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Argument and Logic

*Judge Julian L. Bush**

I. INTRODUCTION

Closing argument is the capstone of a trial: the evidence has been presented, the instructions of law have been given, and the time has come for the lawyers to convince the jurors that, given that evidence and given that law, their respective clients are entitled to win. It is usually the most dramatic part of the trial, and, at its best, closing argument is rhetorically eloquent and logically compelling. It moves the heart and convinces the mind. At its worst, it is rhetorically clumsy and logically fallacious, appealing to the heart's worst prejudices and confusing the mind.

Closing argument, of course, is *argument*, and much of the law of closing argument that has developed over the centuries by common law judges finds its analogue in the principles of valid argument developed by logicians over these same centuries. The vocabulary is different, and it would certainly sound strange to our ears if we were to hear a lawyer objecting to his opponent's closing argument on the ground that the argument was argument *ad hominem* or that it contained the fallacy of an undistributed middle. And, indeed, our law does not expect the judge presiding over the argument to police the argument to the extent that the judge would forbid all arguments that a logician would condemn. Instead, the law leaves it generally to the lawyers to expose the weaknesses and fallacies in their opponents' arguments. There are, however, instances where the judge (on proper objection) is called upon to rule that certain arguments are out of bounds. Sometimes there are constitutional reasons for forbidding certain arguments, and sometimes there are not. There does not seem to be a general theory applied to the latter cases that explains why those bad arguments are

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forbidden while other bad arguments are not, and, therefore, judges and lawyers need to know the cases. But it is possible to classify many of the bad arguments within the categories of fallacious arguments condemned by logicians, and it is useful to clear thinking to do so. The cases considered below are all criminal cases, but it is possible to cite civil cases with equal ease.

II. INDUCTION AND DEDUCTION

Closing argument is argument. And a lawyer's closing argument will ordinarily comprise one part inductive argument and one part deductive argument. Inductive arguments are those whose conclusions are claimed to follow from their premises only with probability, while deductive arguments are those whose conclusions are claimed to follow with absolute necessity.¹ For example, one might argue inductively, "I left my seat when Mark McGwire was coming to bat, moments later there was a large roar from the crowd; therefore, Mark McGwire hit a home run." Well, he probably did, but he might not have; perhaps something else caused the crowd's reaction. By contrast, one might argue deductively, "Mark McGwire hit seventy home runs in a season, the person who hit seventy home runs in a season has the record for hitting the most home runs in a season; therefore, Mark McGwire has the record for hitting the most home runs in a season." This is a valid deductive argument; if the premises are true, the conclusion must be true.²

The instructions that a judge gives a jury contain a verdict-director that tells the jury the circumstances under which the jury is to return a verdict of guilty or not guilty. In essence, the verdict-director defines the conclusion to be proved, and also provides one of the premises. For example, the verdict-director in a first-degree murder case might read as follows:

If you find and believe from the evidence beyond a reasonable doubt:

First, that on January 1, 2000, the defendant caused the death of Victor Victim by shooting him, and

Second, that defendant knew that his conduct was causing the death of Victor Victim, and

Third, that defendant did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief,

Then you will find the defendant guilty of murder in the first degree.³

1. DOUGLAS N. WALTON, *INFORMAL LOGIC: A HANDBOOK FOR CRITICAL ARGUMENTATION* 198 (1989).

2. In this instance the second premise was true when this Article was first drafted, but no longer. Thus, this is a valid argument but a false one.

3. Adapted from MISSOURI APPROVED INSTRUCTIONS—CRIMINAL § 313.02 (3d ed. <https://scholarship.law.missouri.edu/mlr/vol67/iss3/1>)

The conclusion to be proven is that the defendant is guilty (G), and the verdict-director provides this premise: if A, B, and C, then G (guilty).

A. Prosecutor's Argument

The full prosecutor's argument is *modus ponens*:⁴

1. If A, B, and C, then G.
2. A, B, C.
3. Therefore, G.

The first premise—"[i]f A, B, and C, then G"—is derived from the court's verdict-director. This is not a problem in argument unless one of the lawyers misrepresents the law in his or her argument.

The second premise—A, B, and C—consists of facts that the prosecutor must establish, and this is typically done by inductive argument. For example, the first fact—the fact that on January 1, 2000, the defendant caused the death of Victor Victim by shooting him—could be asserted with the following inductive argument: "Reliable witnesses have testified that, on January 1, 2000, they saw the defendant with a gun as he and Victor Victim entered a room together. They also testified that they saw no one else enter or leave the room. The witnesses reported that, moments later, they heard a shot ring out, saw the defendant run from the room, and saw Victor Victim dead with a bullet wound. Therefore, it is highly probable that defendant caused the death of Victor Victim by shooting him." One would expect the prosecutor to offer similar inductive arguments on behalf of facts B and C.

Relying on the court's verdict-director to establish the first premise of his or her argument ["if A, B, and C, then G"], and having argued the facts ["A, B, and C"] that constitute the second premise with inductive arguments, all that remains for the prosecutor is to urge the inevitable and deductive conclusion: G.

B. Defendant's Argument

One might be tempted to formulate the defendant's argument as follows:

1. If A, B, and C, then G.
2. Not A [or not B or not C or not B and C, etc.].
3. Therefore, not-G.

1998).

4. ROBERT E. RODES, JR. & HOWARD POSPESEL, PREMISES AND CONCLUSIONS: SYMBOLIC LOGIC FOR LEGAL ANALYSIS 31-32 (1997).

This does not quite work, however. First, because the law imposes the burden of proof on the prosecutor, the premises need to be articulated to accommodate that burden. Second, this articulation commits the fallacy of affirming the consequent.⁵ After all, defendant may have murdered Victor Victim by stabbing him, not shooting him and, if he had, he would have been equally guilty of first degree murder, albeit not in the manner charged. The argument may be reformulated to avoid both of these objections:

1. Only if the prosecutor proves A, B, and C, then G.
2. The prosecutor has not proven A [or not proven B or not proven C, etc.].
3. Therefore, not-G.

This is a valid argument.

Indeed, Missouri law makes it easy for the defendant to make this argument. The defendant is entitled to submit a converse instruction directing a verdict in the defendant's favor.⁶ For example, in the case of Victor Victim, a converse instruction might read as follows:

Unless you find and believe from the evidence beyond a reasonable doubt that,
 First, on January 1, 2000, the defendant caused the death of Victor Victim by shooting him, and
 Second, that defendant knew that his conduct was causing the death of Victor Victim,
 You must find the defendant not guilty of murder in the first degree.⁷

In other words, unless A and B, then not-G. Defendant argues:

1. Unless A and B, then not-G.
2. Not A [or not B or not A and B].
3. Therefore, not-G.

5. *Id.* at 32.

6. *State v. Mouse*, 989 S.W.2d 185, 191 (Mo. Ct. App. 1999) (citing MISSOURI APPROVED INSTRUCTIONS—CRIMINAL § 308.02, Notes on Use, 2 (3d ed. 1998)).

7. Adapted from MISSOURI APPROVED INSTRUCTIONS—CRIMINAL § 308.02 (3d ed. 1998). Missouri does not permit a converse of all of the elements of the state's verdict director. *Id.* § 308.02, Notes on Use, 3(B).

III. FALLACIES

Logic condemns many arguments as fallacious. An argument is fallacious if it contains a fallacy, that is, an error that renders an argument unsound, either because it contains a logical error (for example, denying the antecedent) or contains a mistaken premise. And the law condemns many arguments as improper. Many of the arguments that the law condemns as improper commit what logic calls a fallacy.

A. False Premises—the Law

A logically valid argument is an unsound argument if at least one of the premises of the argument is false. As we have seen, the prosecutor's argument has two premises: the opening premise, which should be derived from the court's verdict-director, and the second premise, which the prosecutor must assert by inductive argument. It is imperative, then, that the first premise not be muddled. Recognizing this, the law leaves it to the judge to instruct the jury on the law, and forbids lawyers to misrepresent the law.⁸ To that end, "[i]t is improper for counsel to inform the jury as to the substantive law of the case, to read statutes to the jury, or to argue questions of law inconsistent with the jury instructions."⁹ Consider now problems that may arise with argument directed at the second premise.

B. False Premises—the Evidence

The prosecutor must establish the second premise—A, B, and C—by arguing inferences from the evidence. Inferences purporting to be based on the evidence can have no value if there is no such evidence and, therefore, the parties cannot misrepresent the evidence¹⁰ nor "argue facts outside the record."¹¹

8. *State v. Rush*, 949 S.W.2d 251, 256 (Mo. Ct. App. 1997).

9. *State v. Oates*, 12 S.W.3d 307, 312 (Mo. 2000).

10. *Rush*, 949 S.W.2d at 256.

11. *State v. Baller*, 949 S.W.2d 269, 272 (Mo. Ct. App. 1997); *State v. Long*, 684 S.W.2d 361, 365 (Mo. Ct. App. 1984).

C. Types of Fallacious Arguments

1. Argument *ad Ignorantiam*

Argument *ad ignorantiam* is argument that a proposition is true because it has not been proven false:¹² “The St. Louis Cardinals will win the pennant; after all, nobody has shown that another team will.” In *State v. Booker*,¹³ the prosecutor argued that a cup had been tested because defendant had not shown that the cup had not been tested.¹⁴ This argument was improper because the defendant was not obligated to prove or request anything.¹⁵ This principle, however, applies asymmetrically in a court of law. The party upon whom the burden of proof lies (usually the plaintiff, whether the case is civil or criminal) is barred from making such an argument, but the opposing party (usually the defendant, whether the case is civil or criminal) is entitled to argue that the defendant is not guilty or not liable because the plaintiff has not proven that the defendant is guilty or liable.

2. Argument *ad Verecundiam*

Argument *ad verecundiam* is an appeal to an inappropriate authority:¹⁶ “The Cardinals will win the pennant; after all, my sister (not a baseball expert) says that they will.” In *State v. Debler*,¹⁷ a murder case, both the State and the defendant made arguments based on history and the Bible.¹⁸ These arguments were condemned as “obscuring the instructions of the court” and because the decision of the jury “[ought] not turn on the most compelling Scriptural parallel or the best historical analogy.”¹⁹ Similarly, in *State v. Shurn*,²⁰ another murder case, the prosecutor’s argument in favor of a death sentence invoking the Bible by asking the jury to “‘take an eye for an eye,’ while referring to the Old Testament,” was condemned as improper.²¹ The Bible, while deemed by many an excellent (even controlling) authority on all sorts of matters, is not an appropriate authority in a court of law.

12. RUGGERO J. ALDISERT, LOGIC FOR LAWYERS 190-91 (1997).

13. 945 S.W.2d 457 (Mo. Ct. App. 1997).

14. *Id.* at 458.

15. *Id.*

16. ALDISERT, *supra* note 12, at 180-81.

17. 856 S.W.2d 641 (Mo. 1993).

18. *Id.* at 656.

19. *Id.*

20. 866 S.W.2d 447 (Mo. 1993), *cert. denied*, 513 U.S. 837 (1994).

21. *Id.* at 464.

Another type of improper argument might be thought to be argument *ad verecundiam*. An attorney cannot make “a statement of personal opinion or belief that is not drawn from the evidence.”²² Thus, a prosecutor cannot argue, “I know the witness. He is telling the truth.”²³ The prosecutor is not an appropriate authority.

3. Argument *ad Hominem*

Argument *ad hominem* condemns the argument because it condemns the arguer:²⁴ “Do not accept my opponent’s argument because he is a Cubs fan.” Logic deems this kind of argument a fallacy because the character of the arguer is logically irrelevant to the correctness or incorrectness of the argument. Therefore, the law does not allow a lawyer to vilify opposing counsel by making a personal attack upon the lawyer, such as by accusing the opposing lawyer of lying, suborning perjury, or fabricating evidence.²⁵ Nor can a lawyer attack a class of attorneys to which his opponent belongs, such as by calling defense attorneys “vultures.”²⁶

Another kind of argument *ad hominem* seen in the cases is where the prosecutor calls the defendant names. This is strongly discouraged,²⁷ although there are many cases where prosecutors have been allowed to call defendants names justified by the evidence.

While the law does not allow argument *ad hominem* directed at opposing counsel, it might be thought to allow such argument directed at counsel’s witnesses. Argument *ad hominem, abusive*, which argues that one ought not to believe one of bad character, is allowed to the extent that it may be argued that a witness may be disbelieved because the witness is a person of untruthful character,²⁸ or because the person has been convicted of a crime.²⁹ And argument *ad hominem, circumstantial*, which argues that a person should be disbelieved because of the connection between the beliefs held and the circumstances of those holding it, is allowed to the extent that it may be argued

22. State v. Baller, 949 S.W.2d 269, 272 (Mo. Ct. App. 1997).

23. State v. Kirk, 918 S.W.2d 307, 309 (Mo. Ct. App. 1996).

24. ALDISERT, *supra* note 12, at 182-85.

25. See State v. Weaver, 912 S.W.2d 499, 513 (Mo. 1995), *cert. denied*, 519 U.S. 856 (1996); State v. Lyles, 996 S.W.2d 713, 716 (Mo. Ct. App. 1999).

26. State v. Keil, 794 S.W.2d 289, 293 (Mo. Ct. App. 1990), *aff’d sub nom.* Owsley v. Bowersox, 234 F.3d 1055 (8th Cir. 2000), *cert. denied*, 122 S.Ct. 233 (2001).

27. State v. Owsley, 959 S.W.2d 789, 798 (Mo. 1997), *cert. denied*, 525 U.S. 882 (1998).

28. MISSOURI EVIDENCE RESTATED § 608(a), Reputation Guidance as to Truthfulness, at 6-25 to 6-27 (MoBar 3d ed. 1996).

29. *Id.* § 609, Impeachment by Evidence of Conviction of Crime, at 6-29 to 6-34.

that a witness should be disbelieved because of an interest that the witness may have in the result or another bias that the witness may have in favor of or against a party.³⁰ But, perhaps, these ought not be regarded as *ad hominem* arguments because they are not directed at the arguer but at the arguer's evidence.

4. Argument *ad Populum*

Argument *ad populum* is an appeal to emotion:³¹ "The St. Louis Cardinals are sure to win the pennant because they have a glorious history." For example, when a lawyer "personalizes" an argument by asking the jurors to put themselves in the shoes of a party or a victim or to pray that their children will not have to go through what the victim's children went through, the lawyer is appealing to emotion. These arguments are out of bounds.³² In *State v. Taylor*,³³ the prosecutor argued that "now is the time you can put your emotions into it. Now is the time that you can show your outrage. Now is the time to get mad."³⁴ The case was reversed.³⁵ In *State v. Link*,³⁶ the prosecutor's argument calling upon the jury to "raise that window and say we're mad as hell" was deemed "over the line,"³⁷ although the case was not reversed.³⁸

5. Argument *ad Misericordiam*

Argument *ad misericordiam* is an argument that appeals to pity:³⁹ "Agree with me that the Cardinals will win the pennant; otherwise I will be crushed." In *State v. Rawlins*,⁴⁰ the defendant argued that she should be found not guilty because the state trooper who had arrested her had treated her so harshly as to cause her emotional injury.⁴¹ This argument, urging the jury to acquit as a way of compensating the defendant for the alleged improprieties committed by the trooper, was improper.⁴²

30. *Id.* § 616, Impeachment by Evidence of Bias, at 6-63 to 6-67.

31. ALDISERT, *supra* note 12, at 185-87.

32. *State v. Tokar*, 918 S.W.2d 753, 768 (Mo. 1996), *cert. denied*, 519 U.S. 933 (1996).

33. 944 S.W.2d 925 (Mo. 1997), *cert. denied*, 531 U.S. 901 (2000).

34. *Id.* at 940 (Robertson, J. dissenting).

35. *Id.* at 939 (reversing death sentence but affirming convictions).

36. 25 S.W.3d 136 (Mo. 2000), *cert. denied*, 531 U.S. 1040 (2000).

37. *Id.* at 147.

38. *Id.* at 150.

39. ALDISERT, *supra* note 12, at 175-80.

40. 932 S.W.2d 449 (Mo. Ct. App. 1996).

41. *Id.* at 453-54.

42. *Id.* at 454.

6. Argument *ad Baculum*

Argument *ad baculum* is an appeal to force:⁴³ “If you will not agree with me that the Cardinals will win the pennant, I will punch you in the nose.” The case law condemns prosecutors’ arguments that attempt to arouse fear of personal danger to jurors or their families if the defendant is acquitted as improper “personalization.”⁴⁴ The prosecutor, in such cases, is telling the jurors that they will be harmed if they do not accept the prosecutor’s argument. Other examples are *State v. Cruz*,⁴⁵ where the prosecutor stated that the jurors would have to justify an acquittal to their friends and answer to the community,⁴⁶ and *State v. Delaney*,⁴⁷ where the prosecutor stated that the citizenry would have a record of the verdict and the jurors would have to face the consequences.⁴⁸

7. *Ignoratio Elenchi*

Ignoratio elenchi, that is, ignoring the issue, is a fallacy committed when an argument fails to prove the conclusion that it is supposed to prove, but instead is directed towards proving some irrelevant conclusion.⁴⁹ “The Cardinals will win the pennant; after all, Mark McGwire has hit more than fifty home runs every season for the past three seasons, and, therefore, he will again.” There are many cases where courts have forbidden defendants to argue the State’s failure to take fingerprints or hair samples or to undertake handwriting analysis, or to otherwise conduct tests.⁵⁰ Such failures tend to prove that the police investigation was incomplete or even inept, but the conclusion that needs to be proven is that the defendant is not guilty, or, at any rate, that the prosecutor has not shown that the defendant is guilty.

Likewise, the prosecutor “may not refer to a defendant’s criminal proclivities . . . or suggest the jury convict him to prevent him from committing future crimes,” or speculate about future crimes.⁵¹ Perhaps the defendant will

43. BLACK’S LAW DICTIONARY 102 (7th ed. 1999).

44. *State v. Tokar*, 918 S.W.2d 753, 768 (Mo. 1996), *cert. denied*, 519 U.S. 933 (1996).

45. 971 S.W.2d 901 (Mo. Ct. App. 1998).

46. *Id.* at 903.

47. 973 S.W.2d 152 (Mo. Ct. App. 1998).

48. *Id.* at 157.

49. ALDISERT, *supra* note 12, at 170-74.

50. *See, e.g., State v. Booker*, 945 S.W.2d 457, 458 n.1 (Mo. Ct. App. 1997) (citing *State v. Beck*, 785 S.W.2d 714, 720 (Mo. Ct. App. 1990)); *State v. Hope*, 954 S.W.2d 537, 544-46 (Mo. Ct. App. 1997); *State v. Simpson*, 611 S.W.2d 556, 560 (Mo. Ct. App. 1981).

51. *State v. Griggs*, 999 S.W.2d 235, 245 (Mo. Ct. App. 1998).

commit future crimes if he is acquitted, but the conclusion to be established is that the defendant is guilty of the crime charged.

IV. CONCLUSION

Not all arguments that the law condemns can be brought under the rubric of logical fallacies. For example, the prosecutor cannot comment on the defendant's failure to testify,⁵² argue that the defendant is guilty because he requested to speak with a lawyer,⁵³ or comment on the defendant's invocation of his right to remain silent.⁵⁴ None of these arguments is logically fallacious; all are forbidden because the United States Constitution is construed as forbidding them. Therefore, logic does not tell us all that we need to know about what is allowable argument and what is not allowable argument. But it does help: recognizing that a particular argument has been disallowed by the case law and that it is logically fallacious assists in assessing an argument that has not yet been addressed by the case law but which commits the same logical fallacy.

52. *State v. Neff*, 978 S.W.2d 341, 344 (Mo. 1998).

53. *State v. Wessell*, 993 S.W.2d 573, 576 (Mo. Ct. App. 1999).

54. *State v. Zindel*, 918 S.W.2d 239, 241 (Mo. 1996).