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Richard H. Underwood

University of Kentucky College of Law, runderwo@uky.edu

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Logic and the Common Law Trial

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Logic and the Common Law Trial

Richard H. Underwood†

The only certain ground for discovering truth is the faculty of discriminating false from true. . . . Otherwise, I can assure you, you will be *led by the nose* by anyone who chooses to do it, and you will run after anything they hold out to you, as *cattle* do after a green bough.¹

I. Introduction

Throughout history, right up to the present day, there have been persistent, if somewhat contradictory, attempts by members of the legal guild to attribute to the practice of law some of the characteristics of religion and science.² Fortunately, references to the trial lawyer as “the priest in the [T]emple of [J]ustice”³ have pretty much disappeared from the literature. One assumes that such references were never taken too seriously. As Barrister C.P. Harvey has so succinctly put it:

[T]he Temple of Justice is not dedicated to Reason alone. It is rather like one of those churches, which abound in East Anglia, where gargoyles, pagan symbols and caricatures of the seven deadly sins are found in close company with images of the Christian saints. Reason, attended by Mercy and Discretion, may be the presiding deity, but there are a number of less respectable demigods or demons, including *Fear*, *Distraction*, *Sentiment* and *Prejudice*, who are often worth an invocation. In one way or another therefore the advocate in a court of law can find plenty of scope for the black arts if he chooses to indulge in them. . . .⁴

† B.S. (1969), J.D. (1976), The Ohio State University. The author is the Spears-Gilbert Professor of Law, University of Kentucky College of Law. This Article will appear as an Appendix in a forthcoming book by the author, *False Witness: The Law and Lore of Perjury and Other Forensic Mischief*. Professor Underwood also serves as the Chairman of the Ethics and the Unauthorized Practice Committees of the Kentucky Bar Association.

1. Lucian, *Hermotimus*, para. 68 quoted in MICHAEL MACRONE, *IT'S GREEK TO ME!* 194 (1991) (emphasis added). I am indebted to Michael Macrone for this particular translation. I suspect that he relies on a Loeb edition, but our University library has suffered the depredations of vandals or bookworms or both, and I cannot find Macrone's source. The particular Loeb volume has disappeared. Hopefully the Kentucky legislature will fund the new library, save the old books, and replace all missing ones.

2. In this, lawyers and academics have something in common—these exercises in scientism or quasi-religious gnosticism, that is. Throughout history, the trappings of science and religion have been badges of authority, put on by those who would have power.

3. EDWARD A. PARRY, *THE SEVEN LAMPS OF ADVOCACY* 13 (1924).

4. C.P. HARVEY, *THE ADVOCATE'S DEVIL* 5 (1958) (emphasis added).

Note that Harvey at least bows in the direction of the Rationalists. They have not yet abandoned the field. On the contrary, reason, he says, is still the *presiding* deity. Logic occupies a respectable place in the modern literature of trial advocacy.

True, trial handbooks no longer resemble smug little treatises on Aristotelian logic. However, legal scholars and teachers of trial advocacy seem to assume that a great deal of rational thought takes place during the jury's deliberations and, consequently, that logic must dictate trial tactics. We are told that a successful appeal must be an appeal to Reason.⁵ Other observers, in moments of candor (lucidity? sobriety?), have expressed their doubts. Harvey quotes a British judge:

Here you wish to persuade twelve ordinary citizens with probably little or no training in consecutive thought. They will be largely if not entirely swayed by emotion. But the advocate does well to remember that in all probability they do not think so. The less training or capacity for reasoning they have, the more certain it is they will pride themselves on being susceptible only to strict logic and impervious to mere emotion. But the fact is that reason is a new human toy, while *emotions* have been the *mainspring* of men's thoughts and acts *since man appeared in the morning of time*.⁶

Do we not try our best to stack the jury deck? In this excerpt from *Roughing It*, Mark Twain comments on the art of jury selection. While

5. For recent offerings alluding to logic in advocacy, see LAWRENCE A. DUBIN & THOMAS F. GUERNSEY, *TRIAL PRACTICE* (1991); JAMES A. GARDNER, *LEGAL ARGUMENT* (1993). For an extended discussion of logic in the law, particularly as regards appellate advocacy and the writing of judicial opinions, see RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* (1989). This excellent text provides many interesting examples of sound and unsound reasoning from actual appellate opinions.

6. HARVEY, *supra* note 4, at 23-24 (quoting Hilbery, J.) (emphasis added). Compare ARTHUR SCHOPENHAUER, *The Art of Controversy*, in *ESSAYS FROM THE PARERGA AND PARALIPOMENA* 10 n.3 (1951) ("[U]nquestionably, the safest plan is to be in the right to begin with; but this in itself is not enough in the existing disposition of mankind, and, on the other hand, with the weakness of the human intellect, it is not altogether necessary.").

For a scientist's case that the human mind does not instinctively turn to logical operations, see ALAN CROMER, *UNCOMMON SENSE: THE HERETICAL NATURE OF SCIENCE* (1993). Cromer cites studies that suggest that more than half of adult Americans never reach the stage of formal operations, "meaning that they can[not] analyze a situation with several variables or understand a simple syllogism." *Id.* at 188. In a note he quips: "For example, half the members of a jury might not see the fallacy in the argument 'The murderer had to have been very strong. The defendant is very strong. Therefore, the defendant is the murderer.'" *Id.* at 224 n.1.

this is a caricature of practice in an earlier age,⁷ it is nevertheless guaranteed to evoke many a knowing chuckle and at least a nod or two of recognition when read to an audience of experienced trial lawyers.

I remember one of those sorrowful farces, in Virginia, which we call a jury trial. A noted desperado killed Mr. B., a good citizen, in the most wanton and cold-blooded way. Of course the papers were full of it, and all men capable of reading read about it. And of course all men not deaf and dumb and idiotic talked about it. A jury list was made out, and Mr. B.L., a prominent banker and a valued citizen, was questioned precisely as he would have been questioned in any court in America:

"Have you heard of this homicide?"

"Yes."

"Have you held conversations upon the subject?"

"Yes."

"Have you formed or expressed opinions about it?"

"Yes."

"Have you read the newspaper accounts of it?"

"Yes."

"We do not want you."

A minister, intelligent, esteemed, and greatly respected; a merchant of high character and known probity; a mining superintendent of intelligence and unblemished reputation; a quartz-mill owner of excellent standing, were all questioned in the same way, and all set aside. Each said the public talk and the newspaper reports had not so biased his mind but that sworn testimony would overthrow his previously formed opinions and enable him to render a verdict without prejudice and in accordance with the facts. But of course such men could not be trusted with the case. Ignoramuses alone could mete out unsullied justice.

When the peremptory challenges were all exhausted, a jury of twelve men was impaneled—a jury who swore they had neither heard, read, talked about, nor expressed an opinion concerning a murder which the

7. Compare Fannie M. Farmer, *Legal Practice and Ethics in North Carolina 1820-60*, 30 N.C. HISTORICAL REV. 329 (1953).

Carawan, a Baptist preacher, was tried and found guilty of murder. The judge ordered a recess of one hour; at that moment, the prisoner drew a pistol and aimed at the solicitor. The bullet struck above the heart, cut the cloth of his suit, struck the padding, and fell to the floor. The prisoner dropped his pistol, took another, and, despite the efforts of the sheriff to stop him, shot himself. No wonder the courts attracted a large crowd! The court was an exciting place.

Id. at 335-36.

very cattle in the corrals, the Indians in the sage-brush, and the stones in the streets were cognizant of! It was a jury composed of two desperadoes, two low beer-house politicians, three barkeepers, two ranchmen who could not read, and three dull stupid, human donkeys! It actually came out afterward that one of these latter thought that incest and arson were the same thing.

The verdict rendered by this jury was, Not Guilty. What else could one expect?

The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and *perjury*.⁸

For having collected these many observations, I hope that I will not be taken for an enemy of logic⁹ or a philosopher of feeling.¹⁰ Much

8. 2 MARK TWAIN, *ROUGHING IT* 56-57 (1871) (emphasis added). The author confesses that he has served on a number of petit juries in criminal cases. For Alice's experiences see LEWIS CARROLL, *ALICE IN WONDERLAND*, reprinted in *THE ANNOTATED ALICE* 144-45 (Martin Gardner ed. 1960).

The twelve jurors were all writing very busily on slates. "What are they doing?" Alice whispered to the Gryphon. "They can't have anything to put down yet, before the trials begun."

"They're putting down their names," the Gryphon whispered in reply, "for fear they should forget them before the end of the trial."

"Stupid things!" Alice began in a loud indignant voice. . . .

Id. at 144-45.

9. No less an authority on modern Anglo-American thought than Stanley Baldwin, British Prime Minister 1923-24, 1924-29, 1935-37, has been quoted as proclaiming that "one of the reasons why our people are alive and flourishing, and have avoided many of the troubles that have fallen to less happy nations, is that we have never been guided by logic in anything we did." DAVID H. FISCHER, *HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* x-xi (1970). I am reminded of the immortal words of the hitchhiking Douglas Adams: "Thus was the Empire forged."

10. The allusion is to Bergson. For all of you Finance majors who need a crash course in philosophy see JUDY JONES & WILLIAM WILSON, *AN INCOMPLETE EDUCATION* (1987); DONALD PALMER, *LOOKING AT PHILOSOPHY: THE UNBEARABLE HEAVINESS OF PHILOSOPHY MADE LIGHTER* (1988); BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* (1945). Of course, even logicians have been suspected of being illogical from time to time. See, e.g., PAUL JOHNSON, *INTELLECTUALS* 224 (1988) (complaining that Bertrand Russell, co-author of *Principia Mathematica* and author of an *Introduction to Mathematical Philosophy*, "only invoked [logic] when required"). During a minor dispute with Johnson over the position of Russell's signature on an open letter published in *The Times*, Johnson pointed out that Russell's position was not logical. "'Logical fiddlesticks!' said Russell sharply, and slammed down the receiver." *Id.*

of procedural law, the law of trials,¹¹ and the law of evidence,¹² is logical and linear, but even the most stuffed legal shirt must concede that some of the *lex non scripta* is down and dirty.

II. "Lawiers Logike"

"I know what you're thinking about," said Tweedledum; "but it isn't so, no-how." "Contrariwise," continued Tweedledee, "if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic."¹³

Of course, respect for logic never stood in the way of a successful retort from the time of Aristotle till now, nor will [it] on this side of the millennium.¹⁴

A great number of books, and a smaller number of great books, deal with informal logic and argument, and each contains a catalog of fallacies.¹⁵ I cannot hope to compete with these works—neither in

11. See J. Alexander Tanford, *An Introduction to Trial Law*, 51 MO. L. REV. 623 (1986) (offering a superb primer).

12. Writers like C.P. Harvey and Arthur Train (both capable trial lawyers) spend considerable time making fun of the law of evidence. Harvey cites one judge's peroration of the merits of the British law of evidence as evidence that the judge was "certifiable," and, in the style of Rumpole, alludes to the law in general as a sort of formality. See, e.g., HARVEY, *supra* note 4, at 51. "[E]very practitioner soon discovers that what he really needs is to have the merits of the case on his side. . . . But the 'merits' is a very elastic term." He goes on to explain how counsel might go about exploiting the prejudices of the trial judge. *Id.* at 51-53 EPHRAIM TUTT, *YANKEE LAWYER: THE AUTOBIOGRAPHY OF EPHRAIM TUTT* 349-71 (Arthur Train ed., 1943) (devoting an entire chapter to a critique of the law of evidence).

13. CARROLL, *supra* note 8, at 230-31.

14. AUGUSTUS DE MORGAN, *FORMAL LOGIC: OR, THE CALCULUS OF INFERENCE, NECESSARY AND PROBABLE* 250 (1847).

15. Among the works I have consulted for my refresher in Logic: NICHOLAS CAPALDI, *THE ART OF DECEPTION* (1971); IRVING COPI, *INTRODUCTION TO LOGIC* (5th ed. 1978); DE MORGAN, *supra* note 14; W. WARD FEARNside & WILLIAM B. HOLTER, *FALLACY: THE COUNTERFEIT OF ARGUMENT* (1959); FISCHER, *supra* note 9; ROBERT J. FOGELIN, *UNDERSTANDING ARGUMENTS: AN INTRODUCTION TO INFORMAL LOGIC* (3d ed. 1987); C.L. HAMBLIN, *FALLACIES* (1970); PATRICK J. HURLEY, *A CONCISE INTRODUCTION TO LOGIC* (3d ed. 1988); BROOKE MOORE & RICHARD PARKER, *CRITICAL THINKING* (1992); RUSSEL R. WINDES & ARTHUR HASTINGS, *ARGUMENTATION & ADVOCACY* (1965); Jack Landau, *Logic for Lawyers*, 13 PAC. L. REV. 59 (1981). Lawyer-scholars and other bull-shooters who really want to drop names can resort to *Aristotle on Fallacies* or the *SOPHISTICI ELENCHI* [Sophistical Refutations] (London: The Macmillan Co., 1866), or an obscure work by Abraham Fraunce titled *LAWIERS LOGIKE*,

terms of technical precision, nor in terms of the length of the laundry list.¹⁶ I can only hope to illustrate a few of the ways in which lawyers use so-called "fallacious" reasoning to persuade juries and judges to favor the positions of their clients—to "lead them by the nose."¹⁷

Once again, the critical point to make is that *something is wrong with these tactics*. We are informed that they should not persuade, and their use should not be encouraged. Some are sufficiently notorious, and transparent, to be found "objectionable" by at least a few of our most alert (least narcoleptic) judges. Still, for whatever reason, *they do seem to work*. Because they seem to work, they are part of the basic repertoire of the advocate.

EXEMPLIFYING THE PRAECEPTS OF LOGIKE BY THE PRACTISE OF THE COMMON LAWE (London: William How, 1588). If you want to score, mention Vatsyayana, who wrote commentary to Gautama's *Nyaya sutra* ("Logic Book"). Vatsyayana wrote the *Kama sutra* too. Indeed, the latter was his big seller. These obscure tidbits (Fraunce and Vatsyayana) I have gleaned from Hamblin, at 50, 139 and 178. Hamblin provides a spectacular bibliography. As I was circulating this article for publication, Professor Rogers, formerly a friend, gave me a copy of Kevin Saunders' *Informal Fallacies in Legal Argument*, 44 S.C. L. REV. 343 (1993). He assured me that my article would not be redundant since Saunders article was "academic" whereas mine was "irreverent," if not "frivolous." Of course, this buoyed my spirits.

16. See CAPALDI, *supra* note 15, at 12. "No two lists of such errors are the same. Even the Latin names traditionally used to identify and codify [them] are not used uniformly. One author comes up with a list of thirty-four, but he is quickly superseded by another author who has discovered over one hundred fallacies!" *Id.* at 12. Fischer lists over 100 fallacies, although a purist would argue that *not all are fallacies, or even arguments*. FISCHER, *supra* note 9, at xv-xxii.

17. Compare CAPALDI, *supra* note 15. This interesting little book attempts to explain how a knowledge of informal logic can actually be used in an argument *in real life*! The author writes the book "from the point of view of one who wishes to deceive or mislead others." *Id.* at 13. For example, in "Presenting Your Case," the author points out that one must first "Gain A Sympathetic Audience"—perhaps an Appeal to Pity, Authority, or Tradition will do. *Id.* at 19-29. The same fallacies of reasoning may also be useful in "Attacking An Argument." *Id.* at 71-97. In "Defending Your Case" the author suggests the Appeal to Ignorance, Quoting Out of Context, Red Herring, Damning the Dilemma, Appeal to Self-Interest. *Id.* at 118-34. For the *coup de grace*, the author suggests an argument *Ad Hominem*, or even an Appeal to Force or Fear. *Id.* at 137-40. This author's intentions are good. He wants his readers to learn to spot and expose bad arguments by mastering (for educational purposes) the deceiver's art. The methodology is that "it takes one to know one." Needless to say, there is nothing new under the sun. The unknown author of *Rhetorica Ad Herennium* claimed to be well-motivated too: "This knowledge of defective arguments will confer a double advantage. It will warn us to avoid a fault in arguing, and teach us skillfully to reprehend a fault not avoided by others." RHETORICA AD HERENNIIUM 113 (G.P. Goold ed. & Harry Caplan trans. 1954) [hereinafter RHETORICA]. See also Schopenhauer, *supra* note 6, at 9-13 (distinguishing Logic from Dialectic ("the art of getting the best of it in a dispute")).

Why do they work? I am no logician, but I can venture a couple of guesses. The first is obvious; that is, that *all* of these “fallacies” appeal to *psychological* factors—or, if you prefer, the “less respectable demigods or demons” in Barrister Harvey’s pantheon. Some appeal more than others, in that they trigger strong emotions. Others appeal because they look compelling—they may serve as a sort of logic substitute.¹⁸ A logic substitute can be a comfort. If nothing else, it can induce a reluctant decision-maker to take the plunge into what must be, for many, very cold water, even if the “fallacy” is not really *the reason* for the particular decision.¹⁹ The second point to be made is that some of these “fallacies” may not be fallacies at all. As arguments (and sometimes what are called fallacies are not really arguments),²⁰ they may not be all *that* illogical. For example, many are said to be “fallacies of weak induction.”²¹ The premises *appear* to be relevant to the conclusion, but “the connection between premises and conclusion is not strong enough to support the conclusion. . . . [T]he evidence is not nearly good enough to cause a reasonable person to believe the conclusion.”²² In other words, many of these arguments are more like vintage Marx²³ than like vintage Alice. They are screwy, but they are not *too* silly to appeal to weak minds.

18. MOORE & PARKER, *supra* note 15 (referring to the common fallacies as types of “Pseudoreasoning”).

19. “Many readers will remember the advice given by an old judge to a young one, ‘Give your judgments without reasons; most likely . . . that your reasons will be wrong.’” DE MORGAN, *supra* note 14, at 263.

20. They may be some other kind of verbal persuader. See *infra* section XIV.

21. In the case of a strong inductive argument, if the premises are true then the conclusion is only *probably* (not necessarily) true. In the standard treatments, the fallacies of weak induction include appeal to authority, appeal to ignorance, false cause, slippery slope, and weak analogy. See, e.g., COPI, *supra* note 15; HURLEY, *supra* note 15. The fallacies of relevance, in which the premises are logically irrelevant, but psychologically relevant, to the conclusion, include appeal to force or fear, appeal to pity, attacking the arguer (the argument *ad hominem*), straw man, and the red herring. The great British logician Richard Whatley lumped all of these “Arguments ‘Ad’” together under the label “fallacies of appeals to the passions.” See HAMBLIN, *supra* note 15, at 171.

22. HURLEY, *supra* note 15, at 121.

23. Karl—not the smarter Brothers Marx.

III. The Appeal to Pity

The argument *ad misericordiam* is a favorite of trial lawyers, the refuge of the weaker party, the weapon of choice of the injury victim, the last resort of the feckless criminal defendant, and the stuff of class struggle.²⁴ Several commentators have summoned the ghost of Darrow to give us an example—an example which, admittedly, *may* be a bit florid for a 1990s jury:

I appeal to you not for Thomas Kidd, but I appeal to you for the long line—the long, long line reaching back though 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.²⁵

I say *may* be too florid because, in many cases, today's juries have been swayed by such arguments. Here is a recent example in which the pitch was *too* effective. The verdict was reversed on appeal for improper argument.

You will decide what is the dollar value of the loss of a husband and a father, one who earns and provides, loves, guides, comforts, consoles, protects and even punishes children. Now my partner . . . has a little six year old boy who probably couldn't and wouldn't know enough about the value of money to know what price he might want to put on a daddy, but I don't believe my sixteen year old would take three million dollars for me—that may sound selfish, but he knows the value of money, but I believe he'd rather have me.

. . . .

Now I feel a heavy burden right now, and I think all of you know that. I feel the heavy burden because this young redheaded lawyer has to close this argument. This young lawyer has to say the last things that

24. CAPALDI, *supra* note 15, at 21-22 (citing Mark Antony's speech in WILLIAM SHAKESPEARE, JULIUS CAESAR act III, sc. 2 as an Appeal to Pity). Mark Antony's speech is more frequently cited as an example of an appeal *ad populum*. See, e.g., FEARNSIDE & HOLTHERR, *supra* note 15, at 95.

25. COPLI, *supra* note 15, at 92 (citing IRVING STONE, CLARENCE DARROW FOR THE DEFENSE (5th ed. 1941)).

will be said for . . . the widow of [the deceased]. And the last thing that can be said for that baby that's asleep there. And the last thing for this little girl that can be said. So I feel a heavy burden. I feel a heavy burden because [the deceased] was my friend from Seminary; that we grew up together and were friends for a long time.

. . . .

Not one person that's been on this witness stand in nine days will approve those [Defendant's] claims. Not one. Didn't make any tests until after [the deceased] is dead and in the grave. My goodness, they ought to have been at the grave to hear that child cry and say, "I want my Daddy" and to watch that child wait on the doorsteps of its home for its Daddy to return. But they weren't there because they had sold the tires. Maybe after this case—maybe after this one they won't be able to make those claims. Maybe there won't be many more children sitting on the doorstep waiting for Daddy to come home, and he never comes home because they couldn't back up what was in that Owner's Manual.²⁶

This type of argument is usually prefaced by a solemn admonition that the party making the argument *does not want the jury's pity!*²⁷

Not all appellate judges are hostile to the appeal to pity. The use of pathos is, for many, part of a grand tradition.

No lawyer has the right to misrepresent or misstate the testimony. On the other hand, he is not required to forego all the embellishments of oratory, or to leave uncultivated the fertile field of fancy. It is his time-honored privilege to—

"Drown the stage in tears,
Make mad the guilty and appall the free,
Confound the ignorant, and amaze, indeed,
The very faculties of eyes and ears."

. . . .

26. *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 285 (5th Cir. 1975).

27. Compare Craig Spangenberg, *Basic Values and the Techniques of Persuasion*, LITIG., Summer 1977, at 13, 14-15, in which a deservedly respected plaintiff's personal injury lawyer claims that he does not appeal to emotion or attempt to make juries cry (although he notes that he could if he wanted to), but instead limits his appeals to reason alone. He almost immediately opines that "[e]motional content comes not so much from words as from the voice and manner. . . ." *Id.* at 15. So does he go for the emotions or not? I suspect that he does, but that he is more subtle than many lawyers. In any event, I do not dispute that whatever he does works for him. My point is that he protests too much if it is his position that lawyers do not make the appeals I allude to, or that such appeals do not work.

The sorrowing, "grey-haired parents," upon the one hand, and the broken-hearted "victim of man's duplicity," upon the other, have adorned the climax and peroration of legal oratory from a time "whence the memory of man runneth not to the contrary," and for us at this late day to brand their use as misconduct would expose us to just censure for interference with ancient landmarks.²⁸

Tears have always been considered legitimate arguments before a jury, and, while the question has never arisen out of any such behavior in this court, we know of no rule or jurisdiction in the court below to check them. It would appear to be one of the natural rights of counsel which no court or constitution could take away. It is certainly, if no more, a matter of the highest professional privilege. Indeed, if counsel has them at his command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they were indulged in to such excess as to impede or delay the business of the court.²⁹

The appeal to pity has been exploited since the ancient Greeks first got worked up over the opportunities presented by oratory. Athenian defendants routinely trotted out their weeping children in the hope of swaying the jury.³⁰ Even Socrates made such an appeal in a round about way in the *Apology*—"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."³¹ A famous painting by Jacques Louis David, the "Trial of Phyrne," is based on the case of a beautiful courtesan who had been charged with profaning the Eleusinian mysteries. She was

28. *State v. Burns*, 94 N.W. 238, 241 (Iowa 1903).

29. *Ferguson v. Moore*, 39 S.W. 341, 343 (1897). For another perspective, see HAMBLIN, *supra* note 15, at 43. He agrees that these arguments are "fallacious" to the extent that they "proceed[] by engaging the hearer's emotions to the detriment of his good judgment." *Id.* However, he adds: "[M]ore depends on a lawsuit . . . than assent to a proposition. A proposition is presented primarily as a guide to action and, where action is concerned, it is not so clear that pity and other emotions are irrelevant." *Id.*

30. See ARISTOPHANES, *The Wasps*, in ARISTOPHANES 404, 461-63 (T.E. Page et al. eds. & Benjamin B. Rogers trans., Loeb Classical Library, 1924).

31. COPI, *supra* note 15, at 93. Compare *Commonwealth Life Ins. Co. v. Hall*, 517 S.W.2d 488, 495 (Ky. 1974) ("[I]t's a little woman against a big company. . . . Now, there has been no attempt to characterize the big company. We tried to keep away from it. [The decedent's daughter] has not been in the Courtroom. That would have been one of the nicest tricks we could have pulled.").

represented by her lover Hyperides (lawyers having sex with their clients has been a problem of long standing). The latter waited for a critical point in the case, whereupon he stripped his client down to her birthday suit and implored the jurors to gaze upon and have pity for a priestess of Aphrodite. The verdict? Not guilty!³²

Roman oratory was no less dependent upon it (pity, that is). The following quote, from an ancient handbook, was once incorrectly attributed to Cicero:

We shall stir Pity [Misericordia] in our hearers by recalling the vicissitudes of fortune; by comparing the prosperity we once enjoyed with our present adversity; by enumerating and explaining the results that will follow for us if we lose the case; by entreating those whose pity we seek to win, and by submitting ourselves to their mercy; by revealing what will befall our parents, children, and other kinsmen through our disgrace, and at the same time showing that we grieve not because of our own straits but because of their anxiety and misery; by disclosing the kindness, humanity, and sympathy we have dispensed to others; by showing that we have ever, or for a long time, been in adverse circumstances; by deploring our fate or bad fortune; by showing that our heart will be brave and patient of adversities. The Appeal to Pity must be brief, for nothing dries more quickly than a tear.³³

32. This painting is one of the many collected in Sara Robert, *Law: A Treasury of Art and Literature* (1990). Demonstrations in court are always popular. One commentator alludes to a trial in Spain. WILLIAM FORSYTH, HORTENSIIUS: A HISTORY OF ADVOCATES 39 (1880). The clergy wished to suppress the popular Bolero. The dancers were allowed to demonstrate the dance as part of their defense. "When they began, the bench and the bar showed symptoms of restlessness, and, at last, casting aside gowns and briefs, they joined, as if tarantula-bitten, in the irresistible capering. Verdict for the defendants, with costs." *Id.* at 39.

33. RHETORICA, *supra* note 17, at 151-53. If you think that the author of this ancient treatise was cynical (in the modern sense of the word), compare CAPALDI, *supra* note 15, at 75-76:

The third possibility is what to do if your opponent has been successful. To begin with, *moral posturing* calculated to shame your opponent and audience is *very effective when you are the obvious underdog* in a dispute. Now if your opponent's success is owing to *his* use of techniques of deception such as those we are discussing, you can probably win points by exposing this fact and accusing him (more or less gently) of being a trickster. But if your audience is so dimwitted that it would not see what you are driving at, you should stick to using the deceptive tricks yourself. Above all, do not be so harsh with your opponent as to increase the audience's sympathy for him, and do not give the appearance yourself of being crafty or nit-picking. Most audiences immediately dislike someone who seems impressed with his ability to argue, so avoid looking oppressively flashy or pleased with your incisiveness or wit. Strive to look like a slightly wounded, unjustly used underdog, but again, don't overdo it. Know your audience!

According to the real Cicero, the rhetorical art is simply an instrument—to be used to make the case you are pleading in the law courts appear to be the better and more plausible, and to make your speeches to the people and the senate as effective as possible, in fact to make the wise think your speech eloquent and fools even think it is true.³⁴ As to the tactics of the advocate, none is more important than an appeal to the emotions. “[M]en decide far more problems by hate, or love, or lust, or rage, or sorrow, or joy, or hope, or fear, or [misconception] or some other inward emotion, than by reality, or authority, or any legal standard, or judicial precedent, or statute.”³⁵

Cicero practiced what he preached. Professor Clarke describes how effective Cicero’s reliance on emotion could be. “Under the spell the jurymen would dissolve in tears, forget their reasoning powers and follow their feelings. ‘In my opinion’, says Quintilian, ‘the audience did not know what they were doing, their applause sprang neither from their judgment nor from their will; they were seized with a kind of frenzy and, unconscious of the place in which they stood, burst forth spontaneously into a perfect ecstasy of delight.’”³⁶

If your audience is somewhat sophisticated, but perhaps taken in by your opponent’s skillful presentation, then you should expose him as a sophist and a trickster who is insulting the intelligence of the audience. You then engage in a point by point critique of his tricks. Finally, after the expose you claim that you *shall not stoop* to using such dishonest means.

Id.; see also SCHOPENHAUER, *supra* note 6, at 15-38 (“Strateguer”) (offering similar cynical advice).

34. 1 MARCUS T. CICERO, DE ORATORE BOOK I, in CICERO: DE ORATORE 2, 33-35 (T.E. Page et al. eds. & E.W. Sutton trans., The Loeb Classical Library 1942). Truth was not critical. Truth was nothing more nor less than one of many things that the Roman advocate had to deal with. Compare, RHETORICA, *supra* note 17, at 28-29:

Our Statement of Facts will have plausibility if it answers the requirements of the usual, the expected, and the natural. . . . If the matter is true, all these precautions must none the less be observed in the Statement of Facts, for often the truth cannot gain credence otherwise. And if the matter is fictitious, these measures will have to be observed all the more scrupulously. Fabrication must be circumspect in those matters in which official documents or some person’s unimpeachable guaranty will prove to have played a role.

Id. Cicero and the (true) author of Ad Herennium are cynical. On the other hand, one need not countenance fabrication in order to find some sound advice in this excerpt.

35. CICERO, *supra* note 34, at 324-25.

36. MARTIN L. CLARKE, RHETORIC AT ROME: A HISTORICAL SURVEY 79 (1953) (citing Quint.VIII.iii.4).

The so-called "Golden Rule" argument combines pity with self-interest. The jurors are asked to give the plaintiff what "they would take" if they were in the shoes of the injured plaintiff.³⁷ Because the "Golden Rule" argument has been universally condemned, a lawyer may attempt to "backdoor it" in the style of Socrates. For example, the late Moe Levine of New York City is "credited" with telling the jury:

You [jurors] cannot approach [the amount of damages] subjectively, which means, of course, that you cannot say to yourselves, "What would I want if this happened to me?" If you did there is not enough money in the world. So you cannot.³⁸

IV. Appeal to Force or Fear

A radically different form of appeal to emotion may be based on force or fear. Of course, an outright *argumentum ad baculum*, or appeal to force or to "the stick" is not the stuff of jury argument—in *free* countries anyway. However, more subtle threats that some harm may come to jurors if they do not accept the arguer's conclusion rear their ugly heads from time to time.³⁹

Perhaps the best example of this sort of thing occurred in *United States v. McRae*,⁴⁰ a criminal case arising from a shooting of a wife by her husband on the Fort Bliss, Texas, military reservation. Though the shooting was at point blank range, the defense claimed that the shooting was accidental.⁴¹ The defendant was convicted and lodged an appeal.⁴² That it was unsuccessful does not validate the closing argument of the prosecutor:

37. *Stanley v. Ellegood*, 382 S.W.2d 572 (Ky. 1964); see RICHARD H. UNDERWOOD & WILLIAM H. FORTUNE, *TRIAL ETHICS* 368-69 (1988).

38. LAWRENCE J. SMITH, *ART OF ADVOCACY—SUMMATION* § 14.61 (1992); see also *Woods v. Burlington N. R.R.*, 768 F.2d 1287 (11th Cir. 1985). The argument *ad misericordiam* is effective in law school faculty meetings when issues of academic discipline and academic status of students are discussed.

39. Compare HURLEY, *supra* note 15, at 107.

40. 593 F.2d 700 (5th Cir.), *cert. denied*, 444 U.S. 862 (1979). The trial judge was William Sessions, who later became the Director of the FBI.

41. *McRae*, 593 F.2d at 702.

42. *Id.*

I think the case is very simple. It boils down to whether or not, when the gun was fired, it was fired with the malice aforethought that the Government claims, or it was a total accident that Mr. Larry Mathews claims, and that this defendant, remember, testified, claimed. And remembering that credibility, ladies and gentlemen, remember that you don't have to believe a word of what he told you if you don't want to. You don't have to believe part of it if you don't want to. Or if you want to, you can believe all of it and turn him loose, and *we'll send him down in the elevator with you with his gun. He'll go out the front door with you.*⁴³

This must have tightened up the jurors a few clicks. However, the appellate judges, smug in their omniscience, secure in their life tenure, and protected by the U.S. Marshall Service, found the argument to be harmless error in light of what they perceived to be overwhelming evidence of guilt.⁴⁴

Efforts to enlist the jurors as "the conscience of the community" may also involve a type of coercion, albeit subtle.⁴⁵ "Whenever an attorney refers to 'the community,' it is likely that the suggestion is that the jurors will be ashamed to face their fellow citizens if the verdict is 'wrong.'"⁴⁶ Some courts are offended by such arguments; in fact, one appellate court groaned that "[w]e have a low opinion of the planting of this kind of corn in a federal courtroom."⁴⁷ Nevertheless, this argument is standard fare on the trial lawyer lecture circuit.⁴⁸ Of course, more blatant appeals to xenophobia, self-interest, and paranoia ("You'll

43. *Id.* at 706 (emphasis added).

44. *Id.* at 706-07.

45. *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233 (5th Cir. 1985).

46. *UNDERWOOD & FORTUNE*, *supra* note 37, at 370. Another variation is one that tells the jurors that they should or must return a verdict that they will be able to justify to neighbors or friends afterward. *See, e.g.,* *Young v. State*, 431 A.2d 1252 (Del.), *cert. denied*, 454 U.S. 972 (1981). *Compare* *Northern Mariana Islands v. Mendiola*, 976 F.2d 475, 486 (9th Cir. 1992) ("Everyone in Saipan is interested. That's why there are so many people in the courtroom. The people want to know if they are going to be forced to live with a murderer. . . . If you say not guilty, he walks out the door, right behind you."). *See* JACOB STEIN, *CLOSING ARGUMENT* §§ 74, 79 (1992) (offering cases pro and con regarding arguments alluding to "community interest in conviction" and appeals to jurors to act as the "conscience of the community").

47. *Barzelis v. Kulikowski*, 418 F.2d 869, 870 n.1 (5th Cir. 1969).

48. *THE SUMMATION*, (Moe Levine) (a popular CLE video prepared by the Hastings College of Law).

be next!")), are dangerous in almost all courtrooms.⁴⁹ My favorite pitch of this genre was made by an Estill County, Kentucky, prosecutor to an Estill County, Kentucky, jury:

If you want a Clark County lawyer to come over here to defend a Clark County thief who breaks into and steals from an Estill County place of business, then that is your own business, and if you want that you will find this thief here not guilty.⁵⁰

V. The Appeal to Moderation

Fischer identifies what he calls the fallacy of argument *ad temperantiam*. Many people are repelled by a strident, self-righteous speaker and an extreme position (even when the extreme position is *correct*). Psychologically, the middle can be attractive—nonconfrontational, nonjudgmental, comfortable and, well, easy. The lawyer makes an “appeal to moderation . . . [and we are instinctively drawn in this direction] . . . on the apparent assumption that truth, in Burke’s phrase, is always a ‘sort of middle.’”⁵¹ Ironically, this argument may work best on judges and other professional arbitrators, who seem constitutionally inclined to give each side half a loaf. Many lawyers who habitually represent defendants in civil cases tend to favor trials “to the judge alone,” and they love to make appeals to moderation. A half a loaf is often counted as a big win in this context.

Related to the appeal to moderation is the fallacy of “forestalling disagreement.”⁵² In reality, this is not a fallacy (it is not even an argument, let alone an invalid one), but a technique of “phrasing [statements or] . . . ideas in ways that will forestall disagreement” and making the opponent or decision-maker feel embarrassed to disagree.⁵³ Here

49. *Weinberger v. City of New York*, 97 A.D.2d 819, 468 N.Y.S.2d 697, 699 (App. Div. 1983) (granting a new trial on the issue of damages because counsel representing the defendant city appealed to the jurors as taxpayers, informing them that “we are all together in this” and [we] have a “sworn duty” to keep the city from being “ripped off”); see also STEIN, *supra* note 46, § 83 (regarding appeals to jurors’ self-interest as taxpayers or as potential future victims of the defendant).

50. *Taulbee v. Commonwealth*, 438 S.W.2d 777 (Ky. 1969).

51. FISCHER, *supra* note 9, at 296.

52. FEARNside & HOLThER, *supra* note 15, at 101.

53. *Id.*

expressions are used to alternatively assure and cow such as: "it is obvious," "as any fool can see," "of course, everyone must agree that," "needless to say, we all know that," "only a fool would disagree with the proposition that," and so forth.

VI. Appeal to Authority

This is the *argumentum ad verecundiam*. Such an appeal is not necessarily fallacious. Many times we can and should rely on experts and other authorities. "Historically speaking, argument from authority has been mentioned in lists of valid argument-forms as often as in lists of Fallacies."⁵⁴ When listed as a fallacy, the appeal to authority is said to be one of weak induction—the premises may lend some support to the conclusion. The question is, how much? However, it is important to be aware of the psychological aspects of the argument. Here is what the expert or specialist says. Who are *you* to disagree? Are you an engineer, tax accountant, Rhodes scholar, Professor of Constitutional History, a [gulp?] Yale Law Grad [!] . . . ? The object is to "put an opponent in the awkward position of appearing to commit the sin of pride if he persists in his opposition."⁵⁵

Interestingly, the United States' founding philosopher, John Locke, had something to say about this:

[I]t may be worth our while a little to reflect on *four sorts of arguments* that men, in their reasonings with others, do ordinarily make use of to prevail on their assent, or at least so to awe them as to silence their opposition.

First, The first is to allege the opinions of men whose parts, learning, eminency, power, or some other cause has gained a name and settled their reputation in the common esteem with some kind of authority. When men are established in any kind of dignity, it is thought a breach of modesty for others to derogate any way from it, and question the authority of men who are in possession of it. This is apt to be censured

54. HAMBLIN, *supra* note 15, at 43.

55. FISCHER, *supra* note 9, at 283. *Verecundia* is Latin for something like shame, shyness, or modesty. HAMBLIN, *supra* note 15, at 42. As Hamblin points out, "[one] can respect authorities without being ashamed, shy or (particularly) modest." *Id.* Hamblin is knowledgeable and clever; however, he is also something of a pain in the ass, is he not?

as carrying with it too much of pride, when a man does not readily yield to the determination of approved authors which is wont to be received with respect and submission by others; and it is looked upon as insolence for a man to set up and adhere to his own opinion against the current stream of antiquity, or to put it in the balance against that of some learned doctor or otherwise approved writer. Whoever backs his tenets with such authorities thinks he ought thereby to carry the cause, and is ready to style it impudence in anyone who shall stand out against them. This I think may be called *argumentum ad verecundiam*.⁵⁶

Of course, in some *fora* (and the courtroom is not immune from this) the appeal may get even sillier and, yet, be surprisingly successful. A movie star may be called upon to testify before Congress. Put in the best light, the testimony is nothing more than an attention getter. Surely a responsible advocate will also call *legitimate* expert witnesses to the microphone to provide substantial support for the arguer's position. On the other hand, even the responsible advocate knows and hopes to capitalize on the fact that politicians are even more star-struck than the average citizen. Some will support a position in order to curry favor with the elite or to appear to be "hip." After all, it will cost *them* nothing.

In the courtroom, cross-examination may be an effective counter-measure. The authority appealed to may be shown to be a liar, or other than disinterested, or not really an authority in the relevant area; the expert may also be shown to hold unrepresentative or idiosyncratic views within his or her field.⁵⁷ The subject matter may be one in which there is no basis for a claim of expertise, or any need for it.⁵⁸

Nevertheless, cross-examination has its limits. "Junk science" is one of the central problems of evidence law in the 1990s. Abuse of

56. HAMBLIN, *supra* note 15, at 159-60 (quoting 2 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 278-79 (1961)). The other three fallacies discussed by Locke besides *ad verecundiam* are *ad ignorantiam*, *ad hominem*, and *ad judicium*. *Id.* at 160. Hamblin points out that it was Locke and his nineteenth and twentieth century offspring, and not the ancient authors, who applied Latin terms to most of the "arguments 'ad'." *Id.* at 41.

57. See generally CAPALDI, *supra* note 15, at 23-28; COPI, *supra* note 15, at 61-62; FEARNSIDE & HOLTER, *supra* note 15, at 85-86 (offering a list of "conditions to watch for in questions of personal reliability."). For a new treatise dealing with the examination and cross-examination of expert witnesses see MICHAEL E. TIGAR, EXAMINING WITNESSES (1993).

58. Cf. HURLEY, *supra* note 15, at 122.

the "scientific image"⁵⁹ is rampant. Nowadays the scientist, like the movie star, regularly lends his or her name to a claim or cause without regard to the relevance of his or her special knowledge—*argumentum ad verecundiam*—all in the service of the "agenda." So what else is new? "Each of them believed himself to be extremely wise in matters of great importance, because he was skillful in his own art: and this mistake of theirs threw their real wisdom into the shade."⁶⁰

The critics of the status quo hold the position that judges have not been given, or at least have not exercised, sufficient authority to prevent unreliable expert testimony from being admitted at all—from even being heard by jurors. Implicit in the argument are the notions that cross-examination is not a sufficient safeguard, and that juries cannot properly evaluate such testimony.⁶¹

VII. Personal Attack

This is the ever popular and instinctual *argumentum ad hominem*. Admittedly, such an "argument" often emanates from the lower brain stem. It can be a sort of reaction—like our instinct to blindly follow a leader. On the other hand, such an argument can be the product of a considerable, if malign, intelligence. In short, making arguments *ad hominem* can involve the *creative act*, and be a *hell of a lot of fun!*

Here we are attacking the other arguer, or making an "argument against the person." The old gag is "if you don't have the law on your side, argue the facts, and if you don't have the facts, attack opposing counsel."⁶²

59. "The scientific image [not to be confused with the scientific attitude or the scientific method] is a majestic facade of omnipotence and omni-accuracy which becomes indiscriminately attached to scientists, popularizers, and quacks whenever they 'sound' scientific." WINDES & HASTINGS, *supra* note 15, at 128; see also JEAN-FRANCOIS REVEL, *THE FLIGHT FROM TRUTH: THE REIGN OF DECEIT IN THE AGE OF INFORMATION* (1991); EDITH EFRON, *THE APOCALYPTICS: HOW ENVIRONMENTAL POLITICS CONTROLS WHAT WE KNOW ABOUT CANCER* (1984).

60. PLATO, *THE APOLOGY* VIII.

61. See PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991). The argument *ad verecundiam* is also a staple at law school faculty meetings.

62. Professor Copi's version:

The classic example of this fallacy has to do with British law procedure. There the practice of law is divided between solicitors, who prepare the case for trial, and barristers,

Of course, attacks on the opponent or the opponent's witnesses are not always fallacious. The credibility of a witness may be undermined—the witness may be impeached—by evidence that he has been convicted of a felony or committed a prior bad act reflecting on his or her credibility. A prior conviction for perjury would be the ideal ammunition.⁶³ Most of the time the *ad hominem* is simply abusive.

Here is my favorite attack on the opposing counsel and the opponent's expert witness:

In his closing argument defense counsel characterized plaintiff's attorney as a "slick attorney from Chicago." Defense counsel referred to plaintiff's attorney as a "slick hired hand" and also referred to plaintiff's medical expert witness as a "sidekick" and a "righthand man."

Defense counsel claimed that plaintiffs' counsel "manufactured" evidence, had a "wild imagination," and was not worthy of the jury's trust. He further stated that plaintiff's counsel was the "captain of (the) ship" who was "piloting" the testimony of plaintiff's expert witness. In addition, defense counsel compared the relationship between plaintiffs' counsel and his expert witness to that existing between the "Cisco Kid and Pancho" and "Mat Dillon and Chester." The expert was characterized as "a professional witness" who carries a "shiny black leather bag" containing instruments that "have never been used."⁶⁴

Other common techniques of bias incitement are not far removed from name-calling, at least in a logical sense.

[I]n spite of the well established and salutary rule that the relative wealth or poverty of a party is ordinarily inadmissible, and that arguments

who argue or "plead" the cases in court. Ordinarily their cooperation is admirable, but sometimes it leaves much to be desired. On one such latter occasion, the barrister ignored the case completely until the day it was to be presented at court, depending upon the solicitor to investigate the defendant's case and prepare the brief. He arrived at court just a moment before the trial was to begin and was handed his brief by the solicitor. Surprised at its thinness, he glanced inside to find written: "No case; abuse the plaintiff's attorney!"

COP1, *supra* note 15, at 89.

63. FEARNSIDE & HOLTHERR, *supra* note 15, at 99; COP1, *supra* note 15, at 89-90. However, Copi points out that if the arguer goes further and contends that the impeachment proves the falsehood of that to which the witness has testified (more than merely that the impeached testimony has less force in proving the truth of the matter asserted) then the arguer has committed the fallacy of *argumentum ad ignorantiam*. *Id.* at 91-92.

64. Cecil v. Gibson, 37 Ill. App. 3d 710, 711, 346 N.E.2d 448, 449 (1976).

regarding the wealth of the defendant are improper (unless about a legitimate claim for punitive or exemplary damages), deliberate incitement of bias along such lines continues to generate a surprising number of reported appellate opinions.

. . . .

In theory, at least, it is the duty of counsel for the parties, as well as the court, to prevent the jury from considering the extraneous and the irrelevant, and to insure that verdicts are rendered on the basis of evidence presented on issues made by the pleadings. The American bar all too often appears to be preoccupied with circumventing this ideal.⁶⁵

Naturally, an argument *ad hominem* is usually found in the company of an argument *ad misericordiam*. Where there is a victim, there must also be an oppressor.

I am going to make [be?] the equalizer. You know what the equalizer between the multimillion dollar [company?] there . . . [and?] for [Plaintiff] and her kids, it's right here. On that side of the room are bills [billions] of dollars and on this side of the room is the equalizer. [I]n this case I brought you the giants, the giants of the industrial world . . . I am going to ask you to tumble the magnificent big companies here with all their engineers.⁶⁶

As regards abuse of criminal defendants, I defer to the definitive collection by lawyer Arthur Bishop. I am stealing the best of his collection,⁶⁷ and aiming them at you (assuming, hypothetically of course, that *you* are on trial):

You "ought to be shot through the mouth of a red hot cannon, through a barb wire fence into the jaws of hell," you "squirrel headed Dutchman," you "young buck with vultures for witnesses," you "fiend and demon having a foul heart," you "brute, beast, animal and mad dog."⁶⁸

65. Richard H. Underwood, *Adversary Ethics: More Dirty Tricks*, 6 AM. J. TRIAL ADVOC. 265, 301, 303 (1982) (footnotes omitted).

66. *Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978).

67. Arthur N. Bishop, *Name Calling: Defendant Nomenclature In Criminal Trials*, 4 OHIO N. U. L. REV. 38, 40-73 (1977).

68. *Id.* (citing *State v. Richter*, 36 S.W.2d 954, 955-56 (Mo. App. 1931); *State v. Ulrich*, 110 Mo. 350, 354, 19 S.W. 656, 660 (1892); *East v. Commonwealth*, 249 Ky. 46, 49, 60 S.W.2d 137, 140 (1933); *Brown v. State*, 121 Ala. 9, 10, 25 So. 744, 745 (1899); *Miller v. State*, 226, Ga. 730, 731, 177 S.E. 253, 254 (Ga. 1970)).

There, I feel better! Do you?

Do not get the idea that name-calling is a one way street in criminal cases. Charges of prosecutorial misconduct are a common defense tactic. This is from a recent biography of Edward Bennett Williams:

Williams was so aggressive about accusing the prosecutors of misconduct that the assistant U.S. attorneys on the case began referring to the lawyer writing Williams's motions as "Worse Yet." After every paragraph alleging some unpardonable act of prosecutorial misconduct, the next paragraph would begin, "Worse yet. . . ."⁶⁹

I must admit that I have resorted to arguments *ad hominem* from time to time; but so has everyone else!⁷⁰ Fischer reminds us that even Honest Abe was up to the task, although he was kinder, gentler, and wittier than most.

In a case where Judge [Stephen T.] Logan—always earnest and grave—opposed him, Lincoln created no little merriment by his reference to Logan's style of dress. He carried the surprise in store for the latter, till he reached his turn before the jury. Addressing them, he said: "Gentlemen, you must be careful and not permit yourselves to be overcome by the eloquence of counsel for the defence. Judge Logan, I know, is an effective lawyer. I have met him too often to doubt that; but shrewd and careful though he be, still he is sometimes wrong. Since this trial has begun I have discovered that, with all his caution and fastidiousness, he hasn't knowledge enough to put his shirt on right." Logan turned red as crimson, but sure enough, Lincoln was correct, for the former had donned a new shirt, and by mistake had drawn it over his head with the pleated bosom behind. The general laugh which followed destroyed the effect of Logan's eloquence over the jury—the very point at which Lincoln had aimed.⁷¹

69. EVAN THOMAS, *THE MAN TO SEE: EDWARD BENNETT WILLIAMS: ULTIMATE INSIDER; LEGENDARY TRIAL LAWYER* 419-20 (1991).

70. The argument *tu quoque* is a variation of the *ad hominem* in which "the first person's argument causes the respondent to appear guilty. The respondent then replies by attempting to shift the burden of guilt back to the first person." HURLEY, *supra* note 15, at 112. Two wrongs make a right. As pointed out by one commentary, "[a] climate of opinion condoning practices that are recognized as immoral does tend to mitigate the culpability of an individual who is merely doing what everybody else does." FEARNSIDE & HOLTHER, *supra* note 15, at 128.

71. FISCHER, *supra* note 9, at 291 (quoting WILLIAM H. HERNDON, *HERNDON'S LIFE OF LINCOLN* 291 (Paul Angle ed., 1965)). The *ad hominem* is also the stuff of law school faculty meetings.

VIII. Appeal to Ignorance

Logicians tell us that "[w]hen the premises of an argument state that nothing has been proved one way or the other about something, and the conclusion then makes a definite assertion about that thing, the argument commits an appeal to ignorance."⁷² The *argumentum ad ignorantiam* may be committed by one who argues that something is false because it has not been proved true; or argues that something is true because it has not been proved false. The former argument may be a strong inductive argument—for example, regarding an issue subject to scientific investigation and proof (depending on the quality and quantity of the evidence mustered).⁷³ This cannot be said of the latter argument, which is a favorite of divines, mystics, psychics, the occasional expert witness, and other obstinate troublemakers. Lawyers use it all the time.

Logician Irving Copi makes several references to the practice of law when he discusses this fallacy. First he contends that "[t]his mode of argument . . . is not fallacious . . . in a court of law; for in a court of law the guiding principle is that a person is presumed innocent until proved guilty. The defense can legitimately claim that if the prosecution has not proved guilt, this warrants a verdict of not guilty."⁷⁴ Copi is then quick to point out that *argumentum ad ignorantiam* is a fallacy in every other forum.⁷⁵ I do not wish to quibble with Copi, but the courtroom should not and need not be viewed as some sort of alternative universe.⁷⁶ The prosecutor's failure of proof does not prove the opposite.⁷⁷

72. HURLEY, *supra* note 15, at 123.

73. *Id.* at 124.

74. COPI, *supra* note 15, at 91.

75. *Id.*

76. *But see infra* section XIX. ["The Adversary System"] Hamblin gives as his example that "there must be ghosts because no one has ever been able to prove that there aren't any." HAMBLIN, *supra* note 15, at 43. Questioning Copi's suggestion regarding the courtroom, he notes that "it must be a strange form of argument that is now valid, now invalid, according as presumptions change with context." *Id.* at 43-44. He then quips that the real fault of the argument about the existence of ghosts is that it violates the Ockhamist principle [Ockham's Razor] that "Entities are not to be multiplied unnecessarily." *Id.* at 44.

77. HURLEY, *supra* note 15, at 125. A wife shoots her husband for the insurance money; but she is acquitted in the criminal case, either because the jury had a reasonable doubt about

A variation of this theme is what De Morgan and others call the "fallacy of possible proof." The advocate dwells on the *possibility* that something *may* be true or false, in the hope of convincing the decision maker that the fact *is*, therefore, true or false. As Fischer points out, "[if we] must respect the doctrine of reasonable doubt, [we] must equally be able to recognize an unreasonable doubt when we see one."⁷⁸ But "reasonable doubt" can be a powerful lever when wielded by a defense lawyer in a criminal case:

One of the great fallacies of evidence is the disposition to dwell on the actual possibility of its being false: a possibility which must exist when it is not demonstrative. Counsel can bewilder juries in this way till they almost doubt their own senses. A man is shot, and another man, with a recently discharged pistol in his hand, is found hiding within fifty yards of the spot, and ten minutes of the time. It does not follow that the man so found committed the murder: and cases have happened, in which it has turned out that a person convicted upon evidence as strong as the above, has been afterwards found to be innocent. An astute defender makes these cases his prominent ones: he omits to mention that it is not one in a thousand against whom such evidence exists, except when guilty.⁷⁹

This intellectual crowbar can jimmy a window in an opponent's theory (we *are* talking burglar tools here), or even jack up one's own otherwise hopeless argument in a civil case as well. Anyone with any experience at all has heard questions put to witnesses, both expert and lay witnesses, about whether something is "possible" (and favorable to the proponent's

her guilt, or because the jurors were convinced that he was the typical male brute who "needed killing." In any event, her acquittal will not bar the insurer from defending its refusal to pay her the policy proceeds. In a parallel civil case, the insurer would bear the burden of proving that she willfully killed her husband, but it would only need to prove the fact by a preponderance of the evidence (a "more likely than not" standard). See ROBERT JERRY, UNDERSTANDING INSURANCE LAW 231-32 (1987); see also HAMBLIN, *supra* note 15, at 162 (stating, "Locke's *argumentum ad ignorantiam* touches on another feature of argumentation that is all too often regarded as no business of the logician; the question of burden of proof").

78. FISCHER, *supra* note 9, at 53.

79. DE MORGAN, *supra* note 14, at 275-76. In some states the defense lawyer may receive the benefit of a jury charge on reasonable doubt that states that the prosecution must negate "any reasonable hypothesis of innocence." The jurors may easily lose track of the notion of reasonableness. This charge is not required by the Constitution, according to the United States Supreme Court. See *Holland v. United States*, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150 (1954).

theory), or "consistent" (with the proponent's theory). Unfortunately, all too often judges drop the reins and jurors bolt forgetting that the question at the end of a civil case is not what is possible, but rather what is more probable than not.

Hamblin argues that while the *argumentum ad ignorantiam* is nominally an appeal "to ignorance," it may also "consist alternatively of a browbeating of ignorant people into accepting the views of the speaker."⁸⁰ This is consistent with my courtroom experience.

I do not digress when I point out that the *argumentum ad ignorantiam* is a favorite of conspiracy theorists.

As long as the conspiracy theories are *compatible* with the known evidence, no disproof is possible. Of course compatibility is not the same thing as proof for the simple reason that an infinite number of compatible possibilities can be invented. Nevertheless, there is in the popular mind the irresistible temptation to take compatibility for proof.⁸¹

This sort of thing would be enough of a worry if all it did was fuel the engine that produces bad movies.⁸² However, we see a similar phenomenon at work from time to time in cases involving expert testimony. Capaldi explains that conspiracy theories work because they are theoretical constructs—"[they] are not things one can check by simple observation. . . . To have constructs which cannot be disproven in one's arsenal is to possess a deadly weapon."⁸³ The same may be said for

80. HAMBLIN, *supra* note 15, at 44. In a more perfect world surely self-righteous advocates, and self-righteous people in general, would be made to stay out of our faces. De Morgan put it this way:

It would be an excellent thing, if, in any disputed matter, those who are better satisfied by authority of the truth of one side of the conclusion than of the validity of argument in general, would avow it, keep their own side, and let others do the same. But here is the difficulty: The persons who should avow such a state of mind are as much disposed to make converts as others: they do not like to debar themselves from dissemination of their opinions. Accordingly they propound their best arguments, be they what they may, as what ought to produce all the conviction which [they] themselves feel.

DE MORGAN, *supra* note 14, at 264-65. See also *infra* section XVIII.

81. CAPALDI, *supra* note 15, at 121. This "irresistible temptation" also rules at law school faculty meetings.

82. Do not see the movie "JFK." For the real story, see *Shaw v. Garrison*, 467 F.2d 113, 116-18 (5th Cir. 1972).

83. CAPALDI, *supra* note 15, at 42, 44.

the substance of some expert opinion, and much that passes for a University Education. For example:

[d]espite the fact that it has no standing among many in the scientific community, Freudian psychoanalysis has so infected the popular mind that most people, or a good many of them, literally believe in such things as the unconscious, repression, Oedipus complex, etc. Generations of college students implicitly have accepted Marxist theories of history, economics, [and] politics even though they are not aware that the theoretical constructs they are accepting are Marxist in origin. In argumentation, it is always a question of what your audience will fall for.⁸⁴

As Peter Huber argues rather persuasively,

[c]ourtroom science has come to revolve around the opinionated eccentric, the go-it-alone maverick. . . . The language of *could*, *possible*, *may*, *might*, and *maybe* that so often litters fringe testimony in court is not the language of science. Nor is science a business of completely open-ended speculation, where any idea can be floated but none can ever be finally brought back to earth. . . . [Courts must give] much less attention to the *self-proclaimed* new Galileos, and far more to the reticent stalwarts of the mainstream scientific community.⁸⁵

This brings us to some "fallacies of causation."

IX. Post Hoc, Ergo Propter Hoc

"What actually constitutes a good argument for the presence of causal connections is perhaps the central problem of inductive logic or scientific method. . . ."⁸⁶ But why suffer the delay and expense associated with

84. *Id.* at 45.

85. HUBER, *supra* note 61, at 209-10 (emphasis added). Compare DE MORGAN, *supra* note 14, at 276.

All the makers of systems who arrange the universe, square the circle, and so forth, not only comfort themselves by thinking of the neglect which Copernicus and other real discoverers met with for a time, but sometimes succeed in making followers. These last forget that for every true improvement which has been for some time unregarded, a thousand absurdities have met that fate permanently.

Id. at 276. On the role of the press in promoting bad science see John Crewdson, *Perky Cheerleaders*, in Nieman Reports (Winter 1993), published by the Nieman Foundation, Harvard University.

86. COPI, *supra* note 15, at 97. I sometimes think that entire courses, if not departments, in the modern university are based on the abuse of statistics. "The fact of correlation implies

the use of truly scientific method when common sense will provide a short-cut?

Post hoc, ergo propter hoc translates "after this, therefore on account of this." If B happened after A happened, then A caused B. This sort of "common sense" appeals to laymen. It is the basis for many superstitions—misfortune befalls a person who breaks a mirror or whose path is crossed by a black cat, and so on.⁸⁷ Sometimes the argument is dressed up in scientific clothing by an "expert" witness.

The traumatic cancer cases provide some likely suspects insofar as the commission of this fallacy is concerned. Plaintiff was healthy, then she suffered a trauma, then she got cancer—what Peter Huber, author and critic of the tort system, calls the "health-trauma-cancer sequence."⁸⁸ He collects these gems of legal reasoning by which courts turned aside responsible scientific-medical testimony that rejected claims of causality:

It should be recognized that inferences, if rational and natural, which follow from a sequence of proved events may be sufficient to establish causal connection without any supporting medical testimony.

When there is such a divergence of competent medical opinion, we, as laymen, must necessarily look to the facts for a way out of a seeming dilemma . . . [and award money to the plaintiff].

"It appears that none of [the six doctors who testified] knows the cause of petitioner's cancer," explained the Tennessee Supreme Court in 1970, so naturally it upheld the award.⁸⁹

nothing about cause. It is not even true that intense correlations are more likely to represent cause than weak ones. . . . The vast majority of correlations in our world are, without doubt, noncausal." STEPHEN J. GOULD, *THE MISMEASURE OF MAN* 242 (1981). These vicious truths would be suppressed by a surprising number of "social scientists." See DARRELL HUFF, *HOW TO LIE WITH STATISTICS* (1954); FISCHER, *supra* note 9, at 103-30 (discussing, in a chapter titled "Fallacies Of Generalization," numerous statistical fallacies including those of "statistical sampling," "the lonely fact," "statistical special pleading," "statistical impressionism," "statistical nonsense," "fallacies of statistical probability," "false extrapolation and interpolation"). Fischer is very imaginative, but he does not mention "false interpolation," which I have encountered all too frequently in law school faculty meetings.

87. See HURLEY, *supra* note 15, at 127.

88. HUBER, *supra* note 61, at 48. This book raised quite a fuss. The professional tortsters could hardly restrain themselves. For a scathing review see TRIAL, Jan. 1992, at 76-77.

89. HUBER, *supra* note 61, at 48, 49, 50 (quoting *Daly v. Bergstedt*, 126 N.W.2d 242, 246 (Minn. 1964); *Mooney v. Copper Range R. Co.*, 27 N.W.2d 603, 606 (Mich. 1947); *Koehring-Southern v. Burnette*, 464 S.W.2d 820, 822 (Tenn. 1970)).

Nowadays it is virtually conceded that the causal connection was bogus all along. "Traumatic cancer would have been 'relegated to limbo, . . . but for lawyers [and judges and juries] constantly keeping the question alive.'"⁹⁰

In my course on Law and Medicine, I show my students a video on medical malpractice from a series styled "Managing Our Medical Miracles."⁹¹ In this video a panel of doctors, lawyers, and reform-minded politicians are shown grappling with a hypothetical involving a birth that did not go all that smoothly—what's known in the trade as a "bad baby case." For one thing, the hospital did not have any operating fetal heart monitors when the patient arrived. After a time, the child is diagnosed as having cerebral palsy. All the panelists seem to take for granted that something that occurred during the birth process might have caused the cerebral palsy. One of the lawyers on the panel opines that the lack of a working fetal heart monitor presents the strongest case for liability.

What is wrong with this scenario? For one thing, the scientific evidence now shows rather convincingly that "cerebral palsy is almost always caused by events that began long before delivery" and fetal monitoring cannot prevent the condition.⁹² That is not to say that an expert cannot still be found to say the contrary. Plaintiff's counsel will almost certainly have to produce such an expert. For another thing, which should be of interest to policy wonks as well as patients and health care providers, the results of auscultation [old fashion stethoscope monitoring] are superior to reliance on the fetal heart monitor. One study that analyzed the neurological development of premature infants yielded data that "there was a 2.9-fold increase in the odds of having cerebral palsy with the monitored infants."⁹³ Of course, it does not follow from this that the doctors in the hypothetical case were not negligent (did they "fall back" on the old fashion technique when a

90. HUBER, *supra* note 61, at 56 (quoting G.R. Monkman et al., *Trauma and Oncogenesis*, 49 MAYO CLINIC PROC. 157, 162 (March 1974)).

91. Media and Society Seminars—Managing our Medical Miracles: Health Care in America—Show # 104, "Malpractice," (Columbia University).

92. HUBER, *supra* note 61, at 84 (collecting the relevant studies).

93. BARRY R. FURROW ET AL., *HEALTH LAW: CASES, MATERIALS AND PROBLEMS* 179 (2d ed. 1991) (citing Kirkwood K. Shy et al., *Effects of Electronic Fetal-Heart-Rate Monitoring, As Compared with Periodic Auscultation, on the Neurologic Development of Premature Infants*, 322 N. ENG. J. MED. 588 (1990)).

monitor could not be produced) or even that there was no possibility of causation in the particular case. Anything is possible, says the little voice of "common sense."⁹⁴ Nor does it follow that the use of fetal monitors causes an increase in cerebral palsy, although blind reliance on the device may be poor medical practice.⁹⁵ All we know for sure is that doctors and hospitals are still afraid of not having and not using fetal heart monitors.

X. Horrible Parades Down Slippery Slopes

Critics of a particular proposal, policy, or point of view will often accuse its proponents or advocates of committing the fallacy of the "slippery slope," or accuse them of bolstering their position by alluding to the "parade of horrors" that will follow from some event or conclusion. The fallacious argument is condemned as resting on the assumption that the taking (or not taking) of some action, or the acceptance of some proposition, will trigger a "chain reaction, leading in the end to some undesirable consequence" or that "the welfare of society rests on a 'slippery slope' and that a single step in the wrong direction will result in an inevitable slide all the way to the bottom."⁹⁶ We all think we can recognize such an argument when we see it, and we all have a tendency to think we are wonderfully sophisticated for having done so. But not so fast!

Such arguments may be fallacious, but then again, they may not be. Sometimes the proponent has little or no reason to think that the "chain reaction" will occur; the proponent is simply making an emotional appeal, or blustering. However, there is more to all of this than simply identifying a form of argument. The fallacious argument, when it is fallacious, is one of weak induction. If there is some likelihood that the chain reaction will occur, then the argument may be more difficult to evaluate, and may not be fallacious after all. The question is, once again, one of causation. We should ask for and evaluate the available evidence, and perhaps look for more, before making up our minds. For example,

94. See *infra* section VIII.

95. There should still be a nurse monitor.

96. HURLEY, *supra* note 15, at 129.

Hurley offers this example (regarding a matter of intense debate these days) for our consideration:

It has been argued that euthanasia (mercy killing) should be permissible in cases where the party concerned has signed a document stating his or her desire to be given a lethal injection if afflicted by terminal cancer, crippling stroke, or irreversible brain damage. Let us suppose that such a policy were made law. In cases where no document had been signed it would then be argued that the afflicted party would have signed one if the opportunity had arisen. This would open the door to such decisions by proxy. Should this be allowed, little imagination is required to envision grown children and other interested parties doing away with their aged parents or grandparents when the latter became a burden. A gradual deterioration in respect for human life would result, and, in the end, all undesired persons might be put out of their misery, including mental defectives in state hospitals, convicted criminals, and unwanted children. The conclusion is obvious that euthanasia must never be permitted.⁹⁷

The conclusion may not be “obvious,” but the chain reaction that is described certainly seems plausible. Indeed, it seems rather likely. I, for one, would not reject the argument out of hand because it looks like it commits the fallacy of slippery slope. The difficulty with many important questions of policy is that “evidence” and “experience” are difficult to come by and difficult to evaluate when we get our hands on them.

Another point that should be made is that in politics and in the courtroom, just as in the ring, punches are usually thrown in combination. A common combination of punches includes the distortion of the opponent’s position (the setting up of a “Straw Person”—see “Distortion”), followed by an accusation that that position (the one just distorted or misrepresented to be the opponent’s) is overstated, hysterical, or just silly—silly in this case because it conjures up a horrible parade down a slippery slope. Any evidence that there is in fact some basis for the claim of “causation” will, of course, be denied or suppressed [see “Suppressed Evidence”]. If you have never seen this combination, then you have never watched “Nightline.”

97. *Id.* at 159-60.

XI. Distortion

Professor Landau suggests that there is a fallacy of distortion. There are, of course, an endless number of ways to distort.⁹⁸ What Landau seems to mean by the term is what is commonly referred to as the setting up of a "Straw Person."⁹⁹ According to Landau, "[a] frequent method of argument involves distorting an opponent's position and attacking the distortion to prove an opposite point . . . [since] [d]istortions are always easier to attack than the opponent's real arguments."¹⁰⁰ Hurley gives us this example:

Mr. Goldberg [the first arguer] has argued against prayer in the public schools. Obviously Mr. Goldberg advocates atheism. But atheism is what they have in Russia. Atheism leads to suppression of all religions and the replacement of God by an omnipotent state. Is that what we want for this country? I [the second arguer] hardly think so. Clearly Mr. Goldberg's argument is nonsense.¹⁰¹

What the second arguer has done is falsely characterize the first arguer's position. The second arguer thought up the "nonsense" and then passed it off or equated it with the first arguer's position—set up the "straw person" to be knocked down.

This is not to be confused with a related fallacy of relevance, the "Red Herring." In this type of argument, the arguer changes the subject—by dragging something across the path of the dogs to lead them off course.¹⁰² Some new conclusion that does not follow at all may be "arrived at," or the listener may simply be left in left field, thinking that the argument actually went somewhere (but where?). "Red Herrings" work best when they exploit emotions. They are used to advantage in political debates more often than in the courtroom. Capaldi gives us an example in which arguer one advances a proposal purporting to solve educational problems in the inner cities. Arguer two points out that similar programs have failed in the past, have proven "self-contradic-

98. See, e.g., *id.* at 142-43 (discussing "Suppressed Evidence").

99. *Id.* at 114.

100. Landau, *supra* note 15, at 95.

101. HURLEY, *supra* note 15, at 114.

102. *Id.* at 116-17. Compare FEARNside & HOLTHER, *supra* note 15, at 121 ("Diversions").

tory," and have not been cost-effective. Arguer one then delineates the horrors of life in poverty, and so on. "By the end of this red herring, the audience is in tears. If the audience does not think [arguer two] is racist, it certainly thinks [arguer two] is insensitive."¹⁰³ Arguer two had not denied the existence of the problem but had instead attacked the quality of the specific proposal.

XII. Suppressed Evidence

This phenomenon "occurs whenever an argument is stated and relevant damaging information is either intentionally or negligently omitted."¹⁰⁴ According to one professional logician,

[s]uppressed evidence is a fallacy of presumption and is closely related to begging the question. . . . The fallacy consists in [sic] passing off what are at best half-truths as if they were the whole truth, thus making what is actually a defective argument appear to be good. The fallacy is especially common among arguers who have a vested interest in the situation to which the argument pertains.¹⁰⁵

Where I'm from we call this *lying* or *fraud* when we think its intentional. Even when its negligent, we still call it *misrepresentation*.¹⁰⁶

Landau focuses on the suppression of governing authority in "legal briefs."¹⁰⁷ "The most common example of this error in the legal context is conveniently forgetting to mention a case that is on point but that reaches an undesirable conclusion."¹⁰⁸ Actually, it is just as common

103. CAPALDI, *supra* note 15, at 129; *see also* FEARNESIDE & HOLTHERR, *supra* note 15, at 124-25 ("Clamorous Insistence on Irrelevancies: 'red herring'").

104. Landau, *supra* note 15, at 93.

105. HURLEY, *supra* note 15, at 142.

106. *See also* MODEL RULES OF PROFESSIONAL CONDUCT 3.3(a)(1) & (3), and 4.1. Nevertheless, it goes on a lot a law school faculty meetings.

107. This is an oxymoron. *Compare* Marson v. Jones & Laughlin Steel Corp., 87 F.R.D. 151, 152 n.1 (E.D. Wis. 1980).

108. Landau, *supra* note 15, at 93. *See also* DE MORGAN, *supra* note 14, at 263-64. "Another common form of the *ignoratio elenchii* lies in attributing to the conclusion asserted some ultimate end or tendency . . . the great fallacy of all, . . . the determination to have a particular conclusion, and to find arguments for it. . . . The perpetual and wilful fallacy . . . is the determination that all argument shall support, and no argument shall shake, the conclusion." *Id.* at 263-64. In this regard, the advocate can lie to himself or herself, as well as to the opponent. After

for lawyers to misquote authorities, distort authorities, or cite authorities out of context.¹⁰⁹ One of my favorite examples comes from a New York case in which a defendant quoted from a case, omitted a sentence, and thereby reversed the meaning intended.¹¹⁰ The effect was similar to that found in movie and book promotions. For all we know, the critic may have said "the greatest example of a bad movie in years." But the quote will appear as "the greatest . . . movie in years." The New York court rebuked counsel:

With these qualifying words which were omitted, it will be seen that the rule is not as counsel states it. This court has frequently admonished counsel of the futility of attempting to mislead the court by misquotation of authority. It not only generally is unsuccessful, but its effect upon counsel's standing with the court is such that reputable counsel would avoid.¹¹¹

This is not a new tactic, and we cannot blame this one on the degeneration of teaching at American law schools. In the trial of Aaron Burr, William Wirt thought he had caught his opponent in the act:

I will not, in commenting on the gentleman's authorities, thank the gentleman with sarcastic politeness for introducing them, declare that they conclude directly against him, read just so much of the authority as serves the purpose of that declaration, omitting that which contains the true point of the case which [he] makes against me; nor, forced by a direct call to read the part also, will I content myself by running over it as rapidly and inarticulately as I can, throw down the book with a theatrical air and exclaim "Just as I said," when I know it is just as I had not said.¹¹²

In my opinion, these games are a trivial matter compared to the suppression of (factual) evidence, particularly by prosecutors. A lawyer's obligation to "volunteer" adverse facts to the opponent (in the absence

all, the word fallacy is derived from the Latin—*fallo*, *fallere*, *fefelli*, *falsum* (f.tr.)—to deceive or cheat.

109. See *infra* section XV notes 136-40.

110. *Carmen v. Fox Films Corp.*, 204 A.D. 776, 198 N.Y.S. 766 (1923).

111. *Carmen*, 198 N.Y.S. at 766. See also, e.g., *UNDERWOOD & FORTUNE*, *supra* note 37, at 286-89; J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 SW. L.J. 677, 698-703 (1989).

112. HENRY HARDWICKE, *THE ART OF WINNING CASES* 439 (1894).

of a triggering discovery request) has, at least until recently,¹¹³ been much more limited than the lawyer's obligation to disclose adverse legal authority. By long-established tradition, a prosecutor has had a special obligation to disclose exculpatory evidence.¹¹⁴ This duty has been incorporated into the codes of professional responsibility¹¹⁵ and has even been recognized as being part and parcel of constitutional "due process."¹¹⁶ Unfortunately, the plethora of professional pronouncements regarding the duty only serve to underline the reality—that prosecutors regularly violate the rules and, all too often, go unpunished.¹¹⁷

XIII. False Analogy

A logician would describe an analogy as an argument in the following form:

A resembles B in respect to the possession of the property X.
A also possesses the property Y.
Therefore, it is inferred that B also possesses the property Y.¹¹⁸

One of the late Irving Younger's best gag lines turns on the proposition that, in arguing matters of law at least, almost habitually, lawyers will reason by false analogy.

Because society keeps changing, judges must now and then deal with new issues. But novelty scares judges. They look for something in the new issue that is familiar; and once they find it, they treat the new problem as though it were the familiar thing. Lawyers and judges reason, in other words, by false analogy.

113. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1, cmt. 1.

114. RICHARD DUCANN, *THE ART OF THE ADVOCATE* 38 (1964) (discussing the British tradition); *United States v. Burr*, 25 F. Cas. 30 (D. Va. 1807).

115. MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.8(d); ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(B); STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION 3-3.11(a).

116. See *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

117. *Read v. Virginia State Bar*, 357 S.E.2d 544 (Va. 1987); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Cris Carmody, *The Brady Rule: Is It Working?*, NAT'L L.J., May 17, 1993, at 1, 30.

118. FISCHER, *supra* note 9, at 243; COPI, *supra* note 15, at 380 (explaining a similar exercise); HURLEY, *supra* note 15, at 129-31 (discussing "weak analogy" as a form of fallacy, for here again, argument by analogy is a matter of induction and not deduction).

Pick up any advance sheet, and wherever your eye happens to fall you will likely find—whatever the court, whatever the jurisdiction, whatever the nature of the case—a perfect example of legal reasoning. It will go something like this: Here is a candlestick. It is cylindrical, and it gives light. Here is a broomstick. It is cylindrical. Therefore, a broomstick gives light. The instant we see something that the new problem is like, we treat the new problem as though it were identical to the thing it is like, without ever stopping to ask the deeper question, is the likeness a mere accident or does it have something to do with the essence of things?¹¹⁹

Analogies are a powerful tool in argument. They “can brilliantly reinforce a reasoned argument,” and can “suggest and persuade, inform and illustrate, communicate and clarify.”¹²⁰ “The greatest weapon in the arsenal of persuasion is the analogy, the story, the simple comparison to a familiar subject. Nothing can move the jurors more convincingly than an apt comparison to something they know from their own experience. . . .”¹²¹ Craig Spangenberg offered a good analogy on the subject of “due care” under the circumstances of a particular case:

If you were loading potatoes into a wagon in the field, you’d pick them up on the fork and heave them toward the wagon. You wouldn’t be much concerned if one potato fell off, would you? One potato isn’t worth much, and if it fell off, it wouldn’t hurt anyone. But suppose

119. IRVING YOUNGER, *HEARSAY: A PRACTICAL GUIDE THROUGH THE THICKET* 90 (1988). For examples in reported appellate opinions see *FEARNSIDE & HOLTER*, *supra* note 15, at 24; Landau, *supra* note 15, at 76. Of course, lawyers are not the only persons dependent on analogies. “Most of our everyday inferences are by analogy. . . . Analogy is at the basis of most of our ordinary reasonings from past experience to what the future will hold.” *COP*, *supra* note 15, at 378. Actually, it seems to me that Copi overstates the case for analogies. Are all forms of inductive thinking matters of analogy? In any event, Abraham Fraunce, our Elizabethan Lawyer-Logician cited in note 15, added to his list of improper and logic-abusing arguments the fallacy of “False Analogy” (and, curiously, one of “False Testimony”).

120. *FISCHER*, *supra* note 9, at 244. Copi notes:

[A]nalogies are very often used nonargumentatively, and these different uses should not be confused. . . . [Analogy may be used] for the purpose of lively description . . . [or may be] used in explanation, where something unfamiliar is made intelligible through being compared to something else, presumably more familiar, to which it has certain similarities. . . . The use of analogies in description and explanation is not the same as their use in argument, though in [any given case] it may not be easy to decide which use is intended.

COP, *supra* note 15, at 379.

121. Spangenberg, *supra* note 27, at 13, 16.

you were loading nitroglycerin. Then how carefully, how gingerly you would carry it and place it in someone else's hands, wrapped in foam or cotton and protected against vibration. Both acts would be done with ordinary care; ordinary care in handling great danger, nitroglycerin, and ordinary care in handling nondangerous potatoes.

In this case the defendant was handling that silent assassin, electricity. With what care should he handle it? Ordinary care, his honor will tell you, but care dependent on the circumstances. Where the danger is great, care that is ordinary in degree must be great in amount.¹²²

The argument or explanation by analogy is psychologically powerful, despite the fact that analogy is useful only as an "auxiliary to proof . . . never a substitute for it. . . . So successful are analogies in creating the illusion of sense and certainty that they are widely used as a method of proof in their own right."¹²³ An analogy can "persuade without proof," "indoctrinate without understanding," or "settle an empirical question without empirical evidence."¹²⁴

Given the risks of manipulation, perhaps it is fortunate that most lawyers overlook the analogy, or trot out only the most overused cliché. We have all had a prosecutor go rustic on us and drone on about how, when he was a small boy, his father took him hunting. They were looking for the wily rabbit in a field of snow. Follow the tracks, said the Father, and you'll find the rabbit; and they found a rabbit at the end of the tracks, hiding in a hollow log. One assumes that they blew the rabbit away. But the point the prosecutor will make is that the bunny story explains why circumstantial evidence should be accepted by the jury. Just follow the tracks ladies and gentlemen of the jury. Of course, analogies can turn around and bite you. The defense lawyer may be alert enough to point out that when we go gunning for rabbits, it does not matter which one we come upon. In this case, the question is whether the defendant is the right rabbit. Put that shotgun down for a moment.

One of my friends uses an analogy from his life on the farm to great advantage in defending criminal cases—the point being that things are not always as they seem. He relates how his father was trying to assist a cow during a difficult birth. The little critter was coming out the wrong

122. *Id.* at 17.

123. FISCHER, *supra* note 9, at 255-56.

124. *Id.* at 259.

way and got stuck. Fortunately a city slicker came by and was good enough to take orders. The punch line comes when the slicker asks "How fast was the little one going when it ran into the big one?"

I suppose that there are good ways to turn that story around too—something about the opponent's perspective or view of the world. I have already noted that the best defense is usually a counter analogy.¹²⁵ I do not want to think about it any more.

XIV. Law Language

"When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I chose it to mean—neither more nor less."¹²⁶

"I put it to you that . . ." means "For what I am about to say I have no evidence, but if I suggest it unpleasantly enough it may find a toehold in the granite craniums of the jury."¹²⁷

Lawyers used to be the masters of the language. They still should be.

I know you lawyers can with ease
Twist words and meanings as you please;
That language, by your skill made pliant,
Will bend to favor every client;
That 'tis the fee directs the sense,
To make out either side's pretence.
When you peruse the clearest case,
You see it with a double face;
For skepticism's your profession;
You hold there's doubt in all expression,
Hence is the bar with fees supply'd;
Hence eloquence takes either side.¹²⁸

Successful trial lawyers must "exercise their power in court by manipulating the thoughts and opinions of others, whether by making

125. See Spangenberg, *supra* note 27, at 16; CAPALDI, *supra* note 15, at 51-55.

126. CARROLL, *supra* note 8, at 269.

127. PATRICK SCRIVENOR, EGG ON YOUR INTERFACE—A DICTIONARY OF MODERN NONSENSE 33 (1989) (emphasis added).

128. JAMES RAM, A TREATISE ON FACTS AS SUBJECTS OF INQUIRY BY A JURY 249 (3d Am. ed. 1873) (quoting from "To a Lawyer," by John Gay, an English poet and playwright (1685-1732)).

speeches or questioning witnesses."¹²⁹ The "presentational style" and language used can be as important as the "facts" of a case.¹³⁰

Ethnographic investigations of language variation in trial courtrooms on the paralinguistic aspects of interactions during witness questioning, including the emphatic stress placed on certain terms and questions, on biases in word choice, on the degree of formality in cross-examinations, on the registers of talks and dialects used by lawyers, have shown that these factors undoubtedly affect the evaluation of testimony, the credibility of the witness, and the influence on attitudes of jurors.¹³¹

This is a fancy way of saying that the words, or rather one's choice of words, count—that language is important. Therefore, plaintiffs' counsel talk of "collisions" "smash-ups" and "wrecks," while defendants' lawyers talk of "accidents."¹³² That's why a skilled advocate seeking compensation in a wrongful death case will use devices such as the so-called "impact phrase"—"We are now engaged in the grisly audit of death."¹³³ This sort of language may sound corny to law students and other sophisticates, but it can be quite effective. Naturally, we do not teach it in law school.

The advocate's arsenal contains many verbal non-argumentative persuaders including slanters, qualifiers or weaselers, stereotypes and persuasive cliches, rhetorical and loaded questions, hyperbole on the one hand and downplayers on the other, and techniques for creating or exploiting innuendo. I can only hope to footnote some references

129. FREDERICK A. PHILBRICK, *LANGUAGE AND THE LAW: THE SEMANTICS OF FORENSIC ENGLISH* vi (1949).

130. Robert J. Kelly & Edward Sagarin, *Criminal Justice and the Cretan Liar: Unmasking Strategies of Dissimulation and Deception*, 16 J. CRIM. JUST. 61, 69 (1988).

131. *Id.* I just received a "flyer" in the mail advertising a new book styled *Trial: Strategy And Psychology*. According to the publisher,

[the book] shows you over 350 little-known psychological tactics, strategies, ploys, techniques and devices including "*Crucial first words*" that will impress the Court, win over the jury, and overwhelm your adversary within the first minute of your opening statement . . . *Verbal ploys* that help make an unsavory client or witness appear in a positive light when talking to the jury . . . cross examination techniques that *set subtle, factual traps* . . . *Gestures and body language* that *psychologically convince* a jury that a witness is lying and so on.

"Flyer," *supra* (emphasis added). Dear Sirs—Please FAX my copy today!

132. Theodore I. Koskoff, *The Language of Persuasion*, LITIG., Summer 1977, at 24, 25.

133. *Id.* at 26 (quoting Levine, *supra* note 45).

for the reader,¹³⁴ and then move on to discuss a few common (or in the case of "accent," commonly alluded to) tricks that may or may not be true fallacies.¹³⁵

XV. Accent

The fallacy of Accent was one of the original list drawn up by Aristotle, but it has since been distorted from its original technical definition. Copi refers to it as a fallacy "committed in argument whose deceptive but invalid nature depends upon a change or shift in meaning."¹³⁶ He gives as an example the following sentence, which may be taken to mean different things depending on which of the italicized words are stressed or accented: "*We should not speak ill of our friends.*"¹³⁷

De Morgan gave us another frequently quoted example.

[Accent (*fallacia prosodiae* or *accentus*) is a] very forceful emphasis upon one word [that] may, according to usual notions, suggest false meanings. Thus, "thou shalt not bear false witness against thy neighbor," is frequently read from the pulpit either so as to convey the opposite of a prohibition, or to suggest that subornation is not forbidden, or that anything false except evidence is permitted, or that it may be given for him, or that it is only against *neighbors* that false witness may not be borne.¹³⁸

I assume that a skilled trial lawyer might mislead a jury by means of some sort of accent, but I must admit that I am at loss for an example. Nevertheless Copi goes on at some length about the mischief wrought by "accent," giving examples like the "making a quotation, where insert-

134. See, e.g., FOGELIN, *supra* note 15; MOORE & PARKER, *supra* note 15; PHILBRICK, *supra* note 129. Lawyers rely on other familiar and effective rhetorical devices that we would not think of as involving rules of logic (or illogic), such as irony and sarcasm.

135. Actually, logicians would classify some of these as fallacies of relevance, and others as fallacies of ambiguity. Note also that lawyers use body language to persuade, and also employ "dumb shows" and other questionable tactics to influence juries. See Underwood, *supra* note 65, at 265.

136. COPI, *supra* note 15, at 112.

137. *Id.*

138. DE MORGAN, *supra* note 14, at 249.

ing or deleting italics may change the meaning," and "[tearing a quotation] from its context," or "[omitting] words or phrases by the use of dots."¹³⁹ The reader will recall that we already encountered this sort of dirty trick under the labels of "suppressed evidence" and "distortion."

In any event, virtually any sort of false emphasis can get modern logicians worked up along these lines. *Imagined* lawyers, if not *real* ones, are supposed to live by the fallacy of accent. Hamblin quotes, and criticizes, one team of enthusiasts at length, pointing out that they are inventing "fallacies" under the misleading label of accent. The passage he takes issue with is this:

The fallacy of *special pleading* or *half-truth* may be considered a distinctive kind of illegitimate accent. For if one emphasizes only those circumstances favorable to his own case, and conveniently forgets the unfavorable circumstances he is wrongfully accenting or stressing only part of the truth. It must be admitted that special pleading is the stock in trade of the legal profession. One wonders indeed how an attorney, especially one who pleads his cases in court, could possibly build a successful practice without persistent and clever resorting to this fallacy.¹⁴⁰

Again, this looks like "suppressed evidence." In any event, Hamblin complains that his source lacks a proper understanding of the traditional and technical meaning of "accent." His gripe seems to be that "accent" has been stretched like a tent over too many related and unrelated inhabitants. Of course, as a lawyer, my complaint is that the quoted material reflects a lack of understanding of, and proper respect for, the adversary system in general¹⁴¹ and me in particular.

We may now proceed to two problems arising from the way that questions are asked. These techniques are, indeed, very commonly employed in the courtroom.

XVI. Complex (Argumentative) Questions

The *fallacia plurium interrogationum* consists in trying to get one answer to several questions in one. It is sometimes used by barristers in the

139. COPI, *supra* note 15, at 113.

140. HAMBLIN, *supra* note 15, at 25 (quoting EDITH SCHIPPER & EDWARD SCHUH, A FIRST COURSE IN MODERN LOGIC (1960)).

141. See *infra* section XIX.

examination of witnesses, who endeavor to get *yes* or *no* to a complex question which ought to partly answered in each way, meaning to use the answer obtained, as for the whole, when they have got it for a part.¹⁴²

Hidden away in the compound, trick, or argumentative question is an implicit argument or assertion;¹⁴³ so the question is not simply intended to trick, trap, or confuse the witness. The question is intended to lead the jury to a conclusion for which there may be no evidence. Thus, the question is similar to "innuendo." Some examples: "Have you stopped beating your wife?" "Have you given up your evil ways?" "What did you do with the money you stole?"¹⁴⁴ "Have you stopped cheating on exams?" "How long must I put up with your snotty behavior?" "When are you going to stop talking nonsense?"¹⁴⁵

XVII. Innuendo

As in the case of the "compound or argumentative question," "innuendo" involves the asking of a question that contains an assertion. In the case of the compound question, the questioner is trying to trick the interrogated party into supplying an answer that can be used against him or her. In the case of innuendo, the interrogator may not care what answer is made to the question—in fact, the interrogator may not care if *any* answer is made. Merely to ask the question (loaded with an assertion) is enough to get the assumed fact before the jury¹⁴⁶—"waft[ing] unwarranted innuendo into the jury box."¹⁴⁷

142. DE MORGAN, *supra* note 14, at 269-70.

143. HURLEY, *supra* note 15, at 139.

144. COPI, *supra* note 15, at 98-100.

145. HURLEY, *supra* note 15, at 139-41. Another commentator calls these "banana peel" questions. MYLES MARTEL, *MASTERING THE ART OF Q&A: A SURVIVAL GUIDE FOR TOUGH, TRICK, AND HOSTILE QUESTIONS* 111-13 (1989). The one about "snotty behavior" comes in handy at law school faculty meetings.

146. *United States v. Lewis*, 482 F.2d 632, 638-639 (D.C. Cir. 1973); *Haynes v. State*, 411 N.E.2d 659, 665 (Ind. Ct. App. 1980).

147. *Michelson v. United States*, 335 U.S. 469, 481, 69 S. Ct. 213, 221, 93 L. Ed. 168, 176 (1948).

Research appears to support the proposition that jurors can be influenced by such innuendo.¹⁴⁸ Judges certainly believe that jurors can be misled, and the sensitive judge will demand assurances that suspect questions have a "good faith basis."¹⁴⁹ If the introduction of extrinsic evidence is permitted, counsel should presumably have competent proof available and offer this proof in contradiction of the witness who has denied the matter.¹⁵⁰ Misconduct may lead to a mistrial or reversal on appeal of a judgment.¹⁵¹

One of the more amusing cases involving cross-examination by innuendo involved a bomb triggered by a remote control device. The following dialogue occurred during the prosecution's cross-examination of a defense alibi witness:

- Q: You said that occasionally Charles Lowe may refer to you as Pigface?
- A: Yes, sir.
- Q: Are you the same Pigface that he had go in the Hobby Shop and buy some remote control devices for him?

The prospector had no evidence that "Pigface" bought remote control devices in a hobby shop. The prosecutor was rebuked for his misconduct.¹⁵²

The cross-examination by innuendo is so notorious that it has turned up from time to time in popular literature. One of the best stories involved Arthur Train's fictional hero Ephraim Tutt, who turned the tables on the unscrupulous prosecutor O'Brien. O'Brien had just

148. Saul Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687 (1990).

149. *United States v. Bohle*, 445 F.2d 54, 73-75 (7th Cir. 1971) (collecting cases), *rev'd*, 653 F.2d 299 (7th Cir. 1981). Offending counsel may even be put on the stand and grilled regarding his or her "good faith basis." *United States v. Pugliese*, 153 F.2d 497, 499 (2d Cir. 1945).

150. *Kiefel v. Las Vegas Hacienda, Inc.*, 39 F.R.D. 592 (N.D. Ill. 1966), *aff'd*, 404 F.2d 1163 (7th Cir. 1968), *cert. denied*, 395 U.S. 908 (1969); *Marsh v. State*, 387 N.E.2d 1346 (Ind. App. 1979), *vacated*, 393 N.E.2d 757 (Ind. 1979).

151. See cases cited *supra* at note 148.

152. *United States v. Leisure*, 844 F.2d 1347, 1362 (8th Cir. 1988).

completed an outrageous cross-examination (all by innuendo) of Tutt's unfortunate client. To cap it off O'Brien overreached himself:

With all the gleeful malice of a Spanish inquisitor about to tear out his victim's beating heart with a pair of incandescent pincers, the charming understudy of Satan sauntered nonchalantly up to the witness and, holding the [book] *Professional Criminals of America* so that the jury could plainly read the title, opened the book and running his finger down a page as if to mark the place—and looking up from time to time as he apparently read what he had found there—put to the hapless being with the moral death-chair before him, as if solemnly declaring the accompanying accusation to be true, the following question:

"Did you not, on September 6, 1927 . . . in company with 'Red' Burch, alias the Roach, Toni Seveli, otherwise known as Toni the Greaser, and Dynamite Tom Meeghan, crack the safe of the American Railway Express at Rahway, New Jersey, and get away with six thousand dollars?"¹⁵³

Of course, Tutt turns the tables on O'Brien by putting him on the stand, conducting the same sort of cross-examination of him (what is sauce for the goose is sauce for the gander, as judges keep telling us—see "Ad Nauseum")—"How much did you [O'Brien] pay . . . for your appointment as assistant district attorney?"—and extracting a confession that he was only pretending to be reading from *Professional Criminals of America*! Tutt's client was found not guilty!

Yet, while cross-examination by innuendo is frequently condemned, it continues to be used by old hands and novices alike. Consider the following excerpt from a recent biography of Edward Bennet Williams:

[T]he prosecution was afraid Cheasty would have a heart attack under cross-examination; the witness carried nitroglycerine pills in his left coat pocket. As he began his cross-examination, Williams insinuated that Cheasty was not just a heart patient, but a dope addict. "Have you ever taken any form of narcotics?" he demanded. The Prosecutor, Edward Troxell, came angrily to his feet. "I object, Your Honor. This is an infraction which is disgraceful!" The judge sustained the objection. Williams began questioning Cheasty about a "sidekick" named Jones, the same Jones "who was convicted of bigamy in New York by the

153. See Arthur Train, *The Bloodhound*, SATURDAY EVENING POST (1922), reprinted in LITIG., Winter 1994, at 72, 64-68. I first encountered the story in TUTT, *supra* note 12, at 364-69. Compare SEYMOUR WISHMAN, ANATOMY OF A JURY: THE SYSTEM ON TRIAL 147 (1986) (using innuendo).

name of Joseph Leo Monaghan?" Up again shot Troxell, spluttering, "Disgraceful!" Objection sustained. Had Cheasty tried to bribe police in Miami in order to set up a friend in a "Gambling joint or illegal still?" Williams inquired. "No!" declared Cheasty, straining in his chair.¹⁵⁴

Justice? Perhaps—but no "Priest in a Temple."

XVIII. Argument by Repetition

Fischer refers "tongue in cheek" to the fallacy of argument *ad nauseam*, his label for argument by repetition. This is the technique by which the "thesis is sustained by repetition rather than by reasoned proof."¹⁵⁵ He quotes the Bellman:

"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.¹⁵⁶

Lawyers believe that repetition works in *argument* and in *questioning*, and they work it at every turn, even in the face of judicial disapproval (which suggests that judges believe that it works too). The objection to "repetitive" questioning or comment is based on more than a simple concern for the saving of time. Barrister Harvey quips that "[while t]he Bellman was undoubtedly on the right lines . . . [the trick is to] devise some way of putting your point across three times while only appearing to do so once. . . ."¹⁵⁷

154. THOMAS, *supra* note 68, at 110-11.

155. FISCHER, *supra* note 9, at 302. Judge Aldisert picks this one up, apparently from Fischer, and includes it in his collection too. See ALDISERT, *supra* note 5, at 220-21. On the other hand, he says that he does not believe that repetition works. Obviously, repetition is not a "fallacy" in the technical sense; but it is the stuff of law school faculty meetings.

156. Lewis Carroll, *The Hunting of the Snark*, in THE COMPLETE WORKS OF LEWIS CARROLL 680 (1936).

157. HARVEY, *supra* note 4, at 44.

Research seems to back up the belief that repetition works, as do the techniques and successes of generations of advertising executives and politicians. The New Testament even alludes to the technique as a means of forging a bond.¹⁵⁸

The late Irving Younger, remembered as a premier teacher of trial advocacy, elevated the Bellman's cry to the level of doctrine. Younger told lawyers that jurors will almost certainly believe that something is true by the third hearing of it. He also taught that the average juror will believe that which has been written over that which has "merely" been spoken (even under oath), which testifies to the effectiveness of a variety of the argument *ad verecundiam*.¹⁵⁹

XIX. The Adversary System

Somerset: Judge you, my Lord of Warwick, then between us.

Warwick: Between two hawks, which flies the higher pitch,
Between two dogs, which hath the deeper mouth,
Between two horses, which doth bear the best,
Between two girls, which hath the merriest eye—
I have perhaps some shallow spirit of judgment;
But in these nice sharp quillets of the law,
Good faith, I am no wiser than a daw.

Plantagenet: Tut, tut, here is a mannerly forbearance.
The truth appears so naked on my side
That any purblind eye may find it out.

158. John 21:15-17. How's *that* for an Appeal to Authority.

159. See, e.g., Irving Younger, ABA Litigation Section Monograph No. 1—"The Art of Cross-Examination" 25 (1976). In this famous lecture the advice was that the lawyer should avoid repeating the content of the direct examination when conducting the cross-examination. "If the jurors hear something once (on direct, for example), they may or may not believe it. If they hear it twice (because you repeated it on cross) they will probably believe it. If they hear it three times, they will certainly believe it. If it is in writing, nothing on earth will persuade them that it is not true." See also IRVING YOUNGER, THE ADVOCATE'S DESKBOOK: THE ESSENTIALS OF TRYING A CASE 298 (1988); FISCHER, *supra* note 9, at 290. Compare CAROL JONES, EXPERT WITNESSES 110 (1994) ("Moreover, it should be borne in mind that juries often find expert evidence compelling, and when that evidence is reduced to writing and introduced into the jury room, its authoritative status may be increased substantially."). Despair and disillusion can lead to an interesting counter fallacy—for example, the belief held by the long-suffering French infantry (the Poilus) that "*anything* might be true, except what [is] printed." PAUL FUSSELL, THE GREAT WAR AND MODERN MEMORY 115 (1975) (quoting Marc Bloch). Needless to say, this fallacy was not missed by Fischer, who seems to have vacuumed up every conceivable tidbit for his collection. See FISCHER, *supra* note 9, at 290.

Somerset: And on my side it is so well apparell'd,
So clear, so shining, so evident,
That it will glimmer through a blindman's eye.¹⁶⁰

According to Shakespeare's fanciful account, this exchange was followed by a choosing up of sides, with each champion's followers selecting either a red or a white rose.¹⁶¹ In this way Warwick's indecision ushered in the Wars of the Roses! Of course, it did not happen that way, but the story puts before us the sensible suggestion that "[a] debate between two raving lunatics is unlikely to issue in a triumph of reason."¹⁶² In this light, let us consider (reconsider) the benefits conferred by the adversary system.

An illuminated Florentine manuscript from the 15th century, written in Greek, MS 50 of the Spenser Collection of the New York Public Library,¹⁶³ contains a fable styled "The Two Boys and the Butcher":

Two young boys went to buy meat at a butcher's shop. Seeing that the butcher was busy helping a customer, one of the boys grabbed a piece of beef and stuffed it down the shirt of the other. The butcher, having finished serving the customer, came over to where the boys were standing and immediately noticed that some beef was missing. He accused the boys of theft, but the one who had taken it said that he didn't have it, and the one who had it said that he hadn't taken it. The butcher understood their trickery and warned them: "You may think that you can get away with this bit of double talk here, but the gods won't be deceived by sophistry." The moral of the fable is: Sometimes lying and telling the literal truth can amount to the same thing.¹⁶⁴

We instinctively share the butcher's view that the boys were "jiving" him, even if we cannot explain why. The philosopher-logician would explain it this way. The butcher was operating in the atmosphere of the hum-drum, everyday life of the town. In theoretical terms, day to

160. WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE SIXTH* act. 2, sc. 4.

161. The scene is the subject of Henry A. Payne's (1868-1939) painting "Choosing the red and white roses."

162. FISCHER, *supra* note 9, at 28.

163. Reprinted as *THE MEDICI AESOP* (Adele Westbrook ed. & Bernard McTigue trans., 1989).

164. *Id.* at 50. Similar stories involving the telling of the "literal truth" as a means of deceiving others are a staple of Western literature. See Richard Underwood, *False Witness: A Lawyer's History Of The Law Of Perjury*, 10 ARIZ. J. INT'L & COMP. L. 215, 227 (1993).

day, cooperative activity takes for granted certain conversational rules. Our philosopher-logician has sorted these out for us, whether we like it or not.¹⁶⁵

First, there is the Rule of Quantity or Strength. It informs us that we should make our contribution to a conversation as *informative as is required* (and, for that matter, not make it more informative than is required). There is also a Rule of Quality, which tells us that we should not say what we believe to be false or say that for which we lack adequate evidence. In terms of the familiar judicial oath, to demand truth and nothing but the truth is to demand Quality,¹⁶⁶ and to demand the whole truth is to demand Quantity. At times, this can be a tall order, even for a speaker who is trying to act in good faith.¹⁶⁷

"Because [good] people generally assume that people are telling the truth, successful lying is possible. . . . [Sometimes a speaker] intentionally break[s] the rules to mislead [the] listener."¹⁶⁸

165. See H.P. Grice, *Logic and Conversation*, in *THE LOGIC OF GRAMMAR* 64, 67 (Donald Davidson & Gilbert Harman eds., 1975), reprinted in ROBERT FOGELIN, *supra* note 15, 403-18. For an extended application of Grice's theory to the law of perjury see also Peter Tiersma, *The Language of Perjury: "Literal Truth," Ambiguity, and the False Statement Requirement*, 63 S. CAL. L. REV. 373 (1990).

166. The right amount of Quantity is also demanded, in the sense that extra stuff can fog up the picture. In this regard, Grice refers to a Rule of Relation or Relevance, as well as a Rule of Manner, the latter informing us that if we want to communicate honestly as well as effectively we should try to minimize ambiguity and eschew obscurity.

167. The difficulty of meeting these demands all the time is understood by religious souls who fear the consequences of promising too much in taking an oath "to tell the truth, the whole truth, and nothing but the truth." See Matthew 5:33 and James 5:12. And consider the following excerpt:

An Eskimo from Northern Canada was called to testify in a case. He was asked if he would tell the truth, the whole truth, and nothing but the truth. Before answering, he started to talk to the translator. Finally the translator said to the judge, "He does not know whether he can tell the truth. He can tell only what he knows."

Kelly & Sagarin, *supra* note 130, at 63 (quoting BOYCE RICHARDSON, *STRANGERS DEVOUR THE LAND* (1976)).

168. FOGELIN, *supra* note 15, at 21. See also Kelley & Sagarin, *supra* note 130, at 65 ("[T]he liar trafficks illicitly in the rapport about understanding [] among speakers, interrogators, and hearers. The agreements and conventions that structure discourse and speech constitute the conditions for the success of lying and the ability of the liar to deceive effectively."). These authors also point out that

[I]liars tell the truth very often—in fact, most of the time—and that is what lends credence to their lies. . . . [J]urors are instructed that if they find that a witness has not told

The speaker may violate [the] first rule of Quality by uttering something he knows to be false with the intention of producing a false belief in his listeners. That's called lying. Notice that lying depends on the general acceptance of the Cooperative Principle. . . .

Flat out lying is not the only way (and often not the most effective way) of intentionally misleading people. We can say something literally true that, at the same time, conversationally implies something false. (This is sometimes called making false a suggestion.)¹⁶⁹

The boys lied to the butcher, because they said something that was "literally true" but that still violated the Rule of Quantity or Strength, and could have misled the listener—and was intended to!

That's a pretty grand explanation for something that we really do not need explained in order for us to get along down at the butcher shop. For better or worse, however, the conversational rules down at the courthouse are at least a little bit different. The United States Supreme Court told us so in *Bronston v. United States*.¹⁷⁰

This case seems to say that in the courtroom, cooperation is not necessarily expected or required. Something about Grice's assumptions does not fit the courtroom exactly.¹⁷¹ Samuel Bronston owned Bronston Productions, Inc., and petitioned for an arrangement with its creditors under the Bankruptcy Act.¹⁷² At a hearing to determine the extent and location of the corporations assets, Bronston was asked the following questions and gave the following answers:

Q: Do you have any bank accounts in Swiss banks, Mr. Bronston?

A: No, sir.

Q: Have you ever?

A: The company had an account there for about six months, in Zurich.

Q: Have you any nominees who have bank accounts in Swiss Banks?

the truth with regard to any material fact, they have a choice, in which (1) they may disregard the entire testimony, or (2) they may disregard only those statements of the witness that they believe to be false.

Id. at 64. In other words, the Cretan Liar (one who always lies) is not a problem in the real world.

169. FOGELIN, *supra* note 15, at 21.

170. 409 U.S. 352, 93 S. Ct. 595, 34 L. Ed. 2d 568 (1973).

171. Tiersma, *supra* note 165, at 381, 383.

172. *Bronston*, 409 U.S. at 353.

A: No, sir.

Q: Have you ever?

A: No, sir.¹⁷³

The true facts were that between October 1959 and June 1964 Bronston had a personal account in a bank in Geneva.¹⁷⁴ While Bronston's answers were literally true, Bronston surely was attempting to mislead the questioner. But according to the court, he did not commit perjury under 18 USC 1621, and that was the issue.

[W]e are not dealing with casual conversation and the statute does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true. . . . It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.¹⁷⁵

The special rules of the courtroom are both a benefit and a curse for lawyers, who must be on their guard and listen carefully at all times:

The question is asked—were you at the corner of Sixth and Chestnut streets, at six o'clock? A frank witness would answer—perhaps I was near there. But a witness who had been there, desirous to conceal the fact, and to defeat the object, speaking to the letter rather than the spirit of the inquiry, answers, No; although he may have been within a stone's throw of the place, or at the very place, within ten minutes of the time. The common answer of such a witness would be: I was not at the *corner*, at *six o'clock*.

Emphasis upon both words plainly implies a mental evasion or equivocation, and gives rise with a skillful examiner to the question: At what hour were you at the corner, or at what place were you at six o'clock. . . . An equivocal question is almost as much to be avoided as an equivocal answer; and it always *leads to*, or *excuses*, an equivocal answer.¹⁷⁶

173. *Id.* at 354.

174. *Id.*

175. *Id.* at 357, 358-59.

176. David P. Brown, *Golden Rules for the Examination of Witnesses*, in RAM, *supra* note 129, at 321-22. Perhaps this is a good example of "Accent," the witness applying the accents in order to redefine the question so that the truth can be skirted.

Furthermore, as we have seen, the Rule of Relevance (the centerpiece of the modern rules of evidence), which looks a lot like a spin-off of the Rule of Quantity, informs us that giving too much information or interrupting can also mislead or misdirect, as can changing the subject. Lawyers can do this by objecting, making speeches, and so forth. Are lawyers lying when they do this?

XX. Conclusion

If you remain skeptical—if you are not convinced by the high court's reasoning in *Bronston*—you are not alone. At the same time, if you have been persuaded, by now, that there is more to the advocate's art than is dreamt of in the logician's philosophy, then I have made my point. The mathematician and logician De Morgan had this to say about stolen meat:

An advocate is sometimes guilty of the argument *a dicto secundum quid ad dictum simpliciter*: it is his business to do for his client all that his client might *honestly* do for himself. Is not the word in the *Italics* frequently omitted? *Might* any man honestly try to do for himself all that counsel frequently try to do for him? We are often reminded of the two men who stole the leg of mutton; one could swear he had not got it, the other that he had not taken it. . . . The answer of the owner of the leg of mutton is sometimes to the point, "Well gentlemen, all I can say is, there is a rogue between you." That a barrister is able to put off his forensic principles with his wig, nay more, that he becomes an upright and impartial judge in another wig, is curious, but certainly true.¹⁷⁷

This thought seems an appropriate note to end on, and a sufficient "summing up."

177. DE MORGAN, *supra* note 14, at 270.