

# **LOGICAL FALLACIES AND THE SUPREME COURT: A CRITICAL EXAMINATION OF JUSTICE REHNQUIST'S DECISIONS IN CRIMINAL PROCEDURE CASES**

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## INTRODUCTION

This article is about “sophisms,”<sup>1</sup> “crooked thinking,”<sup>2</sup> “the arts of persuasion”<sup>3</sup> and the “triumph of rhetoric,”<sup>4</sup> all of which have been used to describe a cause or condition of defective reasoning formally classified under the title “fallacies.”<sup>5</sup> A fallacy is a type of incorrect argument<sup>6</sup> and the study of fallacies is a sub-species of logic. A falla-

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1. C. L. HAMBLIN, FALLACIES 9 (1970).

2. R. THOULESS, HOW TO THINK STRAIGHT 164 (1939).

3. L.S. STEBBING, THINKING TO SOME PURPOSE 10 (1939).

4. W. FEARNSIDE & W. HOLTHER, FALLACY: THE COUNTERFEIT OF ARGUMENT 1 (1959).

5. The following works written exclusively about fallacies (all cited here in full for convenient reference) are relied upon extensively in this article: J. BENTHAM, THE HANDBOOK OF POLITICAL FALLACIES (Torchbook ed. 1962 of H. Larrabee rev. ed. 1952) (1824); S. CHASE, GUIDES TO STRAIGHT THINKING: WITH THIRTEEN COMMON FALLACIES (1956); T. DAMAR, ATTACKING FAULTY REASONING (1980); W. FEARNSIDE & W. HOLTHER, FALLACY: THE COUNTERFEIT OF ARGUMENT (1959); D. FISCHER, HISTORIANS' FALLACIES (1970); C.L. HAMBLIN, FALLACIES (1970); M. PIRIE, THE BOOK OF THE FALLACY (1985).

6. I. COPI, INTRODUCTION TO LOGIC 72 (4th ed. 1972). Other writers have offered essentially the same definition in varying terminology. *E.g.*, J. BENTHAM, *supra* note 5, at 3 (“any argument employed or topic suggested for the purpose, or with the probability of producing the effect of deception, or of causing some erroneous opinion to be entertained by any person to whose mind such an argument may have been presented”); W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 3 (“[A] fallacy occurs where a discussion claims to conform to the rules of sound argument but, in fact, fails to do so.”); C.L. HAMBLIN, *supra* note 5, at 12 (“A fallacious argument . . . is one that *seems to be valid* but *is not so*. ”); M. PIRIE, *supra* note 5, at vii (“Any trick of logic or language which allows a statement or a claim to be passed off as something it is not. . . .”).

Aristotle, on whose original list of thirteen fallacies all subsequent study of fallacies is dependent, defined fallacies in much the same manner:

That some reasonings are genuine, while others seem to be so but are not, is evident. This happens with arguments, as also elsewhere, through a certain likeness between the genuine and the sham. . . . [B]oth reasoning and refutation are sometimes genuine, sometimes not, though inexperience may make them appear so. . . .

cious argument is one that appears correct and may even be extremely persuasive, but which proves upon closer examination to be logically invalid. Examples range from the familiar (e.g., begging the question, straw man) to the esoteric (e.g., *ignoratio elenchi*, undistributed middle term).

Many great scholars have studied the *doctrinal* basis of judicial, and particularly Supreme Court, decision making, but too few have focused upon the *rhetorical* aspects of the process; that is, the how as opposed to the why. This article does that by identifying and analyzing fallacies in Chief Justice Rehnquist's majority, plurality, concurring and dissenting opinions in constitutional criminal procedure cases.<sup>7</sup>

Why undertake this inquiry? Is there value in exposing the logical flaws of Justice Rehnquist's rhetoric? If the results be sound, of what consequence is the content? As Jerome Frank once commented in a similar context:

If an illusion helps men live, if by acting on an erroneous dogma, men arrive at valuable results, for the most part unmixed with evil, then to insist upon exposing the falsity of the illusion or dogma is at best pedantry or bad manners and at worst malicious mischief or sadistic morbidity.<sup>8</sup>

But as Frank concluded in his context, so must it be concluded here, that the harmful consequences of fallacious judicial reasoning are substantial and warrant close study. The way the Supreme Court explains its decisions is important at two levels. On an institutional level, the Court has the ultimate authority to decide the most fundamental issues affecting the government's power to interfere with, alter and sometimes end the lives of American citizens, even when that requires overruling the decisions of the popularly elected branches. Popular and professional demand for sound reasoning in Supreme Court opinions is the principal means by which the Court is restrained in its deci-

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ARISTOTLE, *De Sophisticis Elenchis*, in I THE WORKS OF ARISTOTLE 164a 23 (W. D. Ross ed. 1928) [hereinafter *Sophistical Refutations*].

7. Cases analyzed are those pertaining to the rights of criminal suspects and defendants arising under the fourth, fifth and sixth amendments to the United States Constitution. Criminal procedure cases were selected partly because of the author's own interest in the area and partly to give the article focus, but principally to vindicate the exasperation and self-doubt suffered by students of criminal procedure as they labor through the Court's opinions trying to reconcile logically the often inexplicable and contradictory holdings. No other area of the law seems to evoke such arbitrary line-drawing, fractious opinions and rapid restructuring of precedent. As a result (or perhaps as a cause) of this, constitutional criminal procedure cases provide a fertile breeding ground for fallacies.

8. J. FRANK, LAW AND THE MODERN MIND 127 (Anchor Books ed. 1963) [hereinafter *LAW AND THE MODERN MIND*]. Frank was referring to what he and other legal realists saw as the illusion of certainty and predictability in our system of judicial decision making. See *infra* notes 29-40 and accompanying text.

sion making. On an intellectual level, the Court's opinions serve as the most conspicuous paradigms of the best feature of the American judicial system: fair and impartial application of legal principles to reach honest results. In short, "[i]t matters how judges decide cases."<sup>9</sup>

Judicial reasoning is legal argument at its most refined. Our success as law students, lawyers, law professors and judges depends upon the ability to master legal argument, yet without an ability to detect fallacies we may follow close arguments only imperfectly. Though we pride ourselves on our analytical expertise, we frequently allow ourselves to be taken in by the veneer of legal argument, and are unable to see the flaws in its substance. When that occurs, we risk allowing persuasion to prevail over proof and have failed to conquer the principal tool of our profession. Too often our inclination is to seize upon the overall form<sup>10</sup> or the result of a decision as the sole determinant of its soundness, but that in itself commits a fallacy—the fallacy of division, which consists of attributing the characteristics of the whole of something to its individual parts.<sup>11</sup> It does not follow from the fact that a decision appears to make sense as a whole or reaches a sensible result that each of its parts is also sound.<sup>12</sup>

The study of fallacies, like the study of logic in general, "beget[s] a habit of clear and sound reasoning,"<sup>13</sup> the value of which is undeniable. By learning to detect fallacies, we learn how to combat them and also how to avoid them ourselves. Though fallacies are frequently intentional rhetorical tricks, it would be a mistake to believe that all danger from fallacies can be avoided simply by being wary of sophists. All fallacies are deceptive, but the deception often results from carelessness or unconscious motivations from within. Acquiring an understanding of fallacies allows us to avoid self-deception<sup>14</sup> as well as deception by others. It follows that to charge someone with a fallacy is not necessarily to accuse him of duplicity. To commit a fallacy

9. R. DWORKIN, *LAW'S EMPIRE* 1 (1986).

10. Lord Stanley Baldwin warned against the danger of paying heed to only the strict logical form of an argument and offered two purposes for studying fallacies:

[I]t is, in the first place, to clear the mind of cant, and in the second place not to rest content with having learnt enough to follow the syllogism, knowing perfectly well that to follow the syllogism alone is a short cut to the bottomless pit, unless you are able to detect the fallacies that lie by the wayside.

Baldwin, *Political Education*, in *ON ENGLAND* 150 (1926).

11. I. COPI, *supra* note 6, at 97; W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 27; D. FISCHER, *supra* note 5, at 221; C.L. HAMBLIN, *supra* note 5, at 21-22.

12. This would be akin to arguing that since a particular machine is heavy, complicated or valuable, each of its parts must be heavy, complicated or valuable. I. COPI, *supra* note 6, at 97.

13. R. WHATELY, *ELEMENTS OF LOGIC* 132 (Scholars' Facsimiles & Reprints 1975) (2d ed. 1827).

14. *Id.* at 145.

means only to commit a mistake of reasoning or misuse of a logical principle,<sup>15</sup> which can be either deliberate or unconscious.

In fairness to Justice Rehnquist, it must be noted that a similar article could be written about other Justices, past and present, with similar results.<sup>16</sup> Nevertheless, there are several reasons why it is appropriate to focus upon Justice Rehnquist. First, as Chief Justice, Rehnquist is the most visible member of the Court and, being relatively young, may lead the Court for a generation to come. Second, Justice Rehnquist purports to adhere to an interpretivist judicial philosophy that rejects the injection of personal values by judges into the decision making process in deference to strict construction of the Constitution in accord with the framers' intent. As such, he would appear to have less cause to misuse logic than other Justices. Moreover, his judicial philosophy is positivistic in nature,<sup>17</sup> and one thesis of legal positivism is that correct legal decisions can be reached by neutral application of legal rules by logical means alone.<sup>18</sup> Even if this is too strong a statement to be generally acceptable among positivists, it appears that a positivistic approach to judicial decision making would allow for more consistent application of logic than a philosophy which embraces indeterminate concepts of natural or moral law. Finally, contrary to his asserted distaste for judges who act to enforce their

15. L.S. STEBBING, *supra* note 3, at 154.

16. Lest this entire article be judged guilty of committing what Fischer calls the *fallacist's fallacy*, it is prudent to note that the fallacies discussed herein do not show willful deception on Justice Rehnquist's part, nor do they establish that his opinions are false in their entirety or in their results. Fischer defines the fallacist's fallacy as consisting, *inter alia*, in any of the following false propositions: (1) an argument which is fallacious in some respect is fallacious in all respects; (2) an argument which is false in some respect is substantively false in its conclusion; or (3) "the appearance of a fallacy in an argument is an external sign of its author's depravity." D. FISCHER, *supra* note 5, at 305. It is entirely possible to reach good results by bad reasoning and to do so with no impure motive.

17. Positivists view law as a system of rules enforced by power. They deny the existence of a moral order of natural law or at least that any such order would be accessible to human understanding. T. MORAWETZ, THE PHILOSOPHY OF LAW 38-39 (1980). Thus, among the theses that have been identified with legal positivism are that laws are the commands of human beings rather than nature and that there is no necessary connection between law and morals. H.L.A. HART, THE CONCEPT OF LAW 253 (1961). These principles are consistent with Justice Rehnquist's judicial philosophy, which rejects the notion of a moral order of natural law or that there are such things as "fundamental rights." In his view, morality attaches to law only by virtue of the law having been passed upon by a majority of the people through their elected representatives. "It is the fact of their [laws] enactment that gives them whatever moral claim they have upon us as a society . . . and not any independent virtue they may have in any particular citizen's own scale of values." Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976) [hereinafter *Living Constitution*].

Justice Rehnquist cautions against the "treacherous" journey embarked upon by Justices who bring their moral principles to bear upon constitutional issues, instructing that the job of the Court is to balance the principle of majority rule against the principle of the individual right, not elevating one against the other. W. H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 317-18 (1987) [hereinafter *THE SUPREME COURT*].

18. H.L.A. HART, *supra* note 17, at 253.

own notions of public policy in deciding cases, Justice Rehnquist's decisions in the area of criminal procedure support the perception that his agenda is to eliminate many of the procedural protections accorded to suspects of crime by the Warren Court. He has been either unwilling or unable to accomplish this by directly overruling the Warren Court decisions in many cases. As a consequence, fallacies have resulted from efforts to reach contrary results while purporting to faithfully apply the Warren Court precedents.<sup>19</sup>

Part I of this article examines the relationship of logic to legal argumentation. Part II discusses the development of fallacies and offers a means of classifying them relevant to judicial decision making. Part III, which comprises the main portion of the article, is an analysis of the fallacies employed in Justice Rehnquist's opinions in cases involving constitutional criminal procedure issues. Part IV explores why fallacies occur and suggests criteria for avoiding them. Part V, the conclusion, briefly summarizes the central premises and themes of the article.

## I. LOGIC AND LEGAL ARGUMENTATION

To what extent are the Justices of the Supreme Court constrained by logic in making and articulating their decisions? In answering this question, we can begin with the proposition that Supreme Court Justices *do* purport to act logically and then work backward from that point. The terms "logic" and "illogic" and their variant forms are part of the standard lexicon of Supreme Court opinion writing.<sup>20</sup> It

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19. Only a few of the Rehnquist opinions analyzed in this article were not joined by other Justices. Thus, it could be argued that it is unfair to attribute the fallacies in his opinions solely to him, when each of the Justices joining in the opinions is in one sense jointly and severally responsible for the contents. Some responsibility may also be laid at the door of Justice Rehnquist's law clerks. In his recent book, the Chief Justice is candid about his practice of assigning to law clerks the task of writing the first draft of opinions, subject to editing and revision. He defends this practice, stating:

The justice must retain for himself control not merely of the outcome of the case, but of the explanation for the outcome, and I do not believe this practice sacrifices either.

[T]he law clerk is not simply turned loose on an important legal question to draft an opinion embodying the reasoning . . . favored by the law clerk. . . . The law clerk is not off on a frolic of his own, but is instead engaged in a highly structured task which has been largely mapped out for him.

THE SUPREME COURT, *supra* note 17, at 300. It is axiomatic that each Justice bears ultimate responsibility for the content of his or her opinions.

20. A WESTLAW search shows that from 1790 through the end of the 1986 term, the Court used these terms in 1,826 cases. (WESTLAW, SCT and SCT-OLD libraries, search terms "logic! or illogic!", conducted July 13, 1987). Opinions of Justice Rehnquist that are the subject of this article provide relevant examples: *Lockhart v. McCree*, 476 U.S. 162, 178 (1986) ("The view of jury impartiality urged upon us by McCree is both *illogical* and hopelessly impractical. . . . [I]t is hard for us to understand the *logic* of the argument. . . ."); *Michigan v. Jackson*, 475 U.S. 625, 640 (1986) (Rehnquist, J., dissenting) ("Not only does the Court today cut the *Edwards* rule loose from its analytical moorings, it does so in a

would be a simple matter to deduce from the Justices' frequently stated proclamations of their own logic, together with their broadsides against the illogic of the opposition, that they do indeed concern themselves with the logic of what they are saying and doing. However, we would gain little understanding from the assumption that Supreme Court Justices use logic because they say they do, particularly in light of the evident failure of the Justices to agree among themselves as to the proper role of logic, as illustrated by a case decided in the 1986 term.

*Cruz v. New York*<sup>21</sup> considered whether the *Bruton*<sup>22</sup> rule regarding the inadmissibility of confessions of non-testifying codefendants at joint trials applied to the so-called "interlocking confession" situation. A 1979 plurality decision authored by Justice Rehnquist, *Parker v. Randolph*,<sup>23</sup> held that *Bruton* did not preclude the admissibility of a codefendant's confession in the situation where the complaining defendant had himself confessed, so long as the jury was properly instructed not to consider the codefendant's confession against the defendant. *Parker* was based upon the premise that when the defendant has himself confessed, it is unlikely the codefendant's confession will have the "devastating" effect upon the defendant's case that was the concern in *Bruton*.<sup>24</sup>

In overruling *Parker*, Justice Scalia's majority opinion in *Cruz* rejected the *Parker* premise as "illogical," concluding instead that admission of a codefendant's interlocking confession is likely to be even more devastating in cases where it corroborates a confession the de-

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manner that graphically reveals the *illogic* of the Court's position."); *Richardson v. United States*, 468 U.S. 317, 326 n.6 (1984) ("It follows logically from our holding today that claims of double jeopardy. . . ."); *Arizona v. Rumsey*, 467 U.S. 203, 215 (1984) (Rehnquist, J., dissenting) ("There is no logical reason for a different result here simply because . . . ."); *United States v. Gouveia*, 467 U.S. 180, 191 (1984) ("[T]he Court of Appeals must have concluded, quite logically we believe, that . . . ."); *Florida v. Royer*, 460 U.S. 491, 525 n.6 (1983) ("While each case will turn on its own facts, sheer logic dictates that. . . ."); *Rakas v. Illinois*, 439 U.S. 128, 140 (1978) ("But by frankly recognizing that this aspect of the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine. . . .we think the decision of the issue will rest on sounder logical footing."); *Gooding v. United States*, 416 U.S. 430, 458 (1974) ("[I]t seems totally illogical to suggest that the Department of Justice . . . .") (all emphases added).

21. 107 S. Ct. 1714 (1987).

22. *Bruton v. United States*, 391 U.S. 123 (1968). *Bruton* held that a defendant's sixth amendment rights under the Confrontation Clause are violated when the confession of a non-testifying codefendant is admitted against him at their joint trial and the confessor is not available for cross-examination. Because "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant," a cautionary instruction to the jury to consider the confession only against the person who made it was deemed insufficient protection for the non-confessing defendant. *Id.* at 135.

23. 442 U.S. 62 (1979).

24. *Id.* at 73.

fendant himself has given.<sup>25</sup> Justice White, in dissent, denounced the majority for engaging in what he called "remorseless logic." Judicial decisions, he said, should not be "a matter of imagination or logic, but . . . of common sense . . ."<sup>26</sup> Common sense should prevail, even where logic may seem to justify a contrary result.<sup>27</sup> Justice Scalia responded that he saw no difference between the two, "even in their most remorseless form."<sup>28</sup>

The dispute between Justices White and Scalia probably was rooted in the same lack of understanding as to the meaning and relevance of logic in the law that has plagued discussion of the issue through most of the twentieth century. Paradoxically, Justice Scalia was right in equating logic with common sense and Justice White also was correct in suggesting they are incompatible. Only by clarifying the particular aspects of logic applicable to judicial decision making can we hope to learn anything about what to expect from Supreme Court Justices in terms of their use of logic and the extent to which they meet that expectation. The proper beginning is the source of the confusion—legal realism.

Legal realism,<sup>29</sup> a method of critical analysis that flourished in the early part of this century, arose as a reaction to the notion that judges decide cases merely by applying existing rules of law to known facts.<sup>30</sup> Building upon early statements by Oliver Wendell Holmes,<sup>31</sup>

25. *Cruz*, 107 S. Ct. at 1718-19. The majority said that if the defendant were adhering to his confession, it could be argued that the codefendant's confession does no more than support the defendant's own case. However, "in the real world of criminal litigation, the defendant is seeking to *avoid* his confession." *Id.* Consequently, the fact that the confessions interlock does not diminish the damage to the defendant and is irrelevant to the issue of whether the jury is likely to obey the instruction to disregard the codefendant's confession. *Id.*

26. *Id.* at 1721 (White, J., dissenting).

27. *Id.*

28. *Id.* at 1719. He opined that the law cannot command respect if "inexplicable" exceptions to constitutional imperatives are adopted. Having decided *Bruton*, the Court had to face the "honest consequences" of what it held. *Id.*

29. A thorough exegesis of legal realism is beyond the scope of this article. For a complete review of the realist movement, see W. RUMBLE, AMERICAN LEGAL REALISM (1968). For an overview of the literature of legal realism and its relation to logic, see Loevinger, *An Introduction to Legal Logic*, 27 IND. L.J. 471 (1952). For an interesting collection of excerpts from commentary, see E. POLLACK, JURISPRUDENCE 787-910 (1979). Of course, the best sources of insight to the realist method are the works of its expositors.

30. In the late nineteenth and early twentieth centuries, some philosophers asserted that judicial decisions were reached through the process of logical deduction and that logic offered two guarantees that made it a major stabilizing influence on the law. First, there existed a limited set of self-evident general principles of law which could be discovered and used deductively to reach conclusions as to rules applicable to particular cases. Secondly, the rules could be defined with sufficient precision as to leave judges with no discretion as to how to decide cases. Patterson, *Logic In the Law*, 90 U. PA. L. REV. 875, 882-83 (1942). See also Cohen, *The Place of Logic in the Law*, 29 HARV. L. REV. 622, 624-27 (1916).

The most extreme incarnation of this view was espoused by John M. Zane.

the realists attacked the simplistic conventional view of how judges decide cases—that the decision of any lawsuit results from the application of a legal rule or rules to the facts of the suit.<sup>32</sup> They discounted that either legal rules or the process of judicial fact determination<sup>33</sup> is certain enough to provide any basis for predicting the outcome of litigation, controlling judicial discretion or evaluating judges and the bases of their decisions.

Central to realist thought was rejection of the myth that judges act only as “living oracles” of the law<sup>34</sup> who merely apply rather than make law. Judges do make law, said the realists, and for reasons other than those expressed in their written decisions. It is not rules of law that are important in deciding cases, but external factors such as the

Every judicial act resulting in a judgment consists of a pure deduction. The figure of its reasoning is the stating of a rule applicable to certain facts, a finding that the facts of the particular case are those certain facts and the application of the rule is logical necessity.

Zane, *German Legal Philosophy*, 16 MICH. L. REV. 287, 338 (1918).

31. Holmes' views regarding the relationship of law and logic have had remarkable staying power, as evidenced by the widespread modern familiarity of Holmesian epigrams such as “[t]he life of the law has not been logic: it has been experience.” O.W. HOLMES, *THE COMMON LAW* 1 (1881), and “a page of history is worth a volume of logic.” New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

32. Frank, *Say It With Music*, 61 HARV. L. REV. 921, 922 (1948). Jerome Frank reduced the conventional theory to a simple formula in which the rule of law is designated *R*, the facts *F* and the decision *D*. If the conventional theory were accurate, *R* × *F* would equal *D*, and by knowing the facts and applicable rule of law, we would have a basis not only for predicting the decision but for critically examining the decision. *See id.* This is what Roscoe Pound referred to as “mechanical jurisprudence.” Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). Frank suggested the alternative formula of *S* × *P* = *D*, with *P* representing the judge's personality and *S* the external stimuli which influence the judge, as perhaps coming closer to reflecting the true judicial decision making process. J. FRANK, COURTS ON TRIAL 182 (1949) [hereinafter COURTS ON TRIAL].

33. Though the realists did not always make the distinction clear (perhaps because it was not clear to themselves at the time), a rough dichotomy of philosophy existed between the so-called “fact skeptics” and the “rule skeptics.” Both challenged the conventional view of how courts reach decisions, but for different reasons. The fact skeptics, who were concerned primarily with the trial courts, attributed uncertainty in the law to the elusive nature of fact determination. Because the judge or jury chooses which facts to believe, and because such selection is frequently based upon either conscious or unconscious prejudices not susceptible to discovery, there is little to constrain the trial court from reaching whatever decision it chooses. LAW AND THE MODERN MIND, *supra* note 8, at xii-xiii. Mistakes are unlikely to be corrected at the appellate level because erroneous interpretation of or credence given to facts below will usually stand untouched. *Id.* at xiv-xv. Precedent thus becomes of small value, since the determination of the facts by the trial court has already determined which precedent will control. *See id.* at xvi.

Rule skeptics focused upon appellate court decisions. Their skepticism was with the notion that the rules articulated by judges in their written decisions provide reliable guidance to laypersons or lawyers in predicting the results of future cases. *Id.* at x. This is because the expressed rules mask the true reasons for the decisions, such as mores, customs, and the social, economic and political background of the judges. *Id.* at xvi. The rule skeptics believed that if these “real rules” could be identified and studied, it would add certainty and predictability to the law. *Id.* at x. Frank criticized the rule skeptics’ approach on the basis that no matter how certain the rules were, divergent interpretations of the facts would still control the outcome. *Id.* at xiv-xvii.

34. *Id.* at 35.

judge's values, prejudices or whether he went to bed too late the night before.<sup>35</sup> Reversing the conventional view of judging, realists postulated that judges work backward from conclusions to principles, rather than applying principles of law to facts to determine a result. The conclusion is determined not by logical deduction, but by intuition or "hunch."<sup>36</sup> Under this view, the written reasoning supporting the conclusion becomes little more than an attempt at rationalization.

[T]he judge really decides by feeling, and not by judgment; by "hunching" and not by ratiocination, . . . the ratiocination appearing only in the opinion[.]

[T]he vital, motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause, and the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics[.]<sup>37</sup>

This being so, the realists believed that attempts to analyze judicial decisions logically are futile and pointless. Because written opinions do not express the true reasons for decisions, nothing can be learned by applying principles of logical deduction to them. Judges are able to make their decisions appear logical by fashioning premises that support the conclusion. Without knowing the actual premises, logical evaluation is impossible. The result is what Holmes called "the fallacy of logical form."<sup>38</sup>

#### The realists' perspective of logic vis-a-vis judicial decision making

35. Commentators have suggested several different factors that might influence judicial behavior. *Id.* at 119 ("peculiar traits, disposition, biases and habits"); Haines, *General Observations On the Effect of Personal, Political and Economic Influences In the Decisions of Judges*, 17 U. ILL. L. REV. 98, 116 (1922) (education, family and personal associations, wealth and social position, legal and political experience, and intellectual and temperamental habits); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897) (Judges make particular choices in deciding cases "because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude . . . upon a matter not capable of exact quantitative measurement. . . ."); *Ex Parte Chase*, 43 Ala. 303, 311 (1869) (suggesting that judicial power may be misdirected "by a fit of temporary sickness, an extra mint julep, or the smell or looks of a peculiar raincoat.").

36. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, 14 CORNELL L.Q. 274 (1929). Hutcheson described the "hunch" as "that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way." *Id.* at 278.

37. *Id.* at 285.

38. The language of the judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form.

Holmes, *supra* note 35, at 465-66.

was flawed because it was at once too broad and too narrow. It was too broad because it sought to test the utility of logic as applied to the entire universe of judging—the prediction of results, the reaching of results and the evaluation of results. It was too narrow because it limited consideration of logic to the formal logic of the Aristotelian syllogistic tradition. One can concede that formal logic cannot be depended upon as a basis for predicting decisions, that judges do not rely upon formal logic to reach results and that formal logic is not a wholly perfect means by which to evaluate judicial decisions and judges. But that only begins, rather than ends the inquiry.<sup>39</sup> There are different applications of logic to law and different logics that the realists ignored.<sup>40</sup>

In the early part of this century, American philosopher John Dewey expressed a much more meaningful view of legal logic.<sup>41</sup> Dewey agreed with Holmes that syllogistic logic, since it depends upon fixed premises (rules and facts) which do not exist in the law, had little application to the quest to reach a decision in a particular case. However, Dewey asserted that a logic of "search and inquiry" did exist for resolving concrete cases. Though undoubtedly not as certain as the realists would like it to be, the process goes beyond completely arbitrary "hunching." Faced with a problem presenting alternative courses of treatment and resolution, the lawyer or judge searches for general principles and particular facts to serve as potential premises. The formation of these premises "proceed[s] tentatively and correlatively," the premises being tested and reevaluated each step of

39. The American realists were not original in advancing the proposition that formal syllogistic logic does not provide an adequate means for resolving legal problems. In 1668, Mathew Hale opined that

in matters moral and civil (the common subject of laws) though possibly the general and common notions of them, or whereupon they are founded, are in a great measure common to all men of understanding, yet the applications and particular deductions and conclusions thereof are not so clear, constant, and determinate, as consequences and conclusions in logic or mathematics are; for as the natures of moral actions are in themselves much more indeterminate than the subjects of those arts and sciences, so they most commonly are strangely diversified by infinite circumstances; and therefore men agreeing in the same common notions of justice and morality, oftentimes deduce different conclusions from them, and applications of them . . . .

Hale, *Logic and Law: Preface To Rolle's Abridgement*, in READINGS IN JURISPRUDENCE 341-42 (J. Hall ed. 1938). See *infra* notes 99-151 and accompanying text for discussion of syllogisms and formal logic.

40. The realists overstated their case as to the lack of predictability in the law. While it is true that a particular outcome is not logically certain in a hard case, "it does not follow that just anything goes." J. MURPHY & J. COLEMAN, THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 40 (1984). The realists failed to take cognizance, for example, of the fact that the large majority of cases are never litigated precisely because their results are predictable based upon existing rules. *Id.*

41. Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924).

the way.<sup>42</sup> Once the premises are considered acceptable, the conclusion is given, their development having occurred in tandem.<sup>43</sup> Dewey's essential point was that, though conclusions are not necessarily entailed from premises in legal thinking, there is a "logic" to the way conclusions are reached.

More importantly, Dewey recognized that judges not only reach decisions, they must also justify them. A different type of logic, which Dewey called the "logic of exposition,"<sup>44</sup> comes into play here. Having reached a result, judges have an obligation to furnish "a rational statement which formulates grounds and exposes connecting or logical links."<sup>45</sup>

After making a clear distinction between the logic of discovery and that of exposition, Dewey then appeared to fall back upon the same narrow conception of judicial logic as the realists. The realists took the position that explaining the decision is a simple matter of selecting premises that accord with the conclusion in a logical form,<sup>46</sup> and Dewey similarly suggested that the temptation in exposition is to supplant the logic which yielded the conclusion with "mechanical logic and abstract use of formal concepts."<sup>47</sup>

The fixation with formal logic suggests that judges, after reaching a conclusion by whatever means, then go back and recast it in syllogistic form. The realists were justified in their skepticism of formal logic as a tool of judicial decision making, but mistaken in their belief that the task of expounding decisions is nothing more than an effort to reduce everything to a logical form. Judges generally possess neither the understanding of logic nor the inclination to write opinions with that goal in mind. To the extent judicial reasoning comports with the rules of formal inference, it is probably because well-trained legal minds operate in a sound, analytical fashion which frequently accords with deductive or inductive reasoning.

Moreover, it would be naive to believe that, at least at the

42. *Id.* at 23.

43. *Id.*

44. *Id.* at 24.

45. *Id.*

46. The most clearly stated pronouncement of this came from Frank, who asserted that, through the selection of premises, judges are easily able to portray their decisions in syllogistic logic which make their conclusions "appear inescapable and inevitable." *LAW AND THE MODERN MIND*, *supra* note 8, at 71.

The court can decide one way or the other and in either case can make its reasoning appear equally flawless. Formal logic is what its name indicates; it deals with form and not with substance. The syllogism will not supply either the major premise or the minor premise.

The "joker" is to be found in the selection of these premises.

*Id.* at 72.

47. Dewey, *supra* note 41, at 24.

Supreme Court level, the Court must demonstrate that the conclusion necessarily follows for all time from the premises; as is true in formal logic. Certainly this is not true with respect to constitutional criminal procedure cases. The Court's obligation is less than that, and yet more. Faced with constitutional questions involving competing policy questions, the Court cannot hope to convince its audience (the parties and lawyers in the case, law enforcement officers, prosecutors and defense lawyers, Congress and state legislatures and, ultimately, the people of the United States) of the certain truth and validity of its holdings. Legal issues, unlike some scientific issues, cannot be rendered undebatable by even the best argument. The only realistic goal of the Supreme Court is to make its holding appear as reasonable as possible and thereby secure a degree of acceptance for it as the best resolution among competing alternatives.<sup>48</sup> Dependent as criminal procedure decisions are upon evaluative, frequently shifting premises, they cannot realistically be expected to "prove" anything, and so are different from the syllogisms of formal logic. On the other hand, it is not *enough* for the Court to cast an argument in logical form. Precisely because acceptance *is* the goal, the Justices cannot be content with the formal correctness of their opinions. They must persuade,<sup>49</sup> and the more suspect the holding, the more the audience demands in order to be persuaded.<sup>50</sup>

To be persuasive, the Court must resort to argumentation which necessarily goes beyond formal logic. Though not without value as a testing device,<sup>51</sup> formal logic does not fully explain legal argumentation. Justices of the Supreme Court do more than apply a rule or rules of law (major premises) to a set of facts (minor premises) in order to reach a holding (conclusion). They adduce *reasons* in support of their choices: reasons for addressing or not addressing particular issues; reasons why one rule rather than another is controlling; reasons why some facts are more significant than other facts; reasons the case under consideration is more analogous to Case A than to Case B; reasons for accepting certain arguments advanced by the parties and rejecting others; reasons why certain consequences are desirable and certain others should be avoided; reasons why one set of policy considerations

48. See C. PERELMAN, JUSTICE, LAW AND ARGUMENT 121 (1980) [hereinafter JUSTICE, LAW AND ARGUMENT] ("The role of the judge, servant of existing laws, is to contribute to the acceptance of the system. He shows that the decisions which he is led to take are not only legal, but are acceptable because they are reasonable.").

49. See *id.* at 124.

50. The persuasive force of a decision is particularly significant in the area of criminal procedure, since the degree to which the decision will be obeyed is likely to be affected by the degree to which it is accepted. See *id.* at 121.

51. See *infra* note 108 and accompanying text.

outweighs others; in short, reasons why one resolution is better than other alternatives. These reasons can be complex, often involving great chains of premises leading to conclusions, which, in turn, serve as premises to reach other conclusions.<sup>52</sup> Logically unnecessary and redundant argument is often included to persuade everyone that the case was decided in the best possible way.<sup>53</sup>

Accordingly, the logic of Supreme Court opinions is the *logic of practical argumentation*, of straight thinking, of getting from A to Z through a maze of complex, often conflicting legal principles, facts and policies without committing either intentional rhetorical tricks or unconscious errors of reasoning.<sup>54</sup> This is the logic by which we can measure judges and their decisions and is probably the logic the Justices themselves so frequently exalt.<sup>55</sup> Thus, returning to *Cruz* and the

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52. C. L. Hamblin described argument "in practice" as having a "thread" or "development" involving intermediate statements that do not fit neatly within the categories of either premises or conclusions:

It is usually assumed in logic books that a complex argument can always be broken down into simple steps in such a way that, in any given step, there are one or more premises, just one conclusion and no intermediate statements. This is true of some arguments but not of all; and the word "argument" is, in any case, regularly and properly used of the complex of steps as well as of the steps themselves.

C.L. HAMBLIN, *supra* note 5, at 229.

53. H. BOUKEMA, JUDGING 20 (1980).

54. What is referred to here as the "logic of practical argumentation," Perelman and other rhetoricians would call the "new rhetoric." C. PERELMAN, THE REALM OF RHETORIC 5 (1982) [hereinafter THE REALM OF RHETORIC]. The new rhetoric is simply Aristotelian rhetoric reincarnated, according to Perelman. Aristotle defined rhetoric as "the faculty of observing in any given case the available means of persuasion." ARISTOTLE, *Rhetorica* in XI THE WORKS OF ARISTOTLE 1355b 26 (W.D. Ross ed. 1946). Perelman asserts that logicians have overlooked the fact that Aristotle was the father not only of formal logic, but of practical argumentation as well. The latter was inherent in Aristotle's discussions of dialectical reasoning. Dialectical reasoning begins from theses generally accepted for the purpose of gaining acceptance of other theses, and seeks to persuade or convince, not as in formal logic through necessary inferences, but through arguments which may be strong or weak. Perelman equates the study of "rhetoric" with this aspect of dialectical reasoning and asserts rhetoric suffered an untimely and unwarranted demise at the hands of Peter Ramus in the sixteenth century. Ramus dissected rhetoric from its Aristotelian foundation in dialectical reasoning by defining it to include only the art of using ornate or eloquent language, and reserving to "dialectic" the art of reasoning well. Modern rhetoricians define rhetoric broadly, focusing upon Aristotle's reference to the unearthing of any and all means of persuasion. See, e.g., W.R. WINTEROWD, RHETORIC, A SYNTHESIS 77 (1968) ("[R]hetoric . . . is the art of discovering the possible means of persuasion with regard to any subject whatever; it is the art that has no autonomous subject matter but that concerns all the suasive arts."); E. CORBETT, CLASSICAL RHETORIC FOR THE MODERN STUDENT 3 (2d ed. 1971) ("Rhetoric is the art or the discipline that deals with the use of discourse, either spoken or written, to inform or persuade or move an audience . . ."). Perelman explains the new rhetoric as including "the whole range of discourse that aims at persuasion and conviction, whatever the audience addressed and whatever the subject matter." THE REALM OF RHETORIC, *supra*, at 5.

55. Though several of the fallacies discussed in this article would not be considered "logical" fallacies in a strict sense, they fit within the broad definitions of logic given by logicians. I. COPI, *supra* note 6, at 3 (defining logic as the study of methods used to distinguish correct from incorrect reasoning); R. WHATELY, *supra* note 13, at 1 (defining logic as the science, or art, of reasoning).

disagreement between Justices Scalia and White,<sup>56</sup> Justice Scalia was correct that common sense, viewed as sound practical thinking, does equate with logic;<sup>57</sup> while Justice White was correct to condemn "re-morseless logic," if what he meant was reliance upon strict application of formal logic as inexorably leading to only one possible conclusion.<sup>58</sup> Their theoretical difference was largely illusory, arising from a failure to define terms.<sup>59</sup> Their actual dispute was a substantive one, whether admission of an interlocking confession is "devastating" to the defendant's case to the same extent as in the *Bruton* situation.

## II. THE STUDY OF FALLACIES

Fallacies furnish us with a means by which the logic of practical argumentation can be tested. They provide a relatively concrete basis<sup>60</sup> for evaluating the sufficiency of judicial reasoning and argumentation, thereby at least partially answering one of the realists' central apprehensions about judicial decisionmaking—that judicial decisions offer an insufficient basis for evaluating either the decision or the judge. While analysis of Supreme Court opinions for fallacies does not guarantee the precise external factors influencing the decision can be identified, it does provide a way to evaluate the Court's reasoning process, which may tell us something about how the decisions were reached. Recurrent fallacies signal that unstated reasons may have played a significant role in arriving at the result.

### *A. Development of Fallacies*

The history of fallacies spans a period of more than two millenia. This is not an historical article and only the most capsulized summary will be presented here.<sup>61</sup> Three stages in the development of fallacies

56. See *supra* notes 21-28 and accompanying text.

57. See L.S. STEBBING, *supra* note 3, at 14.

58. Construing Justice White's attack as limited to formal, deductive logic makes it easier to reconcile his statements in *Cruz* with previous expressions of his attitude toward logic. For example, in *Rakas v. Illinois*, 439 U.S. 128, 159 (1978), Justice White dissented on the basis that "[t]he logic of Fourth Amendment jurisprudence" compelled a result contrary to that reached by the Rehnquist majority.

59. Failure to define terms in the course of argumentation can itself be a fallacy. See G. ST. AUBYN, *THE ART OF ARGUMENT* 44 (1962).

60. No assertion is made that fallacies can be applied with mathematical precision or in a completely objective manner. Interpretation of reasoning necessarily occurs through each person's unique perspective and frame of reference. Where one person sees a fallacy, another may disagree. No analysis of another's reasoning can be free from the contamination of one's own values and this undoubtedly holds true with respect to the analysis of Justice Rehnquist's opinions in this article.

61. C. L. Hamblin has compiled the only complete modern history of fallacies. C.L. HAMBLIN, *supra* note 5. Much of this section is drawn from his excellent work. For a thorough history of the

concern us: their origin, the expansion of fallacies beyond formal logic to include fallacies of practical argumentation and the modern view.

Fallacies were originally classified by Aristotle in his *Sophistical Refutations*,<sup>62</sup> where he listed thirteen of them. Aristotle's view of fallacies was limited because of the context of argumentation with which he was concerned. He saw fallacies as a deliberate<sup>63</sup> tool used by "sophists"<sup>64</sup> in the course of "refutation"<sup>65</sup> to win arguments. Six of the thirteen fallacies he identified related to erroneous impressions created by ambiguities inherent in spoken language. These fallacies—the "fallacies dependent upon language"—have little practical utility. The remaining fallacies, classified as "fallacies outside language," covered diverse sophisms with little in common except that most of them tend to produce conclusions either unproven by or irrelevant to the premises.<sup>66</sup>

Aristotle wrote about fallacies in the fourth century, B.C., yet, for reasons not altogether clear,<sup>67</sup> discussion of fallacies in literature was virtually nonexistent from then through the eleventh century, A.D.<sup>68</sup> Some new works began appearing in medieval times and by the thirteenth century, logic, including treatment of *Sophistical Refutations*, formed part of the core curriculum at medieval universities.<sup>69</sup>

For centuries, virtually all writing about fallacies tracked Aris-

development of logic in general, see W. KNEALE & M. KNEALE, THE DEVELOPMENT OF LOGIC (1962).

62. *Sophistical Refutations*, *supra* note 6. *Sophistical Refutations* is the translation of the Latin title *De Sophisticis Elenchis*. It is generally regarded as one of Aristotle's earliest works. Two other of Aristotle's works, *Analytica Priora* and *Rhetorica*, also treated fallacies.

63. See *Sophistical Refutations*, *supra* note 6, at 165a 19.

64. From this term, came the word "sophism," which has come to be a synonym for fallacy.

65. Aristotle defined refutation as "reasoning involving the contradictory of the given conclusion." *Sophistical Refutations*, *supra* note 6, at 165a. Refutation was a form of public debate conducted in accordance with a well-established set of rules. It followed a standard pattern of, If *p* then *q*; but not *q*; therefore not *p*, in which one disputant, the questioner, would seek to deflate a hypothesis advanced by another, the answerer, by forcing the answerer to concede through a series of questions unacceptable and absurd consequences that would follow from the hypothesis. W. KNEALE & M. KNEALE, *supra* note 61, at 13. These debates were conducted as much for amusement as for the serious pursuit of knowledge. R. WHATELY, *supra* note 13, at 4.

66. The fallacies dependent on language were: (1) ambiguity (equivocation); (2) amphiboly; (3) combination of words (composition); (4) division of words (division); (5) wrong accent (accent); (6) the form of the expression used (figure of speech). The fallacies outside language were: (7) accident; (8) the use of words absolutely or in a certain respect (*secundum quid*); (9) misconception of refutation (*ignoratio elenchi*); (10) assumption of the original point (begging the question); (11) consequent (affirming the consequent); (12) non-cause as cause (false cause); and (13) many questions (complex question). The parentheticals show the modern names by which the fallacies are known, where different from Aristotle's original description. See C.L. HAMBLIN, *supra* note 5, at 62-63, for the list as originally stated by Aristotle. See *infra* note 89 for the discussion of Aristotle's classification of fallacies.

67. Some of Aristotle's writings were lost. C.L. HAMBLIN, *supra* note 5, at 89.

68. *Id.*

69. *Id.* at 113-14.

totle's original treatment.<sup>70</sup> Only in the early seventeenth century did the concept of fallacies begin to expand beyond the misuse of language and logical form to include appeals to matters external to the substance of the argument. These "psychological fallacies," so common in practical argumentation, prey upon human prejudices, biases, emotions and other weaknesses of the mind. They had their origin in Francis Bacon's "Idols." Drawn from several of his works,<sup>71</sup> the Idols were Bacon's allegorical references to different kinds of argument that imposed "false appearances" upon the mind.<sup>72</sup> Bacon's concept of false appearances, though a turning point in the study of fallacies, offered only a glimmer of things to come because of the vague and diffuse way it was presented.

It was Antoine Arnauld who made the quantum leap from the Aristotelian era to the modern era when he published *The Art of Thinking* in 1662.<sup>73</sup> As Hamblin notes, so advanced was this work that it could almost pass as contemporary.<sup>74</sup> Arnauld devoted two chapters to fallacies. The first more or less followed the Aristotelian sophisms, but the second, entitled "Concerning faulty arguments advanced in public life and everyday affairs," built upon Bacon's notion of false appearances and portrayed a remarkably modernistic view of fallacies through its emphasis on the ways emotion can be used to pervert reason. Arnauld asserted that bad reasoning follows from false judgments we make concerning the world around us. Every false judgment involves a reasoning, although the reasoning may be only implicit. False judgments, in turn, are attributable to two sources: external false appearances which initiate the error; and internal self-deception based upon self-love, passion and interest which facilitate the acceptance of the false appearance in processing a judgment.<sup>75</sup> The false appearances Arnauld described included several fallacies of modern interest, including *argumentum ad hominem* (attacking the man rather than the argument), *argumentum ad populum* (appeals to popu-

70. There was some rebellion, led by Peter Ramus, against the Aristotelian view of fallacies. Ramus, whose dissertation thesis in 1537 proclaimed that, "Everything Aristotle said was false," *id.* at 137-38, dismissed the study of fallacies as unnecessary on the basis that fallacious thinking was simply the opposite of sound thinking and that if one learned and followed the proper rules of logic fallacies would not occur. See *id.*

71. Bacon's writings are collected in F. BACON, WORKS (Facsimile ed. 1961-63) (Spedding, Ellis and Heath ed. 1858-74).

72. The Idols and their corresponding source of false appearances were: Idols of the Nation or Tribe and Idols of the Cave (appeals to psychological factors); Idols of the Market Place (appeals to social factors); and Idols of the Theatre (appeals to authority). C.L. HAMBLIN, *supra* note 5, at 143-47.

73. A. ARNAULD, THE ART OF THINKING (J. Dickoff & P. James trans. 1964) (1662).

74. C.L. HAMBLIN, *supra* note 5, at 158.

75. A. Arnauld, *supra* note 73, at 265-66, 279.

lar opinion) and *argumentum ad verecundiam* (appeals to authority).<sup>76</sup> Though not all of Bacon's and Arnauld's work was original, the emphasis they attached to psychological fallacies, as opposed to purely logical fallacies, was largely responsible for permanently refocusing the study of fallacies.

From these roots, modern writers greatly expanded both the weapons and the arena of fallacious argumentation. Extended from the realm of formal disputation to include all discourse which seeks to persuade, the original list of thirteen fallacies has grown to include any type of rhetorical device or incorrect thinking. Modern accounts, some of which include comprehensive lists of fallacies,<sup>77</sup> have been criticized for failing to present any coherent theory of fallacies,<sup>78</sup> but a satisfactory theory may be impossible in the real world of practical thinking and argumentation. Fallacies assume many forms, and efforts to delimit a sphere as vast as human thought seem doomed to failure. The modern treatments, while failing to present a systematization of fallacies, are valuable because they broaden our perception of the many ways argument can be used or abused to win assent.

### *B. The Requirement of Argument*

A fallacy is a form of deceptive argument; an argument which seems valid, but is not.<sup>79</sup> Not every error qualifies as a fallacy, because fallacies occur only in argument. A false statement, standing alone, is not a fallacy. If a person says to his neighbor, "It rains only on Tuesdays," he has committed an error, but not a fallacy. Had he said, "For the last two weeks, it has rained on Tuesday, but not on any other day; therefore, it rains only on Tuesdays," he would have committed a fallacy (that of hasty generalization<sup>80</sup>). He advanced beyond making a naked false statement into argument by asserting that the known fact that it has rained only on Tuesdays for the past two weeks inferentially establishes the previously unknown conclusion that it rains only on Tuesdays.

Argument is the mechanism by which we seek to establish the

76. John Locke is credited with inventing several of the famous "argumentum ad" labels. C.L. Hamblin, *supra* note 5, at 161.

77. Fischer lists 112 fallacies in *Historians' Fallacies* and discusses even more than that. D. FISCHER, *supra* note 5. Fearnside and Holther discuss 56 fallacies in *Fallacy: The Counterfeit of Argument*. W. FEARNSIDE & W. HOLTHER, *supra* note 5. Damar analyzes 64 fallacies in *Attacking Faulty Reasoning*. T. DAMAR, *supra* note 5. Pirie's *The Book of the Fallacy*, though by no means a scholarly work, is a useful guide to 76 different fallacies. M. PIRIE, *supra* note 5.

78. C.L. HAMBLIN, *supra* note 5, at 11.

79. See *supra* note 6 and accompanying text.

80. The fallacy of hasty generalization consists in drawing a general conclusion based upon insufficient experience with particular cases. See *infra* note 372 and accompanying text.

unknown from the known through the process of inference. Part of the difficulty of detecting fallacies lies in first distinguishing argument from non-argument. Generally stated, an argument is any group of propositions in which one is claimed to follow from the others.<sup>81</sup> In formal logic, arguments follow a particular structure,<sup>82</sup> but in practical argumentation this is not usually the case and the task of separating argument from other discourse is more formidable. Hamblin, for example, takes the position that “[s]o long as one can insist that he is merely *elucidating* his position, and not arguing, he can evade censure” for committing what otherwise would be a fallacy.<sup>83</sup>

Perhaps this would be true if there were some acceptable means of separating elucidation from argumentation. But no such means exists, certainly not in legal argument. A judicial opinion presents elaborate practical reasoning directed toward persuading the audience of the reasonableness and acceptability of the court’s conclusion.<sup>84</sup> Written decisions are the systematized means by which we articulate the search from the known—facts and precedent—to the unknown, the right result in the particular case. At the Supreme Court level, decisions also consider policies, interests and consequences. The result can be a labyrinthine argumentation which seldom admits of a distinction between argument and mere explanation. Because they are not easily separated, elucidation is better viewed as part and parcel of argument.

Every portion of a Supreme Court opinion is included as part of the effort to gain acceptance for both the specific holding and the *ratio decidendi* of the case, and so can be considered argument. This is not limited to the reasoning offered in support of the result, but includes the statement of the facts and even the statement of the proceedings below, both of which are typically presented in the fashion most likely to bolster the position adopted by the Court.<sup>85</sup> The same is true, in

81. I. COPI, *supra* note 6, at 7.

82. See *infra* notes 99-106 and accompanying text.

83. C.L. HAMBLIN, *supra* note 5, at 225.

84. Argument of a practical nature has been broadly defined as

the art or activity by which one person, through the use of reasoned discourse, seeks to get other persons to believe or do what he wants them to believe or to do. . . . Whenever either in writing or in speech we seek to get other people to believe or to perform as we want them to, by the use of language which has a thread of reasoning running through it, we are using argumentation.

J. MCBURNEY, J. O’NEILL & G. MILLS, ARGUMENTATION AND DEBATE: TECHNIQUES OF A FREE SOCIETY 1 (1951).

85. *Dicta* cannot be excluded from the definition of “argument”. First of all, it is questionable whether *dicta* can ever be reliably identified as such. Separating reasoning essential to support the *ratio decidendi* of a case from *dicta* is an assignment fraught with uncertainty. One commentator has gone as far as suggesting that “the division between the *ratio* and *dicta* is in fact mainly a device employed by subsequent courts for the adoption or rejection of doctrine expressed in previous cases, according to the inclinations of the subsequent court.” G. HUGHES, JURISPRUDENCE 236 (1955). Even true *dicta* can-

converse, of dissenting opinions, where the primary goal is to persuade the audience that the Court's opinion should *not* be accepted,<sup>86</sup> that it is *not* reasonable and *not* the best resolution among competing alternatives.<sup>87</sup>

### C. Classifying Fallacies

De Morgan once opined that, "There *is* no such thing as a classification of the ways in which men may arrive at error: it is much to be doubted whether there ever *can be*."<sup>88</sup> Despite many attempts at classification, the study of fallacies never has been systematized in a widely accepted manner. Aristotle's original division between fallacies dependent on language and those outside language proved to be too indistinct to offer much guidance.<sup>89</sup>

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not be excluded from the realm of argument, since it is usually included as part of the effort to persuade. And because it is irrelevant to the Court's holding, *dicta* is particularly likely to be fallacious, since irrelevance to the argument is one of the hallmarks of fallacious argument.

86. Dissuading the audience from opposing views is as important as persuading it as to the speaker's own views. E. BLOCK, RHETORICAL CRITICISM 161 (1978) ("Argumentative situations are those in which incompatible ideas are brought into open conflict. . . [F]or one idea to live, the other must die.").

87. With respect to concurring opinions, the case is somewhat less cogent for they are frequently directed only towards clarification or qualification of the Court's opinion.

88. A. DE MORGAN, FORMAL LOGIC 237 (A.E. Taylor 2d ed. 1926) (1847).

89. See *supra* note 66 for a list of Aristotle's fallacies. Fallacies dependent on language all involve problems arising from the ambiguity of language. For example, equivocation, the simplest case of ambiguity, occurs when a word is used in two different senses in the same context. For example:

The end of a thing is its perfection;  
death is the end of life;  
therefore, death is the perfection of life.

Example from I. COPI, *supra* note 6, at 92. This syllogism is fallacious because it confuses two different meanings of the word "end". In the first premise, "end" is used to mean goal; in the second, to mean last event. Extended beyond solitary words, equivocation becomes the fallacy of amphiboly, which occurs when the ambiguous grammar, syntax or punctuation of a statement makes it susceptible to two different constructions. The classic example is a historical one, involving Croesus and the Oracle of Delphi. Croesus, the king of Lydia, was deliberating whether to invade Persia, but wanted to do so only if he could be assured of victory. He consulted Delphi who told him that, "If Croesus went to war with Cyrus, he would destroy a mighty kingdom." Buoyed by this good news, Croesus went to war and was soundly defeated. A mighty kingdom *had* been destroyed, but it was not the one contemplated by Croesus. *Id.* at 93-94. The fallacies dependent on language are seldom encountered in the real world of argumentation.

While the fallacies dependent on language constitute a relatively distinct set, the fallacies outside language do not fit together so neatly and no one ever advanced a suitable justification for categorizing them as a separate, definite group. Some logicians have attempted to distinguish the fallacies outside language from the fallacies of ambiguity by classifying the former as "material fallacies" because they relate to the "matter" of the argument rather than simply the form. *E.g.*, J. BRENNAN, A HANDBOOK OF LOGIC 214 (2d ed. 1957). That is unsatisfactory, however, because it cannot be said that all fallacies of ambiguity are fallacies of form independent of the matter of the argument. H.W.B. JOSEPH, AN INTRODUCTION TO LOGIC 575 (2d rev. ed. 1916). This can be demonstrated by substituting symbols in the equivocal argument above:

P (end) is q (perfection).

Subsequent efforts have shown it unlikely that any clear principles of division can be devised apart from the arbitrary ones imposed by individual writers.<sup>90</sup> This is attributable to at least three causes. First, because humans do not think in fixed ways, there is no reason to believe their thoughts can be classified in fixed ways. The variety of fallacies is limited only by the possible ways in which a determination to persuade may combine with language. Secondly, attempts to develop a workable system of classification are complicated by the fact that one argument may commit several fallacies.<sup>91</sup> Hence, any classification is likely to be subject to cross-divisions. Finally, the nature of fallacies often depends upon the subject matter. Fallacies that occur in the context of one subject do not occur in others.<sup>92</sup> For example, science is more susceptible than law to causal and statistical fallacies, while law is more prone to fallacies of authority and emotion. Recognizing that there will be deficiencies in any system of classification does not mean attempts to classify fallacies should be abandoned. In spite of the limitations, classification helps to organize thinking about fallacies. This article classifies fallacies in a manner germane to legal argument: (A) Formal Fallacies; (B) Fallacies from False, Omitted or Insufficient Premises; (C) Fallacies of Proof and Authority; (D) Fallacies of Definition, Classification and Qualification; and (E) Fallacies of Irrelevance and Diversion.

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S (death) is p (end).  
Therefore, s (death) is q (perfection).

The form of this equivocal argument is logically valid.

Further doubt as to Aristotle's classification scheme is generated by the fact that the last of the fallacies outside language—many questions—could just as appropriately be classified as a fallacy of ambiguity. The fallacy of many questions (more aptly described as the fallacy of complex questions) consists in the ambiguity that results from combining more than one question within a single interrogative statement and demanding a single answer. I. COPI, *supra* note 6, at 85; D. FISCHER, *supra* note 5, at 8. This is a common tool of lawyers. The classic example, "Have you stopped beating your wife?", is ambiguous because it assumes an affirmative answer to the unstated question of whether the person has ever beaten his wife and cannot be answered yes or no.

90. In expounding his own relatively cogent theory of classifying fallacies, Richard Whately, who later became the Archbishop of Dublin, ingenuously commented:

If any one should object, that the division about to be adopted is in some degree arbitrary, placing under the one head Fallacies, which many might be disposed to place under the other, let him consider not only the indistinctness of all former divisions, but the utter impossibility of framing *any* that shall be completely secure from the objection urged, in a case where men have formed such various and vague notions, from the very want of some clear principle of division.

R. WHATELY, *supra* note 13, at 136.

91. See *Sophistical Refutations*, *supra* note 6, at 179b 18 ("Certainly there is nothing to prevent the same argument from having a number of flaws. . . .").

92. H.W.B. JOSEPH, *supra* note 89, at 570.

### III. THE FALLACIES OF JUSTICE REHNQUIST

Of the many works that discuss fallacies, few refer to concrete, experiential examples. Most illustrations offered by writers on the subject consist of trivial and absurd syllogisms or vignettes that bear little resemblance to anything one may expect to encounter in the real world of argument.<sup>93</sup> The examples are intentionally made to be absurd so that the nature of the fallacy will be immediately apparent to the reader.<sup>94</sup> While they provide a useful foundation of knowledge necessary to advance to higher levels, the examples do not teach one to detect fallacies in real argumentation. Fallacies that occur in authentic argumentation are seldom obvious. If they were, they would lose much of their persuasive effect. The potency of fallacies lies in their ability to beguile. The more subtle the fallacy, at least when the audience is sophisticated, the more likely it will be effective.

This is the case with respect to fallacies found in U.S. Supreme Court constitutional decisions. Supreme Court Justices have traditionally been not only brilliant legal thinkers, but adept writers. Certainly this is true of Chief Justice Rehnquist, whose intellect and legal acuity are unquestioned.<sup>95</sup> The fallacies in Supreme Court opinions are, like their authors, usually subtle and sophisticated.

The task in analyzing judicial decisions for fallacies is twofold: first, one must recognize that a defect is present and, second, identify the particular form of the fallacy that has occurred. The former is much easier than the latter. First year law students often detect that "something is wrong" with an opinion, though they are not sure what the problem is. Without a thorough understanding of fallacies, even

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93. The most notable exception to this is David Hackett Fischer's *Historians' Fallacies*, which analyzes in remarkable breadth fallacies committed by historians. D. FISCHER, *supra* note 5.

94. See T. DAMAR, *supra* note 5, at 7-9 (discussing "absurd example method").

95. Chief Justice Rehnquist's intellectual abilities have been recognized by his supporters and detractors alike, beginning at his confirmation hearings. Not-yet Justice O'Connor declared that as a fellow law student at Stanford University, Justice Rehnquist "quickly rose to the top of the class and, frankly, was head and shoulders above all the rest of us in terms of sheer legal talent and ability." *Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to be Associate Justices of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary, United States Senate*, 92d Cong., 1st Sess. 12 (1971) [hereinafter *Confirmation Hearings*] (statement of Honorable Paul J. Fannin, Senator from Arizona). Former Supreme Court nominee Robert H. Bork asserted that "[t]here can be no doubt whatever concerning his intellectual qualifications" and that Justice Rehnquist "possesses a brilliant and analytical mind." *Id.* at 10 (letter from Robert H. Bork to Committee Chairman James Eastland, Nov. 1, 1971). Even his staunchest opponent, Senator Edward Kennedy, conceded to Rehnquist that he came "highly recommended as a student and scholar of the law, and as a superb craftsman, and as being extremely gifted in . . . his legal mind." *Id.* at 32.

advanced students of the law are unable to "nail the fallacy,"<sup>96</sup> that is, identify the particular nature of the reasoning defect.

Though Supreme Court Justices are seldom hesitant to vigorously lambast the reasoning of their opposing brethren, they only rarely attack "fallacies" *per se*.<sup>97</sup> So long as the substance of the defect is recognized and challenged, this omission is unimportant. More surprising is that many defects constituting fallacies go unchallenged altogether. In some cases, there may be sound reasons for not attacking a fallacy. Some fallacies are of such a minor character that it would no doubt appear petty and injudicious to assail them. Fallacies such as hyperbole, for example, are so common in judicial opinions as to have achieved status as a type of "judicialese." Even some serious fallacies have become so entrenched that a Justice may feel constrained, to mix apt metaphors, from casting stones against them, less it should come to pass that he who lives by the sword dies by the sword. Finally, it may be less fruitful as a practical matter to address particular reasoning defects than to mount a broader attack based upon policy grounds or precedent.

In analyzing Justice Rehnquist's opinions in criminal procedure cases for fallacies from an external perspective, we are not bound by the same restraints. This article seeks to instill, by demonstration, the ability to recognize and identify many types of fallacies in judicial

96. The phrase is from C. L. HAMBLIN, *supra* note 5, at 224, though he used it in a slightly different context.

97. The term "fallacy" appears quite often in Court opinions, but usually in a generic sense, rather than with reference to recognized formal or informal fallacies. A WESTLAW search shows that in only five opinions from 1790 through the end of the 1986 term were "logical fallacies" specifically attacked. (WESTLAW, SCT and SCT-OLD libraries, search terms "logic! /s fallacy or fallacies", conducted July 13, 1987). The cases are: *Carey v. Population Servs.*, Int'l, 431 U.S. 678, 718 (1977) (Rehnquist, J., dissenting) (fallacy of logic chopping, *see infra* notes 319-28 and accompanying text); *Spencer v. Texas*, 385 U.S. 554, 578 (1967) (Warren, C.J., concurring and dissenting) (fallacy of the undistributed middle term, *see infra* notes 110-24 and accompanying text); *United States v. E. I. DuPont De Nemours & Co.*, 353 U.S. 586, 643 (1957) (Burton, J., dissenting) (type of fallacy not specifically identified, but appears to be that of *cum hoc ergo propter hoc*, which consists in reasoning that because an event happened at the same time as another event, it happened because of it); *Lykes v. United States*, 343 U.S. 118, 128 (1952) (Jackson, J., dissenting) (type of fallacy not specifically identified, but appears to be a form of the reductive fallacy of cause, by which necessary causes are confused with sufficient causes as being responsible for an event); *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 760 n.7 (1949) (type of fallacy not specifically identified, but appears to be *ignoratio elenchi*, *see infra* notes 425-41 and accompanying text).

This narrow search is misleading, however, because Justices more often discuss individual fallacies by name without using the label "logical fallacy." For example, "begging the question" has been attacked in 127 cases from 1790 through the end of the 1986 term, (WESTLAW, SCT and SCT-OLD libraries, search terms "question /s begs or begged or begging", conducted July 13, 1987), while "straw man" arguments have been challenged in 28 cases. (WESTLAW, SCT and SCT-OLD libraries, search terms "'straw man' or strawman", conducted July 13, 1987).

opinions.<sup>98</sup> The fact that some are common, or perhaps even trivial by some standards, does not devalue the experience. Once one is able to recognize fallacies, one can assess the significance of a fallacy in an argument, the extent to which it affects the merits of the argument, and the value of challenging the argument on that basis.

#### A. Formal Fallacies

Formal fallacies are arguments that are defective because of their improper form, without regard to content. The form is dictated by the rules of formal logic developed in the context of an Aristotelian<sup>99</sup> "syllogism."<sup>100</sup> A syllogism is a deductive argument consisting of three terms (minor, major and middle) and three propositions (major premise, minor premise and conclusion).<sup>101</sup> Deductive arguments are those in which the conclusion *necessarily* follows from the premises.<sup>102</sup> If the premises of a syllogism are true and the syllogism is valid, the conclusion must also be true. The archetypal example is from Aristotle:

All men are mortal;  
Socrates is a man;  
therefore Socrates is a mortal.<sup>103</sup>

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98. For this reason, some degree of depth necessarily has been sacrificed for breadth.

99. Aristotelian syllogistic logic is not the only type of formal logic. In 1847, George Boole demonstrated that logic worked well within algebraic operations. G. BOOLE, THE MATHEMATICAL ANALYSIS OF LOGIC (Oxford ed. 1951) (1847). From this, what is known as "symbolic" or "modern" logic emerged. Symbolic logic replaces terms in propositions with an artificial symbolic language that eliminates many of the ambiguities of ordinary language and offers more versatility and combinations than syllogistic logic, which is restricted to three terms. I. COPI, *supra* note 6, at 245-46. The recognized masterwork in the area is A. WHITEHEAD & B. RUSSELL, PRINCIPIA MATHEMATICA (1910). This article is not concerned with symbolic logic. Several scholars have analyzed the sophisticated use of symbolic and semantical logic in the law. E.g., I. TAMMELA, MODERN LOGIC IN THE SERVICE OF THE LAW (1978); J. BRKIC', LEGAL REASONING: SEMANTIC AND LOGICAL ANALYSIS (1985); Allen & Caldwell, *Modern Logic and Judicial Decision Making: A Sketch of One View*, 28 LAW & CONTEMP. PROBS. 213 (1963) (and the authorities collected therein); Finan, *Lawgical: Jurisprudential and Logical Considerations*, 15 AKRON L. REV. 675, 676 (1982) (discussing a computer program that "performs the deductive aspects of legal reasoning").

100. Aristotle's classic discussion of the syllogism is found in *Analytica Priora*. ARISTOTLE, *Analytica Priora*, in I THE WORKS OF ARISTOTLE 24a 10 (W. D. Ross ed. 1928).

101. For a discussion of syllogisms, see J. BRENNAN, *supra* note 89, at 49-50; M. COHEN & E. NAGEL, AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD 76-78 (1934) (Cohen and Nagel published a second edition which omitted the chapter pertaining to fallacies; thus, for purposes of convenience, all references to Cohen and Nagel are to the 1934 edition.); I. COPI, *supra* note 6, at 181-84.

102. The premises are said to "entail" the conclusion. A. CASTELL, A COLLEGE LOGIC 112 (1935).

103. This example can be used to illustrate the structure of a syllogism more clearly. The predicate term of the conclusion (mortal) is the *major term* and the subject term of the conclusion (Socrates) is the *minor term*. The third term of the syllogism, which is always repeated in both premises but disappears from the conclusion, is called the *middle term* (man). The *major premise* is the one contain-

Syllogisms are analyzed by logicians in terms of their "validity," rather than their "truth." Validity depends only upon the *form* of the argument. The content is irrelevant.<sup>104</sup> Thus,

all Supreme Court Justices are conservatives;  
Justice Brennan is a Supreme Court Justice;  
therefore, Justice Brennan is a conservative,

is *valid* because the conclusion necessarily follows from the premises. The validity can be established quite clearly by substituting symbols for the terms:

All *p* is *q*;  
*s* is *p*;  
therefore, *s* is *q*.

It is not *true*, however, since the major premise is false.

Validity is important because if the premises are true and the argument is valid, the truth of the conclusion is guaranteed.<sup>105</sup> Rules for determining the validity of syllogisms have appeared in logic textbooks for several centuries. Richard Whately's set of six rules is typical. Violating any of these rules gives rise to a formal fallacy and results in an invalid argument. His rules are as follows:

1. Every syllogism has three and only three terms.
2. Every syllogism has three and only three propositions.
3. The middle term must be distributed at least once.
4. No term can be distributed in the conclusion which was not distributed in one of the premises.
5. No positive conclusion can be inferred from negative premises.
6. If one premise is negative, the conclusion must also be negative.<sup>106</sup>

These rules make sense because the purpose of a syllogistic argument is to establish a relationship between two entities (the major and minor terms) based upon their relationship with a third entity (the middle term).

This discussion of formal logic is by no means complete,<sup>107</sup> but it

ing the major term (the first one in this instance) and the *minor premise* is the one containing the minor term. I. COPI, *supra* note 6, at 181-82.

104. For discussion of the distinction between truth and validity, see M. BEARDSLEY, PRACTICAL LOGIC 204-08 (1950); J. BRENNAN, *supra* note 89, at 3-4; I. COPI, *supra* note 6, at 32-34; W. FEARN-SIDE & W. HOLTHER, *supra* note 5, at 138-42.

105. Stated another way: "*An argument is valid if and only if to assert the premises true and conclusion false involves a contradiction.*" W. FEARN-SIDE & W. HOLTHER, *supra* note 5, at 139.

106. R. WHATELY, *supra* note 13, at 90-93.

107. Whately's rules apply to the standard categorical syllogism consisting of exactly three terms and three propositions. There are other types of syllogisms which also give rise to fallacies when formulated incorrectly. See *infra* note 149 and accompanying text for discussion of conditional syllogisms.

serves our purpose here. In assessing legal arguments, one should first determine whether the argument is formally valid before turning to any of the other fallacy classifications, all of which can be characterized as informal. If the argument is defective in form, it fails to prove its conclusion. This is not to suggest that judges either arrive at decisions through a deductive thought process or that they express their decisions in a neat syllogistic form. The value of formal logic lies principally in its utility as a testing device.<sup>108</sup> By reducing judicial decisions to syllogistic form, we are able to detect flaws that might otherwise remain hidden under the gowns of rhetoric. Such reduction is by no means easy and may sometimes be impossible. As with all attempts to reduce the complex to the simple, caution must be observed less the fallacy of oversimplification be committed.<sup>109</sup>

Formal fallacies are uncommon in Supreme Court opinions. They are unlikely to be used intentionally because, unlike rhetorical devices used simply to embellish or bolster an already tenable argument, structural defects go to the heart of the argument. Formal fallacies are more easily recognized and, once exposed, cause the argument to collapse from its own weight. For this reason, they are also unlikely to occur by oversight. When formal defects do occur, they tend to be latent or implicit rather than overt.

### 1. Fallacy of the Undistributed Middle Term

Whately's third rule of valid syllogistic reasoning relates to what is known as the fallacy of the undistributed middle term. Using a simple example, one can see that failure to distribute the middle term makes it impossible to establish the requisite relationship between the major and minor terms, and, hence, to prove the conclusion:

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108. As John Stuart Mill observed more than 140 years ago:

The value, therefore, of the syllogistic form, and of the rules for using it correctly, does not consist in their being the form and rules according to which our reasonings are . . . made; but in their furnishing us with a mode in which those reasonings may always be represented, and which is admirably calculated, if they are inconclusive, to bring their inconclusiveness to light.

J. S. MILL, A SYSTEM OF LOGIC, RATIOINATIVE AND INDUCTIM 133 (1848).

Even the legal realists did not totally deny the value of logic in fulfilling this "checking" function. Frank, whose views toward judicial decision making softened between publication of *Law and the Modern Mind* and *Courts On Trial*, stated in the latter that, while written opinions do not furnish a basis for complete evaluation of the judge's decision, logical analysis of the opinions is not valueless. Even though opinions are reached through a process of hunching rather than logical deduction, and written opinions are an attempt to rationalize the hunch, the conclusion can be profitably tested by logical analysis. COURTS ON TRIAL, *supra* note 32, at 184.

109. See M. COHEN & E. NAGEL, *supra* note 101, at 382-88.

Murder is a felony;  
burglary is a felony;  
therefore, murder is burglary.

The fallacy results because, absent a complete distribution of the class of felonies, no valid inference as to the relationship between murder and burglary can be drawn from showing that they both belong to the class. A simple notation establishes this more clearly:

$P$  is  $q$ ;  $s$  is  $q$ ; therefore,  $p$  is  $s$ .

The syllogism can be made valid (though not true) by altering it to read:

All felonies are murder;  
burglary is a felony;  
therefore, burglary is murder.

This syllogism is valid because the middle term—felonies—is distributed in the major premise.<sup>110</sup>

In *Colorado v. Bertine*,<sup>111</sup> Justice Rehnquist authored the majority opinion holding that a warrantless inventory search of a closed backpack taken from the automobile of a driver who had been arrested for driving under the influence did not violate the fourth amendment. Justice Rehnquist relied upon the justifications for inventory searches enunciated in *South Dakota v. Opperman*<sup>112</sup> and *Illinois v. Lafayette*<sup>113</sup> to uphold the search, reasoning they were “nearly the same as those which obtain[ed] here.”<sup>114</sup> Those justifications include protection of the suspect’s property after it is taken into police custody, protection of the police from claims of theft or other damage to the property, and protection of the police and public from dangers posed by the property.<sup>115</sup>

The evidence in *Bertine*, however, did not show the search was necessary to further any of these justifications. The Colorado Supreme Court had determined there was no danger to the property because Bertine’s van had been towed to a secure, lighted facility, and, in any event, all concerns regarding the property could have been eliminated simply by offering Bertine the opportunity to make other arrange-

110. For discussion of the fallacy of the undistributed middle term, see I. COPI, *supra* note 6, at 200; W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 142-47; H. W. B. JOSEPH, *supra* note 89, at 270-72.

111. 107 S. Ct. 738 (1987).

112. 428 U.S. 364 (1976).

113. 462 U.S. 640 (1983).

114. *Bertine*, 107 S.Ct. at 742.

115. *Id.*

ments for safekeeping.<sup>116</sup> The Colorado court also determined that, unlike the situation in *Lafayette*, there was no danger posed by the property because it was not introduced into a jail facility.<sup>117</sup>

Justice Rehnquist's contrary conclusion that the justifications were applicable was logically insupportable because it was fashioned upon a predicate applicable to only a narrow class of cases. In the absence of evidence that any of the justifications supporting inventory searches were present under the facts in *Bertine*, Justice Rehnquist's reasoning can be reduced to the following syllogism:

*First premise:* In some cases where property is impounded from a criminal suspect, there is a danger of loss of property, false claims against the police, or danger from the property.

*Second premise:* In this case, property was impounded from a criminal suspect.

*Conclusion:* Therefore, in this case there was a danger of loss of property, false claims against the police, or danger from the property.

The middle term—"cases where property of a criminal suspect is impounded"—is not distributed. No valid conclusion can be drawn as to any particular case based upon the premise that in *some* cases, the stated justifications for inventory searches are applicable. The argument would be valid only if the major premise related to all, or at least most,<sup>118</sup> cases in which property was impounded from a criminal suspect. Only a nescience of the facts could yield Justice Rehnquist's apparent conclusion that the justifications for inventory searches will be present in all cases where property is impounded from a criminal suspect. Because the class of cases necessary to support his conclusion was not distributed, Justice Rehnquist's argument in *Bertine* committed the fallacy of the undistributed middle term.

The same fallacy was evident in *Ybarra v. Illinois*,<sup>119</sup> where the

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116. *Id.* The police had regulatory discretion to simply park and lock the vehicle in a public parking area. *Id.* at 745 n.3.

117. *Id.* at 742. In *Lafayette*, the arrestee's shoulder bag was inventoried and stored at the jail.

118. Because the law does not work upon fixed premises, it operates inductively, rather than deductively. Whereas deductive reasoning deals with certainties (that is, conclusions which *necessarily* follow from premises), induction is the process of assuming certain things are *probably* true because we know certain other things to be true. As a general principle, deduction is the process of reasoning from whole to parts (or general to particulars), while induction reasons from parts to whole (or particulars to general), though this does not always hold true. I. COPI, *supra* note 6, at 23-24. See also H. W. B. JOSEPH, *supra* note 89, at 397-98. Syllogisms are usually used in connection with deductive reasoning, but the form can easily be extended to inductive reasoning so long as it is remembered that conclusions are only probably true rather than necessarily true. Virtually all legal reasoning would be fallacious if we demanded entailment of conclusions from premises. However, we are entitled to expect that the Court's conclusions at least probably follow from its premises.

119. 444 U.S. 85 (1979).

Court invalidated a search of patrons of a tavern who were present at the time a search warrant for the tavern was executed.<sup>120</sup> While other officers were searching the tavern, one officer patted down each of the customers. The officer frisked Ybarra and moved on to other customers, but then returned to Ybarra and removed a cigarette pack from his pocket which was found to contain heroin.<sup>121</sup> The majority, relying upon *Terry v. Ohio*,<sup>122</sup> held there was no probable cause to justify an evidentiary search of the customers and that they could be frisked for weapons only if an individualized reasonable suspicion existed that they were armed and dangerous.<sup>123</sup>

In dissent, Justice Rehnquist argued that the searches were reasonable because of the possibility that the patrons were drug users or traffickers who presented a danger to police. As in *Bertine*, however, the argument was flawed for failing to distribute the relevant class (persons who are patrons of taverns where narcotics are sold). It can be expressed as:

*First premise:* Some people who are patrons of taverns where narcotics are sold are involved in drug trafficking.

*Second premise:* These people were patrons of a tavern where narcotics were sold.

*Conclusion:* Therefore, these people were involved in drug trafficking.

The major premise failed to render the conclusion even probably true. The mere "possibility"<sup>124</sup> that customers of a tavern where drugs are sold may be involved with drugs was not enough to justify searches in a situation that would otherwise require some individualized showing of a probability of criminal activity. The danger of the fallacy of the undistributed middle term is that it permits extravagant extrapolations of principles based upon the most minimal kind of empirical support. For instance, though Justice Burger, in a separate dissent, commented sarcastically that the tavern in *Ybarra* was not the Waldorf ballroom, there is nothing in the reasoning of Justice Rehnquist's dissent that would preclude its extension to patrons of any establishment suspected of being a drug distribution point. Rules or exceptions to rules cannot be fashioned upon such narrow premises, certainly not where the premises involve only naked possibilities.

120. The warrant authorized a search only of the tavern and its bartender. *Id.* at 88.

121. *Id.* at 88-89.

122. 392 U.S. 1 (1968).

123. *Ybarra*, 444 U.S. at 92-94.

124. Justice Rehnquist sought to support the searches based only upon the proposition that "one or more of the persons at the bar *could* have been involved in drug trafficking" and "the *possibility* that one or more of the patrons *could* be armed." *Id.* at 106 (Rehnquist, J., dissenting) (emphasis added).

## 2. Positive Conclusion From Negative Premises

Rule six of Whately's rules is that if one of the premises is negative, the conclusion must also be negative. An affirmative conclusion asserts that one class is either wholly or partially consumed within a second class. This can be accomplished only by premises establishing that there is a third class which contains the first and is itself contained in the second.<sup>125</sup> In other words, if two things each enjoy a different relationship to a third thing, they cannot be in the same class.<sup>126</sup> Thus,

all  $q$  are  $r$ ;  
some  $p$  are  $q$ ;  
therefore, some  $p$  are  $r$ ,

is valid because it establishes, through positive premises and a positive conclusion, that a portion of the class of  $p$  belongs to the class of  $r$  because a third class,  $q$ , contains some of the first ( $p$ ) and is itself contained in the second ( $r$ ). On the other hand,

all  $q$  are  $r$ ;  
 $p$  is not  $q$ ;  
therefore  $p$  is  $r$ ;

is obviously invalid because both premises do not assert class inclusion.

In *New York v. Quarles*,<sup>127</sup> the Court established the "public safety exception" to the rule of *Miranda v. Arizona*<sup>128</sup> that absent the familiar *Miranda* warnings and a waiver of the rights to remain silent and to counsel, statements made by a defendant in response to custodial interrogation are inadmissible. Defendant Quarles was arrested in a supermarket in connection with a suspected rape based upon a tip by the victim, who also told police that the defendant was armed with a gun. Immediately upon apprehending Quarles at the back of the supermarket, Officer Kraft, prior to delivering the *Miranda* warnings, asked him where the gun was and Quarles told him. Altering the previously bright-line rule of *Miranda*, Justice Rehnquist wrote that "the need for answers . . . in a situation posing a threat to the public safety outweighs the need for the prophylactic rule" of *Miranda*.<sup>129</sup> *Miranda* should not, said Justice Rehnquist, "be applied in all its rigor to a

125. I. COPI, *supra* note 6, at 202.

126. M. PIRIE, *supra* note 5, at 138.

127. 467 U.S. 649 (1984).

128. 384 U.S. 436 (1966).

129. *Quarles*, 467 U.S. at 657.

situation in which police officers ask questions reasonably prompted by a concern for the public safety.”<sup>130</sup>

The decision appears at least logically sound to this point. The fallacy arose when Justice Rehnquist sought to apply these pronouncements to the facts. The facts showed, and Justice Rehnquist did not dispute, that “there was nothing to suggest that any of the officers were . . . concerned for their own physical safety” or that they acted out of a concern for public safety.<sup>131</sup> This was deemed insignificant, however, because of Justice Rehnquist’s conclusion that application of the public safety exception does not depend upon the subjective beliefs of the officer that a danger in fact existed. This curious approach cast Justice Rehnquist’s argument in the following form:

*First premise:* A public safety exception to *Miranda* applies to all “situations in which police officers ask questions reasonably prompted by a concern for the public safety.”<sup>132</sup>

*Second premise:* In this case, the police officer did not ask questions because of a concern for public safety.

*Conclusion:* Therefore, in this case, the public safety exception applied.

Here, a positive conclusion is drawn from a negative premise and the resultant fallacy is obvious. To be logically valid, the second premise would have to assert inclusion in the class of cases in which officers ask questions reasonably prompted by a concern for public safety. *Quarles* is a classic case of a holding in search of a factual predicate. Based upon a kind of aprioristic thinking in which facts were deduced from principles, rather than the other way around, the ensconcement of the public safety exception seemed preordained.<sup>133</sup>

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130. *Id.* at 656.

131. *Id.* at 655. Justice Rehnquist was referring to the determinations of the New York Court of Appeals. The facts showed Quarles had been frisked and handcuffed and was surrounded by four officers when he was asked about the gun. *Id.* at 652. It was after midnight and the store was deserted except for the clerks at the checkout counter. *Id.* at 676. The officers had reholstered their weapons and Officer Kraft acknowledged at the suppression hearing that “the situation was under control.” *Id.* at 675.

132. *Id.* at 655.

133. Reasoning *a priori*, that is, “in advance” of the facts, is regarded as a fallacy. T. DAMAR, *supra* note 5, at 33; W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 112-13. Justice Rehnquist may have recognized the anomaly of his reasoning that the public safety exception applies even though the officers on the scene do not perceive a danger to public safety, for despite undisputed evidence that the officers in *Quarles* were not motivated to act by a concern for public safety, Rehnquist injected such strained assertions as: “The police in this case . . . were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket.” *Quarles*, 467 U.S. at 657; and “Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.” *Id.*

### 3. Inconsistent Premises

A *true* argument cannot be produced from premises that contradict<sup>134</sup> or are contrary<sup>135</sup> to each other. Although, paradoxically, it is impossible to establish the *invalidity* of such an argument by formal proof,<sup>136</sup> a sound legal argument must be true and not just formally valid.<sup>137</sup> Outside the realm of strict logic inconsistent premises palpably demonstrate an argument defective in form, so such inconsistencies may be classified as formal fallacies.

In *Rakas v. Illinois*,<sup>138</sup> the Supreme Court decided who may challenge an illegal search and seizure. Justice Rehnquist authored the majority opinion, which discarded the concept of “standing” as a separate inquiry in fourth amendment cases. Instead, the question is whether the defendant had a reasonable expectation of privacy in the property searched or seized and, therefore, was personally aggrieved by the search or seizure.<sup>139</sup> In determining whether an individual’s personal fourth amendment rights have been violated, Justice Rehnquist asserted that arcane distinctions of property law ought not to be controlling,<sup>140</sup> but then, in a critical footnote, suggested that concepts of property law *will* in fact be controlling in a large number of situations.<sup>141</sup> Despite Justice Rehnquist’s general disclaimer that property

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134. Premises are “contradictory” if they both cannot be either true together or false together. J. BRENNAN, *supra* note 89, at 40; M. COHEN & E. NAGEL, *supra* note 101, at 53; I. COPI, *supra* note 6, at 155-56. For example:

All habeas corpus petitions are frivolous.

Some habeas corpus petitions are not frivolous.

Both statements cannot be either true or false.

135. Premises are “contraries” if both cannot be simultaneously true, but both can be false. J. BRENNAN, *supra* note 89, at 40; M. COHEN & E. NAGEL, *supra* note 101, at 55; I. COPI, *supra* note 6, at 155. For example:

All habeas corpus petitions are frivolous.

No habeas corpus petitions are frivolous.

136. An argument consisting of inconsistent premises leading to a completely irrelevant conclusion can be proved valid because, strictly speaking, a false statement can be said to imply any other statement whatsoever. I. COPI, *supra* note 6, at 310-11. Thus, Copi’s example,

Today is Sunday;  
today is not Sunday;  
therefore the moon is made of green cheese,

is materially valid, though obviously false and unsound. *Id.*

137. See *infra* note 152 and accompanying text.

138. 439 U.S. 128 (1978). In *Rakas*, the petitioners sought to challenge an illegal search of an automobile in which they were riding as passengers. They had no property interest in the vehicle, nor did they claim an interest in the items seized from the vehicle (a sawed-off rifle and rifle shells). *Id.* at 129-30.

139. *Id.* at 133-34.

140. *Id.* at 143.

141. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to under-

rights are not controlling, the holding of *Rakas* was expressly based upon property rights, or rather, a lack of them. The Court determined petitioners did not have standing<sup>142</sup> to challenge the search because “[t]hey asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized.”<sup>143</sup>

The contradictory propositions that were suggested in *Rakas*—that notions of property law are and are not controlling—were fully exposed in *Rawlings v. Kentucky*.<sup>144</sup> The issue in *Rawlings* was whether the defendant had standing to challenge an illegal search of a friend’s purse and the seizure of controlled substances found in the purse. Whereas in *Rakas* Justice Rehnquist asserted that notions of property law should not control but nevertheless rejected petitioners’ claim of standing based upon their lack of a property interest, in *Rawlings* he changed course.

*Rawlings* presented the rare situation, seemingly tailor-made for the alternative holding of *Rakas*, where the defendant immediately asserted ownership of the contraband upon its discovery by the police.<sup>145</sup> Nevertheless, despite the holding and repeated references in *Rakas* that standing could arise from either an interest in the place searched or property seized,<sup>146</sup> Justice Rehnquist reverted to the inconsistent proposition that *Rakas* had “emphatically rejected the notion that ‘arcane’ concepts of property law ought to control the ability to claim the protections of the Fourth Amendment,”<sup>147</sup> and held the defendant lacked standing to challenge the search or seizure because he had no

standings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. . . . [B]y focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment.

*Id.* at 143 n.12 (citation omitted).

142. Though the concept of “standing” was formally abandoned in *Rakas*, courts continue to use it as a convenient reference to the issue of whether a defendant’s personal fourth amendment rights were violated and it is in that sense that it is used here.

143. *Id.* at 148.

144. 448 U.S. 98 (1980).

145. *Id.* at 101. Immediately following police discovery of the narcotics in his friend’s purse, the defendant said they belonged to him.

146. See text accompanying note 143. See also *Rakas*, 439 U.S. at 129 (“Neither petitioner is the owner of the automobile and *neither has ever asserted that he owned the rifle or shells seized.*”); *id.* at 130 (“Nor did they assert that they owned the rifle or the shells seized.”); *id.* at 136 (“Standing in *Jeffers* was based on *Jeffers*’ possessory interest in both the premises searched and the property seized. . . . Similarly, in *Bumper*, the defendant had a substantial interest in both the house searched and the rifle seized.”); *id.* at 142 n.11 (“This is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search.”) (all emphases added).

147. *Rawlings*, 448 U.S. at 105.

expectation of privacy in the purse, as opposed to the contents. From these cases, a cynic might posit that the election between the inconsistent propositions—arcane notions of property law are controlling and arcane notions of property law are not controlling—seems to depend upon whether the defendant would win or lose.<sup>148</sup> This fallacy, the application of inconsistent propositions to like situations, deprives the law of predictability, and furthers the perception that Justice Rehnquist's decisions in criminal procedure cases are result-oriented.

#### 4. Affirming the Consequent

The discussion of formal logic thus far has been limited to the standard three-term, three proposition, categorical syllogism. There are other types of syllogisms which also must adhere to certain formal rules in order to convey valid arguments. These include the hypothetical or conditional syllogism, represented in “if, then” arguments. One valid form of a conditional syllogism is the *modus ponens*, which is structured,

if *p*, then *q*;  
*p*, therefore *q*,

and is characterized by affirming the antecedent. Thus, the syllogism,

if it is night, it is dark outside;  
it is night;  
therefore it is dark outside,

is valid because it is proper to draw a conclusion about the consequent (darkness) by affirming the antecedent (night). A fallacy results, however, when one seeks to affirm the consequent.

If it is night, it is dark outside;  
it is dark outside;  
therefore it is night,

is not valid because it does not take account of other possible explanations for darkness, such as an eclipse or heavy storm clouds.<sup>149</sup>

148. Dissenting in *Rawlings*, Justice Marshall took Justice Rehnquist to task for rather inconsistently den[ying] that property rights may, by themselves, entitle one to the protection of the Fourth Amendment, but simultaneously suggest[ing] that a person may claim such protection only if his expectation of privacy in the premises searched is so strong that he may exclude all others from that place.

*Id.* at 119.

149. The other valid kind of conditional syllogism is the *modus tollens*, which follows the form,  
if *p*, *q*;  
not *q*;  
therefore not *p*,

and involves denying the consequent. Casting the textual example in this form, one gets,  
if it is night, it is dark outside;

The fallacy of affirming the consequent seems to be almost a shadow philosophy underlying Justice Rehnquist's attitudes towards search and seizure cases, particularly probable cause issues. The Chief Justice has made clear his position that the " '[c]entral purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence,'"<sup>150</sup> and his distaste for the exclusionary rule. As a result, he seems to approach probable cause issues from a hindsight perspective resembling affirming the consequent. The rule allowing searches based upon probable cause is grounded in the following premise: If there is probable cause to search, evidence of illegal activity will probably be found. Justice Rehnquist's unstated and perhaps unconscious analysis in probable cause cases seems to be:

Evidence of illegal activity was found;  
therefore, there was probable cause to search.

In other words, the result tends to sustain the proposition, instead of the other way around, because of Justice Rehnquist's reluctance to disable the quest for an accurate determination of guilt or innocence by excluding reliable evidence.<sup>151</sup>

#### *B. Fallacies From False, Omitted or Insufficient Premises*

In constructing anything, whether it be a machine, a piece of clothing, or a building, the final product can be no better than the material that went into it. The same holds true with arguments. A conclusion is only as strong as the premises from which it is constructed. If the premises are false or otherwise inadequate, the conclusion is suspect.

We have seen that truth is of no concern in the world of formal logic. Validity is all that matters. Obviously, formal validity is unsat-

it is not dark outside;  
therefore it is not night,

which is valid. However, no valid conclusion can be reached by denying the antecedent. Thus,

if it is night, it is dark outside;  
it is not night;  
therefore it is not dark outside,

is invalid because, like the fallacy of affirming the consequent, denying the antecedent fails to account for other possible causes or explanations for darkness. For a discussion of the *modus ponens* and *modus tollens* and the fallacies of affirming the consequent and denying the antecedent, see M. BEARDSLEY, *supra* note 104, at 374-75; J. BRENNAN, *supra* note 89, at 72-75; I. COPI, *supra* note 6, at 232-34; W. FEARNSIDE & W. HOLTHER, *supra* note 5, 154-55; H. W. B. JOSEPH, *supra* note 89, at 335-39.

150. *Colorado v. Connelly*, 107 S. Ct. 515, 522 (1986) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).

151. For cases that appear to reflect this type of thinking, see *Illinois v. Gates*, 462 U.S. 213 (1983); *Texas v. Brown*, 460 U.S. 730 (1983); *Florida v. Royer*, 460 U.S. 491 (1983) (Rehnquist, J., dissenting); *Adams v. Williams*, 407 U.S. 143 (1972).

isfactory as the sole measure of soundness in judicial decisions. Truth does matter. If the Court reasoned, for example, that,

guilty persons are not entitled to the assistance of counsel;  
John Doe was guilty;  
therefore, John Doe was not entitled to the assistance of counsel,

it would be of small consolation that the argument is perfectly valid in a formal sense. The conclusion would be unacceptable because the major premise upon which its validity depends is false, or at least unacceptable. Where the goal of the speaker is to persuade the audience to accept a particular conclusion or point of view to support a course of action, the sufficiency of the premises is vital. Therefore, assessment of practical argumentation cannot be limited to validity or invalidity, but must include scrutiny for the truth of each of the component parts.<sup>152</sup> False premises in legal argument are properly characterized as a form of fallacy.

In the Court's criminal procedure decisions, premises may be encountered which are false or, more typically, are questionable evaluative judgments which cannot be proved true or false. In some cases, crucial premises may even be left unstated. Because many of the Court's premises cannot be tested empirically, challenging them is difficult. Simply identifying defective premises can present problems, for at least three reasons. First, the ultimate premises upon which conclusions in criminal procedure cases are grounded are not always readily determinable. Second, evaluative premises are sometimes represented as empirically based and, as a result, escape close scrutiny. Third, premises that "sound good" as a matter of principle may not accord with application to real life.

### 1. False Premises

That premises in constitutional criminal procedure decisions cannot be empirically proved true does not render them deficient, since the law operates inductively rather than deductively and, hence, we demand only probabilities rather than certainties. Premises can be evaluated on a continuum of truth, one end of which is "probably not true" and the other end of which is "probably true." To challenge a premise in legal argument as "false" is really to say that it is probably not true.

A particularly egregious case of formulating a conclusion based upon a "false" premise is *Immigration and Naturalization Service v.*

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152. See C. L. HAMBLIN, *supra* note 5, at 231-32 (making the point that arguments in practice should be assessed as "good" or "bad," rather than as valid or invalid).

*Delgado.*<sup>153</sup> In that case, the Court upheld "factory surveys" conducted by the Immigration and Naturalization Service (INS) to ferret out illegal aliens at a garment factory. Acting pursuant to search warrants, INS conducted two surveys of the work force of the Southern California Davis Pleating Co. At the commencement of the searches, several INS agents positioned themselves near the exits of the buildings, while other agents dispersed throughout the plant, questioning some, but not all, of the workers. The agents displayed badges, wore firearms and carried walkie-talkies. Moving throughout the factory, the agents approached employees, identified themselves, and questioned the employees about their citizenship. If an employee gave an unsatisfactory response or admitted he was an alien, he was requested to produce his papers. During the search, employees continued to work and were free to walk around within the factory.<sup>154</sup>

The issue was whether the factory surveys constituted an illegal seizure either of the entire workforce or the individual employees who were stopped and questioned. Resolution of this question depended upon the test derived from *United States v. Mendenhall*<sup>155</sup> for determining when a police-citizen encounter amounts to a "seizure." A seizure is deemed to have occurred "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."<sup>156</sup> The decision accordingly turned upon the particular question of whether the workers believed they were free to refuse to answer the questions of the agents, to walk away unmolested, and exit with impunity past the armed agents guarding the doors.<sup>157</sup> Justice Rehnquist determined that "most workers could have had no reasonable fear that they would be detained upon leaving" and held that there was no seizure of the entire workforce.<sup>158</sup> He similarly declined to find that the four respondents

153. 466 U.S. 210 (1984).

154. *Id.* at 212-13.

155. 446 U.S. 544 (1980).

156. *Delgado*, 466 U.S. at 215 (quoting *Mendenhall*, 446 U.S. at 554).

157. *Id.* at 220. The Court had made it clear in *Florida v. Royer*, 460 U.S. 491, 497-98 (1983), that

[t]he person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

158. He stated that:

This conduct should have given respondents no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer. . . . A similar conclusion holds true for all other citizens or aliens lawfully present inside the factory buildings during the surveys. The presence of agents by the exits posed no reasonable threat of detention to these workers while they walked throughout the factories on job assignments. Likewise, the mere possibility that they would be questioned if

had been seized, rejecting their argument that the agents' show of authority created an intimidating psychological environment that made them reasonably fear that they were not free to leave, and that refusing to answer the agents' questions would have resulted in arrest.

Justice Rehnquist's argument, reduced to syllogistic form, was as follows:

*First premise*: No seizure occurs in a consensual police-citizen encounter if reasonable persons would believe they were free to refuse to answer any questions and leave without adverse consequences.

*Second premise*: These factory workers believed they were free to refuse to answer questions and leave without adverse consequences.

*Conclusion*: Therefore, no seizure occurred.

The second premise is false. In assessing whether "reasonable" persons would have believed they were free to leave, it is necessary to define the relevant class of reasonable persons in terms of relatively unskilled and uneducated, foreign-speaking factory workers. Perhaps a raid upon a Wall Street investment bank would not produce abject fear and bewilderment among the employees, but one would commit a fallacy akin to what Fischer called *elitism* by evaluating the reasonable beliefs of these factory workers according to those of one's own upper strata cultural and economic status.<sup>159</sup> It is doubtful that even the hypothetical investment bankers would feel free to leave if they were surrounded by armed law enforcement agents stopping and questioning employees and guarding each exit. It is fanciful, however, to assert that these factory workers understood that, assuming it was true.<sup>160</sup> The characterization of the stopping and questioning as mere "consen-

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they sought to leave the buildings would not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way. Since most workers could have had no reasonable fear that they would be detained upon leaving, we conclude that the work forces as a whole were not seized.

*Delgado*, 466 U.S. at 219.

159. Fischer defined the fallacy of elitism as "conceptualizing human groups in terms of their upper strata, or of casting belief units in terms of their most refined thoughts and elegant expressions." D. FISCHER, *supra* note 5, at 230. As used here, it means interpreting the probable thoughts or beliefs of a group of people from a frame of reference that is far more sophisticated, educated and knowledgeable than its own.

160. The threshold premise that the workers were *in fact* free to leave with impunity may also have been false. Apparently, an agent stationed at an exit *did* try to prevent a worker from leaving. Justice Rehnquist dismissed this as an "isolated incident," *Delgado*, 466 U.S. at 218 n.6, yet even he conceded at the end of the opinion that "persons who attempted to flee or evade the agents may eventually have been detained for questioning." *Id.* at 220.

sual encounters" carried, as Justice Brennan observed, a "studied air of unreality" about it.<sup>161</sup>

The pernicious effect of false premises of this kind is twofold. First, they allow result-oriented decision making to prosper, for while such premises can be disputed, they can never be satisfactorily refuted. None of the Justices is capable of going back and rethinking the factory workers' thoughts in *Delgado*, for the workers undoubtedly thought different thoughts from Supreme Court Justices and thought them in different ways.<sup>162</sup> This gives credence to the realists' perception that judges have wide latitude to select premises in order to reach the decision of their choosing. Secondly, arguments that are valid in a formal sense often successfully disguise the fact that they are supported only by questionable premises,<sup>163</sup> for it is always easier to assume truth than to examine it.<sup>164</sup>

## 2. Unaccepted Enthymemes

The most dangerous form of false premise is one that is left unstated. An argument that omits one of the premises necessary to sustain it is known as an *enthymeme*.<sup>165</sup> Not every enthymeme is fallacious. Much of ordinary discourse is conducted enthymematically. If someone says, "There are dark clouds coming this way, so it will probably rain this afternoon," it is not fallacious simply because a premise necessary to support the conclusion—dark clouds signify impending rain—is missing.<sup>166</sup> Enthymemes are not objectionable if the omitted premise is one which is known and accepted by the audience. They become fallacious, however, where the missing premise is not generally known and accepted by the audience. Where a necessary

161. *Id.* at 226 (Brennan, J., concurring in part and dissenting in part). Though not expressly accusing the Court of reasoning by a "false premise," the dissent made the same point using considerably more hyperbolic language. It referred to the reasoning as a "considerable feat of legerdemain," *id.*, "sleight of hand," *id.*, "rooted . . . in fantasy," *id.* at 229, and "simply fantastic." *Id.* at 230.

162. Attempting to return to past events and rethink what the actors thought at the time commits what Fischer calls the *idealist fallacy*. Though Fischer described this fallacy in the context of historical research, it applies here as well. One commits the idealist fallacy when he attempts to go back to an event that has already occurred and analyze the thought processes of the persons who experienced it at the time. Unfortunately, we cannot rethink the thoughts of others. D. FISCHER, *supra* note 5, at 195-96.

163. W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 140.

164. A. ARNAULD, *supra* note 73, at 7.

165. For discussion of enthymemes, see M. COHEN & E. NAGEL, *supra* note 101, at 78; H. W. B. JOSEPH, *supra* note 89, at 350-53.

166. A formally correct statement of the argument would be:

When there are dark clouds in the sky it usually rains (missing);  
there are dark clouds in the sky;  
therefore, it probably will rain.

premise is missing, neither the premise nor the argument itself can be suitably evaluated.

In *United States v. Ceccolini*,<sup>167</sup> the Court held that the fruit of the poisonous tree doctrine did not bar the testimony of a witness who was discovered as a result of an illegal search.<sup>168</sup> Justice Rehnquist, writing for the majority, drew a distinction between live witnesses and tangible objects for purposes of applying the exclusionary rule to derivative evidence obtained as a result of a prior illegality. As to live witnesses, he asserted application of the exclusionary rule would be unlikely to deter illegal police conduct, since “[t]he greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness.”<sup>169</sup> This argument can be reduced to the following:

*First premise:* Police have less incentive to conduct illegal searches to discover evidence they have reason to believe would otherwise be discovered by lawful means.

*Second premise:* The greater the willingness of witnesses to testify, the greater likelihood they will come forward on their own volition, thereby allowing police to discover the evidence by lawful means.

*Conclusion:* Therefore, police have less incentive to conduct illegal searches to discover live witnesses.

Missing from this argument is a vital premise, of questionable soundness, necessary to make it valid.

*Omitted Premise:* In most cases, police have reason to believe that some unknown witness exists who will be willing to come forward and testify of their own volition.

It strains rationality to believe that police will be likely to know in advance that some unidentified person exists somewhere in the world who, *once discovered*, may be willing to testify and that the police will

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167. 435 U.S. 268 (1978).

168. Ceccolini owned a flower shop at which he allegedly took bets from one Francis Millow. In the latter part of 1973, Biro, a police officer, stopped in at the flower shop to converse with Lois Hennessey, an employee. During the conversation, Biro saw an envelope with money sticking out of it lying on the drawer of the cash register behind the counter. He picked the envelope up to examine it and discovered it also contained betting slips. The next day Biro mentioned the incident to some detectives who, in turn, relayed the information to the FBI, which had discontinued surveillance of the flower shop in connection with a gambling investigation a year earlier. Several months after receiving the information, an FBI agent went to interview Lois Hennessey. She confirmed the events that occurred on the day of Officer Biro's visit. Ceccolini was subsequently called before a federal grand jury and testified that he never took bets for Francis Millow at the flower shop. Based upon Hennessey's testimony, Ceccolini was indicted for and convicted of perjury. *Id.* at 269-72.

169. *Id.* at 276.

modify their behavior accordingly. As Davy Crockett once said in response to a speech by Andrew Jackson, "That don't even make good nonsense." Perhaps omission was the better part of candor in this case.<sup>170</sup>

### 3. Begging the Question (*Petitio Principii*)

The fallacy of begging the question is one of Aristotle's original thirteen fallacies.<sup>171</sup> The fallacy is generally defined by modern writers as consisting in the assumption of what is to be proved in order to prove it;<sup>172</sup> in other words, assuming as a premise for an argument the very conclusion that is sought to be proved.<sup>173</sup> Whately provides the example:

[T]o allow every man an unbounded freedom of speech must always be, on the whole, advantageous to the State; for it is highly conducive to the interest of the Community, that each individual should enjoy a liberty perfectly unlimited, of expressing his sentiments.<sup>174</sup>

This argument essentially maintains that to allow every man freedom of speech is advantageous to the state because it is advantageous to the state to allow every man freedom of speech.

The fallacy of begging the question does not lead to a formal defect in the argument, for it logically follows that if "*p* is *q*" then "*p* is *q*." The defect is that the premises cannot in any way prove the truth of the conclusion. If the conclusion is acceptable without argument, then no argument is necessary to prove it; but if the conclusion is not acceptable without argument, no argument which requires acceptance of the conclusion as a premise can succeed in establishing its truth.<sup>175</sup>

170. The dissent recognized the defect, seizing upon the "somewhat incredible premise" (not mentioning that it was left unstated) "that the police in fact refrain from illegal behavior in which they would otherwise engage because they know in advance both that a witness will be willing to testify and that he or she will be discovered by legal means." *Id.* at 288.

171. Aristotle defined question begging arguments as "[t]hose that depend on the assumption of the original point to be proved . . ." *Sophistical Refutations*, *supra* note 6, at 167a 38. Understanding the origin of the term requires reference back to the Greek disputations in which one participant would ask to be granted (that is, "beg") certain premises on which he would then build his argument. C.L. HAMBLIN, *supra* note 5, at 33. The latin phrase *petitio principii* roughly translates to "beg the question."

172. E.g., D. FISCHER, *supra* note 5, at 49; H.W.B. JOSEPH, *supra* note 89, at 592. For additional discussion of begging the question, see A. ARNAULD, *supra* note 73, at 247-50; T. DAMAR, *supra* note 5, at 25-27; W. FEARNSIDE & W. HOLOTHER, *supra* note 5, at 165-68; C.L. HAMBLIN, *supra* note 5, at 32-35; R. WHATELY, *supra* note 13, at 178-81.

173. I. COPI, *supra* note 6, at 83.

174. R. WHATELY, *supra* note 13, at 181.

175. I. COPI, *supra* note 6, at 83.

In *Ake v. Oklahoma*,<sup>176</sup> the Court held that when a capital defendant makes a preliminary showing that his sanity at the time of the offense is likely to be an issue at trial, due process requires the state to furnish the defendant with an expert psychiatric witness to assist in the preparation and presentation of his defense.<sup>177</sup> As sole dissenter, Justice Rehnquist rejected this proposition, but nevertheless considered whether the Court's standard had been met.

Commenting that the Court failed to elucidate how the "preliminary showing" requirement was satisfied,<sup>178</sup> he noted that, under Oklahoma law, the burden is on the defendant to raise a reasonable doubt at trial as to his sanity. Once that burden is satisfied, the burden shifts to the state to prove sanity beyond a reasonable doubt. Justice Rehnquist concluded that since the defendant failed to carry this initial burden of proving insanity under Oklahoma law, he was not entitled to the services of a psychiatric witness.<sup>179</sup> Upon close scrutiny, this question begging argument assumes the following form: Ake was not entitled to the assistance of an expert psychiatric witness to establish insanity at trial because he failed to carry his burden to establish insanity at trial. The argument overlooks the central premise of the majority's decision that expert psychiatric assistance is necessary if one is going to have any chance of proving insanity.

Justice Rehnquist committed almost the identical fallacy in *United States v. MacCollom*,<sup>180</sup> which addressed whether an indigent federal prisoner was entitled to a free trial transcript to assist in preparing a petition for post-conviction relief under 28 U.S.C. § 2255. A federal statute<sup>181</sup> provides for free transcripts in Section 2255 proceedings only if the judge certifies that the claim is "not frivolous" and the transcript is "needed to decide the issue." MacCollom claimed he needed a transcript in order to prepare his Section 2255 petition alleging he had been denied effective assistance of counsel.

Writing for a four member plurality, Justice Rehnquist rejected MacCollom's claim that the statute violated the Due Process and Equal Protection Clauses. Justice Rehnquist remarked that respondent presented the district court with "only a naked allegation of ineffective assistance of counsel" and said that if MacCollom had included

176. 470 U.S. 68 (1985).

177. *Id.* at 83. Ake had been diagnosed as a "probable paranoid schizophrenic" and found incompetent to stand trial. The trial court found him to be a "mentally ill person in need of care and treatment" and committed him to the state mental hospital. Six weeks later, he was certified competent to stand trial. *Id.* at 71.

178. *Id.* at 90.

179. *Id.* at 91.

180. 426 U.S. 317 (1976).

181. 28 U.S.C. § 753(f) (1982).

some factual allegations, the district court might have concluded that his claim was not frivolous.<sup>182</sup> Justice Rehnquist's argument<sup>183</sup> that there is no requirement to furnish an indigent prisoner with a free transcript in situations where he is unable to establish that he has a non-frivolous claim overlooked the purpose for requesting the transcript—to determine whether a non-frivolous claim existed.<sup>184</sup> To say that a prisoner is not entitled to a transcript to ascertain whether he has a non-frivolous claim unless he can first show he has a non-frivolous claim begs the question.<sup>185</sup>

The fallacy of begging the question also occurs in arguments where a doubtful conclusion is supported only by premises which are equally doubtful.<sup>186</sup> What is offered as proof must be clearer and better established than what is sought to be proved. Carried to an extreme, this would mean that all legal arguments dependent upon evaluative premises incapable of being demonstrated by empirical means could be said to be question begging. However, judicial decision making operates inductively, rather than deductively,<sup>187</sup> and deals

182. *MacCollom*, 426 U.S. at 326-27.

183. The question begging in Justice Rehnquist's argument was implicit. Justice Blackmun, concurring in the judgment, stated the argument in a more explicitly question begging form, when he said: "Clearly, there is no constitutional requirement that the United States provide an indigent with a transcript when that transcript is not necessary in order for him to prove his claim, or when his claim is frivolous on its face." *Id.* at 330. The issue was whether the transcript *was* necessary to enable him to prove his claim or determine whether it was frivolous.

184. Justice Brennan recognized the question begging nature of this argument when he commented in dissent that respondent "is denied a transcript, for making an unsubstantiated allegation, an allegation that obviously he cannot establish without a transcript." *Id.* at 332.

185. Justice Rehnquist took the position that a prisoner does not need a transcript to make out a claim of ineffective assistance of counsel because he "'was aware and can recall without the need of having his memory refreshed,'" *id.* at 328 (quoting *United States v. Shoaf*, 341 F.2d 832, 835 (4th Cir. 1964)), what happened in the courtroom. This is unrealistic. If legal matters were that simple, experienced trial lawyers would not order daily transcripts during trial and, in cases where separate counsel is retained after trial to handle the appeal, appellate counsel would simply have to ask trial counsel, "What went wrong?", rather than peruse the trial transcript in preparing the appeal. It is inconceivable that an untrained defendant could be expected to be aware of and retain in his memory the many complex maneuvers that occur in the murky world of courtroom drama.

186. See A. ARNAULD, *supra* note 73, at 247. See also A. FRAUNCE, THE LAWYERS LOGIKE, exemplifying the precepts of Logike by the practice of the common Lawe 28 (London 1588 & photo. reprint n.d.) (defining *petitio principii* as "eyther when the same thing is prooved by it selfe, . . . Or when a doubtful thing is confirmed by that which is as doubtfull . . ."); C.L. HAMBLIN, *supra* note 5, at 247 ("A question-begging argument has frequently been defined as one whose premisses are at least as much in need of proof as its conclusion . . ."); WILLIAM OF SHERWOOD, INTRODUCTION TO LOGIC 158 (N. Kretzmann ed. 1966) (1200/10-66/71) (medieval work in which the author described five forms of begging the question, including "when one has to prove something and assumes something else that necessarily affects it"). Under this view, arguments predicated upon false premises could also be characterized as question begging.

187. See *supra* note 118. John Stuart Mill asserted that all deductive arguments are question begging because they rely upon universal propositions that, once assumed, assume the truth of the conclusion. J.S. MILL, *supra* note 108, at 122-23. Thus, with respect to Aristotle's classic syllogism,

with probabilities, not certainties. If premises had to be certain, few cases could be decided and the law could never advance. On the other hand, premises must be supported by more than mere conjecture or the brute force of their being asserted for there to be any boundaries upon judicial discretion. When a premise directly related to the point in issue is assumed, without proof, for purposes of establishing the conclusion, the fallacy of begging the question has occurred.<sup>188</sup>

*Smith v. Phillips*<sup>189</sup> presents a telling illustration. The defendant petitioned for habeas corpus relief based upon alleged juror misconduct at his trial for murder. Defense counsel learned after trial that one of the jurors had an application for employment as a felony investigator for the District Attorney's Office pending during the trial. The prosecutors, who were aware of the application, did not disclose its existence to the court or defense counsel until after trial. Upon learning of the misconduct, the trial judge held a hearing at which the juror testified. The judge concluded that the juror's actions were an "indiscretion," but found no evidence of actual bias.<sup>190</sup>

The issue before the Supreme Court was whether due process was satisfied by holding a posttrial hearing for the purpose of determining whether the juror was actually biased against the defendant, or whether the difficulties of determining actual bias required that bias be imputed as a matter of law.<sup>191</sup> Justice Rehnquist concluded that a posttrial hearing to determine actual bias sufficed. A necessary premise for the conclusion that a posttrial hearing is adequate protection was a determination that posttrial hearings are likely to be successful in uncovering actual bias. Justice Rehnquist established this premise only through the simple conclusion that "such determinations [of ac-

"All men are mortal; Socrates is a man; therefore Socrates is a mortal," Mill argued that, by assuming the universal proposition that "All men are mortal," one has assumed the conclusion that Socrates is a mortal.

188. Problematic are situations where the Court relies upon a premise of doubtful validity, but one which it has purported to establish as true, in order to support its conclusion. The process of identifying question begging arguments in this context is particularly susceptible to biased construction, since "that may be correct and fair Reasoning to one person, which would be, to another, begging the question;" since to one, the Conclusion might be more evident than the Premiss, and to the other the reverse." R. WHATELY, *supra* note 13, at 143. In other words, premises seen as speculative by one person, may be regarded as sufficiently well established by another.

189. 455 U.S. 209 (1982).

190. *Id.* at 213-14.

191. In granting defendant's habeas petition, the federal district court found insufficient evidence of actual bias against the defendant, but imputed bias to the juror because "the average man in [the juror's] position would believe that the verdict of the jury would directly affect the evaluation of his job application." *Id.* at 214. The court of appeals affirmed on the ground that it is "at best difficult and perhaps impossible" to determine from a juror's own testimony whether the juror was, in fact, impartial. *Id.*

tual bias] may properly be made at a hearing like that . . . held in this case."<sup>192</sup>

The defendant had claimed that posttrial hearings relying solely upon the testimony of the juror charged with misconduct are unlikely to accurately ascertain whether actual bias was present, because of the human propensity for self-justification.<sup>193</sup> Justice Rehnquist dismissed this contention off handedly in a footnote stating simply that defendant "errs in contending that such evidence is inherently suspect."<sup>194</sup> He then concluded that, because "a post-trial hearing such as that conducted here is sufficient to decide allegations of juror partiality," such hearings comport with due process.<sup>195</sup> Absent more persuasive proof that posttrial hearings dependent upon the juror's own testimony will successfully reveal actual bias, the conclusion that they do not offend due process begged the question.

### *C. Fallacies of Proof and Authority*

The common thread binding the fallacies in this group is that they all relate to the ostensibly objective premises—proof (facts) and authority (precedent)—upon which results are predicated. Though policy and other types of argument are common in constitutional cases, the task of articulating a judicial decision remains essentially one of stating the facts, stating the law, and reaching a result based upon some catalytic inter-meshing of the two.

The potential for distortion in the critical process of applying law to facts is enormous. The vagueness and indeterminacy of legal rules present both the temptation and opportunity to assert that the law has been distorted in virtually every case. Unless a decision is unanimous, there necessarily has been some disagreement as to the interpretation of proof and/or authority. Since both sides cannot be right, an argument could always be made that one side or the other is guilty of distortion.<sup>196</sup> Where reasonable Supreme Court Justices disagree, it is problematic to assert that only one side has fallaciously distorted facts or precedent. Nevertheless, there are degrees of distortion, and so

192. *Id.* at 217.

193. *Id.* at 215.

194. *Id.* at 217 n.7. The dissenters argued that this premise "ignores basic human psychology" and that in cases such as this one, "an evidentiary hearing can never adequately protect the right to an impartial jury." *Id.* at 228.

195. *Id.* at 218.

196. To illustrate, of the 152 cases the Court decided by full opinion in the 1986 term, only 28, or 18.4 percent, were decided by unanimous opinion. *The Supreme Court, 1986 Term*, 101 HARV. L. REV. 7, 364 (1987).

long as one stays at the high end of the continuum, concrete examples can be profitably discussed.

### 1. One-Sided Assessment

In an adversary system of justice, we expect one-sided presentations from counsel representing the interests of private clients. The goal of counsel representing private or even public parties is rarely to seek truth in a pure sense. Their ultimate goal is victory, whether it be before a jury, a judge, an appellate panel, or the Supreme Court. Were defense counsel in a criminal case to present a fair and balanced summary of the evidence during closing argument, he would be depriving his client of effective assistance of counsel. That such one-sided presentations are expected does not mean they are not fallacious, for to the extent relevant evidence or counter-argument is suppressed or ignored, the audience is deceived. The pernicious effect is mitigated, however, by the adversarial nature of the process. If there is competent counsel on both sides (not always a valid assumption), the judge or jury can depend upon ultimately receiving a balanced and complete depiction of the law or evidence. Moreover, because one-sided presentations by counsel are expected, courts and juries are on guard against them and are less likely to be misled.

The same does not hold true for Supreme Court Justices. Their goal is not as simple as winning the argument. While the rest of us are free to pursue arguments avoiding fallacies only to the extent we fear being exposed as sophists, judges have an obligation to present a more or less fair and balanced consideration of the issues on both sides. The fact that, like opposing counsel in litigated proceedings, dissenting Justices have the opportunity to highlight the deficiencies in the Court's position while bolstering their own position, does not discharge the Justices from their duty to be evenhanded.

This does not mean that the Court should abandon its goal of writing opinions in the way best calculated to persuade. Judicial opinions have always been and will remain a special form of advocacy. Arguments in Supreme Court opinions can be legitimately one-sided to the extent they emphasize the strengths of the position that has been adopted and minimize the weaknesses. Nevertheless, judicial advocacy must retain a sense of balance, fairly meeting opposing arguments. When judicial argument engages in one-sided assessment of the facts, precedent, issues or policy considerations, the credibility of the Court is tarnished.<sup>197</sup> Acceptance of the decision is likely to be diminished, rather than enhanced, for failure to defend against con-

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197. What is referred to here as the fallacy of one-sided assessment has been labeled in different

trasting arguments raises an inference that no adequate defense exists.<sup>198</sup>

Examples of cases involving one-sided assessment of the facts have already been discussed in the context of other fallacies.<sup>199</sup> Cases involving what amounts to one-sided assessment of precedent are discussed in the section pertaining to the fallacy of faulty analogy.<sup>200</sup> The two examples discussed in this section address the one-sided assessment of issues and policy interests.

In an important right-to-counsel decision, *Scott v. Illinois*,<sup>201</sup> Justice Rehnquist was guilty of one-sided assessment in presenting and discussing the relevant issues. The Court was faced with how to construe *Argersinger v. Hamlin*,<sup>202</sup> which had held that the sixth amendment requires states to appoint counsel to represent indigent defendants in all cases where imprisonment is imposed.<sup>203</sup> The "actual imprisonment" standard requires a judge to determine in advance of trial whether imprisonment will be imposed in the event the defendant is convicted. If so, counsel must be appointed.

In *Argersinger*, the Court had rejected the argument advanced by the State of Florida that the right to counsel should be coextensive with the right to trial by jury, which applies in all cases where the *authorized* punishment (regardless of what is actually imposed) exceeds six months.<sup>204</sup> Thus, under a strict actual imprisonment standard, cases can arise where the accused has a right to trial by jury, but is denied counsel.<sup>205</sup> Justice Powell's concurrence in the result in *Argersinger*, in which Justice Rehnquist joined, attacked this anomaly, stating:

It is clear that wherever the right-to-counsel line is to be drawn, it must be drawn so that an indigent has a right to appointed counsel in all cases in which there is a due process right to a jury trial. . . .

ways. T. DAMAR, *supra* note 5, at 60-61 ("Neglect of Relevant Evidence"); Landau, *Logic for Lawyers*, 13 PAC. L.J. 59, 93 (1981) ("Suppressed Evidence").

198. D. ALLEN & J. PARKS, *ESSENTIAL RHETORIC* 103 (1969).

199. See discussion of *Colorado v. Bertine*, *supra* notes 111-18 and accompanying text; and *New York v. Quarles*, *supra* notes 127-33 and accompanying text.

200. See *infra* notes 213-45 and accompanying text.

201. 440 U.S. 367 (1979).

202. 407 U.S. 25 (1972).

203. Scott was convicted of theft and fined \$50 after a bench trial at which he was not represented by counsel. The statute under which he was charged authorized a maximum penalty of one year imprisonment and a \$500 fine. *Scott*, 440 U.S. at 368.

204. The rule as to jury trials is based upon a distinction between "petty" and "serious" offenses first alluded to in *Duncan v. Louisiana*, 391 U.S. 145 (1968), and refined in *Baldwin v. New York*, 399 U.S. 66 (1970).

205. This would include all cases where the *authorized* imprisonment exceeds six months, but no *actual* imprisonment will be imposed.

If there is no accompanying right to counsel, the right to trial by jury becomes meaningless.<sup>206</sup>

Nevertheless, in *Scott*, Justice Rehnquist authored the majority opinion which endorsed the actual imprisonment test and described its foundation as “eminently sound.”<sup>207</sup> No attempt was made to reconcile the incongruity that a defendant may have a right to trial by jury, yet be denied the right to counsel, which was seen in *Argersinger* as rendering the right to jury trial meaningless. Justice Rehnquist offered as support for the holding only an oblique, almost apologetic, reference to the fact that “constitutional line drawing becomes more difficult as the reach of the Constitution is extended further.”<sup>208</sup> His somewhat wistful reference to the fact that the Court had already departed from the literal meaning of the sixth amendment suggests he would have preferred to turn back the clock to the point where the sixth amendment was cut loose from its historical moorings. Unable to accomplish that, he settled for adhering to the actual imprisonment standard, rather than “extrapolate an already extended line.”<sup>209</sup> Because no amount of creative reasoning could rationalize the conflict between the actual imprisonment standard and the right to trial by jury, the conflict was ignored and a one-sided assessment of the right to counsel issue resulted.

Policy considerations, of course, provide fodder for persuasive argument in much of constitutional criminal procedure litigation. For every “interest” considered, there is usually a countervailing one of equal significance. To discuss one interest, while ignoring its counterpart, is to commit a fallacy of one-sided assessment. *Gooding v. United States*<sup>210</sup> involved the interpretation of a federal statute relating to authority to conduct nighttime searches in drug cases. Justice Rehnquist interpreted the statute as not requiring any special showing to justify a nighttime search. In doing so, he took cognizance of the statute’s “major purpose” to “supply more effective enforcement tools to combat the increasing use of narcotic drugs,”<sup>211</sup> but paid scant attention to the traditional reasons for discouraging nighttime searches—the right

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206. *Argersinger*, 407 U.S. at 45-46. The Powell/Rehnquist concurrence criticized the actual imprisonment standard as too rigid. They advocated evaluating the right to counsel on a case by case basis which would allow for the appointment of counsel in situations where imprisonment would not be imposed, but which presented serious collateral consequences such as the stigma of a criminal conviction or the deprivation of property or other liberty interests.

207. *Scott*, 440 U.S. at 373.

208. *Id.* at 372.

209. *Id.* The petitioner in *Scott* sought to have the right to counsel extended to all cases where imprisonment is authorized.

210. 416 U.S. 430 (1974).

211. *Id.* at 458.

to privacy and security within one's home that is at the core of the fourth amendment. Justice Marshall took him to task for being "obviously fully cognizant of the substantial governmental interest in enforcement of the narcotics laws [while remaining] totally oblivious to these constitutional considerations."<sup>212</sup>

## 2. Faulty Analogies

Much of legal argument is reasoning by analogy, which is a form of inductive reasoning.<sup>213</sup> Inductive reasoning is the process of assuming that certain things are *probably* true because we know certain other things to be true. Reasoning by analogy consists of assuming that, based upon known similarities between two or more entities, they probably have certain other characteristics in common as well. Thus, as lawyers we reason that since Rule *P* was applied in Case 1 where Facts *a*, *b*, *c* and *d* were present, it should also apply in Case 2 where Facts *a*, *b*, *c* and *e* are present. The proponent of the analogy will argue that neither the absence of Fact *d* nor the addition of Fact *e* in Case 2 is a sufficient distinction to warrant application of a different rule.

Edward Levi wrote the classic work about legal reasoning by analogy, which he called "reasoning by example."<sup>214</sup> Levi said this process of judicial reasoning involves three steps. First, the judge searches for cases that are similar to the one under consideration. Second, he extracts the rule of law from the previously decided cases. Third, he applies that rule of law to the case before him.<sup>215</sup> Fallacies occur in this process in deciding which cases are similar (that is, in deciding what points of similarity should be deemed controlling) and in extracting the rule of law from those cases. The criteria for judging the validity of an analogy include: (1) the number of respects in which

212. *Id.* at 461-62. Justice Rehnquist has not been reluctant to attack one-sided assessments when he sees them. *E.g.*, *Mincey v. Arizona*, 437 U.S. 385, 408 (1978) (As sole dissenter from an opinion holding that statements obtained from a defendant while he was in intensive hospital care over his repeated requests for counsel were involuntary, Justice Rehnquist charged that the Court "ignore[d] entirely some evidence of voluntariness and distinguished away yet other testimony.").

213. Writers have reached different conclusions as to whether reasoning by analogy is or is not inductive reasoning. Compare *Landau, supra* note 197, at 76 ("One of the most common—and useful—forms of induction is the analogy.") with *Murray, The Role of Analogy in Legal Reasoning*, 29 UCLA L. REV. 833, 847-48 (1982) (Relying upon Aristotle, the author concludes that, while induction is reasoning from "part to whole," analogy is reasoning from "part to part"; moreover, unlike induction, analogy involves not only drawing a conclusion but applying it to a new particular.). Regardless of the technical merits of Murray's argument, analogy properly fits within the general definition of induction as a form of reasoning in which conclusions are deemed to follow probably, rather than necessarily, from particular premises. *I. COPI, supra* note 6, at 351.

214. *E. LEVI, AN INTRODUCTION TO LEGAL REASONING* 1 (1949).

215. *Id.* at 2.

the prior cases are said to be analogous;<sup>216</sup> (2) the number of prior cases that share those salient features;<sup>217</sup> (3) the dissimilarities between the prior cases and the case under consideration;<sup>218</sup> and (4) the relevance of the similarities or dissimilarities.<sup>219</sup>

The last factor is the most important. There may be many similarities or dissimilarities between cases, but if they are not relevant to the purposes or principles motivating formulation of the rule in the earlier case, any analogy or disanalogy between them is fallacious. This is where Justice Rehnquist sometimes errs in arguing by analogy or disanalogy with respect to precedent.

Conclusions drawn with respect to faulty analogies should be scrutinized carefully. The open texture of the law and the ambiguous way in which decisions are often drafted allow Supreme Court Justices wide latitude to reasonably disagree about the meaning and interpretation of precedent. For example, in *Oregon v. Bradshaw*,<sup>220</sup> Justice Rehnquist, on behalf of a four-member plurality, interpreted *Edwards v. Arizona*<sup>221</sup> as not requiring that statements of the defendant be suppressed, while four dissenting Justices believed *Edwards* commanded precisely the opposite result. Justice Powell's concurrence in the result tipped the balance.<sup>222</sup> Similarly, in *Parker v. Randolph*,<sup>223</sup> four

216. I. COPI, *supra* note 6, at 358; W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 23.

217. I. COPI, *supra* note 6, at 358.

218. *Id.* at 359.

219. *Id.* at 360.

220. 462 U.S. 1039 (1983).

221. 451 U.S. 477 (1981).

222. *Bradshaw* construed the *Edwards* rule that, once a suspect has invoked his right to counsel, all custodial questioning must cease and no further interrogation can occur until counsel has been made available "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-85. In *Bradshaw*, the accused, while being transferred to another facility asked, "Well, what is going to happen to me now?" *Bradshaw*, 462 U.S. at 1042. His earlier request for counsel had not been complied with. A discussion ensued from this question in which defendant agreed to take a polygraph test. The next day, no attorney having yet been provided, the defendant received new *Miranda* warnings, waived his rights, took a polygraph test, and made a confession.

The case demonstrates how the Justices' personal values invariably inject themselves into the Court's decision making. The four-member plurality and the four dissenters agreed on essentially the same test to be applied to determine whether conversation initiated by the accused satisfies the "initiation" exception to the *Edwards* rule. Justice Rehnquist's opinion suggested that the defendant's inquiries must evince "a generalized discussion relating directly or indirectly to the investigation." *Id.* at 1045. The dissenters stated that further discussion initiated by the defendant must relate to the "subject matter of the criminal investigation." *Id.* at 1053. Applying these nearly identical standards, eight of the nine Justices split in reaching opposite conclusions as to whether *Edwards* had been violated. The only viable explanation for the vote tally is that it was dictated by the personal views of each Justice regarding the soundness of *Edwards*, the scope of the fifth amendment privilege against self-incrimination and the rights of criminal suspects in general.

223. 442 U.S. 62 (1979). See *supra* note 23 and accompanying text for additional discussion of *Parker*.

members of the Court believed the operative portion of the plurality opinion was consistent with precedent, while three Justices believed it “squarely overrule[d]” four prior cases.<sup>224</sup> With this caveat, the following discussion provides some elucidation as to what constitutes faulty analogy in judicial reasoning.

*Middendorf v. Henry*<sup>225</sup> was a class action brought by servicemen challenging the authority of the Navy to conduct summary courts-martial<sup>226</sup> without providing the assistance of counsel. Resolution of the sixth amendment right to counsel issue depended upon whether a summary court-martial was a “criminal prosecution.” Justice Rehnquist engaged in a somewhat peculiar argument by analogy based upon *Gagnon v. Scarpelli*<sup>227</sup> and *In re Gault*.<sup>228</sup> Despite twice conceding that both cases were “distinguishable,”<sup>229</sup> he placed primary reliance upon them in holding that summary courts-martial are not criminal prosecutions within the meaning of the sixth amendment. The analogical process he employed demonstrates the fallacy of drawing analogies based upon similarities that are not relevant to the issue.

The analogy was based principally upon the similarity in results; that is, that both *Gagnon* and *Gault* held that the respective proceedings at issue were not criminal proceedings for purposes of the sixth amendment. The fact that *Gagnon* and *Gault* reached the same result for different reasons,<sup>230</sup> neither of which was present in *Middendorf*, was not considered important. Instead, Justice Rehnquist engrafted

224. *Id.* at 83.

225. 425 U.S. 25 (1976).

226. The Uniform Code of Military Justice provides four methods of handling offenses committed by servicemen: general, special and summary courts-martial, and disciplinary action administered by the commanding officer. The four procedures establish a descending order of potential punishment. Summary courts-martial provide for maximum punishment of one month's confinement at hard labor; 45 days' hard labor without confinement; reduction to the lowest enlisted pay grade; and forfeiture of two-thirds pay for one month. *Id.* at 31-33.

227. 411 U.S. 778 (1973). *Gagnon* held that no sixth amendment right to counsel attaches at probation revocation hearings largely because revocation proceedings “ ‘deprive[ ] an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.’ ” *Id.* at 781 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)). The Court did hold, however, that counsel may be required as a matter of due process under the totality of circumstances.

228. 387 U.S. 1 (1967). *Gault* held that juvenile proceedings were not criminal prosecutions within the meaning of the sixth amendment, but further held that due process requires the appointment of counsel in all delinquency cases which might result in institutional commitment. Justice Rehnquist did not dispute the dissenters' view in *Middendorf* that the holding in *Gault* that juvenile proceedings were not part of a criminal prosecution was based upon the view that juvenile proceedings are rehabilitative, rather than punitive, in nature. *Middendorf*, 425 U.S. at 37-38, 56 n.6, 60-61.

229. *Middendorf*, 425 U.S. at 37 (“Admittedly *Gagnon* is distinguishable. . . .”); *id.* at 38 (“Undoubtedly both *Gault* and *Gagnon* are factually distinguishable from the summary court-martial proceeding here.”).

230. See *supra* notes 227-28.

yet a third reason—the special problems of the military—onto the analogy and concluded:

The summary court-martial proceeding here is likewise different from a traditional trial in many respects, the most important of which is that it occurs within the military community. This latter factor . . . is every bit as significant . . . as the fact in *Gagnon* that the defendant had been previously sentenced, or the fact in *Gault* that the proceeding had a rehabilitative purpose.<sup>231</sup>

Justice Rehnquist rejected the most closely analogous precedent, *Argersinger v. Hamlin*,<sup>232</sup> which held that a defendant is entitled to the assistance of counsel in every case where actual imprisonment is imposed. The deprivation of unconditional liberty for punitive purposes, which was absent from both *Gagnon* and *Gault*, would seem to be the most relevant fact for purposes of analogy.

Faulty analogies in Supreme Court opinions also present themselves in more ordinary forms not involving legal precedent. In *Texas v. Brown*,<sup>233</sup> the police stopped Brown at a fixed checkpoint and asked for his driver's license. Standing alongside the car, the officer shined his flashlight in and saw Brown taking his hand out of his pocket. Caught between Brown's fingers was a balloon, which he let drop beside his leg as he reached over to the glove compartment. The officer, suspecting the balloon contained narcotics, shifted his position so he would have a view of the inside of the glove compartment, and saw that it contained some plastic vials, white powder and more balloons. When Brown told the officer he did not have his driver's license, the officer ordered him out of the car and extracted and examined the balloon from the front seat. Observing a powdery substance on the tied-off portion of the balloon, the officer placed Brown under arrest and searched his car.

The issue was whether seizure of the balloon was justified under the plain view exception enunciated in *Coolidge v. New Hampshire*.<sup>234</sup> Writing for a three-member plurality, Justice Rehnquist held that the balloon was properly seized. He reasoned that the fact that the officer, using a flashlight, changed his position and bent down at an angle to

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231. *Middendorf*, 425 U.S. at 38.

232. 407 U.S. 25 (1972).

233. 460 U.S. 730 (1983).

234. 403 U.S. 443 (1971). *Coolidge* laid down a three-part test for determining the applicability of the plain view doctrine. First, the officer must lawfully be in a position he has a right to be in when he views the evidence. *Id.* at 465-68. Second, the discovery of the evidence must be "inadvertent" in order to prevent pretext searches. *Id.* at 469-70. Third, it must be "immediately apparent" to the officer that the items he observes are evidence of a crime or contraband. *Id.* at 466.

see what was inside Brown's car was irrelevant under the fourth amendment because

[t]he general public could peer into the interior of Brown's automobile from any number of angles; there is no reason Maples [the officer] should be precluded from observing as an officer what would be entirely visible to him as a private citizen.<sup>235</sup>

Analogizing the police officer's situation to that of the general public was fallacious because it ignored the critical differences between them—only the police officer was empowered to stop Brown's car on a public highway after midnight, demand that he produce his driver's license, and peer in his window with a flashlight to observe his efforts to comply.

Just as much a matter of concern as faulty analogies are faulty disanalogies, or "arguments by distinction," where the Court declines to follow precedent based upon differences perceived between the prior case and the one under consideration. Where those distinctions are either insignificant or irrelevant to the purpose for the rule fashioned in the earlier case, the reasoning approaches what is known as the "black horse/white horse" phenomenon.<sup>236</sup> *United States v. Montoya de Hernandez*<sup>237</sup> upheld a sixteen hour detention<sup>238</sup> of a woman based upon "reasonable suspicion" that she was smuggling narcotics into the country in her alimentary canal. Applying a balancing test, the Court, per Justice Rehnquist, relied upon the border exception to the fourth amendment in determining that the detention was not unreasonably long.

Justice Rehnquist sought to support the broad powers of customs officials by distinguishing them from ordinary law enforcement officials. He argued that, at the border, customs officials have "more than merely an investigative law enforcement role. They are also charged . . . with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives."<sup>239</sup> His distinction between customs officials

235. *Brown*, 460 U.S. at 740.

236. Though the story, presumably apocryphal, is told in differing versions, it makes the same point. A farmer sues his neighbor, a rancher, for allowing his horse to stray onto the farmer's land and destroy his crop. Despite a previous case holding in favor of the owner of the invaded land in seemingly identical circumstances, the judge ruled in favor of the rancher. Asked by the plaintiff why he did not follow the earlier case, the judge replied, "Well, there you had a black horse. This one was white." Of course, faulty disanalogies at the Supreme Court level do not approach this degree of absurdity.

237. 473 U.S. 531 (1985).

238. The majority represented the detention as lasting 16 hours, though it was 27 hours from the time the suspect was detained until she was placed under arrest and advised of her *Miranda* rights. *Id.* at 548 (Brennan, J., dissenting).

239. *Id.* at 544.

and those who perform "mere" investigative law enforcement functions was fallacious. With the possible exception of communicable disease,<sup>240</sup> it cannot be said that the responsibility of a customs official to keep dangerous materials out of the country is any greater than that of an ordinary law enforcement officer to prevent them from being possessed or distributed once inside the country. The roles are largely the same with only the place at which they are fulfilled being different.

Arguing in support of the newly created public safety exception to *Miranda* in *New York v. Quarles*,<sup>241</sup> Justice Rehnquist fallaciously distinguished *Orozco v. Texas*.<sup>242</sup> Four police officers entered Orozco's room four hours after a murder had been committed and, without delivering the *Miranda* warnings, questioned him regarding the whereabouts of the gun used to commit the murder. Orozco directed them to the gun, hidden in a washing machine in the backroom of his boardinghouse. Suppression of Orozco's statements was upheld.

Justice Rehnquist asserted that *Orozco* was "in no sense inconsistent with" the disposition in *Quarles* because the questions in *Orozco* did not relate to any reasonable need to protect the public from any immediate danger associated with the weapon.<sup>243</sup> There was no basis for this claim. The operative fact in *Quarles* was that a dangerous weapon was missing. Thus, Justice Rehnquist asserted that "[s]o long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to public safety. . . ."<sup>244</sup> Logically, the same rationale would apply any time a dangerous weapon, known to exist, cannot be found by police. The significance of the supposed lack of "immediacy" in *Orozco* is illusory. Whether the weapon has been missing for ten minutes or ten hours does nothing to reduce its dangerousness. To the contrary, it could be argued that the longer the weapon is missing, the more likely an unsuspecting member of the public may discover it. While Justice Rehnquist's distinction of *Orozco* may provide solace for some future defendant in a situation similar to Orozco's, it is a faulty disanalogy as

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240. Justice Rehnquist analogized the detention of suspected alimentary canal smugglers to the detention of suspected tuberculosis carriers on the basis that the concern in both cases is to prevent the introduction of a harmful agent into the country. *Id.* But the next paragraph of the opinion made it clear he was concerned primarily with effective law enforcement, rather than simply avoiding the introduction of harmful agents into the country. The fourth amendment, he said, "'does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape.'", *Id.* (quoting *Adams v. Williams*, 407 U.S. 143, 145 (1972) (Rehnquist, J.)).

241. 467 U.S. 649 (1984). See *supra* text accompanying note 127 for a discussion of the facts in *Quarles*.

242. 394 U.S. 324 (1969).

243. *Quarles*, 467 U.S. at 659 n.8.

244. *Id.* at 657.

a matter of reason because it exalts an insignificant difference over a vastly more significant similarity.<sup>245</sup>

### 3. Fallacies of Missing Proof (*Ad Ignorantium*)

The fallacy of *argumentum ad ignorantiam* is illustrated by the argument: Ghosts do not exist because no one has ever proved they do exist. Or its converse: Ghosts must exist because no one has ever proved they do not exist.<sup>246</sup> It is, as its name suggests, an argument from ignorance. The fallacy is committed whenever one argues that the absence of evidence in support of a thesis establishes that the thesis is false, or that the absence of evidence in opposition to a thesis establishes that the thesis is true.<sup>247</sup>

This fallacy occurs in Justice Rehnquist's opinions in a form which Fischer describes more specifically as the *fallacy of negative proof*.<sup>248</sup> From an assertion that "there is no evidence of *X* in this case," the Chief Justice proceeds on the explicit or implicit assumption that "not-*X* is the case." *Colorado v. Bertine*<sup>249</sup> illustrates this type of argument. One of the concerns about inventory searches is that, because they allow searches without probable cause, police may make pretext arrests and impound vehicles for an investigative rather than inventory purpose. In *Bertine*, because "there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation," Justice Rehnquist concluded that the procedures were administered in good faith.<sup>250</sup> In other words, "there is no evidence of *X*; therefore, not-*X*."

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245. In dissent, Justice Marshall "fail[ed] to comprehend the distinction" of *Orozco*. He argued: "In both cases a dangerous weapon was missing, and in neither case was there any direct evidence where the weapon was hidden." *Id.* at 677 n.2.

Justice Rehnquist has reciprocated in complaining about faulty analogies and disanalogies relied upon by his brethren. *Illinois v. Somerville*, 410 U.S. 458, 469 (1973) (In this double jeopardy case, Justice Rehnquist sought to deflate the dissenters' reliance upon *United States v. Jorn*, 400 U.S. 470 (1971), by asserting that *Jorn* could provide support for the lower court's decision in favor of the defendant only if one were to "excise various portions of the plurality opinion . . . , divorcing the language from the facts" in order to "distort its holdings."); *Michigan v. Clifford*, 464 U.S. 287, 306-07 (1984) (criticizing the plurality's asserted distinctions between *Clifford* and *Michigan v. Tyler* as "trivial and immaterial").

246. Example from I. COPI, *supra* note 6, at 76.

247. *Id.* See also T. DAMAR, *supra* note 5, at 54-55; C. L. HAMBLIN, *supra* note 5, at 43-44. An exception applies in situations where a thorough investigation would be likely to uncover any proof regarding the matter and such an investigation has been undertaken unsuccessfully. I. COPI, *supra* note 6, at 77; T. DAMAR, *supra* note 5, at 55. Thus, it would not be fallacious to argue that a person does not have a criminal record based upon an absence of evidence to the contrary if an investigation into the person's background failed to uncover any proof regarding the existence of a criminal record.

248. D. FISCHER, *supra* note 5, at 47.

249. 107 S. Ct. 738 (1987). See *supra* notes 111-18 for an additional discussion of *Bertine*.

250. *Id.* at 742 (emphasis added). He similarly observed that "[t]here was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity." *Id.* at 743.

The defect in this reasoning is that, precisely because of the nature of bad faith, a defendant can never prove its existence. Officers are not likely to voluntarily reveal that their subjective purpose for impounding a vehicle and conducting an inventory search was to illegally investigate their suspicions of criminal activity. While a party advancing a claim generally bears the burden of proof, it is unreasonable to demand that someone prove the unprovable.<sup>251</sup> In any event, the general rule for warrantless searches is that the party seeking to justify the search bears the burden of proving its validity.<sup>252</sup>

Related to the fallacy of negative proof is the *fallacy of possible proof*, which consists of attempting to establish a factual proposition as true or false merely by showing the possibility of its truth or falsity. Factual propositions require more support than that they are possibly true or false. They require some showing of probability.<sup>253</sup>

The fallacy of possible proof appeared in *Michigan v. Jackson*.<sup>254</sup> Justice Rehnquist dissented in *Jackson* from the Court's holding extending *Edwards v. Arizona*,<sup>255</sup> which prohibits further custodial police interrogation after a suspect has requested counsel to protect the suspect's fifth amendment privilege against self-incrimination, to a sixth amendment situation. The defendants in *Jackson* had requested counsel at their arraignments and were subsequently questioned by police before having the opportunity to consult with counsel. Both defend-

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Nor was there a showing that they did not and, in fact, the circumstances in *Bertine* suggested that the search may indeed have been carried out for investigative purposes. The officer arrested Bertine for driving under the influence of alcohol. He testified at the suppression hearing that it was not his practice to impound all cars following such an arrest. *Id.* at 746 n.5 (Marshall, J., dissenting). He further testified that once an officer made a decision to impound a vehicle, he would search "whatever arouses his suspicious [sic] as far as what may be contained in any type of article in the car." *Id.* at 746. Moreover, the officer searched Bertine's car and backpack while it was still on the roadway, prior to its being taken to an impoundment lot. *Id.* at 739-40. Finally, the officer had discretion to allow Bertine to park the car in the nearest public parking area or to make other arrangements for its safekeeping. *Id.* at 745 n.3.

251. Other situations in which Justice Rehnquist has sought to place the burden upon a criminal suspect to prove the unprovable include: *Oregon v. Kennedy*, 456 U.S. 667 (1982) (requiring a defendant to prove that a prosecutor's misconduct resulting in a mistrial was motivated by an intent to provoke a mistrial in order to make out a double jeopardy claim); *Smith v. Phillips*, 455 U.S. 209 (1982) (requiring a defendant to prove "actual bias" of juror who had application pending during trial for position as felony investigator with the District Attorney's Office); *Delaware v. Prouse*, 440 U.S. 648, 667 (1979) (As sole dissenter from holding disapproving of random automobile stops to check for license and registration, Justice Rehnquist, though conceding that discretionary stops could be abused, argued that the record contained "no showing that such abuse is probable or even likely.").

252. *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *McDonald v. United States*, 335 U.S. 451, 456 (1948).

253. D. FISCHER, *supra* note 5, at 53.

254. 475 U.S. 625 (1986).

255. 451 U.S. 477 (1981). For a more complete discussion of the holding in *Edwards*, see *supra* note 222.

ants made incriminating statements after being advised of and waiving their *Miranda* rights. The Court held that *Edwards* applied to prevent further police questioning in the absence of counsel, since defendants had an absolute sixth amendment right to counsel after the arraignment.<sup>256</sup>

Justice Rehnquist argued that the *Edwards* prophylactic rule was designed only to protect a custodial suspect's fifth amendment privilege against self-incrimination by precluding police from overriding a suspect's request for counsel by badgering him with further questioning.<sup>257</sup> While this interpretation of *Edwards* was probably truer than the Court's, his additional argument that similar prophylactic protection of the sixth amendment right to counsel is unnecessary committed the fallacy of possible proof. The Court, he argued, had not suggested that police "commonly deny defendants their sixth amendment right to counsel. Nor, I suspect, would such a claim likely be borne out by empirical evidence."<sup>258</sup> Accordingly, he concluded that "the justification for the . . . [*Edwards* rule], namely, the perceived widespread problem that the police were violating . . . the Fifth Amendment rights of defendants during the course of custodial interrogations . . . is conspicuously absent in the Sixth Amendment context."<sup>259</sup> Police might or might not commonly deny defendants their sixth amendment rights, but Justice Rehnquist's mere suspicion that empirical evidence would show this not to be the case did not support his categorical conclusion that the need for prophylactic protection is "conspicuously absent" in a sixth amendment context. At most, this was a possibility.

#### 4. Fallacious Appeals to Authority: *Ad Verecundiam, Ad Antiquitam and Ipse Dixit*

The Court, as it should, attempts to support its decisions with authority. Improper appeals to authority, however, result in fallacies. The generic label attached to fallacious appeals to authority is *argumentum ad verecundiam*, which usually refers to appeals to irrelevant sources of authority.<sup>260</sup> Though this particular form of the fallacy does not occur frequently in Supreme Court decisions, it is not alto-

256. Once adversary proceedings, which include arraignments, have been commenced, a defendant's sixth amendment right to counsel attaches to subsequent "critical stages" of the proceeding. *Jackson*, 475 U.S. at 629-30. See also *United States v. Gouveia*, 467 U.S. 180, 187, 188 (1984); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

257. *Jackson*, 475 U.S. at 639-40.

258. *Id.* at 639.

259. *Id.* at 639-40.

260. For discussion of improper appeals to authority, see J. BENTHAM, *supra* note 5, at 17-33; I. COPI, *supra* note 6, at 80-81; T. DAMAR, *supra* note 5, at 93-94; W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 84-89; C. L. HAMBLIN, *supra* note 5, at 42-43.

gether unknown. In *Middendorf v. Henry*,<sup>261</sup> Justice Rehnquist, in considering whether the fifth amendment due process clause required counsel for servicemen in summary courts-martial, argued that the Court should defer to the determination of Congress that counsel need not be provided.<sup>262</sup> He rejected the contention that the Court should defer to the Court of Military Appeals, which had decided by a divided vote that counsel was required.<sup>263</sup> The dissent noted that, though the determination of Congress was entitled to some deference, the Court was obligated to arrive at its own conclusion regarding the validity of the procedure.<sup>264</sup> This was surely correct, as it is the Court, not the Congress, which is charged with the duty of construing the Constitution. Congress is not the ultimate authority on constitutional construction.<sup>265</sup>

A more common form of fallacious appeal to authority is the distinct fallacy of *argumentum ad antiquitatem*, which is an illegitimate appeal to principles or actions of the past in order to justify current acts.<sup>266</sup> Jeremy Bentham called it the "Wisdom of our Ancestors" or "Chinese Argument."<sup>267</sup> His humorous and insightful analysis of this

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261. 425 U.S. 25 (1976). See *supra* notes 225-32 and accompanying text for additional discussion of *Middendorf*.

262. *Id.* at 43. Congress did not require the appointment of counsel in the legislation regulating summary courts-martial. Justice Rehnquist determined that, in order to decide the due process issue, the Court "need only decide whether the factors militating in favor of counsel . . . are so extraordinarily weighty as to overcome the balance struck by Congress." *Id.* at 44.

263. *Id.* at 43-44.

264. *Id.* at 67 (Marshall, J., dissenting). The dissent also admonished that the "recognized expertise" of the Court of Military Appeals in dealing with military problems was entitled to more weight than that accorded to it by the Court. *Id.* at 66.

265. *Argumentum ad verecundiam* can also result when the Court defers to lower court decisions in disposing of cases. Of course, there is nothing fallacious about considering lower court decisions in the absence of existing Supreme Court authority, but *deference* to lower courts regarding questions of law is inconsistent with the Court's role as supreme arbiter of federal law. *United States v. MacCollom*, 426 U.S. 317 (1976), is illustrative of when this can become fallacious. (See *supra* notes 180-85 and accompanying text for more extensive discussion of *MacCollom*.) Arguing in support of denying free transcripts to federal inmates for the purpose of assisting them in preparing petitions for post-conviction relief, Justice Rehnquist relied upon a decision by the United States Circuit Court of Appeals for the Fourth Circuit, stating court of appeals decisions regarding this issue are entitled to "particular weight" because they represent "practical judgment on questions which those courts must confront far more than we do." *Id.* at 327. Carrying this argument to its logical conclusion, Justice Rehnquist should be willing to defer routinely to *trial courts* as to most issues which come before the Court, since the expressions of those courts also represent practical judgments with respect to matters they face far more often than the Supreme Court.

266. D. FISCHER, *supra* note 5, at 297.

267. J. BENTHAM, *supra* note 5, at 43. He defined the fallacy as consisting in stating a supposed repugnancy between the proposed measure and the opinions of men by whom the country . . . was inhabited in former times: these opinions being collected either from the express words of some writer living at the time in question, or from laws or institutions that were then in existence.

fallacy gives us reason to cautiously scrutinize all appeals to ancient precedent and ideas, including the intent of the framers of the Constitution.

Bentham, noting that fallacies of authority are used principally in law and religion "to limit and debilitate the exercise of the right of private inquiry in as great a degree as possible,"<sup>268</sup> lamented the inherent inconsistency of appealing to the wisdom of our ancestors. Presumably, "[e]xperience is the mother of wisdom,"<sup>269</sup> but this fallacy denies that, holding that "the true mother of wisdom is not experience, but inexperience."<sup>270</sup> What we commonly think of as old is, in fact, young in the sense that it was developed by a generation with much less experience in the matter than succeeding generations.

Bentham did not deny that earlier ages produced men of genius, but observed that

as their talents could only be developed in proportion to the state of knowledge at the period in which they lived, and could only have been called into action with a view to the then-existing circumstances, it is absurd to rely on their authority, at a period and under a state of things altogether different.<sup>271</sup>

He challenged those who would advance *ad antiquitam* arguments to compare the most wise class of our ancestors to the lowest class of literate people in modern times, asserting that the former will be shown to be grossly ignorant.<sup>272</sup> No rational person, he said, would want to return to the state of affairs of preceding ages.<sup>273</sup>

Though his attacks, directed against lawyers, judges and politicians, were overstated and somewhat unfair, there is an undeniable ring of truth in what Bentham said that is relevant to contemporary constitutional decision making. Justice Rehnquist adheres to an interpretivist philosophy which holds that the Constitution should be construed as nearly as possible in accordance with the framers' intent as determined by language of the document and historical materials.<sup>274</sup> He disavows that Supreme Court Justices should construe the Constitu-

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268. *Id.* at 29.

269. *Id.* at 43.

270. *Id.* at 44.

271. *Id.* at 45 n.1. For example, it would be absurd for a politician to seize upon George Washington's admonition in his Farewell Address against entangling foreign alliances in support of a contemporary foreign policy decision. Though Washington may have been astute as to such matters in the eighteenth century, if he were brought back today, it would take him years to acquire an understanding of foreign affairs. Example from W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 87.

272. J. BENTHAM, *supra* note 5, at 47.

273. *Id.* at 49.

274. See *Confirmation Hearings*, *supra* note 95, at 55, 81-82, 138, 167 (testimony of William H. Rehnquist). See also THE SUPREME COURT, *supra* note 17, at 317 ("[T]o go beyond the language of the

tution with a view toward keeping it in step with modern times.<sup>275</sup> His interpretivist philosophy is not fallacious for giving weight to the framers' intent, for that should no doubt play a significant role in constitutional interpretation. The fallacy arises when the search for and focus upon that intent becomes single-minded, to the exclusion of two hundred years of change and collective, societal experience.

This fallacy occurred in *Evitts v. Lucey*,<sup>276</sup> where Justice Rehnquist argued in dissent that the language of the sixth amendment militated against recognizing a due process right to effective assistance of counsel in appellate proceedings. The words "prosecutions" and "defense," he said, "plainly indicate that the Sixth Amendment right to counsel applies only to trial level proceedings."<sup>277</sup> Later in the same opinion, he noted that a federal right to appeal was not created until 1889 and no right to appeal existed in England until 1907.<sup>278</sup> The fact that no right to appeal existed for one hundred years after the Bill of Rights was adopted suggests only that the framers did not consider whether the assistance of counsel should be provided for a proceeding that did not exist. The fact that appeals have been around for almost one hundred years and are provided for in the federal courts and courts of every state suggests that experience has shown them to be a necessary feature of our criminal justice system. Relying upon a strict reading of two words of the sixth amendment to rebut a constitutional right to effective assistance of counsel on appeal constituted an unreasonable appeal to the wisdom of our ancestors.

Like single-minded appeals to the framers' intent, arguments which rely solely upon outdated common law principles or case law commit the fallacy of *ad antiquitatem*. The common law was not always wise or sound. In criminal procedure, for example, defendants were not entitled to testify on their own behalf, and a person could retain counsel to defend misdemeanor, but not felony, cases. The es-

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Constitution, and the meaning that may be fairly ascribed to the language, and into the consciences of individual judges, is to embark on a journey that is treacherous indeed.").

275. Justice Rehnquist has acknowledged that the principles set forth in the Constitution must be applied to "very changed conditions," but asserts that constitutional problems must be solved by reference "to the Constitution and to its authentic interpretation . . . rather than simply an outside desire to be 'in step with the times.'" *Confirmation Hearings*, *supra* note 95, at 81. See also *id.* at 20 (stating he would not be willing to give new interpretation to the Constitution to bring it "up to date"). For analysis of Justice Rehnquist's judicial philosophy, see Denvir, *Justice Rehnquist and Constitutional Interpretation*, 34 HAST. L.J. 1011 (1983); Kleven, *The Constitutional Philosophy of Justice William H. Rehnquist*, 8 VT. L. REV. 2 (1983); Riggs & Proffitt, *The Judicial Philosophy of Justice Rehnquist*, 16 AKRON L. REV. 555 (1983); Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

276. 469 U.S. 387 (1985).

277. *Id.* at 408 (Rehnquist, J., dissenting).

278. *Id.* at 409.

sence of the fallacy of *ad antiquitam*—the application of rules *only* because they have been around a long time, without examining justification for their continued existence—is classically represented in modern cases applying the border search exception to the fourth amendment. Simply stated, that exception is that the fourth amendment does not apply to routine searches at the border.

There may be a valid justification for excepting border searches from the strictures of the fourth amendment, but one would never know what that justification is from reading modern criminal procedure cases. Though Justice Rehnquist is not responsible for the border exception, two Rehnquist opinions, *United States v. Montoya de Hernandez*<sup>279</sup> and *United States v. Ramsey*,<sup>280</sup> demonstrate how discussion of the exception in modern cases never progresses beyond a fallacious *ad antiquitam* argument. In *Montoya de Hernandez*, the Court upheld a sixteen hour detention of a suspected alimentary canal narcotics smuggler based upon reasonable suspicion, while in *Ramsey*, the Court approved a search of international letter mail based upon reasonable suspicion. Justice Rehnquist wrote for the majority in both cases.

Both decisions relied upon the border search exception in upholding the detention and search, respectively. Other than references to the obvious fact that it is important to keep illegal items out of the country, the only justification offered for the exception was that it has been around for a long time. Indeed, Justice Rehnquist cited this in *Ramsey* as a reason for dispensing with the need to state any justification for the exception.<sup>281</sup> His analysis of the exception in both cases was simply historical.<sup>282</sup> No attempt was made to support the exception by reason, but only by references such as: the Court has “long recognized” the exception;<sup>283</sup> the exception has been in existence “[s]ince the founding of our Republic”;<sup>284</sup> “it is an old practice,”<sup>285</sup> it “has a history as old as the Fourth Amendment itself,”<sup>286</sup> and “[i]t

279. 473 U.S. 531 (1985). See *supra* notes 237-40 and accompanying text and *infra* notes 301-04, 360-69 and accompanying text for more extensive discussion of *Montoya de Hernandez*.

280. 431 U.S. 606 (1977).

281. “That searches made at the border, pursuant to the *long-standing* right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, *are reasonable simply by virtue of the fact that they occur at the border*, should, by now, *require no extended demonstration.*” *Id.* at 616 (emphasis added).

282. Substituting a purely historical analysis of an event for a logical analysis of its structure also commits what is known as the *genetic fallacy*. M. COHEN & E. NAGEL, *supra* note 101, at 388-90; T. DAMAR, *supra* note 5, at 77; D. FISCHER, *supra* note 5, at 155-57.

283. *Montoya de Hernandez*, 473 U.S. at 537.

284. *Id.*

285. *Ramsey*, 431 U.S. at 618 (quoting *United States v. Thirty-seven Photographs*, 402 U.S. 363, 376 (1971)).

286. *Id.* at 619 (footnote omitted).

is a longstanding, historically recognized exception.<sup>287</sup> The fallacy lies not in relying upon history and precedent, for that is the nature of *stare decisis*. It lies in relying *solely* upon history, ignoring reasoned justification for the continued validity of a rule or practice.<sup>288</sup>

A particularly troublesome form of improper reliance upon authority is the *ipse dixit*, which translates to “[h]e himself said it.”<sup>289</sup> As the translation suggests, an *ipse dixit* is an assertion made with no proof or authority to support it. Such statements are practically impossible to refute because they are simply stated as truth with no argument in support of them. The most effective way to deal with *ipse dixit* assertions is simply to recognize them for what they are, as Justice White did in *Rakas v. Illinois*,<sup>290</sup> where he accused Justice Rehnquist of making an *ipse dixit* determination that the petitioners had no reasonable expectation of privacy while riding in the automobile.<sup>291</sup> *Rakas* is not the only case in which Justice Rehnquist has employed an *ipse dixit* to resolve ultimate issues. In *United States v. Ceccolini*,<sup>292</sup> he simply concluded, without support, that “[a]pplication of the exclusionary rule in this situation could not have the slightest deterrent effect on the behavior of an officer such as Biro.”<sup>293</sup> Why not? It is at least as arguable that applying the rule to exclude evidence derived from any illegal search would make officers less likely to undertake them. In *Donnelly v. DeChristoforo*,<sup>294</sup> the issue was whether the prosecutor’s closing argument, which suggested that the defendant had offered to plead guilty to a lesser charge, violated due process and required a new trial. The extent to which such comments prejudiced the jury is, of course, purely speculative. Nevertheless, in *ipse dixit* fashion, Justice Rehnquist had no problem concluding that “[a]lthough some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect, the comment in

287. *Id.* at 621.

288. Dissenting in *Montoya de Hernandez*, Justice Brennan made precisely this point, when he said “it is time that we reexamine its [the border exception’s] foundations,” for the Court “has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment’s passage.” *Montoya de Hernandez*, 473 U.S. at 554 (quoting *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980)).

289. BLACK’S LAW DICTIONARY 743 (5th ed. 1979).

290. 439 U.S. 128 (1978). See *supra* notes 138-48 and accompanying text for more extensive discussion of *Rakas*.

291. *Id.* at 168 n.21 (White, J., dissenting) (“The Court’s *ipse dixit* is not only unexplained but also is unjustified in light of what persons reasonably do, and should be entitled to, expect.”).

292. 435 U.S. 268 (1978). See *supra* notes 167-70 and accompanying text for more extensive discussion of *Ceccolini*.

293. *Id.* at 280.

294. 416 U.S. 637 (1974).

this case is hardly of such character."<sup>295</sup> How do we know? Because he said so!

#### *D. Fallacies of Definition, Classification and Qualification*

Much of law involves the defining, classifying and qualifying of rules, principles and concepts. Faced with a set of facts and a set of previously articulated rules and principles of law, the Court must classify the factual situation within one or another existing rule or principle. To do so, the Court must define the rule or principle and, in applying it to the facts, often will be required to qualify it in some way. Every subsequent case involving similar facts then involves reclassifying, redefining and requalifying. The infinite permutations in fact patterns, the need to formulate broad rules having application beyond the particular case before the court, the desire to leave the refining of rules to future cases presenting concrete controversies, and the inherent limitations of language, combine to make it impossible for the Court to fashion sufficiently precise rules to account for all situations.<sup>296</sup> Law is not a science, and legal classifications cannot be scientifically measured or defined. Nevertheless, the Court must develop and define its terms and rules with reasonable certainty to guide people seeking to conform their conduct to the law, whether they be ordinary citizens, police, magistrates or judges.

The fallacies discussed in this section occur when the Court imposes an unreasonably high degree of precision upon matters incapable of being precisely defined, classified or qualified, or is imprecise when a greater degree of precision is both possible and desirable. Related to these are fallacies involved in failing to make necessary qualifications in statements of rules or principles or attaching qualifications that do not fit within the purposes of the rules or principles.

##### 1. The Black or White Fallacy

In Joseph Heller's *Catch-22*, the corrupt Colonel Korn told Yossarian, "You're either for us or against your country. It's as simple as that." When Yossarian scoffed that he would not buy that, Korn replied that neither did he, "but everyone else will. So there you are."<sup>297</sup> Few problems of life, and particularly of law, are black or white, yet it can be effective to portray a situation as involving only two choices

295. *Id.* at 644.

296. Some rules are relatively certain and some fact patterns fit clearly within them, but these are not the kind of cases likely to come before the Court. The Court deals in hard cases in which problems of defining, classifying and qualifying are almost always present and seldom easily resolved.

297. J. HELLER, *CATCH-22* 413 (1955).

because of our tendency to concentrate on what is said, rather than what is not said. When an issue requires a relative judgment, it is a fallacy to portray it as all one thing or all something else.<sup>298</sup> Matters are seldom that simple. There is usually some middle or alternative ground that needs to be considered.

Identifying the black or white fallacy in law is complicated because there are sometimes legitimate reasons for resolving complex problems by drawing simple lines. Bright-line rules of criminal procedure are often arbitrarily drawn for the worthy purpose of providing guidance to the police and lower court judges who must interpret the rules on a daily basis. Fashioning bright-line distinctions is not necessarily fallacious, even though cases may arise where application of the rule seems unreasonable. Justice Rehnquist, however, cannot take legitimate refuge in any professed need for bright-line rules with respect to the black or white fallacy, for his opinions demonstrate an inconsistent contextual approach in which fixed rules are advocated only where they work to the benefit of the police and the detriment of the criminal suspect.<sup>299</sup>

The black or white fallacy is frequently expressed in terms of a

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298. W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 30. See also T. DAMAR, *supra* note 5, at 42-43; D. FISCHER, *supra* note 5, at 9-12, 276-77; P. SCHLAG & D. SKOVER, *TACTICS OF LEGAL REASONING* 33-34 (1986).

299. Where bright-line rules favor the police, Justice Rehnquist has praised them as necessary for providing guidance to the police and instilling certainty in the law. Where such rules favor the defendant, Justice Rehnquist tends to eschew their "rigidity" in favor of "flexibility." In taking these inconsistent positions he commits the *fallacy of special pleading*, which occurs when one applies different standards to like matters or applies a less stringent standard to his own position than he demands from opponents. Thouless defined it as "the use in one context of an argument which would not be admitted in another context where it would lead to the opposite conclusion." R. THOULESS, *supra* note 2, at 157. See also D. FISCHER, *supra* note 5, at 110-113. Consistency in favoring or disfavoring bright-line rules would preclude the Chief Justice from reaching the results he does in many cases. Compare Colorado v. Bertine, 107 S. Ct. 738, 743 (1987) (upheld inventory searches of containers in impounded automobiles, asserting it is essential to have a single familiar standard to guide police who have only limited time and expertise to reflect on and balance the interests involved) and Oregon v. Kennedy, 456 U.S. 667, 675 (1982) (rejected an "overreaching" or bad faith standard for determining when prosecutorial misconduct resulting in mistrial bars retrial on double jeopardy grounds of the basis they have "virtually no standards for their application") and Steagald v. United States, 451 U.S. 204, 231 (1981) (dissented from holding that a search warrant is required to enter the dwelling of a third party to search for a suspect as to whom police have an arrest warrant, lamenting that "the greater misfortune" of the rule is "the increased uncertainty imposed on police officers in the field, committing magistrates, and trial judges, who must confront variations and permutations of this factual situation on a day-to-day basis") with New York v. Quarles, 467 U.S. 649, 658-59 (1984) (though recognizing that the newly created public safety exception "lessen[ed] the desirable clarity" of *Miranda*, nevertheless opted to defer to the ability of police officers to "instinctively" decide between proper and improper application of the exception) and Illinois v. Gates, 462 U.S. 213, 232 (1983) (abandoned *Aguilar/Spinelli* test for determining probable cause based upon informant tips in favor of a totality of circumstances approach, asserting that "[r]igid legal rules are ill-suited to an area of such diversity") and Ybarra v. Illinois, 444 U.S. 85, 105 (1979) (dissented from holding that patrons of bar where search warrant was executed

*false dilemma.* A dilemma is a situation requiring a choice among two or more alternatives, none of which is ideal. Dilemmas in legal argument are framed so as to pose an explicit or implied choice between the course of action advocated by the speaker and one or more allegedly undesirable courses. Dilemmas are valid, however, only if the available courses of action are truly limited to the ones stated and if the option favored by the speaker is really the best one.<sup>300</sup>

*United States v. Montoya de Hernandez*<sup>301</sup> exemplifies a dilemma that was false for failing to enumerate all of the alternatives. When the defendant, a suspected alimentary canal smuggler, declined an offer by customs agents to submit to an x-ray examination, Justice Rehnquist asserted that "the customs inspectors were left with only two practical alternatives: detain her for such time as necessary to confirm their suspicions . . . or turn her loose into the interior carrying the reasonably suspected contraband drugs."<sup>302</sup> There was a third viable alternative, left unstated by Justice Rehnquist, which was to require the suspect to return to Columbia, her point of departure.<sup>303</sup> As the dissenters noted, the government's interest in preventing the introduction of contraband into the country would seem to be fully vindicated by requiring travelers who refuse to submit to conditions of entry to return home.<sup>304</sup> The point is not whether this option was the best one, but that Justice Rehnquist posed a false dilemma when he excluded it from the potential choices.

*Illinois v. Gates*<sup>305</sup> was a case in which a dilemma was defective for stating a false alternative. *Gates* abandoned the two-prong test developed in *Aguilar v. Texas*<sup>306</sup> and *Spinelli v. United States*<sup>307</sup> for de-

could not be searched except upon individualized probable cause, advocating the need for "flexibility" and criticizing the "rigidity" of the Court's position.

This is not to suggest that consistency is the be-all and end-all of judicial decision making. Emerson was no doubt correct that foolish consistency is the hobgoblin of little minds. In fact, attacking an argument solely upon the basis of inconsistency itself risks committing a fallacy—that of *tu quoque* ("you too"), which consists of challenging an opponent's argument by accusing him of engaging in the same conduct of which he complains. S. CHASE, *supra* note 5, at 65-70; T. DAMAR, *supra* note 5, at 83-84. Nevertheless, inconsistent positions must be explained.

300. Attacking a dilemma on the basis that it fails to consider other available alternatives is commonly referred to as "going between the horns" of the dilemma, while denying the truth of one of its parts is known as "grasping the dilemma by the horns." I. COPI, *supra* note 6, at 238-39.

301. 473 U.S. 531 (1985). See *supra* notes 237-40, 279-88 and accompanying text and *infra* notes 360-69 and accompanying text for additional discussion of *Montoya de Hernandez*.

302. *Id.* at 543.

303. Customs officials originally offered this choice to *Montoya de Hernandez*, but apparently withdrew it after they were unable to place her on a return flight that night. *Id.* at 535.

304. *Id.* at 564 (Brennan, J., dissenting).

305. 462 U.S. 213 (1983).

306. 378 U.S. 108 (1964).

307. 393 U.S. 410 (1969).

termining the sufficiency of probable cause to obtain a search warrant based upon information furnished to police by informants. In support of the Court's decision to supplant the *Aguilar/Spinelli* test with one which looks at the totality of the circumstances,<sup>308</sup> Justice Rehnquist argued: "If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches . . ."<sup>309</sup> This amounted to arguing that, because police might disobey the law if we enforce it, we should change it. The suggestion that the only two options were to keep the law the way it was, thereby compelling police to act illegally, or change the law so police will not act illegally, was fallacious because of the falsity of the first option. If the courts scrutinize warrantless searches to the same or greater extent as searches conducted pursuant to warrants, police would have no incentive to avoid complying with the warrant requirement and opt instead for warrantless searches.<sup>310</sup>

## 2. Unreasonable or Unnecessary Demands for Perfection or Precision

To demand an unreasonable degree of perfection or precision from a proposal when absolute perfection or precision is either not possible or unnecessary is fallacious. Most constitutional issues are complex and no resolution of them will be perfect. All potential resolutions will be subject to some criticism. Nevertheless, some choice must be made, and all that can be expected is that the best choice be made from among the available alternatives. There is nothing wrong with attacking weaknesses in one option as compared with possible alternatives, but rejecting a course of action just because it is imperfect, without showing that some other one is better, is a fallacy.<sup>311</sup>

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308. Before issuing a search warrant under the *Aguilar/Spinelli* standard, the magistrate had to be satisfied both as to the basis of the informant's knowledge and the reliability of the informant. In *Gates*, the police acted upon an anonymous tip that Lance and Susan Gates were involved in a drug trafficking operation in which they made trips to Florida to retrieve drugs that they brought back and sold in Illinois. The police obtained a search warrant based upon the anonymous tip and found drugs in the Gates' automobile and home. Since the tip was anonymous, it was impossible for the police to furnish the magistrate with information necessary to satisfy both prongs of the *Aguilar/Spinelli* test. Nevertheless, because the police corroborated certain details provided by the informant, albeit details that were consistent with innocent activity, the Court held there was sufficient probable cause under the totality of the circumstances.

309. *Gates*, 462 U.S. at 236.

310. Justice Brennan made somewhat this same point in dissent, when he said, "If the Court is suggesting, as it appears to be, that the police will intentionally disregard the law, it need only be noted in response that the courts are not helpless to deal with such conduct." *Id.* at 289 n.9.

311. Fallacies of this genre travel under many different names. See J. BENTHAM, *supra* note 5, at 223-26 ("Rejection Instead of Amendment"); W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 128-29 ("The Wicked Alternative"), 129-31 ("Nothing but Objections"), and 131-32 ("Impossible Conditions:

In *Illinois v. Gates*,<sup>312</sup> Justice Rehnquist criticized the two-pronged *Aguilar/Spinelli* test for determining the sufficiency of probable cause to search based upon informant tips on the basis that it "has encouraged an excessively technical dissection of informants' tips"<sup>313</sup> and was "unlikely to assist magistrates [who are frequently untrained laymen] in determining probable cause."<sup>314</sup> Though the critique had some merit, it was fallacious because the alternative he endorsed was even less satisfactory. In place of the *Aguilar/Spinelli* standard, the Court embraced a "totality of circumstances" test, a substanceless test that provides *no* assistance to magistrates in determining probable cause. If the *Aguilar/Spinelli* test was too technical or difficult to apply, a good case could be made for refining or clarifying it, but not for abandoning any and all guidance to magistrates. The argument carried its own refutation.

A hypertechnical demand for a perfect analogy in a situation where it was not necessary was the basis for the decision in *Allen v. Illinois*.<sup>315</sup> The issue was whether proceedings under an Illinois statute requiring the involuntary commitment of sex offenders were "criminal" in nature. If so, the admission against petitioner of psychiatric testimony based upon statements made by petitioner violated his privilege against self-incrimination. Justice Rehnquist, writing for a five member majority, declared the statute was civil in nature because, even though the result of the proceedings was confinement, the purpose of the statute was rehabilitative rather than punitive. Accordingly, admission of the testimony did not violate petitioner's privilege against self-incrimination.

Petitioner argued that the proceedings were criminal in nature because a person adjudged to be sexually dangerous under the statute is committed for an indeterminate period to a maximum security psychiatric center, run by the Illinois Department of Corrections, which houses both convicted sex offenders and persons committed under the statute. Justice Rehnquist rejected this argument because petitioner had not shown that the conditions of confinement for sexually dangerous persons were "essentially identical" to those of convicted felons.<sup>316</sup>

'the call for perfection' "); M. PIRIE, *supra* note 5, at 45-47 ("Damning the Alternatives"), 164-66 ("Trivial Objections"), and 173-76 ("Unobtainable Perfection").

312. 462 U.S. 213 (1983). See *supra* notes 305-10 and accompanying text for a more extensive discussion of *Gates*.

313. *Id.* at 234.

314. *Id.* at 236.

315. 106 S. Ct. 2988 (1986).

316. *Id.* at 2994 (emphasis added). This also commits the fallacy of negative proof, see *supra* note 248 and accompanying text, because there apparently was no evidence that the conditions were *not* essentially identical. Justice Rehnquist relied on the conclusory assertion of counsel for the state that

Absent such a showing, the conditions of petitioner's confinement did not amount to "punishment" so as to make the proceedings criminal in nature.<sup>317</sup> The demand for a perfect identity between the conditions of petitioner's confinement and those of convicted felons was fallacious. The critical fact is that under the Illinois statute a person is deprived of his liberty in a criminal setting for what can be substantial periods of time.<sup>318</sup> Justice Rehnquist made no reference to the kinds of differences in conditions of confinement he might deem relevant, but it is hard to imagine any that would overshadow the critical similarity of incarceration in a maximum security institution operated by the Department of Corrections. Requiring "essential identity" of unspecified collateral conditions of confinement constituted a demand for precision that was unnecessary and unrelated to the real issue.

### 3. Logic Chopping

Logic chopping is a special form of attacking a rule or proposal by demanding an unobtainable degree of perfection. Few legal classifications are capable of dealing with all marginal situations. It is fallacious to reject a relatively workable and precise rule by drawing attention to marginal cases in which the rule was or could be applied improperly.<sup>319</sup> If the rule is capable of dealing with the black and white situations and dark gray and light gray variations, it cannot be assailed on the ground that it does not adequately resolve situations that are intermediate shades of gray. The existence of a body of clear-cut cases to which a rule is applicable vitiates the criticism that it is overly vague.<sup>320</sup> Purveyors of this fallacy focus upon that fact that there are some cases which are *not* clear-cut.<sup>321</sup>

In *Rakas v. Illinois*,<sup>322</sup> a portion of Justice Rehnquist's majority opinion was devoted to overruling the "legitimately on the premises" test for determining standing to challenge an illegal search or seizure. As the label suggests, the test conferred standing upon any person who was legitimately on the premises at the time and place the search was conducted, whereas persons wrongfully on private premises would not

sexually dangerous persons "must not be treated like ordinary prisoners" under Illinois law. *Id.* at 2994-95.

317. *Id.* at 2995.

318. The dissenters referred to a case where a person committed under the statute was confined for more than five years for conduct that carried a criminal penalty of only a \$500 fine and less than one year imprisonment. *Id.* at 2996 n.5 (Stevens, J., dissenting.).

319. For discussion of this fallacy, see W. FEARNSIDE & W. HOLTHOR, *supra* note 5, at 64-68.

320. *Id.* at 57, 66.

321. *Id.* at 65.

322. 439 U.S. 128 (1978). See *supra* notes 138-48 and accompanying text for more extensive discussion of *Rakas*.

have standing.<sup>323</sup> Justice Rehnquist's denouncement of the standard was grounded in an unreasonable demand for perfection. He offered two marginal situations where its application might lead to unreasonable results;<sup>324</sup> characterized the test as "illusory" based upon the fact that even the dissenters conceded it was not perfect;<sup>325</sup> and posed a set of pedantic questions that could possibly arise in interpreting the rule.<sup>326</sup>

His attempt to portray what was a workable, though not exact, test for determining standing as a wholly chimerical apparition without substance was fallacious. Few rules of constitutional law would survive under a standard requiring that they be unambiguously and sensibly applicable to any and all fact patterns which might arise. The courts are not incapable of dealing with problematic situations if and when they arise.<sup>327</sup> That the dissent conceded the rule was not perfect meant only that the dissenters were being candid, and added nothing to bolster Justice Rehnquist's position. Finally, the demonic complexities conjured up in the form of questions such as what is "private" and what are "premises" could be turned around with stronger force against his substituted test—a contentless "reasonable expectation of privacy" inquiry. What is "reasonable"? What is "privacy"? These questions have produced far more perplexity and mystical results in

323. The rule was derived from *Jones v. United States*, 362 U.S. 257 (1960), where the Court held the petitioner had standing to challenge a search of a friend's apartment where he was staying.

324. "Applied literally," said Justice Rehnquist, the test would permit a visitor who had never seen the basement of another's house to object to a search of the basement if the visitor happened to be in the kitchen of the home at the time of the search. The rule also would enable a visitor who walked into a house one minute before a search commenced and left one minute after the search ended to contest the search. *Rakas*, 439 U.S. at 142.

325. Justice Rehnquist's demand for perfection here was explicit. He took note of the fact that the dissenters "concede[d]" that there may come a point "'when use of an area is shared with so many that one simply cannot reasonably expect seclusion.'" *Id.* at 146. To Justice Rehnquist, it was significant that "the 'point' referred to is not one demarcating a line which is black on one side and white on another; it is inevitably a point which separates one shade of gray from another." *Id.*

326. Justice Rehnquist seized upon a sentence from Justice White's dissent that a person legitimately on private premises, though he does not have absolute privacy, is entitled to expect that he is sharing it only with persons allowed there and that government officials will not invade the area absent consent or compliance with the fourth amendment. Justice Rehnquist's response was: "What are 'private' premises? Indeed, what are the 'premises'? . . . Also, if one's privacy is not absolute, how is it bounded? If he risks governmental intrusion 'with consent,' who may give that consent?" *Id.*

327. The legitimately on the premises test could have been refined to deal with each of the problems posed by Justice Rehnquist. *See supra* note 324. As to the first one, the Court could require that the defendant show he was legitimately on the particular portion of the premises where the evidence was found, or at least that he had prior access to the place within a reasonable time preceding the search. The second situation could be dealt with simply by construing the rule as not including mere momentary appearances at the premises. Though such limitations would not be free from ambiguity, the difficulties of application they would present would be no greater than those raised by many other rules. Of course, it is also possible that the scenarios posed by Justice Rehnquist would never arise.

standing cases since *Rakas* than the legitimately on the premises test did in its almost twenty year reign.<sup>328</sup>

#### 4. Misplaced Literalism and Misplaced Qualifiers

*Misplaced literalism* is a context error in which an overly restrictive literal meaning is attached to terms or rules when a broader meaning was intended.<sup>329</sup> It is a type of quoting out of context.<sup>330</sup> The fallacy sometimes occurs in connection with the fallacy of *misplaced qualifiers*. A misplaced qualifier is a qualification or limitation imposed upon a rule or principle that does not fit with the purpose for the rule or principle.<sup>331</sup>

An argument committing both these fallacies occurred in *Scott v. United States*,<sup>332</sup> where the Court was required to construe the “minimization” requirement of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>333</sup> Title III sets forth procedures and limitations for conducting wiretaps and other types of electronic surveillance. The petitioners challenged the admissibility of phone conversations electronically intercepted by government agents. They claimed the agents had failed to comply with the minimization provisions of Title III, which require that electronic surveillance “*shall be conducted* in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter.”<sup>334</sup>

The district court suppressed the conversations because the government agents had intercepted all telephone calls placed over the wiretapped phone for a one-month period and, though aware of the minimization requirement, testified that they made no effort to comply with it.<sup>335</sup> Justice Rehnquist wrote for the Court in finding that no

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328. A similar example of logic chopping occurred in *Illinois v. Gates*, 462 U.S. 213 (1983) (see *supra* note 308 for a discussion of the facts). There, in rejecting the *Aguilar/Spinelli* test for determining the existence of probable cause for the issuance of a search warrant, Justice Rehnquist discussed three state cases in which the rule was applied improperly to support the argument that it was too rigid and difficult to apply. *Id.* at 234 n.9. One would suspect the *Aguilar/Spinelli* rules were properly applied to many thousands of search warrants during the period they were in effect. Three exceptional cases furnished no support for abandoning the test.

329. See D. FISCHER, *supra* note 5, at 58.

330. Fearnside and Holther list quoting out of context as a type of improper appeal to authority. W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 88.

331. P. SCHLAG & D. SKOVER, *supra* note 298, at 36-37. Schlag and Skover talk about “tactics” and “countermoves” rather than fallacies, but their discussion of misplaced qualifiers fits within the definition of fallacy used in this article.

332. 436 U.S. 128 (1978).

333. 18 U.S.C. §§ 2510-2520 (1982 & Supp. III 1985).

334. 18 U.S.C. § 2518(5) (1982) (emphasis added).

335. Only forty percent of the intercepted calls related to the subject of the investigation. *Scott*, 436 U.S. at 132. An agent testified at the suppression hearing that the only steps taken which resulted in non-interception of a call placed over the line occurred when the agents discovered they had inadver-

statutory violation had occurred. His analysis turned upon construction of the word "conducted" in the minimization provision. He concluded that the verb "conducted" "made it clear that the focus [of the inquiry as to whether the minimization requirement was violated] was to be on the agents' actions not their motives."<sup>336</sup> Under this parsimonious reading of the statute, the only relevant inquiry was deemed to be whether the actions of the agents in carrying out the electronic surveillance were reasonable as judged in hindsight.<sup>337</sup> The agents' conceded failure to make any effort to comply with the minimization provision was deemed immaterial.<sup>338</sup>

Can it be said that law enforcement officers, who by their own admission made no attempt at minimization, conducted the electronic surveillance in such a way so as to minimize the interception of communications not subject to interception? Justice Rehnquist's niggardly interpretation of "conduct" was overly literal, artificial and attached a qualification to the statute that fails to accord with either the purpose of the provision or with common sense. Title III was intended to permit electronic surveillance only under jealously guarded restrictions designed to protect individual privacy. Justice Rehnquist's "linguistic tour de force"<sup>339</sup> shifts the analysis from whether the agents conformed their conduct to the restrictions of the Act, to a *post hoc* evaluation of whether their conduct would have been reasonable had it been done with a view towards acting in conformity with the law.<sup>340</sup>

### 5. The Balancing Fallacies

Constitutional balancing has been defined as the process "that analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified inter-

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tently connected the wiretap to an improper line. The testimony led to the following question by the court and response by the agent:

"Q. Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number?

A. That is correct, Your Honor."

*Id.* at 133 n.7.

336. *Id.* at 139.

337. Justice Rehnquist determined that interception of all of the calls was reasonable under the circumstances. *Id.* at 139-43.

338. The motive of the agents, according to Justice Rehnquist, is irrelevant to the determination of whether a constitutional or statutory violation has occurred. Motive becomes relevant only in assessing the propriety of applying the exclusionary rule once a constitutional violation has been established. *Id.* at 139 n.13.

339. *Id.* at 145-46 (Brennan, J., dissenting).

340. *Id.* at 145.

ests."<sup>341</sup> It has been described less kindly as "measuring the unmeasurable . . . [and] compar[ing] the incomparable."<sup>342</sup>

The fallacies described in this section, though they occur in other contexts where an effort is made to distill substance from abstractions, are most conspicuous and prevalent in the context of constitutional balancing. Of course, Justice Rehnquist cannot be charged with primary responsibility for the Court's expanded reliance upon constitutional balancing. Balancing has a distinguished pedigree<sup>343</sup> and has been embraced by each member currently on the Court.<sup>344</sup> Justice Rehnquist's endorsement of balancing,<sup>345</sup> however, is perhaps particularly fallacious in light of his avowed interpretivist approach to constitutional adjudication. As Professor Aleinikoff so aptly observed, nothing seems further removed from an interpretivist philosophy than resolving constitutional questions by converting any and every type of relevant social interest into an interest of constitutional magnitude.<sup>346</sup>

The center arena for balancing in the area of criminal procedure

341. Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987).

342. Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729, 748 (1963).

343. Balancing was an outgrowth of the realists' attack upon judicial formalism in which formalism was replaced by an instrumentalist perspective of the law; that is, a view that law is a means of achieving social goals. Balancing, because it required scrutiny of relevant social interests, was particularly well tailored to a pragmatic view of judicial decision making. The first full airing of balancing occurred in 1921 when Roscoe Pound presented a paper entitled *The Theory of Social Interests* setting forth his view that the obligation of the legal system was the identification and prioritizing of "interests." See Pound, *infra* note 368. Balancing first explicitly appeared in cases as a method of constitutional decision making in the late 1930's and early 1940's. Aleinikoff, *supra* note 341, at 948-972 (this historical information is taken from Professor Aleinikoff's fine article, which thoroughly discusses the historical development of the balancing test in constitutional adjudication).

344. See *id.* at 964 n.126 (and cases cited therein).

345. Criminal procedure decisions in which Justice Rehnquist has endorsed balancing include: *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (upholding sixteen hour detention without probable cause); *New York v. Quarles*, 467 U.S. 649, 657 (1984) (need to protect public safety outweighs *Miranda* protections of the privilege against self-incrimination); *Texas v. Brown*, 460 U.S. 730, 739 (1983) (upholding seizure under plain view doctrine); *Steagald v. United States*, 451 U.S. 204, 224 (1981) (dissenting from holding that search warrant is required to search residence of third person to apprehend a person for whom police have an arrest warrant); *Rawlings v. Kentucky*, 448 U.S. 98, 110 (1980) (upholding warrantless seizure); *Ybarra v. Illinois*, 444 U.S. 85, 104-06 (1979) (advocating, in dissent, ad hoc balancing by police officers as to which persons present at the scene of a search conducted pursuant to a warrant may be searched without probable cause); *Delaware v. Prouse*, 440 U.S. 648, 665 (1979) (dissenting from holding that disapproved random automobile stops); *Mincey v. Arizona*, 437 U.S. 385, 406 (1978) (qualifying concurrence in the Court's holding that disapproved a warrantless four-day search of a murder scene); *United States v. Ceccolini*, 435 U.S. 268, 275-76 (1978) (weighing the costs and benefits of applying the exclusionary rule); *Michigan v. Tucker*, 417 U.S. 433, 450-51 (1974) (applying balancing in a fifth amendment context to uphold admissibility of the testimony of a witness discovered as fruit of *Miranda* violation). In none of these cases did Justice Rehnquist resolve the balancing equation in favor of the defendant.

346. Aleinikoff, *supra* note 341, at 977 (describing balancing as "the ultimate non-interpretivism").

is the reasonableness clause of the fourth amendment. From an inauspicious beginning in 1967,<sup>347</sup> balancing has emerged as the predominant mode of fourth amendment adjudication. The Court's standard for measuring reasonableness, stated with beguiling simplicity, is the balancing of the government's need to search or seize against the nature of the intrusion which the search or seizure entails.<sup>348</sup>

In a 1973 case Justice Rehnquist recognized that reasonableness, as used in the fourth amendment, was no more than a general guide and that there was "very little [the Court] might say . . . [to] usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this."<sup>349</sup> Conceding this to be true, Justice Rehnquist might argue that the balancing of non-constitutional interests against the interests protected by the fourth amendment is the only method of giving substance to the reasonableness clause. Such an argument would not, however, render balancing any truer to interpretivism. At best, it would strike a blow against the viability of interpretivism as a sound method of constitutional adjudication, since the same argument in favor of balancing could be made with respect to other vague provisions of the Constitution.<sup>350</sup>

347. Balancing was first overtly applied in a fourth amendment context in *Camara v. Municipal Court*, 387 U.S. 523 (1967), where the Court held that a search warrant had to be obtained before a building inspector could enter and inspect residential premises. The appellant, who had refused access to building inspectors, argued that such warrants could be issued only pursuant to a showing of probable cause to believe that conditions inside a particular dwelling violated the building code. Resolution of this argument hinged upon the "reasonableness" of area inspections under the fourth amendment. "[B]alancing the need to search against the invasion which the search entails," the Court determined that area inspections without a case-by-case showing of probable cause are reasonable so long as sufficient legislative or administrative standards are promulgated and complied with to reduce the discretion of agents in the field. *Id.* at 537-38. Rather than undertake any cognizable identification and weighing of interests, however, the Court merely listed three "factors"—the long history of public acceptance of inspection programs, the public interest in abating dangerous conditions, and the limited nature of the intrusion—supporting the reasonableness of the inspections. *Id.* at 537.

348. Two recent cases set forth the twin alternative formulations of the test. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) ("To determine the constitutionality of a seizure, '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'") (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)); *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) ("'balancing the need to search against the invasion which the search entails'") (quoting *Camara*, 387 U.S. at 536-37).

349. *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973). More recently, he suggested that the reasonableness clause does indeed have definitional content when he said in *Ybarra v. Illinois*, 444 U.S. 85, 104 (1979):

To define those limits [of searches of persons present at a scene where a search warrant is executed], however, this Court need look no further than the first clause of that Amendment and need ask no question other than whether, under all the circumstances, the actions of the police in executing the warrant were reasonable.

He was closer to the mark in *Cady*. To find an answer to the puzzle of reasonableness is more complicated than simply asking the question, "What is reasonable?"

350. Balancing in cases involving warrantless searches also runs contrary to the longstanding

The fallacies inherent in fourth amendment balancing are all rooted in the attempt to give substance to a process that is at best unsystematic and formless and at worse an empty metaphor one step beyond a simple *ipse dixit* declaration that something is or is not reasonable. Several related fallacies are implicated by this process: *reification*,<sup>351</sup> *word magic*,<sup>352</sup> *unnecessary vagueness in classifications*,<sup>353</sup> *discontinuity*,<sup>354</sup> *improper movement in levels of abstraction*,<sup>355</sup> *essences*,<sup>356</sup> *pseudo proof*,<sup>357</sup> and *metaphysical questions*.<sup>358</sup> These fallacies share in common an attempt to represent an abstraction as

view that, except in narrowly circumscribed situations, searches without warrants are *per se* unreasonable. The fourth amendment provides as follows:

[1] The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, [2] and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The bracketed numbers indicate the two distinct clauses of the amendment. There has always been dispute as to the degree of interdependence between the two clauses, but until recently the Court's consistent position for twenty years has been that search warrants are required except in exceptional circumstances. *E.g.*, *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."). *Accord* *United States v. Ross*, 456 U.S. 798, 825 (1982); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Vale v. Louisiana*, 399 U.S. 30, 34 (1970). Though Justice Rehnquist has quoted the *Katz* language with approval, *Ybarra v. Illinois*, 444 U.S. 85, 101 (1979), he stated more recently that: "Our cases hold that procedure by way of a warrant is *preferred*, although in a *wide range of diverse situations* we have recognized flexible, common-sense exceptions to this requirement." *Texas v. Brown*, 460 U.S. 730, 735 (1983) (emphasis added). Shifting from a "*per se*" rule to a mere "preference" for warrants and from "a few specifically established and well-delineated exceptions" to "a wide range of diverse" exceptions to the warrant requirement is a dramatic reprioritizing of traditional fourth amendment principles.

351. Reification is "thing-ization"; an attempt to make an abstraction into substance. Reified terms or concepts cannot be adequately reduced to a set of particular statements that give meaning to them. For example, general notions such as "good" or "bad" or "justice" resist reduction to meaningful particulars. Unless an abstraction can be reduced to particulars, it is impossible to refute an argument dependent upon it. *W. FEARNSIDE & W. HOLTHOR*, *supra* note 5, at 41-45.

352. Word magic is the assumption that because something has a name it must actually exist. We speak of "balancing"; therefore, there must be some concrete process out there that really is balancing. Word magic is closely related to reification. *See id.* at 68-75.

353. A classification that is not precise enough to allow for recognition and avoidance of serious marginal cases is defective. *See id.* at 53-64.

354. Discontinuity occurs when an argument divides a conceptual spectrum into two or more categories, when no measurable criteria exists for setting the boundaries to the categories at any particular points. *P. SCHLAG & D. SKOVER*, *supra* note 298, at 35.

355. Analyzing components of the same issue at different levels of abstraction results in a skewed argument by facilitating manipulation of their relative importance. *Id.* at 41-43. *See infra* note 368 and accompanying text.

356. The fallacy of essences is based on the idea that everything has some deep, profound inner core of reality that can be ascertained through empirical study of it. *D. FISCHER*, *supra* note 5, at 68-70.

357. Pseudo proof consists of verifying evidence in a form that appears to be precise and specific, but which proves to be meaningless upon close inspection. The form of the fallacy applicable to balancing is the attempt to precisely quantify imprecise entities. *Id.* at 43-45.

something tangible, concrete and measurable. They can be avoided only in situations where: (1) *all* relevant interests are identified; (2) the interests are evaluated at their proper level of abstraction; (3) the value of each interest is subject to some common denominator that allows the interests to be meaningfully compared; and (4) there is some way of quantifying the relative weight to be accorded to constitutional interests as compared with non-constitutional social interests.<sup>359</sup>

*United States v. Montoya de Hernandez*,<sup>360</sup> demonstrates the degree to which fourth amendment balancing fails to measure up to these standards. Justice Rehnquist authored the majority opinion upholding a sixteen hour detention of a suspected alimentary canal smuggler at the border without probable cause. The reasonableness of the detention under the fourth amendment was determined by “‘balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.’”<sup>361</sup>

*Identification of interests.* On the government’s side of the scale, Justice Rehnquist noted the “longstanding concern for the protection of the integrity of the border,” the “veritable national crisis in law enforcement caused by smuggling of illicit narcotics”<sup>362</sup> and the difficulty of detecting alimentary canal smugglers.<sup>363</sup> Balanced against these rights were “the Fourth Amendment rights of respondent.”<sup>364</sup> However, Justice Rehnquist engaged in no analysis of the respondent’s fourth amendment rights. He noted only that, while she was entitled to be free from unreasonable search and seizure, she approached the border with a reduced expectation of privacy.<sup>365</sup> Therefore, the balance “leans heavily” in favor of the government.<sup>366</sup> Apart from the

358. The fallacy of metaphysical questions results when a nonempirical problem is sought to be resolved by empirical means. *Id.* at 12-15.

359. These considerations were inspired by Professor Aleinikoff’s article. See Aleinikoff, *supra* note 341.

360. 473 U.S. 531 (1985).

361. *Id.* at 537 (quoting *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983)).

362. *Id.* at 538.

363. *Id.* at 538-39.

364. *Id.* at 539.

365. *Id.* Justice Rehnquist’s argument exposed the circular, question begging nature of balancing. Citing precedent, he argued: “[N]ot only is the expectation of privacy less at the border than the interior, but the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is struck much more favorably to the Government at the border.” *Id.* at 539-40 (citations omitted). Prior cases having already struck the balance in favor of the government in connection with border searches, no real balancing occurs in subsequent cases. Resolving the balance in one class of cases preordains the results in later cases because the government’s interest—effective and efficient law enforcement—never changes and the individual interest is considered only in a generic sense without due regard for the nature of the intrusion in the particular case.

366. *Id.* at 544.

fact that several relevant interests were ignored altogether,<sup>367</sup> the failure to properly identify and account for the interests on the individual's side of the equation skewed the analysis. The interests of the individual, as the test purportedly recognizes, vary with the nature of the intrusion. However, by characterizing the respondent's interests simply as her "Fourth Amendment rights," ignoring the extremely intrusive and humiliating nature of this particular detention, Justice Rehnquist did not fairly identify and weigh respondent's interests.

*Improper levels of abstraction.* Roscoe Pound, the father of balancing, cautioned that interests must be compared "on the same plane."<sup>368</sup> It is deceptive and erroneous to characterize, as Justice Rehnquist did in *Montoya de Hernandez*, the relevant interests to be balanced as those of the government as against those of the individual. The government's interests equate with the interests of the public and will seldom be outweighed by the interests of any one person. Properly framed, the balancing is between the interests of the government and *society's* interests in keeping secure the protections afforded by the fourth amendment, for any narrowing of an individual's fourth amendment rights narrows the rights of 240 million others. Comparing interests at different levels of abstraction aggravates the lack of commonality in the nature of the interests compared, which is the next consideration.

*Common denominator for comparative purposes.* Assuming the interests were properly identified in *Montoya de Hernandez* as the government's interest in effective law enforcement at the border on the one hand, and the respondent's fourth amendment rights on the other, what happens next? How are relative values to be assigned to interests that have no ground of commonality among them that permits meaningful weighing? Apples are compared with oranges. One set of interests wins, one set loses, but never according to any attempted articulation of rules, standards or even guidelines. Professor

367. No consideration was given to *society's* interest in protecting human dignity and the sanctity of fourth amendment rights, *see infra* note 368 and accompanying text; to the danger that the mere suspicion standard may result in the detention of innocent travelers for lengthy periods; to the impact such detentions might have upon tourism or relations with Latin American countries; or to the fear and anxiety friends or family members might suffer while waiting to hear from the traveler held *incommunicado* for a lengthy period.

368. Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943) (this article is a revision of his paper *A Theory of Social Interests*, first published in 1921). Pound observed that

[w]hen it comes to weighing or valuing claims or demands . . . , we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance in our very way of putting it.

Aleinikoff explained this fundamental deficiency in the balancing process as follows:

The most troubling consequence of the problem of deriving a common scale are those cases in which the Court simply does not disclose its source for the weights assigned to the interests. These balancing opinions are radically underwritten: interests are identified and a winner is proclaimed or a rule is announced which strikes an "appropriate" balance, but there is little discussion of the valuation standards. Some rough, intuitive scale calibrated in degrees of "importance" appears to be at work. But to a large extent, the balancing takes place inside a black box.<sup>369</sup>

So it was in *Montoya de Hernandez* that the balancing occurred in a "black box." Interests were identified and the government was declared the winner, but no effort was made to explain how the interests on the government's side compared with the interests on the respondent's side or why one set overshadowed the other.

*Proper weighing of constitutional interests.* As demonstrated by *Montoya de Hernandez*, constitutional interests obtain no special statute under Justice Rehnquist's fourth amendment balancing. This seems undesirable, inasmuch as it could be argued the drafters of the Bill of Rights already undertook the balancing when they wrote the fourth amendment. Yet in *Montoya de Hernandez*, respondent's fourth amendment rights assumed a lower position than the non-constitutional interest of combatting drug smuggling.

A formula for constitutional balancing probably never will be devised to wholly satisfy these four considerations, raising legitimate questions as to whether balancing should be abandoned as a method of constitutional adjudication. That will never happen. Even if the Court excised balancing discussions from its opinions, balancing would no doubt continue to be applied in practice. Given that, we are better off having it in writing, where it can be evaluated. Accepting that balancing is rooted firmly in place as a means of deciding criminal procedure cases, we can concentrate on identifying the fallacies inherent in efforts to convert abstraction into substance, and demand more extensive and developed reasoning in support of the process. The facile way in which balancing can be employed to reach any result entitles us to a better-faith explanation of how it works than is currently being provided.<sup>370</sup>

369. Aleinikoff, *supra* note 341, at 976.

370. Justice Rehnquist's applications of balancing have not escaped unscathed. In *Montoya de Hernandez*, for example, Justice Brennan lambasted Justice Rehnquist's analysis as "the most extraordinary example . . . of converting the Fourth Amendment into a general 'reasonableness' balancing process—a process 'in which the judicial thumb apparently will be planted firmly on the law enforce-

## 6. Secundum Quid

*Secundum quid*, one of Aristotle's original thirteen fallacies, consists in making sweeping generalizations that neglect necessary qualifications<sup>371</sup> or which are based upon too few or atypical cases.<sup>372</sup> Fallacies of generalization are common in ordinary discourse.<sup>373</sup> Not possessing complete information as to many issues, yet nevertheless holding firm opinions about them, we argue broad conclusions supported by only the barest empirical evidence, conclusions which are usually untrue absent qualification. For instance, a non-lawyer might argue that "the lawyer's only goal should be the pursuit of justice." While the achievement of justice is obviously an important goal that should be encouraged, lawyers would be quick to modify this general pronouncement by adding, "except when justice is not in the client's best interest." Similarly, non-lawyers may conclude from a newspaper article about Sam Shyster being indicted for embezzling client funds that "all lawyers are crooked"; or from the fact that a well-known lawyer lives in a mansion down the street, that "all lawyers are rich"; or from hearing that a criminal defendant was granted a new trial because police deprived him of some procedural protection, that "all lawyers try to do is get their clients off on technicalities." The defects in these conclusions are obvious. While it is true that some lawyers are crooked, that more are rich and that all seek to use the law to their client's advantage, each of the statements is an untrue generalization based upon insufficient evidence.<sup>374</sup>

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ment side of the scales.' " *Montoya de Hernandez*, 473 U.S. at 558 (quoting *United States v. Sharpe*, 470 U.S. 675, 720 (1985)). See also *New York v. Quarles*, 467 U.S. 649, 681 (1984) (Marshall, J., dissenting) (criticizing the majority for portraying the balancing test as being applied "with pseudoscientific precision"); *Gooding v. United States*, 416 U.S. 430, 465 (1974) (Marshall, J., dissenting) (opining that balancing should not be regarded "as a one-way street to be used only to water down the requirement of probable cause when necessary to authorize governmental intrusions").

371. *Secundum quid* translates to "in a certain respect" and refers to qualifications which may be attached to a generalization. C. L. HAMBLIN, *supra* note 5, at 28.

372. I. COPI, *supra* note 6, at 82 (atypical cases); W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 13-15 (too few cases). When the fallacy appears in this context, it is often referred to as the *fallacy of hasty generalization*.

373. Stuart Chase labeled improper generalizing as the commonest of all fallacies. S. CHASE, *supra* note 5, at 52.

374. Closely related to the fallacy of *secundum quid* is the fallacy of *accident*. It is sometimes said that while the fallacy of *secundum quid* consists in arguing from insufficient particulars to a general rule, the fallacy of *accident* occurs when one argues for application of a general rule to a particular situation the special (or "accidental") circumstances of which do not warrant application of the rule. *But see C. L. HAMBLIN, supra* note 5, at 28 (questioning the soundness of this distinction). Though the fallacies have traditionally been treated as converses, modern writers tend to equate them. E.g., J. BRENNAN, *supra* note 89, at 214 n.3; C. L. HAMBLIN, *supra* note 5, at 28; H. W. B. JOSEPH, *supra* note 89, at 588.

As perceived by Aristotle, the fallacy of *accident* was little more than a word-play which arose from a failure to distinguish the essential properties of an object or entity from its "accidental" ones. A

Generalizations are an inherent part of Supreme Court decision making. Though the Court sometimes limits rules to the particular facts before it, more frequently rules are fashioned in a general way that allows them to be applied flexibly to future cases. Drawing general conclusions from particulars is, after all, the stuff of inductive reasoning.<sup>375</sup> The fact that a case may arise in which the generalization will not apply does not make it fallacious.

When, however, sweeping statements of general principle are applied to resolve particular cases without regard to necessary qualifications of the principle, the fallacy of *secundum quid* results.<sup>376</sup> In

subject term may have numerous accidental predicates indicating attributes which are not essential to it. The fallacy occurs when an accidental attribute is taken as an essential one. H. W. B. JOSEPH, *supra* note 89, at 587-88; R. WHATELY, *supra* note 13, at 177. Consider this ancient example:

What you bought yesterday, you eat today;  
you bought raw meat yesterday;  
therefore, you eat raw meat today.

I. COPI, *supra* note 6, at '81. The fallacy in this conclusion arises from misconstruction of the first premise, which is intended to refer only to the essential attribute of the *substance* of what was bought, not the accidental attribute of its *condition*.

Aristotle's treatment of accident is largely a matter of historical interest. The only practical difference between *secundum quid* and accident, as they are presently formulated, is that the former involves the formulating of overbroad rules, while accident involves applying them to particular cases. Both fallacies result from failure to recognize necessary qualifications to general rules.

375. Most generalizations are *deductively* unjustified, since it is seldom possible to survey every particular case in order to draw a general conclusion that necessarily follows the premises. See C. L. HAMBLIN, *supra* note 5, at 29.

376. Overqualification can also constitute a fallacy. Fischer describes the *fallacy of the double-reversing generalization* as "a species of interpretative bet-hedging" where a generalization is overqualified to the point that no point is made. D. FISCHER, *supra* note 5, at 125. In *Texas v. Brown*, 460 U.S. 730 (1983), the Court was required to construe the element of the plain view doctrine that to justify seizure of an item discovered in plain view, it must be "immediately apparent" that the item constitutes evidence of a crime or contraband. See *supra* notes 234-35 and accompanying text for more extensive discussion of *Brown*. Justice Rehnquist's plurality opinion held that probable cause that the item was subject to seizure was the standard for satisfying the immediately apparent requirement, but then hedged this holding in an accompanying footnote stating: "We need not address whether, in some circumstances, a degree of suspicion lower than probable cause would be sufficient basis for a seizure in certain cases." *Id.* at 742 n.7. This qualification left the door open for Justice Rehnquist to retreat from the holding in future cases, which he did in *Arizona v. Hicks*, 107 S. Ct. 1149 (1987). In *Hicks*, six members of the Court joined Justice Scalia's opinion reaffirming the probable cause standard in a case where police officers legitimately present in *Hicks'* apartment moved stereo equipment, which they suspected of having been stolen, in order to record the serial numbers. They did not have probable cause to believe that the stereo equipment was stolen. Justice Rehnquist joined Justice O'Connor's dissent which argued that, in the context of a limited intrusion of this type, probable cause should not be the standard for satisfying the "immediately apparent" requirement of *Coolidge*. Rather, a reasonable suspicion should suffice. The dissent did agree that probable cause would be required for a "full-blown search" of an object found in plain view, *id.* at 1158, but determined that the officers' actions in moving and examining the equipment to locate and record the serial numbers constituted a "mere inspection" not rising to the level of a search. It is difficult to imagine, however, what else could be done to "search" an item of stereo equipment. Other than taking it apart, which would rarely serve any useful police purpose, handling it and closely examining it would seem to be about as "full-blown" a

*Colorado v. Connelly*,<sup>377</sup> the Court considered the effect of insanity upon the admissibility of a confession. The respondent had approached a Denver police officer on the street and confessed to the murder of a young girl that had occurred a year earlier. It was subsequently determined that he was a schizophrenic who had confessed because the “voice of God” had instructed him to do so. The Colorado courts suppressed the statements, finding them to be the involuntary result of mental illness. The Supreme Court, per Justice Rehnquist, held that only police coercion, which was absent here, renders a statement involuntary and reversed the Colorado Supreme Court. In doing so, he echoed a familiar theme of the current conservative Court: “[T]he central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence.”<sup>378</sup> The breadth of this unqualified proclamation is so vast as to render it almost a platitude. Certainly, it is true that a central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence. But it is also a central purpose of a criminal trial, at least in the American system of criminal justice, that guilt or innocence be determined fairly, impartially and adversarially with full cognizance of the protections accorded to criminal suspects under the Constitution.<sup>379</sup> Justice Rehnquist would no doubt agree with this qualification, yet in failing to take note of it, he gives priority to the notion that the end justifies the means in seeing that the guilty are convicted and punished.

The fallacy of *secundum quid* also occurs when a general rule is fashioned from insufficient or atypical particulars. This occurred in *Illinois v. Gates*,<sup>380</sup> where the Court discarded the two-pronged *Aguilar/Spinelli* standard for determining probable cause based upon informant tips in favor of a broad totality of circumstances approach. Faced with a narrow category of cases involving *anonymous* tips, Justice Rehnquist jettisoned the relatively well-defined *Aguilar/Spinelli* test as to all cases involving informant tips. Ironically, in the same opinion, Justice Rehnquist pledged fidelity to the principle of “dis-

search of such an object as could be achieved. In any event, *Brown* demonstrates how qualifications attached to a holding can deprive the holding of what otherwise appear to be fixed dimensions.

377. 107 S. Ct. 515 (1986).

378. *Id.* at 522 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).

379. This point has been made in other cases. In *Oregon v. Kennedy*, 456 U.S. 667, 682 n.7 (1982), Justice Stevens disagreed with the holding of Justice Rehnquist’s majority opinion that retrials occasioned by prosecutorial misconduct do not violate the double jeopardy clause unless the prosecutor intended to provoke a mistrial in the first trial, stating: “Society’s interest, of course, is not simply to convict the guilty. Rather, its interest is ‘in fair trials designed to end in just judgments.’” *Id.* at 682 n.7 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

380. 462 U.S. 213 (1983). See *supra* note 308 for a discussion of the facts.

courag[ing] the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances."<sup>381</sup> The unique problems of applying the *Aguilar/Spinelli* rule to cases involving anonymous informants, which one would suspect arise only infrequently,<sup>382</sup> did not justify the adoption of a broad, general rule applicable to all cases involving informant tips in place of a more precise rule that had been in service for almost twenty years.

#### *E. Fallacies of Irrelevance and Diversion*

To some extent, almost all fallacies can be characterized as fallacies of irrelevance or diversion. False premises divert attention from the absence of support for a conclusion; faulty analogies rely upon irrelevant precedent and faulty disanalogies upon insignificant distinctions; fallacies of missing proof shift attention away from what has been and should be proved by emphasizing what has not been proved; and false dilemmas focus concentration upon an unduly restrictive set of alternatives, leaving other options unexamined. The list could go on. Nevertheless, while some degree of irrelevance and diversion are present in most fallacies, they are the dominant qualities of the fallacies reserved for this section. The essence of these fallacies is that they inject clearly irrelevant matter into the argument, either to intentionally prejudice the audience or to draw it off the path of reason.

##### 1. Hyperbole

"More matter, with less art," Queen Gertrude told Polonius in response to an effusion regarding Hamlet's madness that carried plenty of ornamentation, but no substance. Ornamentation is the subject of this section. Lawyers, politicians and other advocates are keenly aware of the great power of words to persuade. They have learned through experience that lack of merit in a position is not always an insurmountable obstacle to one skilled in rhetoric. Rhetorical flourish and emotive pleas are an expected and accepted, though sometimes unseemly, aspect of their professions.

But we expect Supreme Court Justices to dispassionately analyze issues and discuss them in more or less neutral terms. This is not to say they should couch their decisions in dull, colorless and sterile tones. The gift of good writing is a large part of what makes some

381. *Id.* at 224. Justice Rehnquist was referring to the Court's reluctance to exercise discretionary jurisdiction as to issues not considered in the lower courts, specifically, the decision in *Gates* not to consider a good faith exception to the exclusionary rule. The Court had directed the parties to brief the issue, but ultimately declined to resolve it because it had not been considered by the Illinois courts.

382. The opinion contained no discussion suggesting this is a recurring problem.

Justices great, and such gifts should by all means be exercised. Imagery, euphony, adornment, metaphor—these are the tools of all writers. There is no reason they should be limited to literature or journalism. Justices often should speak plainly and bluntly, even where the result is harsh or may appear strident. Sometimes it is necessary to "call a spade a spade" and false euphemism only detracts from clear thinking.<sup>383</sup> Fallacies occur, however, when rhetorical devices are used to make a weak argument appear stronger than it really is.

Hyperbole, an exaggeration or overstatement for rhetorical effect,<sup>384</sup> is not unusual in Supreme Court opinions. Recognized for what it is, it presents no great danger of deception. However, it is frequently designed to create a misleading appearance that an argument has more support than actually exists.

Hyperbole can assume many forms. Perhaps the most common are descriptive terms that portray a matter as closed to dispute with an oversimplicity and assurance not warranted by the facts and law.<sup>385</sup> This is accomplished by the use of such familiar catch-words and phrases as "clearly," "plainly," "beyond peradventure," "axiomatic,"

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383. See W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 80.

384. D. FISCHER, *supra* note 5, at 269.

385. Another common form of hyperbole is found in arguments which overstate the consequences that might flow from an act. To the extent particular consequences are truly likely to follow, discussion of them is not completely fallacious, for the consequences of the Court's decisions need to be considered. Frequently, however, such arguments consist of an *unnecessary parade of horribles*—predictions of dire consequences that are at best speculative and at worse illusory. See P. SCHLAG & D. SKOVER, *supra* note 298, at 31-32. These predictions seldom bear their predicted progeny. Parade of horribles arguments nevertheless retain vitality. In *Evitts v. Lucey*, 469 U.S. 387 (1985), Justice Rehnquist responded to the Court's recognition of a right to effective assistance of counsel on appeal by conjuring up images of a breakdown in the judicial system. The holding was predicted to result in a flood of frivolous habeas petitions which would "tie up the courts," "undermine[ ] the ability of both the state and the federal courts to enforce procedural rules on appeal . . . , and "indiscriminately free litigants from the consequences of their attorneys' neglect or malpractice." *Id.* at 411.

Related to parade of horribles arguments are *slippery slope* arguments. These consist in arguing against a proposal, which may be innocuous by itself, on the ground that its application might be extended to other situations with increasingly absurd results. See generally Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985). Schauer maintains that slippery slope arguments are not necessarily invalid, provided the proponent furnishes some empirical support for the claim that absurd extensions of the rule are likely to follow. *Id.* at 382. A fallacious slippery slope argument occurred in *Carter v. Kentucky*, 450 U.S. 288 (1981), where eight members of the Court agreed that a trial judge is required, upon request by the defendant, to instruct the jury that it may not consider or draw any inference from the failure of a defendant to testify. Justice Rehnquist dissented, posing a slippery slope argument that "[s]uch Thomistic reasoning is now carried from the constitutional provision itself, to the *Griffin* case, to the present case, and where it will stop no one can know." *Id.* at 310. Justice Rehnquist's concern that the Court was trespassing beyond the bounds of the Constitution may have had merit, but his conclusion that the Court's extension of *Griffin* "allows a criminal defendant in a state proceeding virtually to take from the trial judge any control over the instructions to be given to the jury," *id.*, was itself an unwarranted extension—of hyperbole, beyond reason.

"obviously," "absolutely" and "completely," to name only a few. That they are common does not make them less objectionable. The twofold purpose of these expressions is to assure the audience that it is not necessary to think about the problem, and to forestall disagreement from those who do think about it.<sup>386</sup>

A particularly striking illustration of hyperbole occurred in *Gelbard v. United States*,<sup>387</sup> where the Court held that grand jury witnesses were entitled to invoke a statutory prohibition barring the introduction before a grand jury of evidence obtained from illegal electronic surveillance as a ground for refusing to testify. The witnesses had been held in civil contempt for refusing to testify. Their refusal was based upon 18 U.S.C. § 2515 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which provides that no illegally intercepted communication may be received in evidence in, *inter alia*, any grand jury proceeding. Though the actual communications alleged to have been illegally intercepted were not introduced, the questions that were to be asked of the witnesses were derived from the communications. The Court's decision turned upon the complex interrelationship of several statutes, focusing upon 18 U.S.C. § 2515, the prohibitory statute, and 18 U.S.C. § 2518(10), which authorizes motions to suppress in certain specified proceedings, but omits grand jury proceedings.<sup>388</sup> The majority held that the omission of grand jury proceedings from 18 U.S.C. § 2518(10) was not intended to preclude grand jury witnesses from raising the issue that communications were illegally seized as a defense to contempt proceedings for refusing to testify.<sup>389</sup>

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386. W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 101 (the authors refer to the use of these terms and phrases as the fallacy of "Forestalling Disagreement"). Fischer, in an historical context equally applicable to lawyers and judges, summed this fallacy up wonderfully, when he said:

Historians have been known to write "always" for "sometimes," and "sometimes" for "occasionally," and "occasionally" for "rarely," and "rarely," for "once." . . . "[C]ertainly" sometimes means "probably," and "probably" means "possibly," and "possibly" means "conceivably." Similarly the phrase "It needs no comment" should sometimes be translated as "I do not know what comment it needs." When a historian writes, "It is unknown," he might mean "It is unknown to me," or "I don't know," or even "I won't tell." The expression "in fact" sometimes means merely "in my opinion." And the phrases "doubtless" or "undoubtedly," or "beyond a shadow of a doubt" sometimes really should be read, "An element of doubt exists which I, the author, shall disregard."

D. FISCHER, *supra* note 5, at 270-71.

387. 408 U.S. 41 (1972). Justice Rehnquist is by no means the lone transgressor in this area. Hyperbolic language is commonly employed by other Justices.

388. Also involved were 28 U.S.C. § 1826(a) (1982), authorizing summary contempt proceedings against witnesses who refuse to comply with an order of a court to testify before a grand jury absent a showing of "just cause," and 18 U.S.C. § 3504(a) (1982 & Supp. III 1985), which provides that upon a claim by a party in a grand jury proceeding that illegally seized evidence is inadmissible, "the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act."

389. *Gelbard*, 408 U.S. at 61.

Justice Rehnquist dissented. The gist of his disagreement with the majority was that by omitting grand jury proceedings from 18 U.S.C. § 2518(10), Congress intended that no suppression remedy be available at the grand jury stage, despite the proscription in 18 U.S.C. § 2515 against the use of illegally seized oral or wire communications. Therefore, the witnesses did not have just cause for disobeying the district court's order to testify. Though beginning his analysis with a concession that the majority's conclusion was supportable based upon the actual language of the statutes involved, and that disposition of the issue depended upon "the sorting out of admittedly conflicting implications from different sections of the principal statute involved,"<sup>390</sup> his discussion grew increasingly hyperbolic as he sought to establish that his interpretation of the statutes was the correct one. Thus, Justice Rehnquist wrote that it was: "clear beyond cavil"<sup>391</sup> that prior to the enactment of Title III, a hearing like the one granted to the witnesses in *Gelbard* was unauthorized and "completely contrary"<sup>392</sup> to the principles long governing the functioning of the grand jury;<sup>393</sup> section 2518(10) "rather clearly" denied a hearing in these circumstances;<sup>394</sup> the language of section 2518(10) "quite clearly" referred not simply to the forum where the suppression hearing is to be held, but to the forum where the testimony is sought to be adduced;<sup>395</sup> the Senate Report accompanying section 2518(10) "indicate[d] as plainly as possible" the omission of grand jury proceedings was deliberate;<sup>396</sup> the Court's conclusion was "plainly wrong";<sup>397</sup> section 3504(a)(1), "even if read totally out of its context and background" afforded the witness no help;<sup>398</sup> the "entire thrust" of the congressional findings made it "as plain as humanly possible" that section 3504 was intended to limit, rather than expand the rights of criminal defendants;<sup>399</sup> the language used in section 3504 illustrated the "palpable error" of the Court in construing it;<sup>400</sup> and the Court "figuratively stood on its head" the language and history of the statute.<sup>401</sup>

The point here is not which side had the better argument. The

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390. *Id.* at 71.

391. *Id.* at 77.

392. *Id.* at 78.

393. *Id.*

394. *Id.* at 79.

395. *Id.* at 80.

396. *Id.* at 81-82.

397. *Id.* at 85.

398. *Id.* at 90.

399. *Id.*

400. *Id.* at 91.

401. *Id.*

arguments on both sides were tenable. Even conceding that Justice Rehnquist's position was better reasoned, it was nevertheless fallacious for representing issues that were ambiguous and confusing as plain and clear, which they were not.<sup>402</sup>

The converse of inflating a position by the use of descriptive terms is using such terms to belittle or deprecate opposing interests or views in an effort to minimize their significance. This is frequently accomplished with words such as "merely," "simply," or "only." For example, in *Immigration and Naturalization Service v. Delgado*,<sup>403</sup> Justice Rehnquist described the conduct of the INS agents during the factory sweeps for illegal aliens as "simply" questioning employees, as if that were an insignificant intrusion.<sup>404</sup> In *Texas v. Brown*,<sup>405</sup> he commented that once an officer has observed an object in plain view, "the owner's remaining interests in the object are *merely* those of possession and ownership,"<sup>406</sup> suggesting they were unworthy of serious consideration. And in *Michigan v. Tucker*,<sup>407</sup> Justice Rehnquist set the tone for the ensuing discussion as to whether the testimony of a witness discovered as a result of an illegal interrogation should be barred by the exclusionary rule when he noted that the police conduct did not abridge respondent's constitutional privilege against self-incrimination but violated "only" the prophylactic standards of *Miranda*.<sup>408</sup> The decision resulted in a depreciation of *Miranda*'s safeguards to a sub-constitutional stature, from which *Miranda* has never recovered.<sup>409</sup>

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402. For other examples of Rehnquist opinions where hyperbole resulted in overstatements of questionable soundness, see *Michigan v. Jackson*, 475 U.S. 625, 639 (1986) (asserting in dissent that prophylactic rules to protect a defendant's sixth amendment right to counsel are "clearly" not needed); *Evitts v. Lucey*, 469 U.S. 387, 408 (1985) (asserting in dissent that the words "prosecutions" and "defense" in the sixth amendment "plainly indicate" that the right to counsel applies only at the trial level); *Texas v. Brown*, 460 U.S. 730, 742-44 (1983) (asserting that discovery of a tied-off balloon in defendant's possession "plain[ly]" gave rise to probable cause to search and "spoke volumes as to its contents"). Again, the defect here is not whether his conclusions were right or wrong, but that the issues were presented as not open to dispute when, in fact, none of them was clear-cut.

403. 466 U.S. 210 (1984). See *supra* text accompanying notes 153-54 for a discussion of the facts.

404. *Id.* at 218.

405. 460 U.S. 730 (1983). See *supra* text accompanying note 233 for a discussion of the facts.

406. *Id.* at 739 (emphasis added).

407. 417 U.S. 433 (1974).

408. *Id.* at 446.

409. See, e.g., *Oregon v. Elstad*, 470 U.S. 298 (1985); *New York v. Quarles*, 467 U.S. 649 (1984). Euphemism is a related form of understatement, that can also be used to color the tone of a discussion. In *Colorado v. Connelly* (see *supra* text accompanying note 377 for facts), one consideration relating to the voluntariness of Connelly's statements was whether the police knew Connelly was suffering from mental problems when he confessed. Justice Rehnquist euphemistically described the officer whom Connelly approached on the street as "understandably bewildered" by Connelly's conduct, *id.* at 518, when, in fact, the officer testified that his first thought was that Connelly was a "crackpot." *Id.* at 529 n.3 (Brennan, J., dissenting).

## 2. Ad hominem

*Ad hominem* is one of the most familiar and common of all fallacies, perhaps because it is so effective, perhaps because it is so easy to use, or perhaps simply because we are all naturally mean-spirited. *Ad hominem* consists in attacking the arguer rather than the argument. Attacking the arguer is fallacious because it diverts attention from the argument to an irrelevant matter.<sup>410</sup>

To a surprising degree, Supreme Court Justices engage in *ad hominem* attacks upon each other. This is somewhat of a remarkable phenomenon—that the highest judicial officials in our land, members of the most powerful tribunal in the world, routinely level not-so-subtle personal charges of deception, dishonesty and even ignorance against each other.<sup>411</sup> Justice Rehnquist directed a particularly shrill barrage of abuse against Justice White's plurality opinion in *Florida v. Royer*.<sup>412</sup> He assailed the Court for engaging in "meandering" reasoning that offered "a little something for everyone" and which "betrayed a mind-set more useful to those who officiate at shuffleboard games";<sup>413</sup> suggested that, contrary to the plurality's conclusion, the conduct of the customs agents who detained and searched Royer would be deemed reasonable by "virtually all thoughtful, civilized per-

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410. For discussion of *ad hominem* and related fallacies, see J. BENTHAM, *supra* note 5, at 83-92 ("Vituperative Personalities"); S. CHASE, *supra* note 5, Ch. VII; I. COPI, *supra* note 6, at 74-76; T. DAMAR, *supra* note 5, at 79-80; W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 97-99 ("Damning the Origin"), 99-101 ("Personal Attacks: '*ad hominem*' "), and 102-104 ("Creating Misgivings"); C. L. HAMBLIN, *supra* note 5, at 41-42. There are two types of *ad hominem* arguments: *ad hominem* abusive and *ad hominem* circumstantial. *Ad hominem* abusive is simply a personal attack upon the person who makes an assertion, rather than upon the assertion itself. This fallacy is common in law. Impeachment of witnesses, though legitimate to the extent the impeachment focuses upon witness credibility, frequently degenerates into blatant attempts to embarrass the witness for any reason the court will indulge. Copi recites the classic story about the British solicitor and the barrister. The barrister had neglected to prepare for trial, counting upon the solicitor to investigate the matter and prepare the case. When the barrister arrived on the morning of trial, the solicitor handed him the brief. Surprised by its thinness, the barrister looked inside only to find written: "No case; abuse the plaintiff's attorney!" I. COPI, *supra* note 6, at 75.

*Ad hominem* circumstantial consists in attempts to persuade an opponent to accept a position because of his own special circumstances. Again, Copi offers a classic example. A hunter, faced with an accusation of barbarism for killing defenseless animals replies, "Why do you feed on the flesh of harmless cattle?" The fallacy is that the hunter diverts attention from the issue, whether it is right to sacrifice animal life for sport, by attacking the special circumstances of his accuser. *Id.* at 76.

411. The fallacy is by no means limited to Justice Rehnquist. Justice Brennan, for example, is generally more strident and profuse in his attacks against Justice Rehnquist than vice versa. In *Wainwright v. Witt*, 469 U.S. 412 (1985), Justice Brennan accused the Rehnquist majority of not being "forthright," *id.* at 441, being "brazenly revisionist" in its interpretation of precedent, *id.* at 450, dodging its obligation to provide support for its decision, *id.* at 453, using "trick[s]," *id.* at 457, and of being "unseemly" in its eagerness to recognize state interests in efficient law enforcement, *id.* at 462-63. See also *supra* note 161.

412. 460 U.S. 491 (1983).

413. *Id.* at 520.

sons not overly steeped in the mysteries of this Court's Fourth Amendment jurisprudence";<sup>414</sup> condemned the "opaque nuances" of the opinion;<sup>415</sup> stated that, on one point, the plurality "stutters, fudges, and hedges";<sup>416</sup> and concluded that "if the plurality's opinion were to be judged by standards appropriate to Impressionist paintings, it would perhaps receive a high grade, but the same cannot be said if it is to be judged by the standards of a judicial opinion."<sup>417</sup>

### 3. Emotional Appeals

As lawyers know, language can be used to evoke many powerful emotions, yet appeals to emotions in argument are fallacious. Suppose a case in which the defendant is on trial for manslaughter for running into a child with his automobile while allegedly intoxicated. The defense at trial was that the child simply ran out in front of the defendant's car. The evidence is in and it is time for closing arguments. The defense attorney argues to the jury that his client is an upstanding citizen who goes to church regularly, is kind to his mother and has a wife and five children who rely upon him as their sole source of support. The prosecutor argues that an innocent child is dead, that drunk drivers are running rampant in streets and that the jury needs to take a stand and stop the carnage. Both arguments are likely to be effective, yet both are fallacious, for they divert attention from the only issue before the jury—the factual guilt or innocence of the defendant. Neither sympathy for the defendant and his family nor fear and hatred toward the defendant should have any bearing on the jury's decision. Controversies should be resolved by reason, not anger, fear, prejudice, hatred or sympathy.<sup>418</sup>

Emotional appeals by Supreme Court Justices are not common, but they do occur. In both *Ake v. Oklahoma*<sup>419</sup> and *Wainwright v.*

414. *Id.*

415. *Id.* at 522 n.2.

416. *Id.* at 529.

417. *Id.* at 529-30. See also *Evitts v. Lucey*, 469 U.S. 387, 406 (1985) (accusing his fellow brethren of creating a due process right to effective assistance of counsel on appeal "out of whole cloth"); *Steagald v. United States*, 451 U.S. 204, 226 (1981) (berating the Court for its "ivory tower misconception" of reality); *Carter v. Kentucky*, 450 U.S. 288, 308-09 (1981) (Sarcastically suggesting the Court was unfaithful to the Constitution, Justice Rehnquist stated: "If we begin with the relevant provisions of the Constitution, which is where an unsophisticated lawyer or layman would probably think we should begin, we find . . . ."); *Delaware v. Prouse*, 440 U.S. 648, 666 (1979) (Sniping at the Court for rejecting the state's argument that random automobile stops were justified by the state interest in enforcing motor vehicle safety, Justice Rehnquist said: "The Court would apparently prefer that the State check licenses and vehicle registrations as the wreckage is being towed away.").

418. Fallacious appeals to emotions are usually known by their latin names: *ad misericordiam* (sympathy), *ad odium* (hate), *ad metum* (fear), *ad superbiam* (snobbery, pride), and *ad invidiam* (envy).

419. 470 U.S. 68 (1985).

*Witt*,<sup>420</sup> for example, Justice Rehnquist unnecessarily recited the gruesome facts surrounding the crimes for which the respective defendants were convicted.<sup>421</sup> Description of the horrible crimes succeeds in its presumed purpose of moving the reader to feel repulsion and hatred toward the defendants. However, like all appeals to emotion, these facts bore no relevance to reasoned discussion of the legal issues involved.<sup>422</sup> Of course, an argument could be made that the Court's business is to go beyond dispassionate analysis of legal issues where necessary to achieve ultimate justice and that, in such case, emotions are an appropriate guide to action.<sup>423</sup> But this would be contrary to Justice Rehnquist's asserted judicial philosophy that the Supreme Court is a court of law, not necessarily of justice.<sup>424</sup>

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420. 469 U.S. 412 (1985).

421. In *Ake*, Justice Rehnquist stated the facts as follows:

Petitioner Ake, and his codefendant . . . drove to the rural home of Reverend and Mrs. Richard Douglass, and gained entrance to the home by a ruse. Holding Reverend and Mrs. Douglass and their children, Brooks and Leslie, at gunpoint, they ransacked the home; they then bound and gagged the mother, father, and son, and forced them to lie on the living room floor. Ake and Hatch then took turns attempting to rape 12 year old Leslie Douglass in a nearby bedroom. . . . Ake then shot Reverend Douglass and Leslie each twice, and Mrs. Douglass and Brooks once, with a .357 magnum pistol, and fled. Mrs. Douglass died almost immediately as a result of the gunshot wound; Reverend Douglass' death was caused by a combination of the gunshots he received, and strangulation from the manner in which he was bound.

470 U.S. at 88 (Rehnquist, J., dissenting).

In *Witt*, the facts were even more chilling:

Respondent Johnny Paul Witt was convicted of first-degree murder in Florida and sentenced to death. The murder was committed while respondent and a friend were bow-and-arrow hunting. The evidence at trial showed that the two had spoken together on other occasions about killing a human, and had even stalked persons as they would stalk animal prey. . . . [R]espondent . . . and his younger accomplice were hunting in a wooded area near a trail often used by children. When the victim, an 11-year-old boy, rode by on his bicycle, respondent's accomplice hit the child on the head with a star bit from a drill. Respondent and his accomplice then gagged the stunned victim, placed him in the trunk of respondent's car, and drove to a deserted grove. Upon opening the trunk, the conspirators discovered that the victim had died by suffocating from the gag. The two committed various sexual and violent acts on the body, then dug a grave and buried it.

469 U.S. at 414.

422. The factual narration in *Witt* prompted Justice Brennan to write:

The Court has depicted the lurid details of respondent Witt's crime with the careful skill of a pointillist. . . . However heinous Witt's crime, the majority's vivid portrait of its gruesome details has no bearing on the issue before us. It is not for this Court to decide whether Witt deserves to die.

469 U.S. at 440 n.1.

423. Hamblin suggests that where propositions are presented primarily as a guide to action, it is not so clear that emotions are irrelevant. C. L. HAMBLIN, *supra* note 5, at 43.

424. At his confirmation hearings, in response to a question posed by then-Senator Gary Hart as to whether the obligation of a judge is to deliver justice, Justice Rehnquist invoked the aphorism attributed to Justice Holmes about how he was always suspicious of advocates who came before the Court proclaiming it to be a court of justice because he felt it was a court of law. Justice Rehnquist rejected the notion that the function of a judge is to deliver justice apart from what is provided by the Constitution or laws. *Confirmation Hearings*, *supra* note 95, at 24.

#### 4. Ignoratio Elenchi

As first described by Aristotle, the fallacy of *ignoratio elenchi*, sometimes known as "irrelevant conclusion"<sup>425</sup> or "irrelevant thesis,"<sup>426</sup> was broad enough to encompass many types of fallacies, for Aristotle described the fallacy in terms of a complete system of rules for valid refutation.<sup>427</sup> Modern writers distilled Aristotle's definition by extracting and refining the element that, for refutation to be valid, it must "contradict one and the same attribute";<sup>428</sup> that is, the argument must meet the issue in dispute. The fallacy occurs when an argument purporting to establish one conclusion is misdirected, either intentionally or accidentally, toward proving a different conclusion that is not in question.<sup>429</sup> The fallacy amounts to "missing the point" and can be employed either to sustain an assertion or to refute the argument of an opponent.<sup>430</sup>

Suppose one were faced with the argument that imposition of the death penalty upon a convicted murderer was unconstitutional because putting a human being to death is cruel and unusual punish-

425. *E.g.*, I. COPI, *supra* note 6, at 85; R. WHATELY, *supra* note 13, at 187.

426. M. PIRIE, *supra* note 5, at 99.

427. *Ignoratio elenchi* translates to "ignoring the issue." C. L. HAMBLIN, *supra* note 5, at 31. Aristotle described *ignoratio elenchi* in the following passage:

Other fallacies occur because the terms 'proof' or 'refutation' have not been defined, and because something is left out in their definition. For to refute is to contradict one and the same attribute—not merely the name, but the reality—and a name that is not merely synonymous but the same name—and to confute it from the propositions granted, necessarily, without including in the reckoning the original point to be proved, in the same respect and relation and manner and time in which it was asserted. . . . Some people, however, omit some one of the said conditions and give a merely apparent refutation. . . .

*Sophistical Refutations*, *supra* note 6, at 167a 21. Aristotle attempted in this passage to set forth a complete set of conditions for valid refutation. C. L. HAMBLIN, *supra* note 5, at 87-88. He recognized that his definition of *ignoratio elenchi* was broad enough to encompass each of his other fallacies and, immediately after this passage, set about to demonstrate this by going through each of the other fallacies and describing how they could be regarded as failures to conform to this model. *Id.*

428. See *supra* note 427.

429. For discussion of *ignoratio elenchi*, see: A. ARNAULD, *supra* note 73, at 246-47; J. BRENNAN, *supra* note 89, at 215-216; I. COPI, *supra* note 6, at 85-87; C. L. HAMBLIN, *supra* note 5, at 31-32, 87-88; A. SIDGWICK, *FALLACIES: A VIEW OF LOGIC FROM THE PRACTICAL SIDE* 182-93 (1884); R. WHATELY, *supra* note 13, at 187-97.

Two closely related fallacies are the *red herring* and *non sequitur*. Red herring got its name from a trick used in fox hunting. When the dogs are following the wrong scent, a herring, cooked to a brownish-red color, is dragged across the trail in order to shift the scent and, hence, the trail being followed. In fallacy, the trail is the argument and the red herring is used to draw attention away from the real issue to one that is irrelevant. E. CORBETT, *supra* note 54, at 92; T. DAMAR, *supra* note 5, at 102-04; W. FEARNSIDE & W. HOLOTHER, *supra* note 5, at 124-25. A *non sequitur* is any proposition represented to be a consequence of another proposition when, in reality, it is not. In one sense, all invalid arguments involve a *non sequitur* to the extent they offer conclusions which do not follow from the premises. However, the term is usually reserved for widely irrelevant conclusions. *Id.* at 152.

430. As Whately put it, "to prove what was not denied, or to disprove what was not asserted." R. WHATELY, *supra* note 13, at 189.

ment. A possible response would be, "Well, the defendant obviously didn't think it was cruel and unusual punishment to put the innocent victim to death." Such an argument, though perhaps persuasive, commits the fallacy of *ignoratio elenchi* because it does not fairly meet the issue of whether capital punishment should or should not be considered cruel and unusual punishment under the Constitution. At most, the attempted refutation would establish only that it was wrong for the defendant to commit murder.

Arguments committing the fallacy of *ignoratio elenchi* are not uncommon in Justice Rehnquist's opinions. In *United States v. Ceccolini*,<sup>431</sup> Justice Rehnquist sought to distinguish live witnesses from tangible physical evidence to support his conclusion that the fruit of the poisonous tree doctrine should not apply to the former. He opined that applying the exclusionary rule to the testimony of a live witness was different in kind from applying it to exclude tangible physical evidence, for application to a live witness would perpetually disable the witness from testifying.<sup>432</sup> He relied upon Professor McCormick's evidence treatise in arguing that rules which disqualify witnesses from testifying are "'serious obstructions to the ascertainment of truth,'" and, accordingly, "'[f]or a century the course of legal evolution has been in the direction of sweeping away these obstructions.'"<sup>433</sup>

Professor McCormick's discussion was concerned with outdated rules pertaining to the competency and disqualification of witnesses and had nothing to do with the interests implicated by illegal searches or the fourth amendment exclusionary remedy. As such, the comments offered no support for the conclusion that the exclusionary rule should not apply to exclude testimony of a witness discovered through illegal means. Surely, Professor McCormick would have agreed that the exclusion of *any* reliable, relevant evidence constitutes a "serious obstruction to the ascertainment of truth." Excluding the proverbial smoking gun, for example, would in most cases be a more devastating obstruction to truth than the exclusion of a witness' testimony. Rather than prove his distinction between live testimony and physical evidence, Justice Rehnquist's argument supported only the conclusion that *no* reliable evidence should be excluded from a criminal trial. While this conclusion may support abolition of the exclusionary rule in toto, it furnished only an illusory basis for distinguishing between

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431. 435 U.S. 268 (1978). See *supra* notes 167-70 and accompanying text for more extensive discussion of *Ceccolini*.

432. *Id.* at 277-78. Justice Marshall, in dissent, questioned the basis for this distinction, noting that excluding tangible physical evidence also results in permanently "disabling" that evidence. *Id.* at 288.

433. *Id.* at 277 (quoting C. MCCORMICK, *LAW OF EVIDENCE* § 71, at 150 (2d ed. 1954)).

live witnesses and tangible evidence for purposes of applying the fruit of the poisonous tree doctrine.

To support his argument in *Illinois v. Gates*<sup>434</sup> that a totality of circumstances approach should replace the *Aguilar/Spinelli* test for determining the sufficiency of probable cause for issuance of a search warrant based upon an informant tip, Justice Rehnquist argued that many warrants are issued "by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of 'probable cause.'"<sup>435</sup> The solution, as he saw it, was to replace the *Aguilar/Spinelli* prongs, which he viewed as complex interferences with the "nontechnical, common-sense judgments of laymen," with the totality of circumstances approach.<sup>436</sup> The argument, however, bore no legitimate relationship to this conclusion. That many persons responsible for issuing search warrants are laymen who do not understand probable cause supported one of two conclusions—either that laymen should not be issuing search warrants or that the *Aguilar/Spinelli* test should have been clarified to make it easier to apply—but it did not support withdrawing any and all guidance to such persons as to what constitutes probable cause in the context of informant tips.<sup>437</sup>

Justice O'Connor recognized an *ignoratio elenchi* argument in *New York v. Quarles*<sup>438</sup> when she observed that Justice Rehnquist's argument in support of a public safety exception to *Miranda* "really misse[d] the critical question to be decided."<sup>439</sup> Under *Quarles*, police are permitted to question a suspect in custody prior to giving any *Miranda* warnings or obtaining any waiver of rights in order to obtain information necessary to eliminate a danger to the public. Any statement or evidence obtained as a result of such questioning is admissible. Assuming Justice Rehnquist succeeded in establishing the need for police to question some suspects prior to any warnings and waiver in order to protect the public, he did not establish his conclusion that evidence obtained as a result of such questioning should be admitted against the defendant. Rather, "the critical question *Miranda* addresses is who shall bear the cost of securing the public safety when

434. 462 U.S. 213 (1983). See *supra* note 308 for a discussion of the facts.

435. *Id.* at 235.

436. *Id.* at 235-36.

437. Justice Rehnquist said in a footnote that a case resolved under the totality of circumstances approach "will seldom be a useful 'precedent' for another", an implicit concession that the test will provide no guidance to anyone. *Id.* at 238 n.11.

438. 467 U.S. 649 (1984). See *supra* notes 127-33 and accompanying text for more extensive discussion of *Quarles*.

439. *Id.* at 664 (O'Connor, J., concurring in the judgment in part and dissenting in part).

such questions are asked and answered.”<sup>440</sup> Justice O’Connor believed *Miranda* had already answered that question in favor of the defendant and that, even if police are entitled to ask questions absent prior warnings in order to protect the public, the fruits of the questioning should be excluded.<sup>441</sup>

### 5. The Straw Man

*Straw man* arguments are a special species of *ignoratio elenchi*. They consist in attempts to refute an argument by first distorting it, so that the argument met is not the actual argument at all, but only a straw man that can be easily knocked down. Straw man arguments usually assume one of two forms in Supreme Court opinions: extension of an argument beyond its reasonable bounds to an inference that does not fairly follow from the argument; or oversimplification of an argument to the point where it appears absurd.<sup>442</sup> Examples of each can be found in Justice Rehnquist’s opinions.

Extending opposing arguments to their extremes makes it much easier to argue against them. In *Franks v. Delaware*,<sup>443</sup> the Court held that a defendant who makes a substantial preliminary showing that police knowingly or recklessly included false statements in a search warrant affidavit is entitled to an adversary hearing on the matter. Justice Rehnquist dissented. Arguing against providing hearings to determine whether false statements were included, he suggested that the majority’s decision would

exalt as the *ne plus ultra* of our system of criminal justice the absolute correctness of every factual determination made along the tortuous route from the filing of the complaint or the issuance of an

440. *Id.* Justice Rehnquist’s response to this argument also missed the point. He asserted that absent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of the evidence that results from police inquiry of this kind; and we do not believe the doctrinal underpinnings of *Miranda* require us to exclude the evidence, thus penalizing officers for asking the very questions which are the most crucial to their efforts to protect themselves and the public.

*Id.* at 658 n.7. This was a combination of red herrings. First, “actual coercion” is irrelevant under the express holding of *Miranda* that coercion is presumed in custodial interrogation. Second, excluding the evidence would not be a matter of “penalizing” the officers, but simply an allocation of the consequences of the officers’ conduct weighted in favor of the privilege against compelled self-incrimination.

441. *Id.* at 664.

442. See T. DAMAR, *supra* note 5, at 99. Damar refers to this as the fallacy of “Distortion.” He describes “Attacking a Straw” as a separate fallacy consisting of attacking an opponent’s position by focusing criticism upon an insignificant point. *Id.* at 101. As used here, “straw man” includes all arguments that create a smokescreen by distorting the form or substance of the opponent’s argument and then attacking the distorted argument, rather than the real argument. See D. ALLEN & J. PARKS, *supra* note 198, at 111-12; P. SCHLAG & D. SKOVER, *supra* note 298, at 22-23.

443. 438 U.S. 154 (1978).

indictment to the final determination that a judgment of conviction was properly obtained . . .<sup>444</sup>

This was a straw man. The Court's opinion in no way suggested that we should exalt the *absolute* correctness of *every* factual determination from the beginning to the end of every case as the be all and end all of our criminal justice system. *Franks* involved the limited and grave problem of police officers falsifying information in order to obtain a search warrant. The Court explicitly stated that "allegations of negligence or innocent mistake" would be insufficient to entitle the defendant to a hearing, that the affidavit carries a presumption of validity and that only the affiant's statements could be impeached, not those of informants.<sup>445</sup> Justice Rehnquist's dissenting opinion never met the issue of what *should* be done to deal with false affidavits. Instead, he concentrated upon exaggerating the limited scope of the majority's holding and knocking it down.

Oversimplification of the Court's reasoning was relied upon to attack the holding in *Florida v. Royer*.<sup>446</sup> In *Royer*, the Court upheld the legality of the initial airport stop of a suspected drug smuggler, but disapproved the length and scope of the detention made without probable cause. A variety of facts influenced the Court's opinion. Narcotics officers approached Royer at the Miami International Airport, identified themselves as policemen and asked if Royer would speak with them for a moment. After Royer agreed, the detectives asked for his airline ticket and driver's license, which he produced without oral consent. Upon being questioned about a discrepancy between the names on his ticket and driver's license, Royer became visibly nervous. The detectives then told Royer they were narcotics agents and that they suspected Royer of transporting narcotics. They did not return his ticket or license, but asked him to accompany them to a room adjacent to the concourse. Royer followed, but said nothing. The detectives described the room as a "large storage closet." Without Royer's consent, one of the detectives retrieved his luggage and brought it to the room. Royer was asked for permission to search the suitcases. Without saying anything, he produced a key and unlocked one of them. Marijuana was found. Royer said he did not know the combination to the other suitcase and the detectives asked if he would mind if they opened it. He said "[n]o, go ahead," and the detectives broke it open. More marijuana was found.<sup>447</sup>

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444. *Id.* at 182.

445. *Id.* at 171.

446. 460 U.S. 491 (1983).

447. *Id.* at 493-95.

In attacking the Court's conclusion that the officer's conduct after the initial stop was unreasonable, Justice Rehnquist partook in a multi-tunnelled vision analysis in which he seized upon facts and sought to refute the Court's holding by assessing the insufficiency of each fact individually to support the decision. He queried whether the result would have been different "[i]f the room had been large and spacious, rather than small," or "if it had possessed three chairs rather than two."<sup>448</sup> He challenged the Court's consideration of the officer's decision to retrieve Royer's luggage without permission by sarcastically questioning whether it would have been preferable for the officers to have allowed Royer's luggage to be flown to New York without him.<sup>449</sup> Finally, he asked with unveiled incredulity whether the Court meant to say that a *Terry* stop can never exceed fifteen minutes.<sup>450</sup>

Discussing the facts in isolation made it easier to challenge the majority's determination that the conduct was unreasonable because no single fact was so egregious as to warrant that conclusion. The facts were set up as straw men and picked off one by one, resulting in an oversimplification of the case. Few decisions turn on isolated facts. Not only did Justice Rehnquist's argument ignore the tally of the facts, but the synergy of their combined weight.

#### IV. CAUSE AND AVOIDANCE

Why do fallacies occur and what can be done to avoid them? We can surmise from the survey of Justice Rehnquist's opinions that the more hotly contested issues are, the more likely fallacies are to be present. Many of the cases discussed were decided on close votes, and none of them was unanimous. Precisely because an issue is in controversy, neither side is likely to have incontrovertible proof to sustain it. If the conclusions to issues addressed by the Court were self-evident, there would be no need for argument and all rhetoric and fallacies would be superfluous.<sup>451</sup> But recognizing that fallacies occur in controversy does not answer why they occur.

##### A. Causes of Fallacies

There are four probable explanations why fallacies occur in Supreme Court opinions.

*Compromise.* Some fallacies probably result from compromise. To gain a majority or even a plurality, writing Justices sometimes have

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448. *Id.* at 528.

449. *Id.* at 527.

450. *Id.* at 529.

451. See JUSTICE, LAW AND ARGUMENT, *supra* note 48, at 120.

to accommodate the views of other Justices. Adding or deleting paragraphs from a carefully crafted opinion can detract from the clarity and logic of the decision, as anyone who has drafted appellate opinions can attest. How often this occurs cannot be accurately gauged. In his recent book, Justice Rehnquist stated that the willingness to alter an opinion to accommodate another Justice is directly proportional to the number of votes needed to obtain a majority.<sup>452</sup> He paraphrased the position of Chief Justice Hughes who "tried to write his opinions clearly and logically, but if he needed the fifth vote of a colleague who insisted on putting in a paragraph that did not 'belong,' in it went, and let the law reviews figure out what it meant."<sup>453</sup>

*Self-deception.* Self-deception is a common source of fallacious reasoning. Rational minds do not knowingly accept false reasoning, but our strongly held beliefs allow us to convince ourselves and others who hold similar beliefs of the correctness of arguments that may carry little substance to sustain them. Correlatively, our fixed views enable us to unhesitatingly reject much stronger evidence or arguments inconsistent with those views. Such rationalization may be completely unconscious.

One would like to believe that when a fallacy is called to the attention of an opponent in argument, the opponent would redirect the course of his argument along more suitable lines. This may be too much to ask if the arguer has strong feelings on the subject, even if the arguer is a sincere person arguing in good faith. Our self interest and personal biases, values and convictions blind us to flaws in our reasoning.

To illustrate, we need look only to the fundamental controversy between "liberal" Justices and "conservative" Justices regarding the proper method of constitutional interpretation. Justice Rehnquist and others who share his interpretivist judicial philosophy are undoubtedly sincere in their beliefs that they obey the Constitution, while the more liberal Justices rewrite it to fit their own sense of right. Allowing personal values to dictate decision making is anathema to the conservatives.<sup>454</sup> But as Ronald Dworkin points out, this distinctive view ignores the interpretative nature of law. Both types of Justice agree as

452. THE SUPREME COURT, *supra* note 17, at 302.

453. *Id.*

454. Justice Rehnquist subscribes "unreservedly" to the position that

when you put on the robe, you are not there to enforce your own notions as to what is desirable public policy. You are there to construe as objectively as you possibly can the Constitution of the United States, the statutes of Congress, and whatever relevant legal materials there may be in the case before you.

*Confirmation Hearings*, *supra* note 95, at 156. See also *supra* notes 17, 274-75 and accompanying text.

to the words they are interpreting, but disagree as to the law derived from those words. Each seeks to enforce the Constitution as law, according to his or her own interpretative judgment about what it means, and each believes the other is guilty of subverting the true meaning.<sup>455</sup>

To deny that conservative Justices inject their personal values in constitutional decision making defies a common sense appreciation of the cognitive processes at work when a Justice must make a reasoned judgment from several possible alternatives. It is at best presumptuous and at worst folly to believe that one is able to know how the framers intended a snip of vague words be applied to situations they could not have foreseen. "Unreasonable searches and seizures," "criminal prosecutions," "impartial jury," "cruel and unusual punishments"—neither these terms nor the historical materials from which they arose is susceptible to value-free interpretation.

Justice Rehnquist may not be such a "clause-bound" interpretivist.<sup>456</sup> He acknowledges, for example, that the framers used general language to allow succeeding generations to apply the Constitution to cases which were unforeseen.<sup>457</sup> Yet, even if his philosophy of constitutional interpretation is broad enough to recognize that *general themes* directly inferable from the constitutional text can be extracted and applied in interpreting the framer's intent,<sup>458</sup> he fares no better on this point. If anything, this less restrictive interpretivist view is perhaps less credible as a basis for Justice Rehnquist's attacks upon Justices who allow their personal values to influence their decisions. The "theme," for example, that persons should be free from unreasonable searches and seizures has no more ascertainable content than strict interpretation of the language itself. To the extent Justice Rehnquist's philosophy focuses upon wider constitutional themes, such as the structural relationship between the federal government and the states,<sup>459</sup> his brand of interpretivism becomes even more diffuse and freewheeling.

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455. R. DWORKIN, *supra* note 9, at 357-58. Dworkin believes that labeling judicial philosophies as interpretivist or noninterpretivist is misleading because followers of both philosophies agree on interpretation of the Constitution as a method of judicial decision making. They simply disagree about how it should be interpreted. *Id.* at 359-60.

456. Professor Ely defines "clause-bound" interpretivism as entailing "that the various provisions of the Constitution be approached essentially as self-contained units and interpreted on the basis of their language, with whatever interpretive help the legislative history can provide, without significant injection of content from outside the provision." J. ELY, *DEMOCRACY AND DISTRUST* 12-13 (1980).

457. *Living Constitution*, *supra* note 17, at 694, 699.

458. This is suggested by Riggs and Proffitt in their article about Justice Rehnquist's judicial philosophy. Riggs & Proffitt, *supra* note 275, at 584.

459. Justice Rehnquist has opined that the "implicit ordering" of state-federal relationships in the Constitution yielded "tacit postulates" that "are as much engrained in the fabric of the document as its

Every decision that requires a choice requires a value determination and the broader the constitutional theme, the more latitude for choices and the more room for value interference. Liberal Justices make choices to expand rights perhaps beyond the general themes intended by the framers. Conservative Justices make choices to restrict rights perhaps to a degree that is contrary to the general themes intended by the framers. There is no substantial difference. Interpretivism simply substitutes one set of values for another. To refuse to recognize this is a form of self-deception on a broad level that no doubt colors individual decisions.<sup>460</sup>

Precisely because our beliefs are influenced in the first instance by our values, Justice Rehnquist would no doubt disagree that his per-

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express provisions . . . ." Nevada v. Hall, 440 U.S. 410, 433-34 (1979) (Rehnquist, J., dissenting). For a discussion of Justice Rehnquist's emphasis upon the structural relationship between the federal and state governments as a source for interpreting the Constitution, see Riggs & Proffitt, *supra* note 275, at 568-70.

460. The intrusion of Justice Rehnquist's personal values is reflected in how he prioritizes his basic philosophical views regarding Supreme Court decision making when they come into conflict. In a 1976 article, Professor David Shapiro set forth three ideological principles, extracted from a review of all the cases Justice Rehnquist had participated in until that time, which guide his votes on the Court: (1) conflicts between an individual and the government should be resolved against the individual; (2) conflicts between state and federal authority should be resolved in favor of the states; and (3) questions of the exercise or nonexercise of federal jurisdiction should be resolved against such exercise. Shapiro, *supra* note 275, at 294. When these ideological commitments conflict, as they sometimes do, a choice must be made among them, or else Justice Rehnquist would be paralyzed from acting. In criminal procedure cases, the choice seems to be that the first rule—the government wins against the individual—takes precedence over the other two. Cases that reflect this prioritizing include those where the criminal defendant has won in state court and there is an arguable basis for holding that the state court decided the case on an adequate and independent state ground. In several such cases, Justice Rehnquist has authored opinions rejecting the argument that the state decision rested on adequate and independent grounds of state law, reversing the state court rulings in favor of the defendant. Pennsylvania v. Finley, 107 S. Ct. 1990 (1987); Delaware v. Van Arsdall, 475 U.S. 673, 678 n.3 (1986); Texas v. Brown, 460 U.S. 730, 732 n.1 (1983); Oregon v. Kennedy, 456 U.S. 667, 670-71 (1982). To accept jurisdiction in such a case and overturn the state court's determination goes against Justice Rehnquist's philosophy that conflicts between state and federal authority should be resolved in favor of the states and that questions regarding the exercise of federal jurisdiction should be resolved in favor of nonexercise. Moreover, though Justice Rehnquist argues in favor of deference to state court factual determinations when they favor the government [e.g., Wainwright v. Witt, 469 U.S. 412, 428-29 (1985)], he has shown a willingness to depart from such findings when they favor the defendant. Dunaway v. New York, 442 U.S. 200, 223-24 (1979) (arguing that the majority's reliance on the state trial court's conclusion that the defendant did not voluntarily accompany the police to police headquarters was misplaced). Similarly, though cases in which the state court has not made a factual determination regarding an important issue would seem to be candidates for remand under Justice Rehnquist's general philosophy of deference to state courts, Justice Rehnquist has been amenable to making such determinations in the first instance. Rawlings v. Kentucky, 448 U.S. 98, 107 (1980) (over the objection of Justices White and Stewart concurring in part that the Court "should not attempt to decide a factual issue on a record that the state court apparently thought inadequate for that purpose", Justice Rehnquist determined that petitioner's statements were not the result of his illegal detention). *Id.* at 113-14. Valueless decision making under Justice Rehnquist's judicial philosophy would seem to dictate deference to the states and opposition to the exercise of federal jurisdiction whenever there is an arguable basis for doing so.

sonal values affect his decision making to the same extent as his liberal brethren. His views regarding the place the Bill of Rights occupies in the criminal justice system are no doubt deeply and honestly felt. Though we cannot climb into Justice Rehnquist's mind, we can be reasonably certain that the Chief Justice often does not see the flaws in his positions because he strongly believes in them; just as those of us who disagree with him are unlikely to see many of the flaws in our own reasoning.

We all share the same human frailty. No one can claim truthfully that they are immune from self-deception and give credence only to valid reasoning. Those who welcomed the Court's decision in *Mapp v. Ohio*,<sup>461</sup> extending the exclusionary rule to the states, were probably satisfied with the Warren Court's argument for overruling *Wolf v. Colorado*,<sup>462</sup> in which the Court had refused to apply the rule to the states only twelve years earlier. *Wolf*, the Court said, was based upon "factual considerations" that had changed by the time *Mapp* arose, explaining that two-thirds of the states had opposed the exclusionary rule when *Wolf* was decided, while by the time of *Mapp* more than half the states had adopted the rule. This was a blatant *ad populum* argument, no more persuasive than advertising campaigns that testify: "Two million satisfied customers can't be wrong."<sup>463</sup> That the exclusionary rule was gaining popularity among the states had no logical relevance to the issue of whether the rule is constitutionally mandated by the fourth and fourteenth amendments.<sup>464</sup> The truth is that our ability to reason clearly is always obscured by our values and beliefs. We perceive what we want to perceive. But the fact that self-deception is not completely curable does not mean it should be ignored. The better our awareness and understanding of fallacies, the better opportunity we have to recognize and avoid self-deception.

*Supplemental persuasion.* Just because a result can be supported by a logical analysis does not mean it will be readily accepted by the Court's vast audience. Virtually all Supreme Court opinions have some logical support in precedent, statutory commands, the language of the Constitution, or at least common sense, but such support will

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461. 367 U.S. 643 (1961).

462. 338 U.S. 25 (1949).

463. *Ad populum* arguments involve appeals to public opinion or sentiments. The fact that a large number of people accept a position does not prove its soundness. E.g., I. COPI, *supra* note 6, at 79-80; T. DAMAR, *supra* note 5, at 95-96; W. FEARNSIDE & W. HOLTHER, *supra* note 5, at 92-94.

464. The Court recognized this, but disregarded it. *Mapp*, 367 U.S. at 651. To some extent, the *ad populum* fallacy in *Mapp* was simply a perpetuation of the same fallacy in *Wolf*, for *Wolf* did attach significance to the number of states following the exclusionary rule in determining whether the rule was a "fundamental" aspect of the fourth amendment incorporated into the fourteenth amendment due process clause and binding upon the states.

not necessarily make the opinions palatable to the many groups from which the Court's decisions must gain acceptance. This is particularly true in situations where a certain conclusion logically follows a set of premises, but in a way that is obscure and not generally recognized.<sup>465</sup> It is not surprising that a Justice who feels likely to be attacked from many quarters, both inside and outside the Court, feels compelled to make the opinion as persuasive as possible, even if that requires inclusion of fallacious reasoning. Obedience to prior decisions and total allegiance to logic may be insufficient to achieve public acceptance of Court decisions.

*Result-oriented decision making.* We can assume the Court prefers that its decisions rest upon sound reasoning. To the extent sound reasoning is seen as insufficient to gain widespread acceptance of the opinion, there may be a temptation to supplement it with fallacious reasoning. But where false reasoning advances to become the primary basis of the decision, the most dangerous level of fallacy has been reached. Fallacy assumes the character of deliberate disingenuousness directed towards purely result-oriented decision making.

"Result-oriented" is, of course, an overused, almost platitudinous, term that has little content absent definitional refinement. If it means only that judges reach a result first and then construct a written opinion to support the result, then most judicial decision making is result-oriented. This simply restates what the realists have always argued—that judges reach decisions for reasons other than those expressed in their opinions, by judicial hunch or whatever, and the opinions serve only as a means of rationalizing the decision. As used here, result-oriented has a narrower meaning. It means not just those decisions in which the reasons expressed in the opinion are *different* from the Court's true reasons. It refers to decisions that are not based upon a principled application of reason at all. In other words, result-oriented decisions are not just those in which the reasoning is disguised. Fallacy assumes control.

The concern here is not so much that decision making of this kind is imperialistic. That, of course, is a cause for distress, but it is not what this article is about. A rhetorical analysis is not concerned so much with what the Court does as with how it does it. So, for example, the fact that a result is not countenanced by precedent, though perhaps repugnant, would not be a basis for condemnation under this analysis if it were honestly reasoned.

Justice Rehnquist's major transgressions in this area derive from his efforts to apply precedent established by the Warren Court. An

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465. See C. L. HAMBLIN, *supra* note 5, at 236-37.

argument could be made that Justice Rehnquist is simply correcting mistakes made by the Warren Court and that it was the Warren Court's codification of constitutional criminal procedure that represents the archetypal era of result-oriented decision making by the Supreme Court. It is no doubt true that many of the sweeping procedural protections created by the Warren Court were founded upon fallacious reasoning. But this does not excuse Justice Rehnquist or other conservative members of the Court from dealing with them honestly.

If the Warren Court decisions were wrongly decided perhaps they should be overruled. But that is not what is happening. Whether because of institutional constraints or for other reasons, instead of overruling the Warren Court precedent, the Court has purported to adhere to many decisions while reaching results completely at odds with them. Opinion writing assumes the form of paying lip service to the Warren Court decisions, while at the same time slowly cutting the heart out of them. The necessary consequence of this grinding regression has been opinions that stretch logic to the breaking point.

Of these possible explanations for fallacies in Supreme Court opinions—compromise, self-deception, supplemental persuasion and result-oriented decision making—only the last says anything bad about the Supreme Court. Fallacies that result from compromise cannot be vigorously condemned if they are a necessary result of the highly desirable goal of forging solid majorities in an area already marked by too much fractiousness. Fallacies resulting from self-deception should be identified to promote clarity of future thought and reason, but only if an arguer persists in a fallacy or pattern of defective reasoning after it is called to his attention can he be chastised on any moral or ethical basis.<sup>466</sup> More objectionable are fallacies used to supplement an existing logical basis for a decision, but even these can perhaps be justified to assure that Court decisions are accepted and obeyed by the many diverse groups the decisions may affect. Only when the Court relies upon defective reasoning to arrive at a decision that could be attained no other way is unmitigated reproach warranted. The fact that a result may be a good one, which is frequently the case, is no reason for pardon. The Supreme Court owes the public decisions based on honestly reasoned arguments.

### *B. Avoiding Fallacies*

About halfway through this article, the reader may have begun to

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466. Such persistence suggests also that the fallacy is not one of self-deception, but an intentional one.

wonder how anyone ever manages to reason correctly. No ready answer is available, for error truly is infinite in its aberrations.<sup>467</sup> Good intentions on the part of the speaker do not guarantee the avoidance of fallacies, nor does close scrutiny of the opponent's argument guarantee protection from them. The best defense against fallacies is a thorough familiarity with them. This enhances our ability to avoid self deception and provides ammunition to defend against the use of fallacies by others. From the array of fallacies, six stand out to serve as useful guidelines for the avoidance of fallacies in judicial argument.

(a) *The premises must be at least probably true.* False or largely speculative premises fail to support conclusions and render the argument unsound. Even though an argument with false premises can be logically *valid*, formal validity is insufficient in practical argumentation. Truth is necessary to soundness. Certain truth cannot be demanded in the legal arena because most premises upon which decisions are based cannot be empirically tested, but to avoid false or hopelessly question-begging arguments, the premises must be at least probably true.

(b) *The essential premises must be stated.* Enthymematic arguments are not subject to attack if the omitted premises are known and accepted by the audience. In complex, written argument, however, there is both a greater need for explication of the premises and less excuse for omitting them than in oral discourse. The Court's opinions do not deal with subjects in which most people have a general understanding, nor are they delivered as an unpolished, off-the-cuff product—both of which may excuse enthymematic argument in ordinary oral discourse.

The complexity of legal argument also mandates that premises be closely scrutinized. Argument in Supreme Court opinions frequently involves chains of premises and conclusions. Where this is the case, the argument should be sufficiently well-organized that the audience can discern that particular premises are offered to support one subconclusion, which in turn is offered as a premise in support of another conclusion. To fail in this respect increases both the possibility that premises will be omitted, as well as the likelihood that such omission will deceive or mislead the audience.

(c) *The conclusion must at least probably follow from the premises.* As with premises, we cannot demand the absolute certainty of conclusions in legal argument. The law operates inductively, rather than deductively, and we can only expect that the conclusion probably follows from the premises. In any case the Supreme Court chooses to

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467. H. W. B. JOSEPH, *supra* note 89, at 569.

address, there are persuasive arguments on both sides. Otherwise, the case never would have progressed to the level of the Supreme Court. The rules of formal inference can still be applied to test whether the conclusion follows from the premises, so long as application of the rules is tempered by the understanding that probability rather than entailment of the conclusion is the test. The higher the degree of probability, the stronger the argument. Where there are multiple conclusions, this criterion applies to each set of premises and each conclusion.

(d) *The conclusion cannot be used to prove itself.* If the conclusion is relied upon in any form or fashion to prove itself, the argument begs the question. Using the conclusion as premise does not render the argument logically invalid. The conclusion always logically follows from the premise because it logically follows from itself.  $P$  is  $q$ , therefore,  $p$  is  $q$ , is valid, but it does not prove anything.<sup>468</sup>

(e) *Competing arguments must be fairly met.* Supreme Court Justices are more restricted in argument than the rest of us. Lawyers engaged in argument owe no moral or ethical duty to meet and dispose of points raised by the opponent. Failure to accomplish this may well detract from the persuasiveness of the lawyer's argument, but that is a matter of strategy for the lawyer to decide. But the Court's role goes beyond persuasion as to a chosen course; it must be the *best* course as a matter of law, policy and institutional constraints. Opposing arguments must be met fairly and squarely. One-sided assessments of facts, issues or policies are unacceptable.

(f) *Rhetoric must not supplant reason.* Legal argumentation should not be sterile, but neither should it be overly ornate. Hyperbole, *ad hominem* attacks and emotional appeals have no proper place in Supreme Court opinions. They should be filtered out as the case progresses from the trial level, where they are likely to be prevalent, to the Supreme Court, where reasoned argumentation should predominate.

## V. CONCLUSION

Nothing is more to be esteemed than aptness in discerning the true from the false. . . . Men are everywhere confronted with alternative routes—some true and others false—and reason must choose between them. Who chooses well has a sound mind; who chooses ill,

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468. Question begging arguments also violate the first criterion above—that the premises be at least probably true. If the premise in a question begging argument is probably true, there is no need for argument because the conclusion is also probably true.

a defective one. Capacity for discerning truth is the most important measure of men's minds.<sup>469</sup>

This article has been about falseness masquerading as truth in the form of fallacies in legal argumentation. Its purpose has been to facilitate the ability to distinguish between the two—to recognize fallacies for what they are and understand why they are defective forms of reasoning. This has been accomplished through an analysis of Justice Rehnquist's opinions in criminal procedure cases. Justice Rehnquist is by no means the only transgressor of logic on the Supreme Court. A similar article could be written about other Justices, past and present. Justice Rehnquist is the most appropriate target because he is Chief Justice and purports to adhere to a positivistic and interpretivistic judicial philosophy that would seem to present less cause for being illogical.

Supreme Court Justices purport to and do in fact apply logic in their decision-making; not formal logic, but the logic of practical argumentation. The realists were correct that formal logic cannot be relied upon to predict the outcome of judicial decisions or as a wholly adequate means to evaluate judges and their decisions. Judicial decisions are not based upon fixed premises entailing certain results. The most the Court can hope to gain from its written opinions is acceptance from the widest possible audience. To do this, the Court must persuade, which it does through argumentation.

The logic of practical argumentation which we are entitled to expect from the Court can be tested by a fallacy analysis. This includes both formal and informal fallacies. Though formal logic is inadequate to predict results or analyze the true, unstated premises upon which decisions are based, it can be used as a threshold checking device to evaluate the structural soundness of an argument. Formal fallacies, which are uncommon at the Supreme Court level, can be detected by reducing an argument to syllogistic form.

More relevant are the informal fallacies, a broad label applicable to virtually any type of rhetorical device or mode of defective reasoning. Modern writers have been criticized for offering laundry lists of informal fallacies without systematizing them in any coherent fashion, but given the infinite ways in which humans may error, it is unlikely that any satisfactory classification scheme can ever be developed. The classifications of informal fallacies adopted herein—fallacies from false, omitted or insufficient premises; fallacies of proof and authority; fallacies of definition, classification and qualification; and fallacies of

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469. A. ARNAULD, *supra* note 73, at 7.

irrelevance and diversion—were intended to provide a framework for thinking about fallacies in a legal context.

The diverse fallacies found in Justice Rehnquist's criminal procedure opinions are probably attributable to several causes: (1) compromise in accommodating the views of other Justices in order to obtain a majority; (2) self-deception that results when values, bias and interests intrude upon our ability to reason objectively; (3) supplemental persuasion intended to broaden acceptability of decisions that may have a base of logical support; and (4) result-oriented decision making, that is, decisions in which fallacy extends beyond supplement to become the primary basis of an opinion that cannot be justified in an honestly reasoned or logical way. Of these four causes, only the last deserves serious reproach.

Avoiding fallacies is best accomplished by acquiring a thorough familiarity and understanding of them. Absent this understanding, good intentions are not enough to prevent fallacies from creeping into our own arguments, nor is wariness sufficient to protect against being misled when an opponent uses fallacies.

Abraham Lincoln's law partner once said of him:

Lincoln's perceptions were slow, cold, clear and exact. Everything came to him in its precise shape and color . . . . No lurking illusion or other error, false in itself, and clad for the moment in robes of splendor, ever passed undetected or unchallenged over the threshold of his mind . . . . He saw all things through a perfect mental lens. There was no diffraction or refraction there.<sup>470</sup>

Every law student, lawyer, judge and law professor should strive to achieve this state of mental acuity. Students of the law must, above all, master the ability to reason. A proverb holds that, "Law governs man, reason the law."<sup>471</sup> Our obligation to our profession is not to allow this to translate in practice to, "Law governs man, reason the law, and man reason." Man does not govern reason. Reason is a tool of the law, not its handmaiden. To corrupt reason is to corrupt the law.

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470. A. LINCOLN, LINCOLN, HIS WORDS AND HIS WORLD 10-11 (R.L. Polley ed. 1965).

471. THE QUOTABLE LAWYER 268 (D. Shrager & E. Frost eds. 1986).