some informal fallacies are substantive. They shift attention from reasoned argument to other things that are always irrelevant, always irrational and often emotional. They are ploys, but ploys that are used every day, everywhere. They are used in advertising and political campaigning, by essay writers, columnists, editorial writers and TV commentators. For our purposes we will call them “fallacies of distraction.”

We will discuss some fallacies that appear in the legal profession. We will not discuss others: appeals *ad envidium* (to envy), *ad mitum* (to the few), *ad modum* (to due measure or proportion), *ad edum* (to hatred), *ad superbium* (to snobbery or pride) and *ad superstitionem* (to credulity). Others exist as well.

ARGUMENTUM AD MISERICORDIAM
(The Appeal to Pity)

The appeal to pity is familiar in many jury trials, civil and criminal. The jury is asked to accept an argument not for its strength but because of the speaker's emotional appeal to pity. This fallacy evades the pertinent issue and makes a purely emotional appeal to the altruism or mercy of the readers or listeners. It's an appeal for sympathy. Pity is appealed to in order to reach a desired conclusion.

Defending the youth on trial for killing his parents, counsel tells the jury: "In your hearts, consider that this young man is an orphan." Or in the celebrated Menendez brothers' trials in Los Angeles, the appeal to the "piteous circumstances" of their childhood as sons of the millionaire they killed. In a civil case, we may hear, "My client, although not entirely without fault (in running the red light while under the influence), is the family breadwinner. His wife and children are here. And arrayed against them is the gigantic, multi-national corporation, General Motors, who designed a faulty rear seat in the car. Sure, no one was in the rear seat at the time of the collision, but these little innocent children could have been."

I must confess that in my salad days when I was an active trial lawyer, I resorted to this fallacy often in my closing speech to the jury, probably hearkening to the adage: "When the law is against you, argue the facts; when the facts are against you, appeal to anything that will convince a jury." But none of us surpassed the eloquence of Clarence Darrow, the celebrated trial lawyer who was the master of this device. In defending Thomas Kidd, a union official on trial for criminal conspiracy, he closed to the jury:

> I appeal to you not for Thomas Kidd, but I appeal to you for the long line—the long, long line reaching back through the ages and forward to the years to come—the long line of despoiled and downtrodden people of the earth. I appeal to you for those men who rise in the morning before daylight comes and who go home at night when the light has faded from the sky and give their life, their strength, their toil to make others rich and great. I appeal to you in the name of those women who are offering up their lives to this modern god of gold, and I appeal to you in the name of those little children, the living and the unborn.[5]

Another considerably more subtle example of *argumentum ad misericordiam* is reported by Plato in The Apology, which purports to be a record of Socrates' defense of himself during his trial.

> Perhaps there may be someone who is offended at me, when he calls to mind how he himself on a similar, or even a less serious occasion, prayed and entreated the judges with many tears, and how he produced his children in court, which was a moving spectacle, together with a host of relations and friends; whereas I, who am probably in danger of my life, will do none of these things. The contrast may occur to his mind, and he may be set against me, and vote in anger because he is displeased by me on this account. Now if there be such a person among you—mind, I do not say that there is—to him I may fairly reply: My friend, I am a man, and like other men, a creature of flesh and blood, and not "of wood

or stone," as Homer says; and I have a family, yes, and sons, O Athenians, three in number, one almost a man, and two others who are still young; and yet I will not bring any of them hither in order to petition you for acquittal.[6]

California v. Sonleitner
540-41 185 Cal. App.2d 350 (1960)

Throughout defendant's briefs runs the recurring contention that because the court found that he was financially unable on a given date to deposit the security fixed by the board as a condition to a hearing for redetermination, he should be excused from exhausting his administrative remedies and be permitted to contest the tax in the action brought by the State on the jeopardy determination. Defendant phrases this contention in his statement of "Issues" as follows: "Can the Legislature and the Board of Equalization compel courts to restrict due process in tax cases to the wealthy?" This, logicians refer to as *argumentum ad misericordiam*, an appeal to pity. This is of course a contention which could be made against any tax and can have no relevancy here. A similar contention was previously advanced and thus answered: "It would be strange indeed if this court were to sanction a practice whereby a taxpayer could regularly refrain from paying taxes, the obligation of which he disputes, and then urge that, by reason of his large delinquency, the ordinary remedies provided for reviewing his liability are inadequate in his particular case."

Marsh v. Scott
63 A.2d 275, 278-79 N.J. Super. 240 (1949)

It would be unthinkable that this court be powerless to grant support to a minor child in need of funds within the control of the court, of which the income belongs to the father and the corpus will ultimately belong to the child. The answer is found in the expression of Judge Cardozo, which has been quoted with approval by the courts of this state: "There is no undeviating principle that equity shall [be] … 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…. Equity follows the law, but not slavishly nor always…. If it did, there could never be occasion for the enforcement of equitable doctrine…. Let the hardship be strong enough, and equity will find a way, though many a formula of inaction may seem to bar the path."

The will under which the trust in the instant case is created contains a spend-thrift clause, prohibiting payment to creditors of the *cestui,* and it is urged that this provision bars the application. The obligation of a parent for the support of his child does not arise from a creditor-debtor relationship. It is not a debt within the contemplation of the testatrix or the interpretation of the clause.

The needs of both the incompetent and the minor are to be considered.

People v. Ryan
327 N.Y.S.2d 207, 209 (N.Y. App. Div. 1971)

When the appellate court is confronted with a plea *ad misericordiam,* it must take a broader view of all the facts and circumstances, measuring justice and the rights of society, punishment and the voidance of cruelty. And mercy, in its proper place, is an attribute of an appellate court. The power is there. The precedents sanction its use.

And, in this case, a majority feel that in view of 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, his sentence can presently be mitigated without detriment to the needs and protection of society; and that the fulfillment of his jail sentence would add more to the immedicable woe of his family than it would punish him. We note also that his role in the Federal Court indicates the defendant was more of a fool than a felon, that his motive seems to have been one of misguided help to a friend, that he apparently profited nothing and this his friend emerged finally with a suspended sentence.

In extending mitigation in this case, moved by the poignant features of the defendant's home situation, we trust police officers in general will not regard this as a fixed attitude on our part or that we are easily melted. All police officers should know by now that for a transgression of their special trust, there usually follows dismissal, humiliation, loss of pension and oft'times, jail.

However, in this case, although justification existed for the imposition of a jail sentence, nevertheless, under all the circumstances, the sentence imposed was unnecessarily excessive. The record discloses a proper case for the Court's exercise of discretion to reduce the sentence pursuant to Section 470.15 of the Criminal Procedure Law. Accordingly: Judgment of conviction rendered November 4, 1971, Supreme Court, New York County (Birns, J.), should be modified upon the law and the facts, and in the exercise of discretion in the interest of Justice, by reducing the sentence from imprisonment for a term of one year to a period of six months, and as so modified, affirmed.

State ex rel. Commrs. v. Amoco Prod. Co.
645 P.2d 468, 470-471 (Okla. 1982)

The question of law before the court may be one of first impression in this State: where production ceases from a well due to mechanical difficulty, may the lessee continue the lease in force and effect by promptly drilling a new well to produce from the same formation? The trial court responded in the negative. We disagree. We hold that where production ceases due to mechanical problems, the lease continues in force and effect by the diligent efforts to restore production by a reasonable and prudent operator.

Courts have traditionally looked upon forfeiture with disdain, and have sought to avoid it when possible, citing a strong policy of our statutory law and equitable considerations against it. Stewart v. Amerada Hess Corp., 604 P.2d 854, 858 (Okl. 1979). The vehicle commonly used to relieve forfeiture has been equity:

> 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.

See Murphy v. Fox, 278 P.2d 820, 825 (Okl. 1979).

In the case at hand the cessation of production was due to mechanical difficulty beyond the control of lessee. Lessee immediately and diligently drilled a second well to the same formation restoring production. In light of all the circumstances the lessee acted reasonably and diligently. The lease did not expire by its own terms. Cancellation of the lease under these circumstances would be harsh and unfair. *See also* Fox v. U.S. Dept of H.U.D., 680 F.2d 315, 319 (3d Cir. 1982).

Professor Saunders has summarized the cross currents involved in this subject:

> 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. 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.[7]

ARGUMENTUM AD VERECUNDIAM
(The Appeal to Prestige)

This fallacy makes an appeal to authority or prestige of parties having no legitimate claim to authority in the matter at hand. This appeal is made to the party's reputation instead of to pertinent data in order to win assent to a conclusion. This appeal equates prestige with reasoned argument or evidence and attempts to gain support for legal argument by associating it with highly respected individuals or hallowed institutions.

It is appropriate to set forth an argument with a formal or informal syllogism, and then attribute the contention to a renowned legal scholar or treatise recognized as an expert in the particular field. The fallacy occurs, however, when the conclusion to the argument is based on an authority having no rational claim to expertise in that field or no rational support is presented to support the conclusion. Whether an appeal to authority is a fallacy depends upon both the type of argument offered and the amount of weight given to the authority.

Another form of the argument *ad verecundiam* may be found in the paraphernalia of pedantry:

Use of pedantic words and phrases

Use of references

Use of quotations

Use of length

Use of detail and specificity

What Professor Fischer has said about historians may also be applicable to law students, lawyers and judges:

> The first of these forms of error is committed by scholars who never use a little word when a big one will do. Historians take a certain pride in their alleged immunity from this fallacy—in their freedom from jargon and academic affectation. But their conceit is not correct; indeed, it is growing increasingly inaccurate as an understanding of contemporary historiographical language. Ordinary everyday words like "simple" are replaced by monstrosities such as "simplistic" without any refinement of meaning. Special fields of historical inquiry are building pedantic vocabularies at an appalling rate. Urban historians, for instance, speak endlessly of "urbitecture," "areal differentiation," "ecosystems," "nodal points," "metropolitan matrices," "ruralization," "subareal mosaics," "conurbation" and other such neologisms, which are in some cases useful for their precision and defensible for their utility. But these terms are also used for purposes of legitimization, as ritual incantations which serve to camouflage doubt, confusion, illogic, imprecision and ignorance.[8]

Cresap v. Pacific Inland Navigation Co.
478 P.2d 223, 228 78 Wash.2d 563 (1970)

(Neill, J., dissenting)

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 verecundiam,* 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. Further, there is the potential danger that the refusal of a trial court to cite some sources while naming others may amount to a comment on the evidence.

United States v. Howard
774 F.2d 838, 847 (7th Cir. 1985)

The final and most troubling issue on appeal is whether the defendants were denied a fair trial as a result of various allegedly improper and prejudicial comments made by the prosecution during closing arguments at trial. Without cataloging all of the myriad remarks cited by the defendants as examples of prosecutorial misconduct, the transcript of final arguments below reveals that the prosecution's remarks cannot be characterized as always reflecting the best examples of responsible trial advocacy. In order to rebut a claim that the government had sought to deceive the jury, one of the prosecutors stated in his final rebuttal argument:

> 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.

This unwarranted appeal to the authority and prestige of the United States Attorney's Office becomes understandable—though still not fully acceptable—when considered against the backdrop of the out of place and therefore uncalled for *ad hominem* attacks by counsel for the defendant Howard that preceded it.

ARGUMENTUM AD HOMINEM
(The Appeal to Ridicule)

This fallacy shifts an argument from the point being discussed *(ad rem)* to irrelevant personal characteristics of an opponent (ad *hominem).* Instead of addressing the issue presented by an opponent, this argument makes the opponent the issue. It shifts attention from the argument to the arguer; instead of disproving the substance of what is asserted, the argument attacks the person who made the assertion. It may take several forms. First, drawn from the negative campaigning of office seekers, and very common in the law, is what we might call the abusive *argumentum ad hominem.* The argument attacks the assertion based on adversary's reputation, personality or some personal shortcoming. X's statement must be wrong because X is a communist. The argument rests not upon the merits of the case, but on the character or position of those engaged in it.

The abusive *ad hominem* argument tries to shift the burden of proof. It's a would-you-buy-a-used-car-from-this-man? type of question. Unfortunately, too many lawyers degenerate into this practice during the heat of a trial: "My opponent is cheating, is committing fraud upon the court!" "The lawyer for the government deliberately withheld information from me, and is continuing the treachery that began with the first pre-trial conference. He has been misrepresenting from the start and now is trying to pull a fast one on the court." "Continuing her tactics, that I can only describe as sleazy, my opponent is not telling the truth, and my total experience with her is that this is the way she does business." The classic *ad hominem* argument, often repeated, is the note passed from one defense lawyer to another: "No case, abuse plaintiff's attorney."

The second form of *argumentum ad hominem* is the circumstantial variety. The argument is that an opponent's circumstances are such that a given result is dictated. If A accuses B of illegally dumping wastes in Lake Erie, a counterattack by B that A is B's largest competitor or that A dumps hazardous wastes in Lake Ontario, is an example of *argumentum ad hominem.* For examples of both types of *ad hominen argumentum,* tune in to television and movie courtroom dramas and you get the impression that this goes on in every case. Fortunately, it does not.

Professor Kevin W. Saunders makes the excellent point, however, that familiar situations exist in the law in which such arguments are "both perfectly acceptable and common practice." Rule 607 of Federal Rules of Evidence and state counterparts allow the use of evidence of both bad character and bias for the purpose of attacking the witness's credibility.[9] But there can be excesses unless the trial judge strikes a proper balance in the reception of this type of evidence. The defense tactics in the criminal trial of O.J. Simpson in 1995 was a classic case of the *ad hominem* run riot because of the abject failure of the trial judge to control the proceedings. Another proper use of the *ad hominem* is in receiving expert witness testimony where the witness simply states a conclusion after establishing the predicate facts. It is fair game to attack these witnesses by questioning their expertise or incentives for testifying.[10]

Patterson v. Board of Supervisors
248 Cal. Rptr. 253, 260 (1988)

Appellant Geary contends that the deleted ballot arguments, characterized by the city attorney as "idle scandal-mongering" and "base personal attacks" inconsistent with the purposes of the limited public forum, were neither misleading nor inconsistent. Having reviewed the deleted materials, we explain our reasons upholding the rulings below.

The personal attacks concerning Hagan's marital problems and Callinan's financial circumstances bore no relationship, certainly none which could be considered reasonable, to the question whether the Poly High School property should be rezoned, the only subject before the voters. Hagan's name had been mentioned in connection with possible development of the Balboa property, the property proposed for rezoning under Proposition B.

The statements concerning Callinan's financial status were totally unrelated to the proposed rezoning. Since there was no specific development project or potential developer before the voters, they could have been easily misled by the statements into believing that they were also voting to approve or disapprove specific individuals.

The *ad hominem* attack on the two city officials reflected in the third argument again had no relationship to the ballot proposition to rezone the Poly High School property. In fact, the statement is an apparent reference to a frivolous lawsuit filed after the June 1986 election accusing the officials of impropriety in connection with an earlier proposal regarding development of the Balboa site.

Brice v. Maryland
526 A.2d 647, 652-53, 71 Md. App. 563 (1987)

The officer in this case did what the statute and case law indicate he was obligated to do. Under the circumstances, we cannot agree with the appellant that "the conduct of the trooper was repugnant to generally accepted standards of fair behavior, even police behavior." The appellant's case in this regard reduces itself to little more than innuendo. He does not claim to have been in a life-threatening situation; he simply makes the *ad hominem* argument that "so far as the trooper knew, this might well have been a life-threatening situation." With no support in the evidence, the appellant goes on to insinuate, "The trooper apparently believed nevertheless that it was his duty to use any means in order to make (or fake?) a case against the appellant." As the case law discussed earlier makes clear, Society imposes upon the trooper the obligation to move with all possible diligence against drunken drivers. The appellant's final insinuation goes only to the credibility of the trooper and is, therefore, beyond our concern: "That he endeavored to prosecute at all in the context of this case casts suspicion upon all such reported timings and on the animus of the trooper." The blood alcohol content of 0.24 percent indicates that the trooper did precisely what Society expects him to do.[11]

ARGUMENTUM AD POPULUM
(Appeal to the Masses)

This is the political candidate's dream: "I'm for the working man, the underprivileged, the poor, the homeless and the senior citizens." Or the repeated mantra of the 1996 Presidential campaign, " My opponent wants to slash Medicare, cut education and ravish the environment."

This argument departs from the question under discussion and attempts to win assent to a proposition by making an appeal to the feelings and prejudices of the multitude. The arguments are calculated to excite the feelings of the masses and prevent them from forming a dispassionate judgment on the matter at hand. It replaces the task of presenting evidence and rational argument with expressive language and other devices calculated to excite enthusiasm, anger or hate.

During an Ohio Senatorial race, Senator Robert A. Taft's opponent ridiculed him and said "I'm from the common man; I wasn't born with a silver spoon in my mouth." Martha Taft, the senator's wife, sallied forth with a brave rebuttal: "My husband is being accused of not being a common man. That's true. He's not common. He was first in his class in college; first in his class in law school; and first in the U.S. Senate. You don't want a senator who is common. You want someone who is outstanding. And that's my husband!"

The popular acceptance of a policy or practice does not show it to be wise; the fact that a great many people hold to a given opinion does not prove it to be true. The test is whether the believers are expert or at least competent in the field, or on the particular proposition believed.

Kobell v. Suburban Lines, Inc.
731 F.2d 1076, 1100 n.6 (3d Cir. 1984)

The majority unnecessarily and gratuitously injects 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 …." This of course is the classic informal fallacy of *argumentum ad populum,* an appeal to strong feelings of the multitude.

Sigalas v. Lido Maritime, Inc.
776 F.2d 1512, 1518-1519 (11th Cir. 1985)

The appellant argued that American court-made admiralty law should be applied rather than Greek law. She had filed a malpractice action against the shipowner for alleged negligence of the ship's doctor in treating her husband who was an officer of the ship. The district court held that the law of the flag is less persuasive when the vessel flag is of convenience. Instead we should look through the Greek facade and find that, since Lido Maritime is incorporated in Liberia, Liberian law controls. This is convenient for her, because Liberia by statute has adopted American court-made admiralty law as its own. Thus she presents us with a *renvoi* argument—apply the law of Liberia which in turn directs us to our own substantive jurisprudence.

Here over 80% of the stock in the relevant corporations is held by Greeks, who exercise complete control over the day-to-day management of the ROYAL ODYSSEY. It is not the *flag* but the *nation of incorporation* that is of convenience. We can and do disregard that and find, contrary to the determination of the district court, that the allegiance of the owner is Greek, not Liberian. That buttresses the opinion below.

Mrs. Sigalas also submits that we should be guided by the "actual operational contacts that this ship and this owner have with the United States." She couples that with a plea for the safety of the American passengers aboard the ROYAL ODYSSEY whose health she seeks to protect from the incompetence of the ship's doctor. Neither argument has merit. As to the former, this case is very different than [a case in which] the nominally Greek corporation had its largest office in New York, 95% of its stock was held by a Greek citizen who had been an American domiciliary for twenty-five years, the ship's home port was in America, its management and operations were directed out of New York and its entire income came from transporting cargo to or from the United States. In this case the facts cut in the opposite direction on all of these points except that the bulk of Lido's revenue comes from American pocketbooks. That alone is not enough to justify application of American law. Were this an American passenger the posture of this case might be quite different, but such a case is not presented today and, for the same reason, Mrs. Sigalas' *ad populum* for the health of American passengers is beyond the scope of the current case and controversy.[12]

ARGUMENTUM AD ANTIQUITAM
(Appeal to the Ages)

Based on the notion that "we love all truths," this is the fallacy that holds that determinations and customs of our fathers and forbears must not be changed. We see this in the constant debate on the original intent of the Constitution's drafters, and quotations from Washington, Madison, Monroe, Jefferson, Franklin and John Marshall. It always presents the question of bowing down before propositions inherited from our ancestors. The appeal to the ages is based on the adage that age is wiser than youth. Yet we can and do learn from the experience of others, and there is a collective experience which we call history. Oliver Wendell Holmes was addressing this fallacy in his famous statement:

> 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.[13]

Not surprisingly, there exists the counter-fallacy of *argumentum ad novitam* or an appeal to novelty, modernity, current mores or youth. We saw this demonstrated in force in the later sixties and early seventies in the oft-repeated phrase, "Don't trust anybody over thirty." We do not see this in the law. The *argumentum ad antiquitam* may not be a fallacy in constitutional law.

Marsh v. Chambers
463 U.S. 783 (1983)

[The Court held that the Nebraska legislature chaplaincy practice does not violate the Establishment Clause.] The opening sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of 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. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

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."

ARGUMENTUM AD TERROREM
(Appeal to Terror)

This argument makes an appeal to fear of exaggerated consequences in the event an adversary's argument prevails. In the sixties and seventies, when the federal courts were enforcing the Bill of Rights through the Fourteenth Amendment in *habeas corpus* cases reviewing state court convictions, we heard almost daily the refrain: "If the defendant prevails here, the jails will be emptied of criminals turned loose upon an innocent public."

These arguments appear in many personal injury cases. "If the plaintiff prevails, insurance rates will go up all over." The physician's attorney in the malpractice case argues that lawsuits are requiring emergency rooms to shut down and hospitals to close obstetric wards. The city attorney argues, "You know, of course, if we do not have immunity, municipal taxes will rise sky high." The district attorney complains that the *Miranda* rule has handcuffed the effectiveness of the police and crime will run rampant. The appellate advocate pleads: "If your honors sustain this appeal and reverse the trial court, your dockets will be hopelessly clogged with frivolous appeals."

County of Lake v. Mac Neal
24 Ill.2d 253, 181 N.E.2d 85, 90 (1962)

Plaintiff argues that any refusal to extend the rule to defending property owners will be an invitation to the unscrupulous to violate zoning regulations. However, such an *ad terrorem* appeal does not withstand either logical or historical examination. The alleged violation of the zoning ordinance in this case primarily involves a use of open land for recreation purposes. Most zoning litigation, to the contrary, involves proposed substantial investments in and improvements to real estate. In view of the judicial power to preserve the integrity of a zoning ordinance, by mandatory injunction if necessary, we do not foresee that money will be invested or properties substantially altered without first legally testing the zoning ordinance. We conclude that the court below correctly determined that the rule did not extend to the defendants in this case.

Cunningham v. MacNeal Memorial Hosp.
47 Ill.2d 443, 266 N.E.2d 897, 904 (1970)

Defendant implicitly raises the *ad terrorem* argument that allowing a strict tort liability theory to obtain in this case will "open the flood gates" to disastrous litigation which will ultimately thwart the fulfillment of the hospitals' worthy mission by drainage of their funds for purposes other than those intended. Our answer to this contention is that (paraphrasing what we observed [before]) we do not believe in this present day and age, when the operation of eleemosynary hospitals constitutes one of the biggest businesses in this country, that hospital immunity can be justified on the protection-of-the-funds theory. The concept of strict liability in tort logically, and we think, reasonably, dictates that an entity which distributes a defective product for human consumption, whether for profit or not, should legally bear the consequences of injury caused thereby, rather than allowing such loss to fall upon the individual consumer who is entirely without fault.[14]

ARGUMENTUM AD IGNORATIAM
(The argument from ignorance)

The argument from ignorance is the fallacy committed when it is argued that a proposition is true simply on the basis that it has not been proved false, or that it is false because it has not been proved true.[15] The fallacy takes the following forms:

1. P hasn't been proved false.
   Therefore,
2. P is true.

1. P hasn't been proved true.
   Therefore,
2. P is false.

Recall our previous discussion about reflective thinking and inference. We emphasized that thought moves from the known to the unknown (the conclusion). You cannot move from the unknown something that cannot be proved (false) to the unknown (true). And vice versa.

New knowledge must be derived from some measure of knowledge. We cannot affirm knowledge from a state of ignorance (lack of proof). Knowledge cannot be derived from ignorance. It is basic hornbook law of logic that one must know something, some knowledge, in order to acquire other knowledge.

The reasonableness of every inference depends on the plausibility of the first premise. If we have reason to believe that the first premise is true, then, based on human or scientific experience, it is reasonable to believe the conclusion. Unless we possess that legitimate first premise, we can move no further.

Every appeal to ignorance is based on the acceptance of a premise that has not been proved to be true or false. There are exceptions, to be sure. New drugs are tested for safety. The absence of any toxic effect is taken to be evidence. When a security investigation reveals no instances of improper conduct, it would be wrong to conclude that the investigation left us ignorant. Professors Copi and Burgess-Jackson suggest that the following factors be kept in mind: (a) How many individuals are attempting the proof; (b) whether those individuals are experts, or at least competent, on the matter at hand; (c) whether those attempting the proof are motivated (have an incentive) to prove the matter; (d) whether those attempting the proof have the technology and other resources necessary to conduct the inquiry and make the proof; (e) for how long a time the individuals have tried to prove the proposition.[16]

It can be said that a classic appeal to ignorance is accepted in the law: in meeting one's burden of proof in a trial. In criminal cases, for example, the defendant is presumed innocent unless the prosecution proves guilt beyond a reasonable doubt. The formula goes like this:

1. P has not been proved guilty.
   Therefore,
2. P did not commit the crime.

In re Winship
397 U.S. 358, 364-364 (1970)

The reasonable doubt standard is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of … persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the fact-finder of his guilt.[17]

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1. Irving M. Copi and Keith Burgess-Jackson, Informal Logic 98 (3d ed. 1996).

2. James Edwin Creighton, An Introductory Logic 406 (1898).

3. Irving M. Copi and Keith Burgess-Jackson, Informal Logic 131 (3d ed. 1996).

4. *See also* Central Penn. Teamsters v. McCormick Dray Line, 85 F.3d 1098, 1112 (3d. Cir. 1996); Armour v. Ohio, 775 F.Supp. 1044, 1072 (N.D. Ohio 1991); Miles v. Idaho Power Co., 778 P.2d 757, 769 (Idaho 1989).

5. Irving M. Copi, Introduction to Logic 95 (7th ed. 1986) (quoting I. Stone, Clarence Darrow for the Defense (1941)).

6. Jd. at 96.

7. Kevin W. Saunders, Informal Fallacies in Legal Argumentation, 44 So. Car. L. Rev. 343, 351 (1993).

8. David Hackett Fischer, Historians' Fallacies 285 (1970).

9. Kevin W. Saunders, Informal Fallacies in Legal Argumentation, 44 So. Car. L. Rev. 343, 348 (1993).

10. *Id.* at 349.

11. *See also* In Re Maurice, 167 B.R. 114, 131 (Bkrtcy. N.D. Ill 1994); United States v. Biasucci, 786 F.2d 504, 514 (2d Cir. 1986); United States v. Young 470 U.S. 1, 9-10 (1985).

12. *See also* State v. Murdoch, 435 N.W.2d 269, 272 (Wisc. 1988).

13. Oliver W. Holmes, Jr., Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

14. *See also* Simmons v. Philadelphia, 947 F.2d 1042, 1059 (3d Cir. 1991) ("If the Court were to adopt the City's rationale, any municipality could insulate itself from liability by merely failing to train its employees."); People v. Superior Court, 11 Cal. Rptr.3d 652, 658 (1992) (potential prosecutorial misconduct); Aaron v. State, 192 So.2d 456, 459 (Ala. 1986) (for a judge to ignore prior time served on an "erroneous" sentence would be to put an *in terrorem* clause in state post conviction procedure); Borer v. American Airlines, Inc., 563 P.2d 858, 870 (Cal. 1977) (Mosk, J., dissenting).

15. Irving M. Copi & Carl Cohen, Introduction to Logic 116 (9th ed. 1994).

16. Irving M. Copi & Keith Burgess-Jackson, Informal Logic 115-116 (3d ed. 1996).

17. See Board of Trustees v. Powell, 554 A.2d 440, 441-443 (Md. Ct. Spec. App. 1989) (firefighter argues that because he was free from disease when hired, he must have acquired hepatitis in his work as a medic).

Chapter 12

INFORMAL (MATERIAL) FALLACIES: Part Two

CONTEXT AND CONTENT

The informal fallacies that we now discuss are not readily susceptible to categorization. In an extremely rudimentary attempt at classification, we will describe the first group under the rubric of "Context" in the sense of the form or structure in which these fallacious arguments are made. The other group can be described as "Content" or to use the Sahakians' label, "Linguistic."[1] Both groups have one characteristic in common: The fallacies take place in context and content of the argument's premises and not the argument's logical form.

FALLACIES OF ACCIDENT AND HASTY GENERALIZATION
DICTO SIMPLICITER
(Fallacy of Accident)

General rules usually have their exceptions. This is especially true in the law. The informal fallacy we discuss here relates to general rules and exceptions to the rules. It is called the fallacy of accident, *dicto simpliciter*, and it occurs when we apply the general rule to special circumstances. The application of the general rule is inappropriate because of the situation's "accidents," or exceptional facts. To commit the fallacy of accident is to apply the general rule to exceptions to the rule. In the law of evidence, for example, there are many exceptions to the hearsay rule: a dying declaration, a statement against interest or a statement of personal or family history. To apply the general hearsay rule to these exceptions is to commit the fallacy of accident or *dicto simpliciter.*

General rules are developed (usually by inductive reasoning) from consideration of common experiences; where the situation is exceptional because of its accidents, an exception to the rule must exist. Experience teaches us that a proposition generally true is not always true in exactly the same way, because special conditions may be present.

W. Stanley Jevons gives this classic example: "He who thrusts a knife into another person should be punished; a surgeon in operating does so; therefore he should be punished."[2] The maxim "the exception proves the rule" is relevant here. Consider the following argument: "The Bible says, 'Thou shalt not kill.' The deliberate taking of life is murder; the defendant aimed and shot the intruder after the intruder knifed his wife and with bloody knife in hand approached the defendant trapped in a corner; therefore, the defendant is a murderer."

The lawyer must become familiar with exceptions (or "accidents") to the general rule. You must meticulously check the quotations in your opponent's brief, because it may set forth a general rule, but omit the central conditional clause: "Except for circumstances A, B and C, the general rule is …."

United States v. Ezeiruaku
936 F.2d 136, 142-143 (3d Cir. 1991)

In the case before us, the district court ignored the weight of authority of every court of appeals that has considered the subject. It engaged in a convoluted analytical exercise to justify its conclusion that the incoming border search exception is not applicable to an outgoing search: It cited authority that did not apply to border searches. It relied on orthodox Fourth Amendment search doctrine and proceeded as if a border search doctrine did not exist. In so doing, the court committed the logical fallacy of *dicto simpliciter* (fallacy of accident) which occurs when a general rule is applied to exceptional circumstances.

The district court concluded that the requirements of reasonable suspicion, probable cause or a warrant apply to searches of personal luggage notwithstanding the abundant language of the section 5317(b) and case law interpreting the Constitution that specifically deals with this issue. Of the various reasons the court used to support its conclusion, none treated the border search exception to the traditional Fourth Amendment doctrine.

Each of these cases recognizes that people generally have a subjective expectation of privacy in their luggage, but the differentiating feature in the cases relied on by the district court from the case at bar is that none of them concern border searches, which “have a unique status in constitutional law.” All of these cases are thus readily distinguishable.

THE CONVERSE FALLACY OF ACCIDENT
(Hasty Generalization)

The converse fallacy of accident is the reverse of *dicto simpliciter*. It occurs when we move carelessly or too quickly to a generalization. It occurs when we construct a general rule from an inadequate number of incidents. It is the bugaboo of inductive reasoning and often appears in the cases and in the classroom. Also called the fallacy of selected instances, it results from enumerating instances without obtaining a representative number to establish an inductive generalization. The fallacy appears when one or two decisions are used to make a quantum leap to a conclusion that these decisions form a rule with general application. The error lies in failing to obtain an adequate number of instances.

What it does is to anoint an isolated instance(s) with the chrism of generality, and create a general rule from an exceptional circumstance. The fallacy lies in labeling the exception, "the accident," as general rule itself; hence the name, "converse fallacy of accident."

A special form of this problem is known as the fallacy of statistical simplicity. The probability of a sampling error tends to diminish as the size of the sample increases. But size alone is no protection.

> The classic example was a massive effort by the *Literary Digest* to forecast the Presidential election of 1936. More than 10,000,000 ballots were sent out. Something like 2,367,523 came back, mostly marked for Alf Landon. The poll predicted 370 electoral votes for the Republican candidate, and 161 for Franklin Delano Roosevelt, the Democrat. In the real election, Roosevelt won 523 electoral votes, with Landon receiving eight. What went wrong? The *Digest,* it seems, sent ballots to addresses collected from the subscription lists of magazines, and also from telephone directories and automobile registration lists. But magazines, telephones and automobiles were not randomly distributed among the American population in 1936.[3]

The poll was such a disaster that it forced the *Literary Digest,* a distinguished popular magazine, to go out of business. The magazine's name was the butt of jokes for years. This experience should be kept in mind when making general predictions based solely on the use of statistics, as is the case in many types of litigation such as antitrust, securities and discrimination cases.

Professor Kevin W. Saunders places these fallacies in the proper perspective:

> 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.[4]

Shook v. Crabb
281 N.W. 2d 616 (Iowa 1979)

(Dissenting Opinion)

[A wife's estate brought a wrongful death claim against the estate of her husband. The trial court applied the doctrine of spousal immunity and granted summary judgment for the husband's estate. Spousal immunity prevents a spouse from testifying or bringing suit against the other. The underlying policy is to preserve the marriage. One appeal the majority reversed, relying on Professor Prosser's notion that because damage to the marriage already takes place because of the commission of the tort, the necessity for immunity no longer exists. The dissent disagreed. Its opinion discusses the relationship between the fallacies of accident and hasty generalization.]

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 tranquillity 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 a 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.[5]

O’Conner v. Commonwealth Edison Co.
807 F.Supp. 1376, 1390-1391 (C.D. Ill. 1992)

O’Conner intends that Dr. Scheribel would give to the jury at trial an opinion in the unique, sophisticated and highly specialized field of radiation induced cataracts, and yet Dr. Scheribel does not qualify as an expert in this field through personal experience, specific education or even study of relevant literature. In short, Dr. Scheribel’s opinion that radiation cataracts are pathognomonic is not based on any special skill, knowledge, research or experience. He admitted in deposition that he never studied or performed research in radiation physics, that he has never conducted any studies on the medical effects of radiation on the eye, that he did not know the threshold dose required to induce cataracts and that he did not even have a rudimentary knowledge of the dose response curves for the effects of radiation.

Based on the five patients he has observed with cataracts induced by radiation therapy, he developed his “binding universal rule” that he applied to O’Conner, thus committing the logical fallacy known as Converse Accident (hasty generalization). The logical fallacy of Accident is the improper application of a general rule to a particular case. The logical fallacy of Converse Accident (hasty generalization) is the reverse. It occurs when a person erroneously creates a general rule from observing too few cases. Dr. Scheribel has illogically created a “binding universal rule” based upon insufficient data.

For example, observing the value of opiates when administered by a physician to alleviate the pains of those who are seriously ill, one may be led to propose that narcotics be made available to everyone. Or considering the effect of alcohol only on those who indulge in it to excess, one may conclude that all liquor is harmful and urge that its sale and use should be forbidden by law. Such reasoning is erroneous and illustrates the fallacy of converse accident or hasty generalization. I. Copi, Introduction to Logic, at 68 (3d. ed.).

When pressed by this court for the bases of his opinion he abandoned any reliance on his personal experience and relied only on medical articles (which he admitted he had not read before giving his opinion).

United States v. Melancon
972 F.2d 566, 571-573 (5th Cir. 1992)

(Parker, J., concurring)

In Sierra v. United States, 951 F.2d 345 (5th Cir. 1991) this Circuit adopted the rule previously promulgated in other circuits—that guilty plea provisions calling upon the defendant to waive his or her right to appeal are valid as long as this waiver is "informed and voluntary." The following syllogism, as reiterated in today's opinion, underlies this rule: "The right to appeal is a statutory right, not a constitutional right. The Supreme Court has repeatedly recognized that a defendant may waive constitutional rights as part of a plea bargaining agreement. It follows that a defendant may also waive statutory rights, including the right to appeal."

As an initial matter, I do not think that a defendant can ever knowingly and intelligently waive, as part of a plea agreement, the right to appeal a sentence that has yet to be imposed at the time he or she enters into the plea agreement; such a "waiver" is inherently uninformed and unintelligent.

In categorically citing cases concerning the waiver of the right to appeal known quantities, to support the proposition that the waiver of the right to appeal unknown errors may be likewise "informed," today's opinion simply perpetuates a fallacy embraced in *Sierra*—a strain of the fallacy of Accident. *See generally* Irving M. Copi & Carl Cohen, Introduction to Logic 100-101 (8th ed. 1990) ("when we apply a generalization to individual cases that it does not properly govern, we commit the fallacy of Accident"). It is, then, a shaky foundation indeed that props up *Sierra,* and one unworthy of providing the underpinning for such a significant rule of this Circuit. *See id.* at 101 (regarding the fallacy of Accident: "there is no fallacy more insidious than that of treating a statement which in many connections is not misleading as if it were true always and without qualification") (quoting H.W.B. Joseph, An Introduction to Logic (New York: Oxford University Press, 1906)). Yet even if I were convinced that the sort of futuristic waiver at issue in this case could be knowing and intelligent, I could not support it. Any systemic benefits that might inhere in this type waiver cannot overcome its extremely deleterious effects upon judicial and congressional integrity and individual constitutional rights of accident and the converse fallacy.[6]

FALSE CAUSE

The fallacy of false cause is an argument that treats as the cause of a thing something that is not really its cause. It appears very often in the law and takes at least two forms.

In one form it is to mistake what is not the cause of a given effect as the real cause *(non causa pro causa).* The events could be so correlated because they were both caused by a third, unexamined event, although neither caused the other.

In the other, more prevalent form in the law, is the suggested inference that one event is the cause of another merely because the first occurs earlier than the other *(post hoc ergo propter hoc)* (after this, therefore in consequence of this). The *post hoc* fallacy consists of reasoning from sequence to consequence. It is reasoning from what happened in sequence to the assumption of a causal connection. We commit this fallacy whenever we argue that because a certain event was preceded by another event, the preceding event was the cause of the latter. This is the fallacy of inferring causation from temporal succession only:

1. B comes after A *(post hoc).*
   Therefore, *(ergo),*
2. B comes because of A *(propter hoc).*

That A precedes B does not necessarily make A the cause of B.

An example is provided by the story of a woman passenger on board the Italian liner *Andrea Doria.* On the fatal night of the *Andrea Doria's* collision with the Swedish ship *Stockholm* off Nantucket in 1956, she retired to her cabin and flicked a light switch. Suddenly there was a great crash, and the sound of grinding metal, and passengers and crew ran screaming through the passageways. The lady burst from her cabin and explained to the first person in sight that she must have set the ship's emergency brake.[7]

David Hume, the philosopher, wrote in 1748:

> [N]or is it reasonable to conclude, merely because one event, in one instance, precedes another, that therefore the one is the cause, the other the effect. Their conjunction may be arbitrary and casual.[8]

Brennan v. United Steelworkers of America
554 F.2d 586, 614 (3d Cir. 1977)

The particulars from which the majority's universals are drawn seem centered around two factual complexes: (1) tellers of Local 1066 had been guilty of vote fraud, and (2) Sadowski's opponent, Samuel Evett, was supported by the international union's "official family." I find the sweeping conclusions drawn from these instances to be striking examples of the … fallacy of *post hoc propter hoc ergo* …. To conclude that because international officers supported Sadlowski's opponent in a fraudulent election, the international was therefore responsible for the fraud, is the classic *post hoc* fallacy. The mere chronological sequence of events does not establish a causal connection.

Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.
637 F.2d 105, 116-17 (3d Cir. 1980)

Logicians describe one process of reaching an ultimate fact from insufficient basic facts as the false cause or *post hoc* fallacy. The fallacy consists of reasoning from sequence to consequence, that is, assuming a causal connection between two events merely because one follows the other. For this reason the fallacy is often referred to as that of *post hoc ergo propter hoc* (after this and therefore in consequence of this), an expression which itself explains the nature of the error.

Here, the district court properly concluded that the basic facts adduced at trial were insufficient to allow the jury to find for appellants. The basic record facts were that some of Sweeney's competitors complained that Sweeney's stations undersold them by one to three cents per gallon, that Rodden did not know but "guessed" Texaco acted to terminate Sweeney because of these complaints, that Murray surmised Texaco was evaluating Sweeney's ability to get long hauling allowances for short deliveries and that certain consequences of Sweeney's marketing strategy not directly related to Sweeney's competitive position figured into Doherty's decision to terminate Sweeney. Faced with this scanty record, the district court properly removed the issue of concerted action from the jury. It determined that insufficient narrative or historical evidence had been submitted to permit the conclusion that Texaco's decision was a reaction to the specific complaints received. Moreover, the record was devoid of proof of concerted action among Sweeney's competitors and Texaco. The court concluded that the jury could not infer this ultimate fact from the basic facts in evidence without engaging in pure *post hoc* guesswork. We will not fault the court for these determinations.

Sunward Corp. v. Dunn & Bradstreet, Inc.
811 F.2d 511, 521-22 (10th Cir. 1987)

In this case, we are not confronted with difficult line-drawing determinations. Inferences that the reports were understood as defamatory and that they caused or contributed to Sunward's financial difficulties are here supported only by speculation and conjecture. The record is devoid of evidence that anyone ever understood the credit reports in the defamatory manner inferred by the plaintiff. The only evidence offered was a chronological rendition of events which, among other things, indicated that the first inaccurate Dunn & Bradstreet report preceded Sunward's financial downturn, rumors of difficulty and associated problems. Sunward's argument based on this evidence consists of "reasoning from sequence to consequence, that is, assuming a causal connection between two events merely because one follows the other." The inferences required to establish proof of defamation in this case do not follow from the evidence and must be rejected.

This form of reasoning represents a logical fallacy known as the *post hoc ergo propter hoc* (after this and therefore because of this) fallacy. Other courts have held that a conclusion based upon such reasoning is not a reasonable inference but is mere speculation and conjecture. *See, e.g.* Loesch v. United States, 645 F.2d 905, 914-15, 227 Ct., Cl. 34 (rejecting an inference of a taking based upon evidence that erosion of plaintiffs' riverbanks was not a problem until after the government constructed certain dams and locks on the river) …; Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 115-17 (3d Cir. 1980) (evidence that competitors' complaints to supplier preceded supplier's termination of agreement with plaintiff was insufficient evidence to permit a reasonable inference that defendant terminated plaintiff's distributor agreement because of competitor's complaints); Dodge Motor Trucks, Inc. v. First National Bank, 519 F.2d 578, 584 (8th Cir. 1975) (evidence that a seller, in selling a car to a buyer who later went bankrupt, had relied on a letter (allegedly a guaranty of credit) written by the defendant bank was insufficient to hold the bank liable; "merely because the letter preceded the injury and the injury followed hard on the heels of the letter does not establish the relation of cause and effect" (quoting Ligget v. Levy, 233 Mo. 590, 136 S.W. 299, 303 (1911)).

Gainey v. Folkman
114 F. Supp. 231, 237 (D. Ariz. 1953)

So the concrete question around which the determination of this case turns is, as stated in substance by me during the trial: Did the "dusting" actually damage the plaintiff?

This, in turn, depends upon the answer to another question: Did enough chemicals from the dusting or spraying in 1952 drift over to the plaintiff's field so that, when ingested or absorbed by the cattle directly and impregnated in the alfalfa pastured by or fed to the cattle, they caused their unthriftiness?

As already stated, no deleterious consequences to human beings or warm-blooded animals were discerned following the 1951 dustings. The testimony of many of the plaintiff's own lay witnesses, including the ranch manager's wife, may be dismissed as being an expression of that fallacy which is referred to in logic as *post hoc ergo propter hoc*. Translated into English, it means the fallacy of assuming that, because an event follows another, it is necessarily caused by it. The only testimony in this respect which showed any direct effect is that of witnesses who testified that when near the dusting, the drift of some of the chemicals made their eyes smart. But every person giving such testimony readily admitted that the discomfort was temporary and disappeared quickly.

Del Pilar v. Eastern Airlines, Inc.
172 F. Supp. 158, 160 (S.D.N.Y. 1959)

The Court is unable to find any causal connection between the condition of the seat and the condition of which plaintiff complains. Plaintiff has failed to meet his burden of establishing this causal connection by a fair preponderance of the evidence. He has relied upon the old logical fallacy of *post hoc ergo propter hoc*, i.e., that because he felt pain after he had sat in the seat, therefore the condition of the seat was the cause of his pain, without offering competent proof to establish this causal connection.

The cases recognizing the *post hoc* fallacy are legion.[9]

NON SEQUITUR
(It Does Not Follow)

We can consider the *non sequitur* (it does not follow) as a separate fallacy. It is an argument that contains a conclusion that does not necessarily follow from the premises or any antecedent statement offered in its support. It is sometimes called the fallacy of the consequent because it always exhibits a lack of a logical connection between the premises and their conclusion.

The difference between the *post hoc* and the *non sequitur* fallacies is that the *post hoc* fallacy lacks a causal connection; the *non sequitur* fallacy lacks a logical connection.

Copi and Cohen place under the *non sequitur* umbrella all those fallacies which in their classification come within the umbrella of fallacies of relevance (except begging the question): *ad ignoratiam, ad verecundiam,* compound question, *ad hominem,* accident, converse accident, false cause, *ad populum, ad misericordiam, ad bacculum* and *ad ignoratio elenchi.*[10] Most other logicians, as we do here, regard it as a fallacy *sui generis* because in this form of argument the statements (premises) may all be relevant, but their relationship is logically disconnected with the conclusion.

In a speech in Chicago in 1854, Abraham Lincoln said:

> It was a great trick among some public speakers to hurl a naked absurdity at his audience, with such confidence that they should be puzzled to know if the speaker didn't see some point of great magnitude in it which entirely escaped their observation. A neatly varnished sophism would be readily penetrated, but a great, rough, *non sequitur* was sometimes twice as dangerous as well polished fallacy.[11]

Goldwater v. Carter
617 F.2d 697, 736-37 (D.C. Cir. 1979)

(Wright & Tamm, J.J., concurring)

The linchpin in the President's argument, and it is completely fallacious, is that he must be recognized as having the power, acting alone, to terminate the treaty because the position of the Mainland Chinese Government was that "termination of the Defense Treaty with Taiwan was a prerequisite to [normalization]" of relations between that government and the United States. But it is a logical *non sequitur* to conclude from the premise that because the People's Republic requires termination of the Taiwan Treaty that therefore the President must be recognized under our Constitution as having the absolute power alone to terminate that treaty. Such a conclusion is completely unjustified by the premise.

United States v. Williams
561 F.2d 859, 869 (D.C. Cir. 1977)

(Mackinnon, J., statement)

The great lengths to which the majority opinion goes in its attempt to dredge up evidence to strengthen the completely impeached testimony of the alibi witnesses is reflected in the following statement: Their recollection [that of the alibi witnesses] was corroborated by the introduction into evidence of Nathaniel's birth certificate.

The reasoning of the majority opinion in this respect proceeds as follows:

1. Witnesses who testified that Williams was with them on November 19, 1974, recalled that the occasion was a birthday party for Nathaniel.
2. Nathaniel's birthday, as proved by his birth certificate, was November 19th.
3. Therefore, the birth certificate supports the witnesses' recollection that they were at a party with Williams on November 19th.

The logical fallacy in this syllogistic presentation is that of *non sequitur* because the conclusion does not really follow from the premises by which it is supposed to be supported. The introduction of the birth certificate only proves that Nathaniel had a birthday on the same day as the bank robbery. It might, at the most, furnish a reason as to why the witness might remember the day, but that does not corroborate that they correctly recall that Williams was present—the critical point—or even that they were present at a party. The logic behind the statement of the majority opinion in this respect is the same as that of the robber who testified he could not have been at the bank when it was robbed because at that time he remembered he was four miles away riding a white horse, and here is the white horse to prove it. Defense lawyers occasionally make this illogical argument to juries but this is the first instance to my knowledge of its acceptance by an appellate court.

Seegers Grain v. United States Steel
577 N.E.2d 1364, 1369-70 (Ill. App. 1 Dist. 1991)

U.S. Steel's argument that the occurrence was not a sudden and calamitous event is premised on the fact that prior to the occurrence there had been cracks in the foundation and problems with both access doors. The foundation cracks, however, had been repaired long before the occurrence and there was no evidence that the foundation was a cause of the occurrence. Moreover, the record clearly shows that the foundation was not a cause of the occurrence. With respect to the access doors, a crack was found on the top of the northern corner of the small access door in April 1977. It was immediately repaired. Also, a bulge developed on each side of the large access door. This was immediately repaired in September 1977. U.S. Steel concludes that because of these prior problems and repairs, the occurrence on January 10, 1978, was not sudden and calamitous. The conclusion is a *non sequitur.*

The fact that there had been repairs to the foundation and access doors, at least three months prior to the time of the occurrence, does not mean that the occurrence was not a sudden and calamitous event. Indeed, the occurrence was described as being "like a rifle shot" and "a shock wave," and there was, at least, some damage to other tanks and a truck that was nearby. There is also testimony that A283 C steel "fails suddenly." Moreover, there is absolutely no evidence that the occurrence was anything but a sudden and violent implosion or bursting of the tank. Plainly, the corn which was strewn on the snow did not leak out of the tank over a period of time. U.S. Steel's argument that the occurrence was not a sudden and calamitous event is devoid of merit.

Rhein v. City of Frontenac
809 S.W.2d 107 (Mo. App. 1991)

In 1987 plaintiffs applied for rezoning from R-2 to C-1. After a hearing the Planning and Zoning Commission of the city recommended approval of the rezoning to the board of Aldermen. Following a public hearing, which included protests from some residents of the subdivision located north of Cable Avenue, the board voted 5-1 to deny the rezoning. This suit followed. After trial the court found the "current R-2 residential zoning of the property is unreasonable, arbitrary, capricious and confiscatory" and ordered the city to rezone Block 18 to "an appropriate category."

On appeal, the city raises two contentions of error. The second is that the city strictly complied with the procedural requirements of the state enabling statute—Chapter 89 R.S. Mo. 1986—and therefore the refusal to rezone cannot be unreasonable. That is a *non sequitur*. Such a conclusion would render court review of zoning decisions illusory and nonexistent. A court would be restricted to examination only if the procedure followed and would be unable to set aside zoning determinations no matter how arbitrary, capricious, unreasonable or confiscatory if the statutory procedures were followed. The point is patently frivolous.

Papadakis v. Zelis
282 Cal. Rptr. 18 (Cal. App. 1991)

Zelis complained that entry of judgment in this action was improper because there are other lawsuits still pending between the parties; this contention is a *non sequitur* since the existence of other pending actions does not affect the finality of this one, or alter the fact that Zelis stipulated to entry of judgment in this action. We cannot countenance such a shameless effort to unjustifiably prolong litigation.

COMPOUND (COMPLEX) QUESTIONS

The fallacy of the compound (or complex or multiple) question occurs when an argument is phrased as a single question rather than the two or more separate questions actually in the interrogatory. Several questions are combined in such a manner as to place the person who responds in a self-incriminating position. When the question is complex and all aspects are to be denied, they should be denied individually. To require a single answer to the final part of the complex question (Now, answer yes or no!) often may lead to the unwarranted assumption of the truth of another matter or conclusion hidden in the question.

This fallacy arises when (1) two or more questions are asked at once, and a single answer is required; (2) a question is phrased as to beg another question; (3) the question makes a false presumption or (4) the assertion frames a complex question but demands a simple answer.[12] Unfortunately, it is used in cross-examination by real lawyers as well as by their Hollywood and TV counterparts. The classic example is the question, "Have you stopped beating your wife?" and a yes or no answer is demanded.

Trial judges will often take corrective action when a compound question is asked. Sometimes, they require the question to be rephrased or, if a yes or no answer is demanded, the witness is instructed: "You may answer the question and then take your time and explain what you mean." Professor Ralph M. Eaton quotes Aristotle's definition: "Those fallacies that depend upon the making of two questions into one."[13] Eaton also refers to Joseph who offers as a common example the long-standing limitations on the President's veto: "It is therefore not uncommon for the legislature to tack on a bill which the President feels bound to let pass a clause containing a measure to which it is known that he objects; so that if he assents, he allows what he disapproves of, and if he dissents, he disallows what he approves."[14] Congress enacted line item veto legislation in limited instances, but its constitutionality was challenged in 1997.

Missouri v. Debold
735 S.W.2d 23 (Mo. App. 1987)

Heyer's testimony on cross-examination is not contradictory. Heyer testified on cross-examination that he counted out the money on the car seat for defendant. He testified further that defendant picked the money up and put it in his pocket. However, Heyer was not asked and did not testify as to the timing of defendant taking the money and placing it in his pocket. Heyer was asked, "At that point, [defendant] didn't have a gun to your head and say, 'give me your money,' did he?" 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. See 81 Am. Jr.2d Witnesses § 428 at 437 (1976). They are clearly misleading and confusing both to the witness being asked the question and to the jury listening to the answer. Here, Heyer answered the question, "No, [defendant] didn't." No, defendant didn't do what at that point. No, he did not point the gun at Heyer's head; or, no, he did not demand that Heyer give him the money.

Austria v. Bike Athletic
810 P.2d 1312 (Or. App. 1991)

[A jury interrogatory may contain compound questions. The following question was held permissible by reason of separate instructions to the jury, but it contains two questions: (1) Was the football helmet unreasonably dangerous? (2) Did it cause the injury?]

Defendants' final assignment of error relates to the form of verdict submitted to the jury. The form asked:

"Was Defendant's Bike and Kendall's helmet worn by Richard Austria unreasonably dangerous in one or more of the particulars alleged by plaintiffs which cause Richard Austria's injury?"

Defendants argue that it was improper, confusing and prejudicial to use a verdict form that asks a compound question. They assert that the trial court was required to use a form that separately presented the issue of causation. However, as defendants concede, the court specified in its instructions to the jury that causation was one of the elements of the product liability claim. The verdict form was not inconsistent with the instructions, which we presume that the jury followed.

PETITIO PRINCIPII
(Begging the Question)

This fallacy is really a first-class rascal because it sneaks up on us so often. It is a species of question-begging that assumes as true what is to be proved. It is to assume the truth of what one seeks to prove in the effort to prove it.[15]

The rascal bears many names, *petitio principii*, arguing in a circle, circular reasoning, putting the bunny in the hat, failing to prove the original proposition asserted and using the original premise as proof of itself. In order to prove that A is true, B is used as proof, but since B requires support, C is used in defense of B, but C also needs proof and is substantiated by A, the proposition which was to be proved in the first place. Thus, what was to be proved in the first place is affirmed ultimately in defense of itself.

In law we see this fallacy often. A conclusion, or some proposition that follows from the conclusion alone, appears tacitly or explicitly among the supporting premises. It is essentially a fallacy of proof, rather than logical form.

In entertainment, this was used as the basic ingredient in the long-running George Burns and Gracie Allen radio show:

Gracie: Gentlemen prefer blondes.

George: How do you know that?

Gracie: A gentleman told me so.

George: How did you know he was a gentleman?

Gracie: Because he preferred blondes.

The question is begged in the simplest form when we proceed in a single step, by the use of synonyms to the conclusion already stated in the premises. We may put the fact that we want to prove, or its equivalent, under another name. It occurs when we define a sleeping pill “as a medicine that has a soporific effect.” Or Yogi Berra’s famous quips: “It isn’t over until its over,” or, “You know you can see a lot by merely looking.” Where the inference takes several steps, the fallacy is called circular reasoning, or arguing in a circle.

Learned Hand on Begging the Question
Thomas Walter Swan, 57 Yale L. J. 107, 170

[Judge Swan quoted Learned Hand as reminding us:]

Not to be misled into assuming the conclusion in the minor premise—not to beg the question. I can think of no single fault that has done more to confuse the law and to disseminate litigation. One would suppose that so transparent a logical vice would be easily detected; but the offenders pass in troops before our eyes, bearing great names and distinguished titles. The truth is that we are all sinners; nobody's record is clean and indeed it is only fair to say that much of the very texture of the law invites us to sin, for it so often holds out to us, as though they were objective standards, terms like "reasonable care," "due notice," "reasonable restraint," which are no more than signals that the dispute is to be decided with moderation and without disregard of any of the interests at stake. So inveterate is the disposition to eschew all deduction in such cases, that some ironist might argue that, given the average judicial capacity for self-scrutiny, it is safer not to expose the springs of decision, because the chances of a right result are greater than that its support will endure disclosure. Perhaps so: maybe, for the ingenuous and the artless to beg the question is nature's self-protective artifice.

Gitlow v. New York
268 U.S. 652, 666 (1925)

[Almost all of the Bill of Rights have been made applicable to the states by operation of the Fourteenth Amendment. Unlike the other original amendments which have no modifying clauses, the First Amendment as drafted was strictly limited to actions of the Congress: "*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." With such language restricting the prohibition to action by the Congress, how could an interpretation of the Fourteenth Amendment's language and its legislative history support a rational justification that the prohibition extended also to the states? The Court solved the difficult problem in this 1925 case. Later cases relied on it as "*holding* that the First Amendment was made applicable to the states by operation of the Fourteenth Amendment."]

For present purposes we may and do assume that freedom ofspeech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543, that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question.

Note on Gitlow v. New York

This was classic *petitio principii.* The Court openly assumed that the First Amendment was safeguarded by the due process clause of the Fourteenth Amendment. There was no rational discourse. No syllogism with major premise or minor premise. Merely a conclusion that was candidly *assumed.* Yet when the Court had another First Amendment issue before it in 1937, the Court cited *Gitlow* as authority for the incorporation into the Fourteenth Amendment in De Jonge v. Oregon, 299 U.S. 353, 364 and again the same year in Lovell v. Griffin, 303 U.S. 444, 450. Thereafter, the *petitio principii* of *Gitlow* became "settled law."

Erwin N. Griswold, longtime dean of the Harvard Law School, and this century's longest serving Solicitor General of the United States, has commented: "Let's start with the application of the First Amendment to the States. This cannot be done by looking at the First Amendment itself, for by its terms, it says that 'Congress shall make no law ….' It says nothing about the states at all…. There is no doubt that the concept of 'due process' requires interpretation and construction, but I fear that I am so unreconstructed, that I shall never understand how the First Amendment 'is made obligatory in the States by the Fourteenth.' I have the feeling that this will go down as one of the greatest *ipse dixits* in Supreme Court history." Griswold, The Judicial Process, 47 Fed. Bar J. 309, 315 (1972). In the principal case the Court described as an "incidental statement" in *Prudential Ins. Co.* the following: "[A]s we have stated, neither the Fourteenth Amendment nor any provision of the Constitution of the United States imposes upon the States any restriction 'freedom of speech' or 'the liberty of silence'; nor, we may add, does it confer any right of privacy upon either persons or about corporations." The *Prudential Ins. Co.* statement suffers the same structural defect as *Gitlow's:* a conclusion devoid of rational support. In one case, however, the sentence became "an incidental statement," in the other, "settled law."

United States v. Jannotti
673 F.2d 578, 626 (3d Cir. 1981)

(Aldisert, J., dissenting)

The essential flaw in the majority's opinion is its failure to appreciate the jurisdictional nature of the commerce element in a Hobbs Act case. The majority interweaves its jurisdictional argument with the argument that factual impossibility of completing a substantive offense does not bar a conviction of conspiracy. They confuse *proof* of the crime of conspiracy with the jurisdictional *power* to punish the crime. The presence of subject matter jurisdiction is a discrete and primary issue in each case presented to a federal court, unlike a state court. The effect on commerce is both jurisdictional and substantive in a Hobbs Act prosecution, but the two inquiries are separate and distinct. The majority have accepted the government's strawman argument that impossibility is no defense to crime of conspiracy. Even if I could, in the exercise of judicial patience, tolerate a litigant's aggrandizement of irrelevancies, I must object to the majority's agreement to join the government in demolishing the strawman.

I can imagine "the persons of the dialogue," in the form of 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.

In terms of formal logic, how does one analyze this synthesis of the government's argument, which, nodding like Homer, the majority have accepted? To borrow from Lord Devlin, "I confess that I approach the investigation of this legal proposition with a prejudice in favor of the idea that there may be a flaw in the argument somewhere."

Two such flaws quickly leap to the surface. Obviously, it is a *non sequitur*. More unfortunately, the 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. The fundamental issue of this court's jurisdiction deserves a more serious, rational analysis.

Ungar v. Dunkin' Donuts of America, Inc.
531 F.2d 1211, 1225 (3d Cir. 1976)

As an alternative to proving a policy to persuade, the district court would allow illegal use of economic power to be inferred from proof of "acceptance by large numbers of buyers of a burdensome or uneconomic tie." This test, in our view, has the same pragmatic drawback as the policy to persuade test. Assuming that what is "economic" from a franchiser's point of view is "uneconomic" from a franchisee's, this test would render *prima facie* illegal virtually every franchise system involving "large numbers" of franchisees.

But there is another, equally serious, problem with the district court's alternative theory. Whether we call it *"petitio principii"* or "arguing in a circle" or "begging the question", the brute fact is that this test is based on circular reasoning. Obviously, if 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. Establishing that buyers purchase products A and B from the seller does not establish that the seller ties the sale of product A to the purchase of product B. It merely establishes that buyers purchase products A and B from the seller.

Amadio v. Levin
501 A.2d 1085, 1092 (Pa. 1985)

(Zappala, J., dissenting)

The second major objection to permitting wrongful death and survival actions on behalf of a stillborn child is the "derivative" nature of such actions. According to this reasoning, neither Act "was intended to provide a recovery in cases where the person on whose behalf the suits were brought was never alive," and "[f]or purposes of monetary recovery, a stillborn child was never alive." This reasoning succumbs to the fallacy of *petitio principii,* commonly identified as circular reasoning or begging the question. Thus, a fetus is not considered to have certain legal rights because it has not been born. No reason in logic is given why these rights *could* not be ascribed to a child before birth, only that they *are* not. When the question presented is whether or not legal rights should be ascribed, that question cannot be answered simply by stating that the law does not do so.[16]

TU QUOQUE
(You Yourself Do It)

The Sahakians list as an informal fallacy circumstances under which an individual who is being criticized will defend his actions by accusing his or her critic of doing the same thing himself. They call it *tu quoque* from the Latin "you're another" or you yourself do it.[17] But what is sauce for the goose in the law may not always be sauce for the gander. "Son, I want you never to smoke a cigarette." "But, Dad, you smoke."

Yet, in the law, this *tu quoque* argument can sometimes be used as an effective defense. *Tu quoque* is a valid defense in matters of provocation. If lawyer A moves the court for sanctions against lawyer B for delay in responding to interrogatories, it is a good defense for B to show that A is constantly derelict in responding to B's request for answers to other sets of interrogatories. Moreover, under the common law, if the plaintiff in a negligence action was negligent at all, the defendant, if negligent, could in effect say "tu *quoque"* and thus have a complete defense. Most states now have a comparative negligence law where, if the plaintiff's negligence is below 50 percent, a recovery can be granted and the award adjusted accordingly.

The equitable defense of *in pari delicto* which literally means "in equal fault," is rooted in the common-law notion that a plaintiff's recovery may be barred by his own wrongful conduct. Traditionally, the defense was limited to situations where the plaintiff bore "at least substantially equal responsibility for his injury," and where the parties' culpability arose out of the same illegal act.

The fallacy occurs, however, when the argument moves from *in rem* to an argument alleging badness or improper conduct on the party who has alleged wrongdoing on your part. When such an argument is used to discredit your opponent, it is a kind of *ad hominem* argument that defends against one's alleged derelictions by not meeting the argument head on and attempting to refute it by attacking your opponent; not by attacking his or her character, as is the case in ordinary *ad hominem,* but by assaulting his or her conduct.

La Porta v. Leonard
97 A. 251, 252-53 88 N.J.L. 663 (1916)

The plaintiff Attorney La Porta alleges that during a proceeding in the recorder's court of the city of Hoboken the defendant Leonard, a lawyer of many years standing, remonstrated with him, a collaborator at the bar, in the following manner:

"You are a vermin. You are a disgrace to the bar, and are starting out in the wrong way as a young lawyer. This will give you a black eye. You and your client committed perjury. Your suborned your client."

This language resulted in a suit at law for slander, in which the plaintiff alleged serious injury to his reputation and standing in the community, and demanded substantial damages by way of reparation. To this demand defendant replied that he did not utter the language, and that, if he did, he was protected in so doing by the legal privilege peculiar to counsel, which, as he conceived, hedges him about in absolute security, so long as his utterances are honestly conceived, to conduce to the advantage of his client.

The testimony of Leonard shows that La Porta at the same hearing expressed himself of and concerning the defendant and his legal *modus operandi* as follows: "Mr. Leonard and Mr. S., being shrewd lawyers, so manipulated and coaxed their client that he committed perjury and obtained his judgment by fraud."

Therefore, the defendant upon this trial insisted that, while the remarks which are the basis of this action may not be entitled to receive recognition in any logical compendium of the retort courteous, they may without question be properly classified under the classic appellation of a *tu quoque.* And, if to this to be answered that in a court of law his legal status thus acquired is no answer to the plaintiff's claim for damages, his insistence is nevertheless that the jury should have had the opportunity to consider the offense in question, in conjunction with the serious accusation which provoked it, and that in the light of this provocation the offense charged to him might appear to be but the natural and indignant ebullition of a learned advocate, whose ripe experience in the trials of the forum had reached the didactic stage of the seer and yellow leaf, which entitled him to paternally admonish a neophytic junior, whose practical vision of a legal career is usually circumscribed by the buoyant and unstable perspective of the radiant hues of incipient morn. Concededly in such a status *experentia docet.* Such an exalted state of mind upon the part of the defendant might be said to exclude any semblance of malice, as an animating motive, and may have supplied *raison d'etre* upon which a jury might base an argument in mitigation of damages. The trial court declined to so view the case, and, ignoring that contention, charged that the damages to which the plaintiff might be entitled, if they accepted his view of the case, were sufficiently comprehensive to include damages of a punitive or exemplary character, dependent upon their finding the existence of actual malice. In consonance with that view the learned trial court declined to charge the request alluded to, which was as follows: "If you believe the story of the plaintiff, La Porta, and you find from the testimony that the utterances of the defendant, Leonard, then you may consider this in mitigation for damages."

The refusal to charge this request obviously eliminated from the case all consideration by

the jury of the question of provocation to which we have adverted, and which was properly a subject for their consideration, as a basis for mitigation of damages. The doctrine which requires the court to submit to the jury the question of provocation, in cases where the complaining party insists upon punitive or exemplary damages, is settled beyond controversy by the great trend of adjudication in this country.

Revere Camera Company v. Masters Mail Order Co.
127 F.Supp. 129 (Mo. D. 1954)

With respect to the convenience of the parties the defendant says that its only place of business is in Washington, D.C., where it maintains a store for the sale of goods in the business district of Washington, and that it has several clerks or salesmen resident there who, it is anticipated, will be witnesses at the trial of the case. I am not impressed with this point for two reasons. One is that the plaintiff is not complaining with respect to sales actually made by the defendant at its store in Washington, and the other is that even if these witnesses should be thought necessary by the defendant for the trial, the distance from Washington to Baltimore (only forty miles) and the facilities for transportation by rail and motor car are so easy that little inconvenience would be entailed by their attendance in Baltimore. The papers in the file indicate that other possible and indeed probable witnesses for the trial are those resident in Illinois and New York for whom the trial in Baltimore would seemingly be as convenient as one in Washington.

Along the same line the defendant suggests that the plaintiff's policy in bringing this suit in Maryland was in the nature of "shopping for jurisdiction" because Maryland has a fair trade law while the District of Columbia has none. As to this plaintiff's counsel seems 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*. However, both considerations seem to me to be quite beside the point because the real point in the case is one of broad national or federal constitutional and statutory law and the particular district in which the case is originally tried would seem to be of little moment.[18]

LINGUISTIC FALLACIES

Categorical syllogism Rule One not only insists that the argument contain exactly three terms, but that each term be used in the same sense throughout the argument. When different senses are utilized, linguistic fallacies occur. Some of these are fallacies of ambiguity (equivocation and amphibology). Others are known as fallacies of composition, division and vicious abstraction.

EQUIVOCATION

When we confuse the several meanings of a word or phrase, we use the word or phrase equivocally. When we do this in the context of an argument, we commit the fallacy of equivocation. This fallacy refers to the use of terms which are ill-defined, vague and signify a variety of ideas, none of which can be made clear or precise either by definition or by the context. When we confuse the different meanings a single word or phrase may have, or use a word or phrase in different senses in the same context, we are using it equivocally. The fallacy is committed whenever we allow the meaning of a term to shift between the premises of our argument and our conclusion. The fallacy is especially to be condemned when we give the impression that a term is being used to express only one and the same meaning throughout the argument. Sometimes, this is willful quibbling:

> All criminal actions ought to be punished.
>
> Prosecutions for theft are criminal actions.
>
> Therefore, prosecutions for theft ought to be punished.

Any of the three terms of the syllogism may be subject to a shift in meaning, but it is usually the middle term which is used in one sense in one premise and in another sense in the other. Sometimes, this is called the fallacy of the ambiguous middle. Avoidance of this fallacy is critical. It is important to keep in mind Rule One of the categorical syllogism:

> A valid categorical syllogism must contain exactly three terms, each of which is used *in the same sense* throughout the argument.

Another kind of ambiguity consists in the use of an old term in a new way. Compare for example, the use of the word "liberty," in reference to an employer's right to make a contract with his employee without state regulation, as contained in the now discredited Lochner v. New York,[19] with the "liberty" of a woman to exercise a right of privacy contained in the now highly-accepted notion of substantive due process in Roe v. Wade.[20] This was a classic example of using the same term, "liberty," with respect to the due process clause, in an acceptable new way, years after the concept had received almost unusual opprobrium because of its use in *Lochner*.

Sir Lewis Namier provides an amusing example of a Victorian lady who complained that she did not like a house because it was "very romantic." Her correspondent responded, "I don't understand why you should wish it not to be very romantic." The Victorian lady replied, "When I said romantic I meant damp."[21]

And please avoid a special sub-species of the fallacy of equivocation in what the logicians call *litotes*, double or multiple negatives. Consider Harold Laski's simply delicious statement (reminiscent of some briefs presented to appellate judges):

> I am not, indeed, sure whether it is not true to say that the Milton who once seemed not unlike a seventeenth-century Shelley had not become, out of an experience ever more bitter each year, more alien to the founder of that in Jesuit sect which nothing could induce him to tolerate.[22]

United States v. Brawner
471 F.2d 969, 988 (D.C. Cir. 1972)

There may be a tug of appeal in the suggestion that law is a means to justice and the jury is an appropriate tribunal to ascertain justice. This is a simplistic syllogism that harbors the logical fallacy of equivocation, and fails to take account of the different facets and dimensions of the concept of justice. We must not be beguiled by a play on words. The thrust of a rule that in essence invites the jury to ponder the evidence on impairment of defendant's capacity and appreciation, and then do what to them seems just, is to focus on what seems "just" as to the particular individual.

United States v. Gil
604 F.2d 546, 548-549 (7th Cir. 1979)

The defendant next argues that since one member of the alleged joint venture has established that his conduct was not criminal, applying the substantive law of conspiracy to the effect that it is impossible to have a conspiracy involving only one person, as a matter of law there is no conspiracy to supply the necessary predicate to admission of Villegas's statements pursuant to Rule 801(d)(2)(E). Therefore, he contends, the statements were improperly admitted, and he has been convicted in substantial part because of the out-of-court hearsay statements of a declarant who was not under oath and has not been subjected to cross-examination.

The logical structure of this argument fails, however, because of at least one internal fallacy. It equates "conspiracy" as a concept of substantive criminal law, governing who may be punished for which acts, with "conspiracy" as part of an evidentiary principle, and burdens the latter with all of the theoretical limitations and formal requirements of the former. The two are not the same, though it is likely that any provable criminal conspiracy will satisfy the requirements of the evidentiary rule. Nor have the cases in which the issue has been presented treated them as the same.

FALLACY OF AMPHIBOLOGY

In equivocation, ambiguity comes from changing meanings of the word; in amphibology, ambiguity comes from the grammatical structure. The double meaning lies not in the word but in the syntax or grammatical construction of a sentence or sentences. Professor Brennan furnishes an excellent example:

> I give and bequeath the sum of $5,000 to my cousins Ruth Henning and Sylvia Woodbury.[23]

You know that counsel for the beneficiaries are going to claim that each is entitled to $5,000; the estate lawyer will argue that the total sum is not $10,000 but $5,000.

A statement is amphibolous when its meaning is unclear because of the loose or awkward way in which its words are combined. An amphibolous statement may be true on one interpretation and false on another. When it is stated as a premise with the interpretation which makes it true, and a conclusion is drawn from it on the interpretation which makes it false, then the fallacy of amphibology has been committed.[24]

Amphibology differs from equivocation in two important respects. Although amphibology pertains to the entire argument, equivocation is limited to single words or phrases; the entire argument is susceptible to a two-fold interpretation due to its structure, not to any misuse on the part of the debater. Amphibologies arise in an argument where meaning is muddled by slovenly syntax—bad grammar, poor punctuation, dangling participles, misplaced modifiers. At trial of a drunken driver the arresting officer's testimony was summarized. "When the officer arrested the driver, the officer said he did not know what he was doing." This is an example of amphibology deriving from a relative pronoun with more than one referent. Logicians uniformly cite the classic example: "He said, 'Saddle me the ass.' And they saddled him."[25]

Amphibologies are often attributable to the use of misplaced modifiers: Anthropology is defined as "the science of man embracing woman." Or they are the result of an elliptical construction: In World War II, we had posters urging all to "Save Soap and Waste Paper."[26]

Thus, amphibologies come in all shapes and forms:

- "Richly carved Chippendale furniture was produced by colonial craftsmen with curved legs and claw feet."
- "The measures of the New Deal were understandably popular, for many men received jobs, and women also."
- "The ship was christened by Mrs. Coolidge. The lines of her bottom were admired by an enthusiastic crowd."[27]

Some interesting ones might appear as newspaper headlines:

POLICE CAN'T STOP GAMBLING.

CARIBBEAN ISLANDS DRIFT TO THE LEFT.

SUSPECT HELD IN KILLING OF REPORTER FOR VARIETY.

GREEKS FINE HOOKERS.

Young v. Community Nutrition Institute
476 U.S. 874 (1986)

[The main issue was the meaning of the following phrase from 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."* The Federal Drug Administration interpreted the italicized clause as modifying the word "shall"; the Community Nutrition Institute argued that it modified the phrase "limiting the quantity therein or thereon." Under that interpretation the Secretary was required to promulgate special regulations. The court admitted that wording was ambiguous, but opted for the administrative agency's interpretation.]

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 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.

FALLACY OF COMPOSITION

"The fallacy of composition consists of reasoning improperly from a property of a member of a group to a property of the group itself."[28] It is to argue that something is true of a whole which can safely be said of its parts taken separately.[29] According to Copi and Cohen, the fallacy is applied to both of two closely related types of invalid argument: "reasoning fallaciously from the attributes of the parts of the whole to the attributes of the whole itself" and "reasoning from attributes of the individual elements or members of a collection to attributes of the collection or totally of those elements."[30]

In the law the confusion is usually an inference that proceeds from the specific to the general and argues from attributes of parts of the whole to attributes of the whole itself. "The defendant in this case is a very wealthy man because he owns a Jaguar." "There are muggings all over Philadelphia. I read about three that happened on Market Street." In our personal lives we experience this often. For example, you visit Chicago for an overnight stopover. The taxi driver is surly; the room clerk is a snob; the waitress at breakfast is impatient. You leave Chicago, return home, and say, "That Chicago is a terrible town. All the people are horrid!"

Stereotypical images also are improperly formed by this fallacy. "Members of the Mafia break the law; therefore, all Americans of Italian origin are law breakers."

Every fallacy of composition takes one of the two following forms:

Part to whole:

1. Every part of object W has characteristic C.
   Therefore,
2. W has C.

Member to collection:

1. Every member of collection O has characteristic C.
   Therefore,
2. O has C.[31]

Brennan v. United Steelworkers of America
554 F.2d 586, 614 (1977)

(Dissenting)

The particulars from which the majority's universals are drawn seem centered around two factual complexes: (1) tellers of Local 1066 had been guilty of vote fraud; and (2) Sadlowski's opponent, Samuel Evett, was supported by the international union's "official family." I find the sweeping conclusions drawn from these instances to be striking examples of the fallacy of composition…. To conclude that because *local* tellers ran a fraudulent election, the *international* union was responsible, is the fallacious error of reasoning that what is true of a part is necessarily true of the whole.

FALLACY OF DIVISION

The fallacy of division is the converse of the fallacy of composition and takes two forms: the inference that properties of the whole are also properties of parts making up the whole; and that properties of a collection are also properties of the members of that collection.

We take separately what we ought to take jointly. The same confusion is present as in composition, but this time the inference proceeds in the opposite direction, from the whole to its parts. It argues that what is true of the whole must be true of its parts.

"The Pittsburgh Symphony is the best in the country; therefore, the concertmaster is the best violinist in the land." "Italy has the best pasta in the world. Therefore, if you eat pasta at Giovanni's in Rome you will eat the best dish of pasta in the world." "The New York Yankees is the best team in baseball. Thus, the guy who plays second is the best second baseman in baseball."

The fallacy of division has one of the two following forms:

Whole to part:

1. Object W has characteristic C.
   Therefore,
2. P, a part of W, has characteristic C.

Collection to member:

1. Collection O has characteristic C
   Therefore,
2. Every member (or some particular member) of O has C.[32]

United States v. Standefer
610 F.2d 1076, 1106 (3d Cir. 1977)

(See ante, page 171 fallacy of irrelevant evidence)

FALLACY OF VICIOUS ABSTRACTION

The removal of a statement from its context, thereby changing the meaning of an argument, is known as the fallacy of vicious abstraction. Statements may be easily and critically altered merely by dropping something out of context. A general rule is confidently stated in an attorney's brief without any mention of exceptions. Counsel may cite to the court: "No deviations will be permitted from a discovery order." Upon close examination of the rule, we note that it contains an exception clause: "*Except where approved by the court or motion made and served on the adversary,* no deviations will be permitted from the discovery order."

The Sahakians illustrate this fallacy with four examples, each followed by the correct, complete statement:

> St. Paul said, "Money is the root of all evil." ("The *love* of money is the root of all evil.") "Ralph Waldo Emerson said: 'Consistency is the hobgoblin of little minds.'" *("Foolish* consistency is the hobgoblin of little minds.") "Alexander Pope said, 'Learning is a dangerous thing.'"
>
> ("A *little* learning is a dangerous thing; drink deep, or taste not the Pierian spring. There shallow draughts intoxicate the brain, and drinking largely sobers us again.") Francis Bacon said, "Philosophy inclineth man's mind to atheism." ("A *little* philosophy inclineth man's mind to atheism, but depth in philosophy bringeth men's minds about to religion.")[33]

Allegheny Gen. Hosp. v. NLRB
608 F.2d 965, 967-68 (3d Cir. 1979)

[In disagreeing with previous decisions of the court, the NLRB contended that the teachings of Ford Motor Co. v. NLRB, 441 U.S. 488 (1979), required the court to accept the legal theory used by the Board if it was "reasonably defensible."]

The Board's initial contention is that, although this court has disagreed with it on the issues of comity and appropriate hospital bargaining units, we must nevertheless enforce the Board order because it is a "reasonably defensible" construction of the National Labor Relations Act. We reject this attempt to emasculate judicial review of NLRB orders by a resort to an isolated phrase taken out of its context in the Supreme Court's opinion—a "fallacy of vicious abstraction."

[The court then emphasized that the Board was omitting a very important part of the holding in *Ford* to the effect that a court need not follow the legal theory of the Board where its interpretation] was fundamentally inconsistent with the structure of the Act and an attempt to usurp major policy decisions properly made by Congress.

We conclude, therefore, that the standard of review advanced by the Board is too narrow. The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law," but "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."

Borough of Lansdale v. Philadelphia Elec. Co.
692 F.2d 307, 311-312 (3d Cir. 1982)

Central to Lansdale's contention that the geographic market should have been determined as a matter of law is its reliance on a single sentence from Otter Tail Power Co. v. United States: "The aggregate of towns in Otter Tail's service area is the geographic market in which Otter Tail competes for the right to serve the towns at retail." From this single sentence Lansdale concludes that the relevant geographic market is identical to the service area.

It has been recognized that in [Sherman Act] § 2 cases identification of the relevant geographic market is a matter of analyzing competition. "The geographic market encompasses the area in which the defendant effectively competes with other … businesses for the distribution of the relevant product." It is "defined in terms of where buyers can turn for alternative sources of supply." The definition of the relevant geographic market, therefore, is a question of fact to be determined in the context of each case in acknowledgment of the commercial realties of the industry under consideration….

By dipping into the *Otter Tail* opinion and picking out a single sentence, Lansdale is guilty of the common fallacy of vicious abstraction—the removal of a statement from its context, thereby changing its intended meaning. What was before the Supreme Court in *Otter Tail* is not the issue presently before us: whether determination of the relevant geographic market was for the court or for the jury. Although in *Otter Tail* the relevant geographic market coincided with the aggregate of the towns in the defendant's service area, there is in that opinion no indication that its definition was achieved as a matter of law. Lansdale purports to represent as a decision of the Supreme Court only one line in its *ratio decidendi*. Although the Supreme Court's opinion reduces the definition of geographic market to one sentence, it is clear that it did so only upon determining that the district court had analyzed the extent and sources of competition to the defendant. Thus, we reject Lansdale's contention that the geographic market issue should be resolved as a matter of law.

ARGUMENTUM AD NAUSEUM

We simply had to include this one, a fallacy, more understandable than explainable. The *argumentum ad nauseum* is the unnecessarily long brief or a windbag oral argument where the advocate seeks to sustain his position by repetition piled upon repetition rather than by succinct, effective reasoned proof or logical development.

We see this everyday in life—brought to us by TV commercials, advertising executives, public relations specialists and political consultants. Is it not obnoxious to look at a TV news program every night of the week and see the identical commercial displayed every night? Or to watch a football game and be treated to the same commercial four times in one hour? I am not convinced that such repetition encourages critical consumer existence.

Lewis Carroll's bellman said it all in the Hunting of the Snark:

> "Just the place for a Snark!" the Bellman cried,
> As he landed his crew with care;
> Supporting each man on the top of the tide
> By a finger entwined in his hair.
>
> Just the place for a Snark! I have said it twice:
> That alone should encourage the crew.
> Just the place for a Snark! I have said it thrice:
> What I tell you three times is true."[34]

SUMMARY

Our purpose in emphasizing the importance of straight thinking by concentrating heavily on formal and informal fallacies is to illuminate pitfalls that you must avoid. Yet, you must not go too far. You must not commit the *fallacist's fallacy*. This means seeing a fallacy pop up behind every bush, under every tree and around every corner. The advice a noted historian has given to those who chronicle history should help you avoid the fallacist's fallacy:

- Don't conclude that an argument which is structurally fallacious in one particular is therefore structurally fallacious in all respects.
- Don't conclude that an argument which is structurally false in some respect, or even in all its premises, is therefore substantially false in its conclusion.
- Don't conclude that the appearance of a fallacy in an argument is an external sign of its authors' deliberately evil intention.
- Don't conclude that an argument devoid of fallacies is *ipso facto* a sound or correct one.[35]

Our understanding of fallacies can be honed and sharpened in our daily lives. Read editorials and newspaper columns and the digest of news in weekly magazines and put the reasoning to the tests that you have learned.

Are the authors guilty of erecting strawpersons and knocking them down in the fallacy of irrelevant conclusions? Do they beat their breasts over an answer expressed in a news conference by the President or governor or mayor when the question was loaded with three or four compound parts? Does the content of the editorial, column or account truly follow logical form? Does it appear as a categorical, hypothetical or disjunctive syllogism? Do you see *ad hominem* (appeals to ridicule)?

Pay attention to TV correspondents in their 30-60 second bites under the guise of reporting news. Are they guilty of the fallacy of hasty generalization by prophesying broad consequences from one single event in a fast-breaking story. Do you detect any fallacies of distraction? Appeals to pity or to the masses? Are they guilty of *dicto simpliciter*, attempting to project a general rule from that which obviously is an exception to the rule? For the apogee of political science fiction, analyze carefully the TV comments of Senators and Congresspersons who blithefully offer observations on sudden events without a whit of understanding of the underlying factual premises.

Or at the friendly corner tavern, listen to the loud defense of conclusions on church, school, family, religion and politics. Without entering the discussion yourself (don't ever try to use reflective reasoning in a bar!), attempt to identify the premises employed by the discussants. Are there any premises? Listen to conclusions that they draw from current facts. Are these permissible inferences, that is, inferences that would reasonably follow in logical sequence based on past human experience, or are they sheer speculation? How about: "I know the game was

fixed! How could a team lose three in a row to the Mets when they beat them six times straight." In the tavern or the cocktail lounge, take an end seat and drink deeply of *non sequiturs* and *post hocs.*

But don't get smug. All of us commit fallacies every day in reaching judgments—all of us, and that includes judges, lawyers, professors, preachers and authors of books. We do this because our thinking is not always reflective. We are "thinking" every waking moment of the day. At any time, there is always a penny for our thoughts. We have daydreams and reveries. We build castles in the air. We conjure up mental pictures and random recollections. We sometimes "think" and "conclude" because we want a certain conclusion. We think that wishing will make it so. But this is not reflective thinking.

Sometimes, we unwittingly insert a note of invention and add it to a faithful record of observation. We simply want to believe something. We are certain our kids did not smoke pot or mess around. We are totally convinced that our best friends did not say what others reported that they said. We are constantly influenced by emotions, beliefs and social wants and demands. We are humans, not computers.

Sometimes we do draw conclusions by a process that lies somewhere between a flight of fancy and a dispassionate weighing of the relevant considerations that should be employed to reach a reasoned conclusion. We must all confess to this. What is desired in the law is reflective thinking and that this involves more than a sequence of ideas. To do our jobs as members of the legal profession, and of community and family units, and to earn the respect of those who know us and the accolade that we are clear thinkers, we have an obligation. That obligation is to employ reflective thinking when called upon to solve a problem, any problem whether at home, school, church, office, business or in our social relations. We must respect the canons of reflective thinking, what John Dewey called "a con-sequence—a consecutive ordering in such a way that each determines the next as its proper outcome, while each outcome in turn leans back on or refers to its predecessors."[36]

What Professor Dewey said over three-quarters of a century ago is important and should be our watchword:

> The successive portions of a reflective thought grow out of one another and support one another; they do not come and go in a medley. Each phase is a step from something to something. The stream or flow becomes a train or chain. There are in any reflective thought definite units that are linked together to a common end.[37]

If we follow these watchwords we will go a long way in avoiding the pitfalls of fallacy.

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1. William S. & Mabel Lewis Sahakian, Ideas of the Great Philosophers (1966).

2. W. Stanley Jevons, Elementary Lessons in Logic: Deduction and Induction 177 (1965).

3. *See* David Hackett Fischer, Historians' Fallacies 106-107 (1970).

4. Kevin M. Saunders, Informal Fallacies in Legal Argumentation, 44 S. Car. L. Rev. 343, 369 (1993).

5. Commenting on this case, Professor Saunders states: "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." *Id.* at 365.

6. *See also* Illinois State Medical Ins. Services v. Chicon, 258 Ill.App.3d 803, 809, 629 N.E.2d 822, 836 (1994) (fallacy of accident: Routine physical examinations of female patients often involve rectal and vaginal examinations and are exceptions to the criminal code outlawing "intentional or knowing touching or fondling."); Leake v. Casati, 363 S.E.2d 924 (Va. 1988) (whether a local subdivision ordinance applied to a division of real estate ordered by the court); Holt Civic Club v. City of Tuscaloosa, 437 U.S. 60 (1978) (members of unincorporated community were subject to police and sanitary regulations, trade licenses and power and criminal court jurisdiction—court held they had no right to vote).

7. Alvin Moscow, Collision Course: the Andria Doria and the Stockholm 85 (1959).

8. David Hume, An Enquiry Concerning Human Understanding. Ed. Eric Steinberg (1977), p. 27 (originally published 1748).

9. *See, e.g.,* BTZ, Inc. v. National Intergroup, Inc., 19 Del. J. Corp. L. 233 (1994); Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410 (1992); Villar v. Crowley Maritime Corp., 780 F.Supp. 1467 (S.D. Tex. 1992); State v. Klingenstein, 608 A.2d 792 (Md. App. 1992); Rock v. Zimmerman, 1991 WL 148490 (3d Cir. (Pa.)); Ruth v. MMM Foods, Inc. 991 WL 53764 (N.D. Ill); U.S. v. One 1968 Cadillac Vin. No. J8129552, 730 F.Supp. 1434 (N.D. Ill. 1990); Public Citizen Health Research Group v. Young, 909 F.2d 546 (D.C. Cir. 1990); Abbott v. Federal Forge, Inc., 912 F.2d 867 (6th Cir. 1990); Knowles v. Knowles, 462 N.W. 2d 777 (Mich. App. 1990); People v. Benson, 276 Cal. Rptr. 827 (Cal. 1990); McClelland v. Goodyear Tire & Rubber Co., 735 F.Supp. 172 (D. Md. 1990); Isaksen v. Vermont Castings, Inc., 825 F.2d 1158 (7th Cir. 1987); Borello v. U.S. Oil Co., 388 N.W.2d 140 (Wis. 1986); Public Law Education Institute v. U.S. Dept. of Justice, 744 F.2d 181 (D.C. Cir. 1984).

10. Irving M. Copi & Carl Cohen, Introduction to Logic 132 (9th ed. 1994).

11. Roy R. Bassler, Ed., 2 The Collected Works of Abraham Lincoln 283 (1953).

12. David Hackett Fischer, Historians' Fallacies 8 (1970).

13. Ralph M. Eaton, General Logic, An Introductory Survey 354 (1931).

14. Horace W.B. Joseph, An Introduction to Logic 557 (1st ed. 1906), *quoted in* Ralph M. Eaton, General Logic, An Introductory Survey 354 (1931).

15. Irving M. Copi & Carl Cohen, Introduction to Logic 126 (9th ed. 1994).

16. *See also* Cherry v. Higher Educ., 642 A.2d 463, 464 (Pa. 1994); Lowe v. SEC, 472 U.S. 181, 226-227 (1985) (White, J., concurring); Adams v. Gould, Inc., 687 F.2d 27, 30-31 (3d Cir. 1982); United States v. Torres, 583 F.Supp. 86, 104-105 (N.D. Ill. 1984); Horne v. United States Fidelity & Guaranty Co., 791 P.2d 61, 62 (N.M. 1990); People v. Guiton, 17 Cal. Reptr.2d 365, 374 (1993); Laughlin v. Kulkoni, Inc., 643 So.2d 206, 209 (La. 1994).

17. William S. & Mabel Lewis Sahakian, Ideas of the Great Philosophers 21 (1966).

18. *See also* Interag Company Limited v. Stafford Phase Corp., 1990 WL 71478 (S.D. N.Y. 1990) ("The *et tu quoque* defense is similarly unavailing to bar an amended pleading under Rule 15(a)").

19. 198 U.S. 45 (1905).

20. 410 U.S. 113 (1973).

21. Lewis Berns Namier, History and Political Culture printed in Varieties of History 386 (F. Stern, Ed. 1956).

22. Discussed by George Orwell, Politics and the English Language in 156-71, 157 (1953).

23. Joseph Gerard Brennan, A Handbook of Logic 190 (1957).

24. Irving M. Copi & Carl Cohen, Introduction to Logic 145 (9th ed. 1994).

25. David Hackett Fischer, Historians' Fallacies 267 (1970).

26. *Id.*

27. Id. at 267-68.

28. *Id.* at 219.

29. Joseph Gerard Brennan, A Handbook of Logic 190 (1957).

30. Irving M. Copi & Carl Cohen, Introduction to Logic 148 (9th ed. 1994).

31. Irving M. Copi and Keith Burgess-Jackson, Informal Logic 109-110 (3d ed. 1996).

32. Irving M. Copi and Keith Burgess-Jackson, Informal Logic 108 (3d ed. 1996).

33. William S. & Mabel Lewis Sahakian, Ideas of the Great Philosophers 15-16 (1966).

34. Lewis Carroll, The Complete Works of Lewis Carroll 757 (1936).

35. David Hackett Fischer, Historians' Fallacies 305 (1970).

36. John Dewey, How We Think 4 (1933).

37. *Id.* at 4-5.

Chapter 13

CONCLUSION

It is now possible to pull together some of the concepts we have discussed and reach some conclusions about clear legal thinking. To be sure, in so doing, inductive reasoning is used to draw certain generalizations from materials covered in the foregoing chapters.

To offset any criticism that formal inductive and deductive reasoning in the law have been unduly emphasized and that the legal process involves far more than adherence to logical form, we repeat for emphasis that much subjectivity exists in the form of value judgments. Value judgments often inhere in the formation of both major and minor premises. And this leads to reversals by appellate courts of the trial court's choice, interpretation and application of law to facts found by the fact-finder. We see this also in appellate opinions where dissents are filed. The classic example is seen in the majority and dissenting opinions in MacPherson v. Buick in Chapter 5 in our detailed discussion of syllogisms.

Clearly, value judgments affect the resolution of the three flashpoints of legal conflicts: choosing between or among competing legal precepts to formulate the major premise, as well as in the minor premise in interpreting the precept as chosen and applying the chosen and interpreted precept to facts that have been found.

Involved here is an interrelationship, discussed very early in the book, between words that sound alike, but whose meanings diverge in the decisional process: "reasonable" and "reasoning," "reason" and "reasons." A judge's decision on the choice, interpretation and application of a legal precept involves a value judgment justifiable in his or her mind because the decision is "reasonable," in the sense that it seems fair, just, sound and sensible. One judge may believe that it is reasonable to maintain the law in harmony with existing circumstances and precedents, and accede to the magnetic appeal of consistency in the law. Another may believe that the issue should be considered pragmatically, and will respond only to its practical consequences.

What is reasonable in given circumstances may permit endless differences of opinion. And this is how it should be. The inevitable varying views found in multi-judge courts is an extremely vital tradition animating the growth of common law. Also vital is the conflict between respect for precedents and the necessity of reexamining them. In today's jurisprudence, precedents are subject to constant scrutiny. We are all influenced by the tradition of the Holmes-Pound-Cardozo-Jones philosophy:

The Holmes-Pound-Cardozo-Jones Tradition

- The great aim of the law is to improve the welfare of society; it is nothing more or less than the establishment of and maintenance of a social environment in which the quality of human life can be spirited, improving and unimpaired.
- The test of a good judicial opinion is how thoughtfully and disinterestedly the court weighed the conflicting social interests involved in the case and how fair and durable its adjustments of the conflicting interests promise to be.
- The durability of a legal precept, its reliability as a source of guidance for the future, is determined far more by the precept's social utility, or lack of it, than by verbal elegance or formal consistence with other legal precepts.
- The law must be stable, but it must not stand still.

Judges seek to achieve these aims by reaching decisions that are reasonable. As we have emphasized, however, determining what is reasonable is closely related to the overarching process we call reasoning, or solving a problem by pondering a given set of facts to perceive their relationship and reach a logical conclusion. "Reasoning" is a description of the logical analysis of an argument to reach a conclusion. Sometimes we refer to this process as "reason." The implements of this reflective thinking procedure are those propositions we use to reach the conclusion, propositions which we call premises. These premises are the "reasons" for the conclusion.

Material Facts

The application of reasonableness to reasons is an ever-recurring scenario: If A has been found to be liable in set of circumstances (facts) B, we have to decide, often without an exact precedent to guide us, whether A is also liable if B obtains plus or minus circumstance C. To do this we determine if the additional circumstance is material. Given the situation that A is liable if set of circumstances B applies, we must decide if plus or minus circumstance C is material or immaterial.

Two famous cases dramatically illustrate this. In Rylands v. Fletcher[1] the defendant employed an independent contractor to make a reservoir on his land. Because of the contractor's negligence in not filling up some unused mine shafts, water escaped and flooded the plaintiff's mine. The case could have been decided solely on the theory of the contractor's negligence, but the court chose to decide it on the theory of strict liability. It determined that the negligence of the contractor was immaterial. Compare the actual facts of the case with the facts deemed material by the court:

Actual Facts

D had a reservoir built on his land.
Through the negligence of the contractor
(Our plus circumstance C),
Water escaped and injured P.
Conclusion: D is liable to P.

Material Facts As Seen By the Court

D had a reservoir built on his land.
Water escaped and injured P.
Conclusion: D is liable to P.

Thus by deciding that circumstance C was immaterial, the doctrine of absolute liability was established in 1868 and is still alive and kicking today.

In Brown v. Board of Education[2] the Court addressed circumstance B, black children in segregated schools. It decided that under the doctrine of "separate but equal," no black school could be considered "equal." The main emphasis in the reasons (premises) was the importance of educating young children. In Mayor of Baltimore v. Dawson[3] the Court was again presented with a segregation issue—this time minus circumstance B (i.e., not in the context of educating children, not in the context of segregated schools). The Court affirmed the Fourth Circuit's ruling that the *Brown* decision would nevertheless apply to end segregation in public beaches and bathhouses. Segregation minus circumstance B led to the same result in Holmes v. Atlanta[4] (municipal golf course) and Gayle v. Browder[5] (buses). When *Browder* came down, it was recognized that, as a matter of law, the entire doctrine of separate but equal was overruled without being limited to the reasons stated in *Brown:* the special and particular problems of segregated education, circumstance B. Changing social and judicial perspectives had rendered

circumstance B—the driving force for the *Brown* decision, the necessity of giving children a proper education—now immaterial to the overarching problem of racial discrimination.

Analogies Revisited

From this, we can learn something about the process of analogy, which lies at the heart of the system of evaluating putative controlling legal rules in compared cases. In analogizing, it is mandatory to determine which facts in the previous case are to be deemed material. The decision in a subsequent case depends as much on the exclusion of "immaterial" facts as it does on the inclusion of "material" ones.

We have purposely waited until now—until we fully discussed methods of deductive and inductive reasoning as well as formal and informal fallacies—to offer some guidelines in determining what positive analogies (resemblances) and negative analogies (differences) should be taken into consideration in relating a putative precedent to a given case. Whether stated facts will serve to provide a true resemblance or a difference is strictly dependent upon whether a court deems those facts to be material. To one judge the added or subtracted circumstances may be immaterial, so that the new case is simply a new instance of a fact scenario governed by a prior case; to another judge they may appear so entirely new as to constitute a material difference and thus the new case does not fall within the holding of the putative precedent.

The analytical process comes down to this. We establish the holding of the case claimed to be a precedent to learn the legal consequence attached to a specific state of facts and exclude any dictum (in the sense that dictum is a suggested legal consequence to hypothetical facts not found in the record). We then determine whether that holding is a binding precedent for a succeeding case in which the facts are *prima facie* similar. This involves a double analysis. We must first state the material facts in the putative precedent and then attempt to find those which are material in the compared case. If these are identical, then the first case is a binding precedent for the second, and the court should reach the same conclusion as it did in the first one. If the first case lacks any fact deemed material in the second case, or contains any material facts not found in the second, then it is not precedent, but only persuasive argument.

Test for Material Facts

Here are some guidelines to help determine which facts are material and which are immaterial in the process of analogy. I suggest these with some trepidation and advance them not as truths, not even as probabilities, but only as, to use the most weaselly of terms, "possible possibilities":

- All facts which the court specifically stated to be material must be considered material.
- All facts which the court specifically stated to be immaterial must be considered immaterial.
- All facts which the court impliedly treats as immaterial must be considered immaterial.
- All facts of person, time, place, kind and amount are immaterial unless stated to be material. If the opinion omits a fact that appears in the record this may be due to (a) oversight or (b) an implied finding that the fact is immaterial. Option (b) will be assumed to be the case in the absence of other evidence.
- If the opinion does not distinguish between material and immaterial facts then all the facts set forth must be considered material.
- A conclusion based on a hypothetical set of facts is a dictum.[6]

The law then is reduced, in the case of the judge, to the art of drawing distinctions, and in the case of the lawyer, to the art of anticipating the distinctions the judge is likely to draw. "[I]n a system bound by precedent, such distinctions may often be in the nature of hair-splitting, this being the only instrument at hand for avoiding the consequence of an earlier decision which the court now considers unreasonable or as laying down a principle which is not to be extended."[7]

Let us now pause and place this process in proper perspective. The agony of examining a host of earlier decisions to determine the materiality or immateriality of facts is forced upon us in the practice of law in only a relatively small number of cases. Based on my own judicial experience that goes back to 1961, I suggest that 90 percent of the cases appearing before a court of general trial jurisdiction or general appellate jurisdiction fall within two categories: where the law and its application alike are certain, or where the law is certain and the only question concerns its application to the facts before it. Judges are bound by much settled legal doctrine and a great number of statutory rules.[8]

The common-law tradition has been followed for over two centuries in this country, and when we began here we had already absorbed centuries of the English common-law experience, recorded at least since the time of Sir Edward Coke and Sir William Blackstone. The oldest appellate court in the United States, the Pennsylvania Supreme Court, has been handing down recorded decisions since 1686.

Justice William O. Douglas noted the reserves of conceptual grounds for decisions in the hard cases: "There are usually plenty of precedents to go around; and with the accumulation of

decisions, it is no great problem for the lawyer to find legal authority for most propositions."[9]

The tradition of *stare decisis* places the judge under an obligation to follow prior judicial decisions unless exceptional circumstances are present.[10] (Here, of course, the question is begged because the presence of such circumstances requires a judicial decision.)

But here also we must distinguish between the experience of studying law, where each new case in the textbook is a new adventure, and the experience of lawyers who already have gone through the process of assimilating the complexities of substantive law. Clearly, the student has a long uphill struggle to arrive at the plateau now inhabited by the lawyers. What may be considered by a lawyer as an "easy" case may be a jaw-breaking one to a student only one-third of the way through a course. Whether the case be "hard" or "easy," the Pound/Jones formulation is the best test to measure a good decision: not in terms of the correctness or incorrectness of the courts' application of precedents, and not in terms of the result, for this may simply be congruent with one's personal philosophy or inclination, but in terms of (1) how thoughtfully and disinterestedly the court weighed the conflicting interests involved in the case and (2) how fair and durable its adjustment of the interest-conflict promises to be. The first goes to the "reasonableness" of the court's decision; the second to the logical validity of its reasoning.

The study of law and the practice of law consist of problem solving. Because of the doctrine of *stare decisis*, however, the solving of problems cannot be done on an *ad hoc* basis. We must respect the overarching consideration that like cases be decided alike. But the beckoning question is always to decide what is a like case. All problems originate in a confused and often complicated setting. To solve a problem fairly and justly we must employ techniques of reflective thinking. That is what this book has been all about. The function of reflective thought is to face a situation where there is obscurity, doubt and conflict, and to transform that situation to one that is clear, coherent and harmonious with what has gone before and what may occur again. It is a constant effort to suggest, search and compare, and then suggest, search and compare again and again.

Reasonableness and Reasons

As the preceding pages have indicated, logical reflective thinking is critically important. It is the cement that binds the determination of "reasonableness" with the statement of "reasons," the explanation or justification of an act. Judges and lawyers give "reasons" to prove that their conclusion is "reasonable." "Reasons" are the how in the process; "reasonableness" is the why. "Reasons" are the logical premises that imply the desired conclusion of "reasonableness." What is used to coalesce "reasons" and "reasonableness" is "reasoning," which we know as a logical process. It has been to the reasoning process that our efforts have been directed in this book.

Logical order in the law is an instrumentality, not an end. John Dewey has told us that "[i]t is a means of improving, facilitating, clarifying the inquiry that leads up to concrete decisions; primarily that particular inquiry which has just been engaged in, but secondarily, and of greater ultimate importance, other inquiries directed at making other decisions in similar fields."[11] We have emphasized that, unlike in mathematics and science, there are few immutable major premises in the law. Holmes was certainly right when he said that "[t]he actual life of the law has not been logic; it has been experience. The felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had good deal more to do than the syllogism in determining the rules by which men should be governed."[12] But, as we have explained, Holmes was speaking here only of a type of rigid deductive logic that has unyielding fixed premises, especially major premises. By now it should be clear that by inductive logic we witness the drama of developing law to meet felt necessities of the times, current moral and political theories, intuitions of public policy and the hopes, dreams and aspirations of an informed society.

Certainly, in the reasoning process of the law, we do not intend that the guidelines to materiality, the rules of the syllogism and the idiosyncrasies of formal and material fallacies be only a "ballet of bloodless categories."[13] Instead, they are vibrant tools of analytic thought used to give force, power, sinew and respect to a process that adjudicates claims, demands and defenses asserted by live litigants in very live cases and controversies. They are society's sword and shield to fend off, in Frankfurter's felicitous phrase "the tyranny of mere will and the cruelty of unbridled, unprincipled, undisciplined feelings."[14]

Our use of logical processes in the law is not perfect. Inductive reasoning does not purport to reach truths; its aim is to produce a result that is more probably true than not. Rules of deductive reasoning go further. Properly applied, they present an argument based on the theory that if the premises are true, the conclusion must be true. But the genius of the common law is that these premises are not fixed in cement. In the popular idiom they are always up for grabs, up for grabs to meet changes in our social, political, philosophical and economic climate. When invention is active, when industry, commerce and transportation bring about new forms of human relations and when community relations change because of the extension of ethical and moral ideas, the law is able to keep pace with the variety and subtlety of social change. "Old" new law may sometimes give way to "new" new law.

We know by now that court decisions are not necessarily a precise barometer of the beliefs and demands of society. Always present are the jurisprudential idiosyncracies of the men and

women in black robes who sit on our tribunals. Some prize stability and are hesitant to depart from precedent; others, paraphrasing Justice Walter V. Schaefer, "view the court as an instrument of society designed to reflect in its decisions the morality of the community, and will be more likely than not to look precedent in the teeth and to measure it against the ideals and the aspirations of the time."[15] Whatever be the judge's view of his or her court, whether as a passive institution or a force for change, the judge must adhere to the canons of logical order in deciding a case and therefore present a reasonable, and therefore, acceptable, "performative utterance."

How Logic Will Help You

We end as we began. Our thesis has been straightforward. We do not say that knowledge of these materials is absolutely essential to studying or practicing law. A person may reason correctly without knowing a single rule of the syllogism; conversely, a person may know all the details of logic and not be able to discover truths that are necessary in the law. A guide to logical reasoning, or logic in the law, is tautologically speaking, simply a guide.

But what we do suggest is that an understanding of what we have said here should assist you:

- To develop clarity and consistency in your approach to law.
- To avoid error in analyzing reported judicial opinions.
- To avoid error in preparing and presenting a written or oral argument.
- To detect error in the reasoning process mounted by your adversary.
- To think and reason about difficult matters.
- To avoid the pitfalls of both formal and informal fallacies.
- And most important, to develop and improve the specific mental discipline which the study and practice of law demands and requires.

The importance of this mental discipline, commonly called "learning to think like a lawyer," was well summarized by Nicholas F. Lucas, who as a law student many years ago, observed:

> It is by this mental training rather than by the explicit, positive knowledge of its technical rules, that logic gives us the power and habit of thinking clearly. Probably more than any other science, a careful study trains and develops the reasoning powers, not merely the power of thinking consistently, but the power of discovering the truth.[16]

A final word. Logical reasoning and avoidance of fallacies does not always guarantee a solution. There is still the dilemma and counter dilemma, one of which, "Litigiosus," kept ancient Greek logicians busy for many years:

Protagoras, the Sophist, is said to have agreed to train Euathlus in the art of pleading. Half of the fee was to be paid when the course was completed; the remaining half when Euathlus should win his first case in court. Euathlus delayed undertaking any suit, and Protagoras eventually sued his pupil for the other half of the agreed fee, urging the following dilemma:

> If this case is decided in my favor, Euathlus must pay me by judgment of the court; and if it is decided in his favor, he must pay me by the terms of our contract.
>
> But it must be decided either in my favor or in his.
>
> Therefore, he is in any case obligated to pay.

Euathlus urged the following rebuttal:

> If this case is decided in his favor, I am free by the terms of our contract; and if it is decided in my favor, I am free by the judgment of the court.
>
> But it must be decided in his favor or in mine.
>
> Therefore, I am in any case freed of the obligation.[17]

Take your time to work this out. (A couple of years will do.)

Happy thinking!

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1. L.R. 3 H.L. 330(1868).

2. 347 U.S. 483 (1954).

3. 350 U.S. 877 (1955).

4. 350 U.S. 879 (1955).

5. 350 U.S. 903 (1955).

6. *See* Arthur L. Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L. J. 161, 169-170 (1930).

7. *See* Dennis Lloyd (Lord Lloyd of Hampstead), Reason and Logic in the Common Law, 64 L. Q. Rev. 468, 482 (1948).

8. Benjamin N. Cardozo and Henry J. Friendly have written on their experience on the New York Court of Appeals and the U.S. Court of Appeals for the Second Circuit. "Nine tenths, perhaps more, of the cases that come before a court are predetermined—predetermined in the sense that they are predestined—their fate preestablished by inevitable laws that must follow them from birth to death." Benjamin N. Cardozo, The Growth of the Law (1924). In 1961 Judge Friendly wrote: "Indeed, Cardozo's nine-tenths estimate should be read as referring to the first category alone. Thus reading it, Professor Harry W. Jones finds it 'surprising on the high side …. So would I. If it includes both categories, I would not.'" Henry J. Friendly, Reactions of a Lawyer —Newly Become Judge, 71 Yale L. J. 22 n. 23 (1961) (quoting Harry W. Jones, Law and Morality in the Perspective of Legal Realism, 61 Colum. L. Rev. 799, 803 n.16 (1961).)

9. William O. Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 636 (1949).

10. In a small percentage of cases, no legal principles exist for guidance. These cases require the court to examine some justificatory principle of morality, justice and social policy. How these abstractions are defined and applied is beyond the scope of this work. *See* Ruggero J. Aldisert, The Judicial Process: Text, Materials and Cases (2d ed. West 1996).

11. John Dewey, How We Think, 19 (1933).

12. Oliver Wendell Holmes, The Common Law 1 (1881).

13. Dennis Lloyd (Lord Lloyd of Hampstead), Reason and Logic in the Common Law, 64 L. Q. Rev. 468, 483 (1948).

14. As quoted in Time Magazine, Sept. 7, 1962, at 15 on the occasion of his retirement as a Supreme Court Justice.

15. Walter v. Schaefer, Precedent and Policy, 34 U. Chi. L. Rev. 3, 23 (1966).

16. Comment, Logic and Law, 3 Marq. L. Rev. 203, 204 (1919).

17. *Id.* at 210.

APPENDIX “A”

… A Lagniappe

Answers to exercises in legal reasoning. Chapter 3, Elements of Legal Reasoning, pp. 42–44

Hey now. Don't cheat. Perform the exercise first before you look at the answers. These answers are designed only to check your work after you have performed the task of reasoning.

Exercise 1.

Able, Penn, Administrative law.

Baker, Harvard, Civil Procedure.

Charlie, Wisconsin, Evidence.

Dogge, Pitt, Torts.

Easy, Wisconsin, Contracts.

Foxx, Virginia, Crimes.

Exercise 2.

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Mr. Nancy, bishop, B.

Mr. Oliver, retired army colonel, B.

Ms. Peter, housewife, A.

Ms. Queen, paralegal, C.

Mr. Roger, airline pilot, D.

Exercise 3.

Jiggs, professor, New York City.

King, Assistant Secretary of State, Washington, D.C.

Love, federal judge, San Francisco.

Sugar, insurance company vice president, Phoenix.

Victor, banker, Chicago.

Tare, New York City corporate counsel, New York City.

APPENDIX “B”

Syllogisms in Leading Supreme Court Cases Chapter 5, Deductive Reasoning, pp. 74–88

Marbury v. Madison

Polysyllogisms

The province and duty of the judicial department is to say what the law is.

The Supreme Court is the judicial department.

The province and duty of the Supreme Court is to say what the law is.

* * *

The Constitution is superior to any Act of the legislature.

The congressional Act granting the Supreme Court the power to issue writs of mandamus is an Act of the legislature.

The Constitution is superior to this Act.

* * *

Any congressional Act repugnant to the Constitution, the paramount law of the land, is void.

The Act giving the Supreme Court power to issue writs of mandamus is repugnant.

The Act is unconstitutional.

McCulloch v. State of Maryland

Polysyllogisms

The people of all the states have created the general government and have conferred upon it the general power of taxation.

Only Congress represents the general government.

Only Congress represents the people of all the states and has the general power of taxation.

* * *

Only Congress represents the people of all the states and has the general power of taxation.

A State is not Congress.

A State does not have the general power of taxation.

Dred Scott v. Sandford

Majority Opinion

At the time of the adoption of the Constitution, *all* state legislatures recognized the inferior and subject condition of the black race; accordingly, blacks could not be considered as citizens and capable of suing in federal court at that time.

Dred Scott's ancestors were members of the black race at the time of the adoption of the Constitution.

Dred Scott cannot be considered as a citizen of the United States and capable of suing in federal court.

Dissenting Opinion

At the time of the adoption of the constitution, in *some* states (New Hampshire, Massachusetts, New York, New Jersey and North Carolina) all free-born inhabitants, even though descended from African slaves, possessed the right of franchise of electors on equal terms with other citizens.

Dred Scott's ancestors were members of the black race at the time of the adoption of the Constitution.

We cannot conclude that *all* of Dred Scott's ancestors were not citizens of the United States and not capable of suing in federal courts and that he is also precluded.

* * *

Note: The major premise of the majority opinion contains an untruthful distributed middle term, "all state legislatures"; more properly it should be the undistributed terms, "*some* state legislatures," thereby demonstrating that the majority opinion contains the formal fallacy of the undistributed middle term.

Youngstown Sheet & Tube Co. v. Sawyer

The President's power, if any, to issue the order must stem from either an act of Congress or from the Constitution.

No act of Congress or clause in the Constitution gives the President this power.

The President has no power to issue the order.

Brown v. Board of Education

Separate but equal educational facilities are permitted under the constitution, but unequal facilties are not.

A separate educational facility for black children is inherently unequal.

A separate educational facility for black children is not permitted under the constitution.

Griswold v. Connecticut

A law is unconstitutional if it impacts the zone of privacy created by the First Amendment's right of association, the Third Amendment and its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, the Fourth Amendment's right to be secure "against unreasonable searches and seizures," the Fifth Amendment's Self-Incrimination Clause and the Ninth Amendment.

The law forbidding the use of contraceptives impacts on the zone of privacy.

The law forbidding the use of contraceptives is unconstitutional.

Roe v. Wade

Majority Opinion

The right of privacy is guaranteed by the Fourteenth (or Ninth) Amendment and a state Act that violates this right is unconstitutional.

A woman's decision to terminate her pregnancy is protected by a right of privacy.

A woman's decision whether to terminate her pregnancy is protected by the Fourteenth (or Ninth) Amendment and a state Act that impairs this right is unconstitutional.

Dissenting Opinion

The right of privacy is guaranteed by the Fourteenth (or Ninth) Amendment and a state Act that violates this right is unconstitutional.

A woman's decision to terminate her pregnancy is not protected by a right of privacy.

A woman's decision whether to terminate her pregnancy is not protected by the Fourteenth (or Ninth) Amendment and a state Act that impairs this right is not unconstitutional.

Bowers v. Hardwick

Where fundamental rights protect conduct, the laws of many states that make such conduct illegal are unconstitutional.

The Constitution does not confer such a fundamental right upon homosexual conduct.

The laws of the many states that make homosexual conduct illegal are thus not unconstitutional as a violation of a fundamental right.

Miller v. Johnson

Because laws that explicitly distinguish between individuals on racial grounds (whether burdening or benefiting) fall within the core of the Fourteenth Amendment's Equal Protection Clause, we held in Reno v. Shaw that redistricting legislation unexplainable on grounds other than race demands strict scrutiny.

This congressional district was created by the Georgia General Assembly for the purpose of providing a black majority district.

This congressional district must be judged by the same close scrutiny that we give other state laws that classify citizens by race.

Adarand Constructors, Inc. v. Pena

Although the Equal Protection Clause appears only in the Fourteenth Amendment, our cases have interpreted the Fifth Amendment's Due Process clause as affording protections found in the Fourteenth Amendment.

Strict scrutiny of statutes and regulations requiring set asides in the construction industry is mandated by the Fourteenth Amendment's Equal Protection Clause.

Strict scrutiny is mandated by the Fifth Amendment's Due Process clause of statutes and regulations requiring construction industry set asides.

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