

THE RHETORIC OF GUN CONTROL

ANDREW JAY McCLURG*

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* Professor of Law, University of Arkansas at Little Rock; B.S., J.D., University of Florida. I would like to thank my friend and colleague, Professor Mary Pat Treuthart, Gonzaga University School of Law, for the many hours she devoted to reading and commenting on drafts of this article. I benefited greatly from her insightful substantive and editorial comments.

Despite all the rhetoric from the gun lobby, the fact is that the vast majority of law enforcement officials and most of the American public supports [the Brady] bill.¹

—Representative Thomas Downey

Despite all the heated rhetoric about handguns, the Brady bill is not a solution to our crime problem.²

—Representative Jerry Costello

INTRODUCTION

This Article is about rhetoric. In a democratic, pluralistic society, action on any issue of social importance depends on acceptance of the action by many different audiences. Acceptance depends on the audiences being persuaded as to the rightness of the action. Persuasion depends on effective rhetoric.

When Congress debated the Brady bill,³ a bill that imposes a wait-

1. 137 CONG. REC. H2845 (daily ed. May 8, 1991) (statement of Rep. Downey).

2. *Id.* at H2845 (statement of Rep. Costello).

3. The "Brady bill" is the popular title given to proposed federal legislation to require waiting periods and background checks for handgun purchases. Sean Murphy, *Mayor Renews Call For Fewer Handguns*, BOSTON GLOBE, Dec. 1, 1991, at 46. Congress debated the bill during its first session in 1991. See 137 CONG. REC. H2854 (daily ed. May 8, 1991) (introducing Brady bill); 137 CONG. REC. S59,039 (daily ed. June 28, 1991) (debating Brady bill in Senate). The Brady bill is intended to enforce existing prohibitions on handgun purchases by convicted felons, fugitives from justice, drug users, mental defectives or persons who have been committed to mental institutions, illegal aliens, persons who have been dishonorably discharged from the armed forces, and persons who have renounced their United States citizenship. See 18 U.S.C. § 922(d), (g) (1988) (identifying persons not eligible for handgun purchases). The bill was named in honor of Jim and Sarah Brady. Stephanie Saul, *Brady Vows to Keep Pushing Gun Bill*, NEWSDAY, Nov. 28, 1991, at 17. Jim Brady is the former press secretary to President Ronald Reagan who was wounded by John Hinckley during Hinckley's attempt to assassinate the President. Howell Raines, *Reagan Wounded in Chest by Gunman*, N.Y. TIMES, Mar. 31, 1981, at A1. His wife, Sarah Brady, is the chairwoman of Handgun Control, Inc., a Washington-based lobbying organization that promotes gun control legislation. *Id.*

In the summer of 1991, the United States House of Representatives and the United States Senate introduced different versions of the Brady bill as part of broader crime control packages. H.R. 7, 102d Cong., 1st Sess. (1991); S. 1241, 102d Cong., 1st Sess. §§ 2701-2703 (1991). Both bills required licensed firearm dealers to forward identifying information regarding a prospective handgun purchaser to the chief law enforcement officer at the purchaser's place of residence. The dealer would then have to wait for a period of days to receive information from the officer as to whether the purchase would violate federal, state, or local law. The House bill provided for a seven-day waiting period, while the Senate bill specified a waiting period of five business days. H.R. 7 § 2(a)(s)(1)(A)(ii)(I); S. 1241 § 2701(a)(u)(A)(ii)(I). A more important difference between the two bills is that only the Senate bill actually required the chief law enforcement officer receiving the information to conduct a background check of the prospective purchaser. S. 1241 § 2701(a)(u)(2). The House bill required only that the seller communicate the information to the police and then wait seven days. H.R. 7 § 2(a)(s)(1)(A)(III). Though the drafters of the House bill apparently contemplated that the police would conduct a background check upon receiving the information, the bill did not impose such an obligation. In fact, the House bill expressly stated that it "shall not be interpreted to require any action by a chief law enforcement officer which is not otherwise required." *Id.* § 2(a)(s)(2).

The Senate bill also went further than the House bill in mandating that the Attorney General create a computerized "national instant criminal background check system." S. 1241,

ing period and background check for handgun purchases, rhetoric flowed freely on both sides. As reflected in the introductory quotes, each side chastised the other for using rhetoric. There is nothing improper or indecorous, however, about using rhetoric in a debate. Although often characterized pejoratively, "rhetoric" is not a pejorative term. It is simply a label for the discourse of practical argumentation.⁴ To accuse an opponent in an argument of engaging in

supra, § 2702. To ensure this would be accomplished, the bill imposed specific timetables on the federal and state governments for the development of such a system. *Id.* The bill gave the Attorney General 30 months to certify that a national computer system had achieved at least 80% currency of case dispositions for all cases in which there had been activity within the five preceding years. *Id.* § 2702(d)(1)(A). At that time, the Attorney General would also have to determine whether the states were in compliance with a five-year timetable to develop systems of similar capabilities. *Id.* § 2702(c)(2), (d)(1)(B). A state that was certified to be on schedule with the timetable would be released from the federal waiting period and background check requirements. *Id.* § 2702(d)(2). Six years after the law became effective, the Attorney General would be required to certify whether the states were fully in compliance with the act. *Id.* § 2702(d)(3). If they were determined to be in compliance, the waiting period and background check requirements would be lifted. *Id.*

Both the House and Senate bills created some exceptions to the waiting periods and background checks, including situations where a threat had been made against the life of the purchaser or a member of the purchaser's family. H.R. 7 § 2(a)(s)(1)(B); S. 1241 § 2701(a)(u)(1)(B). Both bills also exempted from coverage purchasers possessing permits issued by states that require background investigations as a condition for obtaining the permits. H.R. 7 § 2(a)(s)(1)(C); S. 1241 § 2701(a)(u)(1)(C).

In November 1991, House and Senate conferees reached agreement on an overall crime bill, which was designated the Omnibus Crime Control Act of 1991, of which the Brady bill was a small portion (Title V, Subtitle A). H.R. 3371, 102d Cong., 1st Sess. (1991); *see also* CONFERENCE REPORT ON H.R. 3371, OMNIBUS CRIME CONTROL ACT OF 1991, H.R. REP. NO. 405, 102d Cong., 1st Sess. (1991), *reprinted in* 137 CONG. REC. H11,686-H11,744 (daily ed. Nov. 26, 1991). *See generally* Paul Houston, *House, Senate Conferees Agree on Big Crime Bill*, S.F. CHRON., Nov. 25, 1991, at A1 (explaining history of agreement). The conferees adopted the Senate version of the Brady bill, with only minor modifications. *See* JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. REP. NO. 405, 102d Cong., 1st Sess. (1991), *reprinted in* 137 CONG. REC. at H11,740 (explaining that House conferees assented to adoption of Senate version of Brady bill with modifications including: (1) waiting period is to be triggered when firearms transferor rather than transferee notifies chief local law-enforcement officer of contents of transferee-information statement; (2) waiting-period exemption based on remote location is to be additionally conditioned on existence of local ratio of less than 2.5 law-enforcement officers per 1000 square miles; and (3) funding grants for improvement of criminal records are to be administered by Bureau of Justice Statistics).

In letters to the Republican leaders of Congress, President Bush threatened to veto the crime bill because of his objections to provisions relating to habeas corpus reform, the exclusionary rule, and the death penalty. Letter from President George Bush to Rep. Robert H. Michel (Nov. 25, 1991), *reprinted in* 137 CONG. REC. H11,678-79 (daily ed. Nov. 26, 1991); Letter from President George Bush to Sen. Robert Dole (Nov. 25, 1991), *reprinted in* 137 CONG. REC. S18,671 (daily ed. Nov. 27, 1991). The House nevertheless approved the crime bill by a 205-203 vote. 137 CONG. REC. H11,756 (daily ed. Nov. 26, 1991). After the Senate failed to agree to close debate on the conference report, however, Congress adjourned for the year without taking final action on the legislation. 137 CONG. REC. S18,616 (daily ed. Nov. 27, 1991). Senator Joseph Biden criticized Senate Republicans for taking "the final step" that "killed what would be the toughest anticrime law in U.S. history." *Id.* at S18,665.

4. *See* EDWARD P.J. CORBETT, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 3 (2d ed. 1971) (stating that rhetoric is about using language, either spoken or written, to inform, persuade, or move audience); CHAÏM PERELMAN, *THE REALM OF RHETORIC* 5 (1982) (describing rhetoric as entire range of discourse directed toward persuasion regardless of audience or

rhetoric is to accuse the opponent of nothing more than trying to persuade the audience that the person's position is the better one.

This does not mean that all rhetoric is above reproach, for there is good rhetoric and bad rhetoric. Good rhetoric is grounded in logic and sound reasoning. Bad rhetoric is grounded in fallacy. A fallacy is a type of incorrect argument.⁵ A fallacious argument is one that appears to be correct but proves upon scrutiny to be logically invalid.⁶ Examples range from the familiar, such as "circular reasoning" or "begging the question," to the esoteric, such as "affirming the consequent" and the "undistributed middle term."⁷

Fallacious reasoning is bad rhetoric, but not because it is ineffec-

subject matter); W. ROSS WINTEROWD, *RHETORIC, A SYNTHESIS* 77 (1968) (defining rhetoric as art of trying to persuade about any particular subject).

5. See JEREMY BENTHAM, *THE HANDBOOK OF POLITICAL FALLACIES* 3 (Torchbook ed. 1962 of Harold A. Larrabee rev. ed. 1952) (1824) (defining fallacy as argument used for purpose of deceiving); IRVING M. COPI, *INTRODUCTION TO LOGIC* 52 (2d ed. 1961) (defining effect of fallacy as making reasoning incorrect); W. WARD FEARNSIDE & WILLIAM B. HOLTHUR, *FALLACY: THE COUNTERFEIT OF ARGUMENT* 3 (1959) ("The word 'fallacy' is sometimes used as a synonym for any kind of position that is false or deceptive, and sometimes it is applied in a more narrow sense to a faulty process of reasoning or to tricky or specious persuasions."); C.L. HAMBLIN, *FALLACIES* 12 (1970) ("A fallacious argument . . . is one that *seems to be valid* but is not so."); MADSEN PIRIE, *THE BOOK OF THE FALLACY* vii (1985) (defining fallacy as "[a]ny trick of logic or language which allows a statement or a claim to be passed off as something it is not").

Aristotle, from whose work all subsequent study of fallacies descended, defined fallacies in much the same way:

That some reasonings are genuine, while others seem to be so but are not, is evident.

This happens with argument, 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. . . .

1 ARISTOTLE, *De Sophisticis Elenchis*, in *THE WORKS OF ARISTOTLE* 164^a l. 23 (W.D. Ross ed. & W.A. Pickard-Cambridge trans., 1928) [hereinafter *De Sophisticis Elenchis*].

6. T. EDWARD DAMER, *ATTACKING FAULTY REASONING* 3 (1980).

7. See generally DAMER, *supra* note 6 (analyzing 64 fallacies). The fallacy of the "undistributed middle term" results from inferring a conclusion from two premises where the middle term of the syllogism is not distributed to either premise. *Id.* at 122. Damer explains the fallacy of "affirming the consequent" as a conditional statement that affirms the consequent premise or statement instead of properly affirming the antecedent premise or statement. *Id.*

Aristotle originally classified 13 fallacies in *De Sophisticis Elenchis*. *De Sophisticis Elenchis*, *supra* note 5, at 165^b l. 23-169^a l. 22. He divided them into two groups: fallacies dependent on language and fallacies not dependent on language. The fallacies dependent on language included ambiguity, amphibole, combination, division of words, accent, and form of expression. *Id.* at 165^b l. 25-165^b l. 28. The fallacies not dependent on language included those dependent on accident, qualifications based on time, place, or relation, dependent on ignorance of meaning or refutation, dependent on consequent, dependent on original premise, dependent on causation, and dependent on joining several questions into one. *Id.* at 166^b l. 20-166^b l. 30.

David Fischer lists 11 groups of fallacies in his extraordinary work, *Historians' Fallacies*. See DAVID H. FISCHER, *HISTORIANS' FALLACIES* VIII, 337-38 (1970) (dividing each group into seven or more individual fallacies for more than 100 specific definitions). Fearnside and Holther discuss 51 fallacies in *Fallacy: The Counterfeit Argument*. See FEARNSIDE & HOLTHUR, *supra* note 5, at v-vi (grouping specific fallacies into nine larger groups: faulty propositions, faulty constructions, emotional coloration, misuse of authority, stirring up prejudice, rationalization and lip service, biased misconstructions, diversions, and logical fallacies).

Madsen Pirie's work, *The Book of Fallacy*, while not scholarly, is a useful guide to 76 different fallacies. See PIRIE, *supra* note 5, at 183-87 (providing in lexicon format humorous and easily understandable definitions of fallacies).

tive as a tool of persuasion.⁸ In fact, quite the contrary is true. Sadly, the lesson learned from the study of rhetoric is that while being "right" is helpful it is not necessarily a prerequisite to winning an argument. As demonstrated in this Article, fallacies can be powerful tools of persuasion. A skilled sophist may employ fallacies to divert the attention of listeners from the real issue being debated, lead them to accept false premises or ignore conflicting evidence, cause them to reason by emotion rather than by logic, or even forestall them from questioning the speaker's position altogether. If effectiveness was used as a barometer for evaluating rhetoric, the "good" and "bad" labels probably would have to be reversed.

Fallacies are bad rhetoric because they lead to bad decisionmaking. The essential premise of this Article is that it is better to make decisions based on straight thinking than on crooked thinking.⁹ While this may seem to state the obvious, an examination of the rhetoric used in virtually any political debate shows that we usually do not abide by this principle in the arena of public decisionmaking. As Jeremy Bentham documented more than one hundred and fifty years ago, fallacies are common in the discussions of important social issues in democratic systems.¹⁰ Indeed, there seems to be a positive correlation between the importance of an issue, at least as perceived by the populace, and our readiness to resort to bad rhetoric in debating it.

Gun control is a premiere example of such an issue. As demonstrated by the debate over the Brady bill, few issues are capable of generating such intense rhetorical conflict among the American people. As with other controversial issues such as abortion and affirmative action, opinions about gun control are almost always passionately held and in diametric opposition.

Regrettably, while there is room for reasonable persons to disagree about gun control,¹¹ we have as a nation chosen to disagree in

8. DAMER, *supra* note 6, at 4.

9. See DAMER, *supra* note 6, at 4 (supporting premise that bad rhetoric, or rhetoric containing error, often leads to faulty conclusions).

10. See BENTHAM, *supra* note 5, at 246 (arguing that fallacies flourish in political systems that allow free speech and operate on basis of popular assent). Bentham argued that fallacy in essence is fraud. *Id.* He further believed that such fraud was used especially in democracies because dictators who can resort to force do not need to resort to fraud. *Id.*

11. While there is fierce disagreement regarding the solution to gun violence, it is unlikely that anyone would dispute the magnitude of the problem. Firearms are used to kill more than 30,000 persons each year in the United States. THE GUN CONTROL DEBATE 12 (Lee Nisbet ed., 1990) [hereinafter THE GUN CONTROL DEBATE]. Though precise statistics are not available, it is estimated that for every firearm fatality there are five non-fatal firearm injuries. Bill Stokes, *Daily Devastation; Faulty Thinking About 'Accidents' Is Hurting Us More Than We Think*, CHI. TRIB., Oct. 7, 1990, (Sunday Good Health Magazine) at 8, 32.

Handguns, which are the target of most gun control efforts, are responsible for roughly

a most disagreeable manner. Excepting a limited number of scholarly commentaries,¹² discourse on gun control has been plagued by bad rhetoric. The Brady bill debate exemplifies the prevalence of poor rhetoric and defective reasoning in gun control argumentation. At its best, the debate over the Brady bill seldom rose above the level of shrill hyperbole.¹³ At its worst, the discussion sank into the muck of name-calling and non sequitur.¹⁴

22,000 of the annual firearm deaths. David L. Wilson, *The Numbers Game: The Data Behind the Policy*, NAT'L J., July 21, 1990, at 1796. In 1988, 8,915 people were murdered with handguns in the United States. Wayne King, *Sarah and James Brady; Target: The Gun Lobby*, N.Y. TIMES, Dec. 9, 1990, (Magazine), at 80. This compares with only 7 handgun murders in Great Britain, 8 in Canada, 19 in Sweden, and 53 in Switzerland. *Id.* In addition, approximately 1,200 people die in accidental shootings in the United States each year. Wilson, *supra*, at 1796. The majority of handgun deaths are suicides, which occur at the rate of about 12,000 per year. *Id.*

Every day in this country, 25 people are murdered with handguns, 33 women are raped at gunpoint, 575 people are the victims of armed robberies, and 1,116 people are assaulted with a gun. King, *supra*, at 80. Since 1984, there has been a 97% increase in youth firearm murders. *Youth Homicide and School Violence at Record Levels, New Center Research Shows*, HANDGUN CONTROL SEMI-ANNUAL PROGRESS REPORT (Handgun Control, Inc., Washington, D.C.), Jan. 1991, at 6. Gun violence is the leading cause of death among African-American youths, adding a racial dimension to the tragedy. 137 CONG. REC. H2815 (daily ed. May 8, 1991) (statement of Rep. Norton). In 1988, 44% of all deaths among African-American males in the age range from fifteen to twenty-four were caused by firearms. *Id.*

12. Most of the scholarly commentary regarding gun control relates to the proper interpretation of the Second Amendment. Three symposia have been devoted primarily to this issue. See generally Symposium, Gun Control and the Second Amendment, 15 U. DAYTON L. REV. 1 (1989) (containing articles: Keith Ehrman & Dennis Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?* 5; Robert Dowlut, *Federal and State Constitutional Guarantees to Arms* 59; Stephen Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment* 91; Joshua Horwitz, *Kelley v. R.G. Industries: A Cause of Action for Assault Weapons* 125; James Jacobs, *The Regulation of Personal Chemical Weapons: Some Anomalies in American Weapons Law* 141); Symposium, Gun Control, 49 LAW & CONTEMP. PROBS. 1 (1986) (containing articles: James Jacobs, *Exceptions to a General Prohibition on Handgun Possession: Do They Swallow Up the Rule?* 5; Gary Kleck, *Policy Lessons from the Recent Gun Control Research* 35; Margaret Howard, *Husband-Wife Homicide: An Essay From a Family Law Perspective* 63; Daniel Polsby, *Reflections on Violence, Guns, and the Defensive Use of Lethal Force* 89; Lance Stell, *Close Encounters of the Lethal Kind: The Use of Deadly Force in Self-Defense* 113; Robert Shalhope, *The Armed Citizen in the Early Republic* 125; Don Kates, Jr., *The Second Amendment: A Dialogue* 143; Stephen Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"* 151; Robert Batey, *Strict Construction of Firearm Offenses: The Supreme Court and the Gun Control Act of 1968* 163; Alan Lizotte & Marjorie S. Zatz, *The Use and Abuse of Sentence Enhancement for Firearms Offenses in California* 199; Note, *The Public Use Test: Would a Ban on the Possession of Firearms Require Just Compensation?* 223; John Hasbo, *Gun Control: A Selective Bibliography* 251); Second Amendment Symposium: *Rights in Conflict in the 1980's*, 10 N. KY. L. REV. 1 (1982) (containing articles: Edward Kennedy, *The Handgun Crime Control Act of 1981* 1; Stephen Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791* 13; Windle Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims* 41; Richard E. Gardiner, *To Preserve Liberty - A Look at the Right to Keep and Bear Arms* 63; Martin Ashman, *Handgun Control by Local Government* 97; Ann Gottlieb, *Gun Ownership: A Constitutional Right* 113; Samuel Fields, *Guns, Crime and the Negligent Gun Owner* 141; Darell Pierce, Comment, *Second Amendment Survey* 155). For additional academic commentary regarding the Second Amendment, see sources cited *infra* notes 200-01, 209.

13. See *infra* notes 124-40 and accompanying text (discussing hyperbole in context of Brady bill debate).

14. See *infra* notes 108-11 and accompanying text (listing disparaging names used by both supporters and opponents of Brady bill).

This Article exposes the fallacies in the rhetoric of gun control. Concentrating on the debate over the Brady bill, the Article guides the reader through the treacherous terrain of gun control argumentation by identifying and analyzing the wide variety of reasoning defects employed by participants in the debate. The Article is process oriented. No attempt is made to address the ultimate question of whether the nation's gun policies should be reformed. Until we first reform the debate, we cannot hope to approach law reform in a rational way.

In analyzing the rhetoric of gun control, I have attempted to be fair and balanced, attacking the flaws in reasoning on both sides of the debate. As a proponent of gun control, I initially thought this approach would prove difficult. Gun control advocates like to believe that only those who oppose gun control are guilty of deceptive and fallacious rhetoric, but scrutiny of the Brady bill debate reveals that this assumption is false.¹⁵ The pro-Brady bill forces contrib-

15. See *infra* notes 46-49, 90, 104, 112, 116, 133, 166, 177, 183 and accompanying text (giving examples of fallacious or deceptive reasoning used by gun control advocates). Traditionally, the rhetoric of gun control was largely one sided, flowing predominantly from the anti-gun control movement. This perceived lopsidedness was fueled at least partially by the success of the National Rifle Association (NRA) in controlling the debate. See Alex Prud'homme, *A Blow to the NRA; The House Takes an Overdue Stand for Gun Control*, TIME, May 20, 1991, at 26 (asserting that NRA traditionally overpowered rival gun control organizations by having more than twice as many members and 10 times greater budget). Representative Charles E. Schumer characterized the NRA's control on Congress as a "stranglehold," coupled with an "aura of invincibility." *Id.* In 1991, the organization had a staff of 450, 2.6 million members, and boasted an annual budget of \$87 million. Michael Isikoff, *NRA Selects Hard-Liner as Gun Bill Battle Nears*, WASH. POST, Apr. 16, 1991, at A5.

One factor in the NRA's dominance of the rhetorical arena has been its intimidation strategy. Consider this resolution adopted by the NRA at a 1990 meeting in response to the success of recent state and federal gun control initiatives:

WHEREAS this unprecedented string of legislative defeats and outrageous political backstabbing cannot and will not be tolerated by the membership of this Association,

THEREFORE, BE IT RESOLVED, that the membership of the National Rifle Association of America . . . pledges that we shall not soon forgive, and shall never forget, the betrayals of those politicians who once sought our support and will need it again . . .

Members Meeting Adopts Resolution, AMER. RIFLEMAN, Dec. 1990, at 50.

Experience has shown that the NRA backs up its threats. After former Representative Peter Smith spoke out in favor of legislation to ban assault weapons, the NRA spent approximately \$20,000 on a direct mail and advertising campaign to unseat him from the House of Representatives. Stephanie Saul, *NRA Takes Aim at Brady Bill*, NEWSDAY, Apr. 16, 1991, at 19. He lost his bid for reelection. *Id.* Smith said the NRA created an "aura of anger" against him that prompted NRA supporters to shoot at his campaign signs, harass his family by telephone, and try to run his mother's car off the road. *Id.* An NRA spokesperson said the organization does not condone such conduct. *Id.* Yet the unmistakable message the organization sends to politicians is that it is a mistake to oppose or hinder the NRA. *Id.*

The climate has changed in recent years, however. As gun violence continues to escalate, more and louder voices are being heard from the other side. A pro-gun control lobbying organization named Handgun Control, Inc. (HCI) has emerged as a formidable counterweight in the gun control debate. Michael Isikoff, *The Brady Bill: Success and Growing Pains*, WASH. POST, May 31, 1991, at A17 [hereinafter Isikoff, *The Brady Bill*]. While it still lags far

uted more than enough bad rhetoric to the gun control debate to allow for relatively evenhanded treatment of the two sides of the issue.¹⁶

The importance of dissecting gun control rhetoric extends beyond the issue of gun control, or even law reform in general. Understanding rhetoric is a process every student of the law should care about. Rhetoric is the art of persuasion and persuasion is the lawyer's stock in trade. Advocates cannot be completely effective unless they first master the tools of advocacy. Learning to distinguish between good rhetoric and bad rhetoric, that is, learning to recognize and identify flaws in reasoning, is an essential part of every lawyer's education.

I. REASON: THE MISSING LINK IN GUN CONTROL RHETORIC

The foundation of reasoned, rational discourse concerning gun control is surprisingly thin. Many Americans would be shocked to learn that an issue they consider vitally important¹⁷ is not treated as important by those with the power to make it so. For example, the United States Supreme Court has analyzed the Second Amendment

behind the NRA in resources, HCI boasts a \$6.5 million annual budget and a mailing list of more than one million supporters. *Id.* Regrettably, as this Article indicates, improved balance has done little to improve the content of the gun control debate. As more pro-gun control voices are being heard, so also is much of the same bad rhetoric suffered under the empery of the NRA. *See infra* notes 90-110 and accompanying text (providing examples of bad rhetoric in context of Brady bill debate).

16. *See infra* notes 46-49, 90, 104, 112, 116, 133, 166, 177, 183 and accompanying text (providing examples of bad rhetoric used by proponents of Brady bill). I make no pretense of complete objectivity. While an awareness and understanding of fallacies makes it easier to avoid them, no one can be entirely immune from the self-deception that taints his or her reasoning concerning emotionally charged issues. *See infra* notes 255-57 and accompanying text (discussing fallacies that arise as result of self-deception). The ease with which one can succumb to fallacious reasoning became painfully obvious to me when I reviewed an earlier piece I had written advocating strict liability for handgun manufacturers. To my chagrin, I recognized some of the same emotionally based fallacies that I attack herein. *See* Andrew J. McClurg, *Handguns as Products Unreasonably Dangerous Per Se*, 13 U. ARK. LITTLE ROCK L.J. 599 (1991).

17. Some evidence of the importance of this issue to the American public is found in the attention devoted to the Brady bill debate by the popular media. A search of the LEXIS Omni file on July 17, 1992, using the search term "Brady bill," disclosed 1,732 articles discussing the bill. Search of LEXIS, Nexis library, Omni file (July 17, 1992). Another indication of the issue's importance to the American people is their willingness to contribute money to the cause. The NRA's \$87 million annual budget and the fledgling HCI's \$6.5 million annual budget attest that gun control is a cause in which Americans are willing to invest. *See supra* note 15 (discussing activities of NRA and HCI).

The passion with which people hold their views concerning gun control became apparent to me while delivering presentations on the subject to high school students. During one such presentation, a young woman from rural Arkansas raised her hand and asked me to name the most important thing in the universe to me. Bewildered, I answered that it would be my daughter. With conviction seldom seen, she said the most important thing to her was a pearl-handled revolver that her grandmother had given her and that she would shoot anyone who tried to take it away from her. I encountered similar sentiments from several other students.

in a substantive context in only one case this century¹⁸ and in only four cases in history.¹⁹ And as Professor Sanford Levinson noted in a recent article, the Second Amendment appears in leading constitutional law casebooks only as part of the text of the Constitution, which is generally reprinted in the casebooks' appendices.²⁰ He further observed that constitutional law treatises devote only minimal attention to the Amendment.²¹

This deficiency in what I call professional discourse makes the issue of gun control disturbingly unique. Discourse concerning issues of law reform usually occurs at two levels: popular and professional. Popular discourse is discourse among and for dissemination to the populace and includes lunch room banter, letters to the editors of newspapers and magazines, and congressional floor debate. Professional discourse consists of legal argument, judicial opinions, and scholarly commentary. Such discourse generally occurs in a more carefully reasoned manner.

There is both less room and less cause for the appearance of fallacies in the context of professional discourse. For example, although fallacies of reasoning are not uncommon in judicial decisions,²² judges at least try to justify their results using sound logic.²³ Judges

18. See *United States v. Miller*, 307 U.S. 174, 177-83 (1939) (reversing district court decision that National Firearms Act violated Second Amendment); see also *infra* notes 206-16 (discussing *Miller* in context of Second Amendment).

19. See *Miller*, 307 U.S. at 177-83; *Miller v. Texas*, 153 U.S. 535, 537-38 (1894) (dismissing Second Amendment challenge to Texas gun control statute for lack of jurisdiction); *Presser v. Illinois*, 116 U.S. 252, 258-67 (1886) (holding that Second Amendment only restricts power of Congress and Federal Government, not power of states); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (holding that Second Amendment does not create right to bear arms but rather that right exists independent from Constitution). In 1991, the Court declined an opportunity to interpret the Second Amendment when it denied certiorari in *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 753 (1991). The issue in *Farmer* was whether the Firearms Owners' Protection Act of 1986, 18 U.S.C. § 922(o) (1988), prohibits private possession of machine guns not lawfully possessed prior to the statute's effective date. *Farmer*, 907 F.2d at 1042. The Bureau of Alcohol, Tobacco and Firearms denied Farmer, the plaintiff, permission to make and register a machine gun, so he filed an action for declaratory judgment and writ of mandamus to compel the Bureau to approve his application. *Id.* The Eleventh Circuit Court of Appeals ignored Farmer's Second Amendment claim and held that the Act did indeed impose a blanket ban on private possession of machine guns not lawfully possessed prior to the Act's effective date. *Id.* at 1045.

20. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639 n.14 (1989).

21. *Id.* Levinson also noted that only one article concerning the Second Amendment (other than his) has ever appeared in an "elite" law journal. *Id.* at 639 n.13 (citing Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983)).

22. See PIERRE SCHLAG & DAVID SKOVER, *TACTICS OF LEGAL REASONING* 55-105 (1986) (analyzing reasoning defects in representative cases in areas of property law, criminal law, constitutional law, and tort law); see also Andrew J. McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741, 762-832 (1988) (analyzing fallacies in Justice Rehnquist's opinions).

23. This is not to say that the reasons given in a written opinion are the real bases for the

are prevented from succumbing too readily to fallacy by their legal training and ethical responsibilities,²⁴ and because their audience, which consists largely of lawyers and other judges, demands good reasoning.²⁵ Moreover, because theirs is an educated audience that is capable of and willing to digest complex reasoning, judges have less cause to utilize fallacies to prove their points. Judges can write opinions knowing that their rhetoric will not be evaluated solely on the basis of a ten-second "sound bite."²⁶

The same conditions hold true with respect to other professional participants in the law reform process. Law students are trained to

decision. Jerome Frank and other American legal realists convincingly attacked the conventional notion that judges decide cases through deductive logic by applying neutral legal rules to objectively determined facts. See Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 825 (1987) (stating that legal realists demonstrated impossibility of perfectly rational judicial methodology); Allan Hutchinson & Patrick Monahan, *The "Rights" Stuff: Robert Unger and Beyond*, 62 TEX. L. REV. 1477, 1507 (1984) (explaining legal realists' position that deductive logic cannot resolve all doctrinal ambiguity). The realists asserted that judicial results can best be explained by reference to external stimuli that form a judge's values, prejudices, disposition, or temperament. See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 119 (1930) (positing that emotions, biases, and prejudices of judges impede flexibility and predictability of judicial system); Charles G. Haines, *General Observations on the Effects of Personal, Political and Economic Influences in the Decisions of Judges*, 17 U. ILL. L. REV. 98, 116 (1922) (citing factors such as judges' educational background, family and personal associations, wealth and social positions, legal and political experiences, political affiliations and opinions, and intellectual and temperamental habits as key guideposts in determining which way judge will decide case); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897) (arguing that judges make particular choices in deciding cases because of beliefs as to community or class practices and because of policy opinions or general attitudes toward matters); see also *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").

The fact that written opinions follow a logical form, the realists argued, is irrelevant because courts have great leeway in selecting the premises necessary to achieve this structure. As author Jerome Frank has written:

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.

FRANK, *supra*, at 72; see also Holmes, *supra*, at 465-66 ("The language of the judicial decision is mainly the language of logic. . . . You can give any conclusion a logical form.").

24. See AMERICAN BAR ASSOC., MODEL RULES OF PROFESSIONAL CONDUCT AND CODE OF JUDICIAL CONDUCT 138 (1989) (stating in Canon 3 that "[a] judge should perform the duties of his office impartially and diligently").

25. Early in my legal career, while clerking for the Honorable Charles R. Scott, late United States District Judge for the Middle District of Florida, I learned a valuable lesson about judging: that a primary motivation for judges in deciding any case is to avoid being reversed by an appellate court. Reversal not only means extra work, it is the judicial equivalent of having a big, red "F" slashed across a test paper. Judge Scott used to refer to the Eleventh Circuit Court of Appeals as "my master's voice."

26. "Sound bite" is a term used to characterize the terse and abbreviated treatment afforded by the modern television news media to the discussion of often complex social issues by political candidates, with the effect of encouraging politicians to mold their public statements with this coverage in mind. The result in many instances is overly dramatic and overly simplified debate on important public issues.

reason well.²⁷ They learn early on that their professors will not accept emotional or "gut" reactions that are unsupported by reasoned argument. Similarly, judges demand that lawyers present sound arguments to support their positions. While fallacies no doubt occur, reason predominates.

As to most important law reform issues, discourse occurs simultaneously at both the popular and professional levels. While the public is debating abortion, for example, lawyers are arguing, judges are deciding, law students are studying, and scholars are writing about real cases involving abortion. This professional discourse serves as an anchor of reason in the debate; that is, no matter how bombastic or outrageous the popular discourse becomes, a foundation of rationality exists in the professional dialogue that is available to guide the decisionmaking of those vested with power to reform the law.

In contrast, the gun control debate lacks an adequate body of professional discourse,²⁸ leaving us with only the "low road" of popular discourse to guide us toward resolving this vital issue. As seen in this Article, it is a very low road indeed. In recent years, the gun control debate has taken on the "anything goes" appearance of a professional wrestling match. The rules of intellectually honest debate are ignored. Illicit stratagems designed to gain competitive advantage are as likely to be cheered as jeered. As a member of the audience watching this ugly contest, I have never been quite sure whether to sit back and laugh at the absurdity of it all or to jump in the ring swinging a chair. I finally concluded that a debate in which fallacy so completely obscures reason is not simply unproductive, it is a dangerous way to decide an issue as important as gun control. Regardless of one's views concerning gun control generally or the Brady bill in particular, the defective arguments catalogued in this Article should give the reader good reason to pause and reassess the means by which the American people will decide the future of guns in this country.

II. THE FALLACIES OF GUN CONTROL RHETORIC

The fallacies of gun control rhetoric tend to be informal rather than formal fallacies. Formal fallacies are arguments that are defec-

27. See Alan D. Hornstein, *The Myth of Legal Reasoning*, 40 MD. L. REV. 338, 339 (1981) (deconstructing steps involved in legal reasoning and pointing out similarities between legal reasoning and other forms of formal reasoning). While law professors are fond of telling students that law school trains them to "think like lawyers," I agree with Professor Hornstein that this really means nothing more than learning to reason well. *Id.*

28. See *supra* note 12 and accompanying text (citing significant scholarly works on issue of gun control).

tive because of improper form, without regard to content.²⁹ Argument form is dictated by the rules of logic developed in the context of Aristotelian syllogisms.³⁰ Syllogisms are analyzed by logicians in terms of their validity rather than their truth. In formal logic, validity depends only on the form of the argument. Content is irrelevant.³¹ In the world of practical argumentation, however, the content of an argument is vital.

To illustrate, suppose that a person opposed to gun control advanced the following syllogistic argument:

The Second Amendment protects an individual's right to keep and bear any type of arm.

A nuclear weapon is a type of arm.

Therefore, the Second Amendment protects an individual's right to keep and bear nuclear weapons.

This syllogism is perfectly valid from a formal standpoint, yet any audience would most likely reject the argument because the content is flawed. The audience would dispute the truth of the major premise that the Second Amendment protects an individual's right to possess *any* type of arm. This illustration demonstrates that while content is not a concern of formal logic, content is crucial to the soundness of practical argumentation. The label used to denote all such content-based fallacies is that of "informal fallacy."

No attempt has been made to classify the fallacies evaluated in this Article in a rigorously systematic way. As De Morgan said: "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*."³² Several scholars have made efforts to categorize fallacies, but each attempt has had rather arbitrary results.³³ This is not surpris-

29. See MORRIS COHEN & ERNEST NAGEL, *AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD* 376 (1934) (describing structural flaw inherent in formal fallacy).

30. A syllogism is a deductive argument consisting of three terms (major, middle, and minor) and three propositions (major premise, minor premise, and conclusion). Deductive arguments are those in which the conclusion necessarily follows from the premises. If the premises of the syllogism are true and the syllogism is valid, the conclusion must be true. The following example from Aristotle is illustrative:

All men are mortal;

Socrates is a man;

therefore Socrates is a mortal.

1 ARISTOTLE, *Analytica Priora*, in *THE WORKS OF ARISTOTLE* 25^b l. 38 (W.D. Ross ed., A.J. Jenkinson trans., 1928) [hereinafter *Analytica Priora*]. For a more extensive explanation of syllogisms, see COHEN & NAGEL, *supra* note 29, at 76-78 and COPI, *supra* note 5, at 168-71. Aristotle's classic discussion of the syllogism is found in *Analytica Priora*. *Analytica Priora*, *supra*, at 24^a l. 10.

31. See COPI, *supra* note 5, at 33 ("[T]he truth or falsehood of [an argument's] conclusion does not determine the validity or invalidity of an argument. . . . The logician is interested in the correctness even of arguments whose premises might be false.").

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

33. See, e.g., *De Sophisticis Elenchis*, *supra* note 5, at 165^b l. 23-168^a l. 17 (explaining Aris-

ing. Because we do not think in fixed ways, there is no reason to believe the reasonings we construct can be classified in fixed ways.³⁴ Moreover, any attempt to classify fallacies is immediately stalled by the fact that a single argument may contain several fallacies. This overlap necessitates cross-divisions that invariably dilute the classification scheme. Accordingly, this Article adopts a simple method of classification, dividing the fallacies of gun control into three broad categories: fallacies of emotion, fallacies of diversion, and fallacies of proof. Within each category, several specific fallacies are discussed.

A. *Fallacies of Emotion*

1. *Appeals to fear and sympathy*

In arguing against the Brady bill on the House floor, Representative Barbara Vucanovich, a Republican from Nevada, invoked the tragic episode of serial murders that occurred in Gainesville, Florida in the summer of 1990.³⁵ She posed the following query: "If the Brady bill were law, who knows how many more young women would be dead in Gainesville because they had to wait to protect

tole's division of his 13 original fallacies into two groups: fallacies dependent on language and fallacies outside language); *supra* note 7 (listing classifications of fallacies devised by several authors). Aristotle's fallacies dependent on language all involve problems arising from the ambiguity of language. *De Sophisticis Elenchis*, *supra* note 5, at 165^b l. 23-168^a l. 17. For example, equivocation, the simplest case of ambiguity, occurs when a word is used in two different senses in the same context, as in the following example:

Some dogs have fuzzy ears.

My dog has fuzzy ears.

Therefore my dog is some dog.

COP1, *supra* note 5, at 74. This syllogism is fallacious because it confuses two different meanings of the word "some." In the first premise, "some" is used to mean a portion of the whole; in the second, the term means "exceptional" or "great." The fallacies dependent on language are seldom encountered in the real world of practical argumentation, however. While Aristotle's fallacies dependent on language constitute a relatively coherent class, his fallacies outside language do not have any common feature except that most of the fallacies could be labeled as material fallacies rather than simply as fallacies of form. See JOSEPH G. BRENNAN, A HANDBOOK OF LOGIC 208-23 (2d ed. 1961) (critiquing prior categorizations of fallacies, including Aristotle's).

34. In expounding his relatively cogent classification of fallacies, Richard Whately 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.

RICHARD WHATELY, ELEMENTS OF LOGIC 136 (Scholars' Facsimiles & Reprints 1975) (2d ed. 1827).

35. See Peter Applebome, *Panic on a Florida Campus After 5 Are Slain*, N.Y. TIMES, Aug. 29, 1990, at A1 (documenting murder of five students at universities in Gainesville, Florida, in August 1990).

themselves.”³⁶ Then, in almost the same breath, she urged her fellow representatives “not to let their judgments be clouded by the antigun lobby’s emotional banter.”³⁷

The representative should practice what she preaches. Conjuring up the nightmarish image of defenseless coeds being butchered by a mad killer was a blatant attempt to use emotion to generate opposition to the Brady bill. Appeals to emotion are fallacious because emotions are irrelevant as a basis for deciding an issue. While emotions have psychological relevance in that they have a persuasive impact on the human mind, they have no logical relevance because they are incapable of establishing the truth of conclusions.³⁸ Proving truth requires the mustering of convincing evidence and not simply the exploitation of emotional sensitivities.³⁹ Emotions may move us to act, but reason should control the course of that action.⁴⁰

Vucanovich committed at least three fallacies of emotion in one sentence: *argumentum ad odium* (argument directed to hatred), *argumentum ad metum* (argument directed to fear), and *argumentum ad misericordiam* (argument directed to pity).⁴¹ Her appeal to these emotions was particularly irrelevant because a handgun waiting period would have had little effect on the events in Gainesville. There is no indication that any of the victims was killed because a waiting period kept her from purchasing a handgun, or that any potential victim used a handgun to repel, apprehend, or kill the killer. Vucanovich was simply attempting to provoke opposition to the Brady bill by fabricating an association between the bill and the strong emotions aroused by the serial killings. Vucanovich played on our hatred and fear of serial murderers, as well as our feelings of pity for the murder victims.⁴² None of this, however, has anything to do

36. 137 CONG. REC. H2859 (daily ed. May 8, 1991) (statement of Rep. Vucanovich).

37. *Id.*

38. See COPPI, *supra* note 5, at 53, 58-61 (discussing appealing reasons for use of fallacies). Emotions must be distinguished from reasoning based on values and moral judgments, which are relevant to rational decisionmaking. See *infra* note 121 and accompanying text (expounding difference between use and misuse of emotions in argument).

39. See DAMER, *supra* note 6, at 87 (discussing how interplay of emotion and persuasion often leads to failure to present evidence that is persuasive independent of emotional aspect).

40. See PRIE, *supra* note 5, at 58 (citing Scottish philosopher David Hume as the source of stated observation).

41. See HAMBLIN, *supra* note 5, at 161 (crediting John Locke with inventing “argumentum ad” labels). Scholars of rhetoric still use these Latin names. Some, like *ad hominem*, have become part of the English lexicon.

42. Like many other fallacies, appeals to pity have a distinguished pedigree. Quoting from Plato’s *Apology*, Copi sets out a portion of Socrates’ defense of himself in which he reminds the judges that he is a family man with three young sons, in order to persuade the judges of his innocence. COPPI, *supra* note 5, at 59. Logically, Socrates’ family situation was irrelevant to the question of his guilt.

with whether the Brady bill should become law.

Unfortunately, Vucanovich's salvo was not unique. Fallacies of emotion are one of the hallmarks of gun control rhetoric. Vucanovich's emotional banter was no worse than some of the gun lobby's other scare tactics. After the 1992 Los Angeles riots that followed in the wake of the jury's decision to acquit most of the police officers charged with using excessive force against motorist Rodney King, the National Rifle Association (NRA) employed a four-page advertisement to boost membership by shamelessly exploiting the fear and horror generated by images of the violence.⁴³ The advertisement, featuring color pictures of looters and burning buildings, asked: "Must your glass be shattered? Must your flesh and blood be maimed? Must your livelihood be looted? Must all you've built be torn down? . . . What will it take before you stand up with the one group that will *stand for no more*?"⁴⁴ Such tactics are not new. In 1988, the year Congress first considered the Brady bill, the NRA paid for full-page newspaper advertisements that were designed to incite people's fear of being unarmed in an increasingly dangerous and violent America.⁴⁵ One advertisement depicted a woman's mangled locket under the headline: "Your mother just surprised two burglars who don't like surprises."⁴⁶ Another showed a high-heel shoe with the heel broken off. It read: "He's followed you for two weeks. He'll rape you in two minutes."⁴⁷

Fear is a great motivator, but in the gun control debate fear cuts both ways. It may be dangerous for potential victims of criminals to be unarmed, but this is partly because many criminals *are* armed. Not surprisingly, then, the strategy of preying on fear of violent crime has never been the exclusive province of the gun lobby. Consider a law review article adapted from a speech given by Senator Edward Kennedy urging passage of the Handgun Control Act of

43. NATIONAL RIFLE ASS'N, WHAT WILL IT TAKE? (1992) (magazine advertisement on file with *The American University Law Review*).

44. *Id.* The following are additional excerpts from the advertisement:

The evil in L.A. was just a concentrated form of the one-on-one evil that stalks America every nightfall, untouched by gun laws and ignored by media. In dark parking lots instead of crowded streets. Smashing through bedroom windows instead of store windows. Demolishing lives instead of whole neighborhoods. One lonely woman at a time, one businessman at a time, one family at a time, one innocent victim at a time.

Id.

45. See Mark Udulutch, Note, *The Constitutional Implications of Gun Control and Several Realistic Gun Control Proposals*, 17 AM. J. CRIM. L. 19, 21 n.14 (1989) (citing *Go Ahead, Make Our Day*, THE NEW REPUBLIC, Feb. 22, 1988, at 7) (stating that *Washington Post*, *New York Times*, and other major publications ran series of nine such advertisements sponsored by NRA).

46. *Id.*

47. *Id.*

1981.⁴⁸ The Senator's essential point was that we need legislation to control handguns because of the prevalence of handgun violence. Rather than express this sentiment in such prosaic terms, however, he opted for loaded words and phrases like "fusillade of bullets," "carnage," "assassin," "fears and . . . tears," "haunted," "end the arms race in our neighborhoods," "relentless toll climbs higher," "epidemic," and "plagues the Nation."⁴⁹ And this was all in just the first four paragraphs! Emotive words and phrases such as these are designed to prejudice an argument by illicitly achieving a more dramatic effect than could be attained through reason alone.⁵⁰

While Senator Kennedy's plea went unanswered,⁵¹ other emotional appeals, drawing from an ever-expanding inventory of gun-related horrors, have proven more effective in tipping the balance of fear toward the side of gun control. In the Brady bill debate, proponents used grisly anecdotes and numbing statistics to convince the American people that there is more to fear from criminals having guns than from non-criminals not having guns.⁵² No stratagem capable of evoking strong emotions was overlooked. Indeed, the name of the bill itself served as a powerful emotional symbol. Handgun Control, Inc., the Washington based anti-gun lobbying organization led by chairwoman Sarah Brady, exploited popular sympathy for Jim Brady by running advertisements showing Brady in his wheelchair, saying "[h]elp me beat the gun lobby."⁵³ Some members of Congress buttressed their support of the bill with inspired testimonials to Jim and Sarah Brady.⁵⁴ Others set their emotional sights more broadly, mourning the plight of beleaguered old people, innocent children, terrorized families, and police officers on

48. See Edward M. Kennedy, *The Handgun Crime Control Act of 1981*, 10 N. Ky. L. REV. 1 (1982) (presenting text of speech Senator Kennedy delivered on Senate floor on April 9, 1981).

49. *Id.* at 1-2.

50. See PIRIE, *supra* note 5, at 111 (describing numerous effects emotionally loaded words may have on receiver of argument).

51. Richard Wolf, *Crime Bill Killed by Political Cross Fire*, USA TODAY, Nov. 27, 1991, at A4 (citing failure of Senate to pass crime bill prior to end of legislative session).

52. See Alison Carper, *Clear Shot to N.Y. for Running Firearms*, NEWSDAY, May 8, 1991, at 7 (depicting infant accidentally killed in crib by illegally purchased gun to support gun control); *U.S. Murder Rate Appears Headed for a Record Year*, L.A. TIMES, Aug. 5, 1991, at A16 (using extensive statistics to support passage of Brady bill).

53. Saul, *supra* note 15, at 85.

54. See 137 CONG. REC. H2845 (daily ed. May 8, 1991) (statement of Rep. Downey) ("Let us not forget Jim Brady. . . . Let us make sure that Jim Brady's suffering was not in vain."); *id.* at H2833 (daily ed. May 8, 1991) (statement of Rep. Fish) (stating that "[J]im and Sarah Brady] both decided that after Jim's shooting they would rather light a candle than curse the darkness, and the Brady bill . . . is indeed that candle"). Whether the Brady bill would have prevented John Hinckley from purchasing the handgun used to shoot Jim Brady is by no means clear. See *infra* note 56 (discussing debate on whether gun control legislation would have prevented Jim Brady's injury).

duty.⁵⁵

These references to innocent firearm victims, while relevant to the overall gun control debate, are fallacious arguments in support of the Brady bill. They would be germane to the Brady bill controversy only if some logical connection could be shown between the victims' plight and the lack of waiting periods or background checks for handgun purchasers. Few participants in the debate attempted to establish any such connection, however, probably because it would be difficult to do.⁵⁶ For one thing, the Brady bill would not affect the estimated 200 million firearms⁵⁷ already in circulation.⁵⁸ Whatever good the Brady bill might do, no one can seriously contend that the bill could, by itself, reduce the level of gun violence in

55. See, e.g., 137 CONG. REC. H2868-69 (daily ed. May 8, 1991) (statement of Rep. Owens) ("Every week innocent people, including children, are murdered These innocent adults and children are killed only because they were in the wrong place at the wrong time. And all too often that wrong place is a crib, a family car, or a living room."); *id.* at H2845 (statement of Rep. Downey) ("Older citizens are forced to stay in their homes at night behind locked doors, while criminals rule the streets. Innocent children are terrorized and threatened. Once quiet neighborhoods have become bloody battlegrounds."); *id.* at H2827 (statement of Rep. Weiss) ("Stray bullets have turned mainstreet U.S.A. into a firing range."); *id.* at H2825 (statement of Rep. Slaughter) (referring to shootouts resulting in children's deaths in New York City); Elaine S. Povich, *House Passes Brady Bill; Handgun Control Measure Survives Furious NRA Lobbying*, CHI. TRIB., May 9, 1991, at 1 (quoting Representative Charles Schumer as saying, "Every child that is still growing up, every cop that still patrols his beat, every family that remains intact—they silently ask us to approve the Brady bill.").

56. See David B. Kopel, *Why Gun Waiting Periods Threaten Public Safety* (Mar. 25, 1991) (unpublished issue paper from Independence Institute), reprinted in 137 CONG. REC. S9046-47 (daily ed. June 28, 1991) [hereinafter Kopel] (noting that Sarah Brady and HCI assert that waiting period and background check would have prevented John Hinckley from purchasing cheap handgun he used to shoot President Reagan and Jim Brady, but pointing out that such result is far from clear). Hinckley bought the gun he used in the assassination attempt from a Texas gun shop in October 1980, which was several months before the shooting occurred. *Id.* Thus, Kopel asserts that a waiting period "would obviously have had no impact." *Id.* Other than the possibility that Hinckley might have changed his mind about purchasing the gun had he been required to wait a few days, this is true.

As to the efficacy of a background check, Hinckley was not a convicted felon and, while he had been treated for mental illness, no public record of his illness existed. Thus, a background check would not have disclosed his illness. *Id.* The basis for Sarah Brady and HCI's claim that a background check would have prevented the assassination attempt is that Hinckley lied about his address when he purchased the gun, using an old Texas driver's license as verification. *Id.* Mrs. Brady claims that a background check would have uncovered this lie, and thus Hinckley would not have been permitted to buy a handgun in Texas. *Id.* Kopel asserts, however, that a false statement on the federal firearm transaction form would not by itself make the purchase transaction illegal. *Id.* He notes that federal law requires a gun purchaser to furnish identification only to prove residence in the state of purchase, and not to verify an in-state address. *Id.* So long as Hinckley was a Texas resident, Kopel argues, the transaction would have been legal. *Id.* Kopel then makes a case for Hinckley's Texas residency based on his attendance at Texas Tech University the summer preceding the assassination attempt. *Id.*

57. Erik Eckholm, *Ailing Gun Industry Confronts Outrage over Glut of Violence*, N.Y. TIMES, Mar. 8, 1992, at A1.

58. See S. 1241, 102d Cong., 1st Sess. §§ 2701-2703 (1991) (proposing regulations for new firearm purchases only).

America.⁵⁹ The connection Brady bill supporters sought to make between the legislation and senseless handgun violence was largely an emotional one à la Congresswoman Vucanovich or Senator Kennedy, rather than a logical one.⁶⁰

2. *Appeals to pride and popular opinion*

Not all the fallacies of emotion are negative in tenor. Resorting to the fallacy of *argumentum ad populum*, both sides in the Brady bill contest manipulated positive popular sentiments as well as negative ones. There are several variations of *argumentum ad populum*, which translates to "argument directed to the people." As used here, the fallacy refers to appeals to popular opinion that stimulate and excite the public to favor a particular position.⁶¹

Appeals to national pride and patriotism are particularly attractive strategies for politicians. The Persian Gulf War served as fertile ground for these types of appeals. For example, one House member argued that Congress should approve the Brady bill because "[a]s we learned in the gulf, the best way to defeat the enemy is to disarm him first."⁶² Another representative urged his colleagues to "deal with handgun violence as quickly as we dealt with Saddam Hussein and his Republican Guard."⁶³ Not to be outdone, Brady bill opponents alluded to General Norman Schwarzkopf and Eastern European freedom fighters as reminders of the preciousness of freedom.⁶⁴ Recalling less recent symbols of patriotic pride, an NRA vice president, apparently with a straight face, asked, "What if they had to wait seven days to get their rifles to come to the Alamo and

59. See Kopel, *supra* note 56, at S9048-49 (citing criminological studies showing that waiting periods have little effect on number of crimes committed with guns).

60. Gun control advocates stooped even lower in the related battle over assault weapons. Rivaling the NRA for bad taste, Handgun Control, Inc. sponsored an advertisement showing a hooded Ku Klux Klansman clutching a Colt AR-15 under the headline: "Why Is the NRA Allowing HIM Easy Access to Assault Weapons?" Isikoff, *The Brady Bill*, *supra* note 15, at A17. The Senate voted to ban the manufacture and sale of 14 types of assault weapons as part of the Senate Violent Crime Control Act of 1991, a broad-based crime control statute that also included the Senate's version of the Brady bill. S. 1241, 102d Cong., 1st Sess. § 703 (1991). However, the assault weapon ban failed to pass the House by the surprisingly large margin of 247 to 177. Michael Isikoff, *House Rejects Attempt to Ban Assault Guns*, S.F. CHRON., Oct. 18, 1991, at A1, A20. The proposal ultimately was scrapped by House and Senate conferees. Houston, *supra* note 3, at 1.

61. See generally COP1, *supra* note 5, at 60-61 (defining *ad populum* appeal as attempt to arouse feelings and enthusiasm of multitudes); DAMER, *supra* note 6, at 89-91 (analyzing several distinct appeals to popular opinion).

62. See *Is Seven Days Too Long to Wait to Purchase a Handgun*, USA TODAY, May 7, 1991, at 10A (quoting statement by Representative Charles Schumer).

63. 137 CONG. REC. H2851 (daily ed. May 8, 1991) (statement of Rep. Stokes).

64. *Id.* at H2837 (statement of Rep. DeLay).

fight?"⁶⁵ Even references to apple pie made it into the debate.⁶⁶

Again, the flaw here is irrelevance. American pride in our performance in the Gulf War has nothing to do with whether it is wise to impose a waiting period and a background check on handgun purchases. General Schwarzkopf and the Eastern European countries may be powerful symbols of freedom, but they have no connection to the wisdom or constitutionality of the Brady bill. As for the Alamo, ignoring the unfortunate result there, the Brady bill does not apply to rifles, to the military, or to the 200 million guns already owned by American citizens. Thus, Texans should fare well if attacked again from the south, even if the Brady bill is enacted. Each of these appeals to patriotism and national pride, while probably persuasive to a mass audience, missed the mark of reason by a wide margin.

3. *Appeals to improper sources of authority*

Positive emotions toward a position can also be engendered by appealing to popular personalities; that is, speakers can promote the credibility of their arguments by aligning themselves with persons of outstanding character and reputation who share their views. This is not fallacious if these authorities have specialized knowledge concerning the problems they address. It is quite proper to call on qualified experts to assist laypersons in making decisions concerning matters beyond their knowledge and experience. Lawyers, judges, and juries do it every day.

But where the person is not qualified as an expert on a subject, appealing to that person's judgment as a basis for deciding an issue commits the fallacy of *argumentum ad verecundiam*—an improper appeal to authority.⁶⁷ This is true no matter how well known or well reputed the person may be. Unless a person is an authority on the particular issue, the person's opinion should not influence the dispute.

While improper appeals to authority may seem too transparent to

65. Michael Isikoff, *NRA Leaders Vow All-Out Fight Against 'Brady Bill,'* WASH. POST, Apr. 14, 1991, at A12.

66. See Desda Moss, *New NRA Chief Aims at Diversity, Laws Limiting Guns*, USA TODAY, Apr. 17, 1991, at 2A (quoting newly elected NRA president Wayne LaPierre as stating that "the NRA's about as mainstream and apple pie as you can get").

67. For a discussion of improper appeals to authority, see BENTHAM, *supra* note 5, at 25-29 (explaining circumstances under which appeals to authority are fallacious); COPI, *supra* note 5, at 61-62 (categorizing appeals either as inside or outside experts' field of specialization); DAMER, *supra* note 6, at 93-94 (discussing improper appeals to unidentified and biased authorities and to non-authorities); FEARNSIDE & HOLTHERR, *supra* note 5, at 84-89 (explaining use and misuse of authority); HAMBLIN, *supra* note 5, at 42-43 (providing historical overview of use of improper appeals to authority).

be beguiling, we nevertheless succumb to this fallacy every day. Otherwise, companies would not pay millions of dollars to popular entertainment personalities to secure testimonials for their products. If pop star Michael Jackson drinks Pepsi, it must be better than Coke. Comedian Jay Leno likes Doritos, so throw out the potato chips. Since athlete Bo Jackson wears Nike athletic shoes, they must be superior to those of major competitor Reebok (unless one happens to think more highly of the athletes who endorse Reebok than of Bo Jackson).

Perhaps the single most important factor influencing the passage of the Brady bill was Ronald Reagan's endorsement of the legislation.⁶⁸ Mr. Reagan had been a lifetime member of the NRA and was the first candidate for President ever endorsed by that organization.⁶⁹ When the former President said in "clear, unmistakable language" that he supported the Brady bill,⁷⁰ he deprived gun enthusiasts of one of their most effective and time-honored rhetorical weapons and handed an equally formidable one to the other side.⁷¹ Haunted by the ghost of Willie Horton, Brady bill supporters, most of whom were Democrats, had to be wary of being portrayed as more concerned about gun control than about crime control.⁷² But with Ronald Reagan on their side, no longer could it

68. See John A. Farrel, *Senate OK's 5-Day Wait for Hand Gun Purchases*, BOSTON GLOBE, June 29, 1991, at b1 (stating that turning point in campaign for legislation was Reagan endorsement).

69. See Chuck Conconi, WASH. POST, June 23, 1988, at B3 (reporting that Reagan, lifetime NRA member, is believed to be first candidate for President ever to be endorsed by NRA).

70. Ronald Reagan, Address at George Washington University Marking 10th Anniversary of Attempt on His Life (Mar. 28, 1991). Mr. Reagan also said that waiting periods to perform background checks are "just plain common sense." *Mr. Reagan on the Brady Bill*, WASH. POST, Mar. 29, 1991, at A20 (reporting Reagan's unqualified endorsement of seven-day waiting period for handgun purchases). This may explain the popularity of that phrase among members of Congress who supported the Brady bill. See *infra* note 112 (documenting appeals to "common sense" in Brady debate).

71. *Support the Brady Bill: Congress Should Follow Reagan on Gun Control*, SEATTLE TIMES, Mar. 31, 1991, at A18 (noting that Reagan's reversal in position undoubtedly surprised gun enthusiasts because he had continued to oppose gun control for long period even after being shot by John Hinckley). Reagan's steadfastness on the issue of gun control made him a hero among gun lovers, as evidenced by the following tribute that appeared in a gun enthusiasts' magazine after the Hinckley attack: "Thank God for President Reagan, a man who, even after being shot, realizes that more gun controls are not the solution to our crime problem. . . . Here's a man of guts, common sense and vision. May he live to be 120." JERVIS ANDERSON, GUNS IN AMERICAN LIFE 7 (1984) (quoting from the gun magazine *Pistolero*).

72. See Edward Walsh, *Clinton Charges Bush Uses Crime Issue to Divide*, WASH. POST, July 24, 1992, at A16 (explaining that Willie Horton is convicted murderer who escaped from prison in Massachusetts during prison furlough program). Horton later raped a woman. *Id.* The Republicans used Horton's story in repeated negative advertisements during the 1988 presidential campaign to portray the Democratic presidential candidate Michael Dukakis, then-governor of Massachusetts, as being weak on law enforcement issues. Howard Kurtz, *Past Brings Perspective to Negative Ads*, WASH. POST, July 28, 1992, at A8.

be said that only "liberals" favored gun control.⁷³

The pro-Brady bill forces did not hesitate to capitalize on Ronald Reagan's support, as well as on that of former Presidents Nixon, Carter, and Ford.⁷⁴ It is astonishing, however, that Mr. Reagan's opinion on the issue should carry so much weight. Mr. Reagan is not an expert on gun control. He is not a criminologist or constitutional law scholar. He is simply a popular former President. It is doubtful that he rigorously studied any of the literature on the subject of gun control or the Second Amendment in reaching his conclusion to support the Brady bill. With due respect to Mr. Reagan, his opinion on the bill should carry about as much weight with the public as a popular entertainer's endorsement of a consumer product. Appealing to his judgment as a basis for deciding the issue was an improper appeal to authority.⁷⁵

To further strengthen their shield against criticism that they are soft on crime, Brady bill supporters made good use of the fact that most major national police organizations endorsed the legislation.⁷⁶ This enabled them to project themselves as standing shoulder to shoulder with the nation's police officers in the war against violent street crime.⁷⁷ Appealing to the judgment of law enforcement associations on the issue was not completely fallacious because police officers have substantial experience in dealing with guns and gun

73. See *infra* notes 92-98 and accompanying text (citing examples of characterization of gun control proponents as liberals).

74. See 137 CONG. REC. H2847 (daily ed. May 8, 1991) (statement of Rep. Atkins) (announcing that he is proud to support legislation that is also backed by former Presidents Ronald Reagan, Jimmy Carter, Gerald Ford, and Richard Nixon); *id.* at H2844 (statement of Rep. Roemer) (noting that Brady bill had support of former Presidents Reagan and Nixon).

75. An opponent of the bill sought to explain away Mr. Reagan's support as "an act of love and loyalty" to his friends, Sarah and Jim Brady, which it may have been. *Id.* at H2824 (statement of Rep. Gekas).

76. Handgun Control, Inc. circulated a newsletter touting the support of the following police organizations: Fraternal Order of Police, with 217,000 members; National Association of Police Organizations, with 130,000 members; International Association of Chiefs of Police, with 15,000 members; National Sheriffs' Association, with 22,000 members; and the National Organization of Black Law Enforcement Executives, with 2,300 members. HANDGUN CONTROL, INC., POLICY LOBBY FOR NATIONAL WAITING PERIOD, JUST THE FACTS ABOUT THE BRADY BILL.

77. See 137 CONG. REC. H2837 (daily ed. May 8, 1991) (statement of Rep. Hughes) ("I happen to be with police of this country and Sarah and Jim Brady."); *id.* at H2837 (statement of Rep. Gephardt) ("I will vote for the Brady bill because it has the strong support of the men and women who wear the uniform, walk the beats, bust the pushers, and put their lives on the line every day."). Representative Hughes followed his effort to identify himself with the "good guys" by connecting opponents of the bill with the "bad guys." "Who is on the other side of the issue?" he asked. "Make no mistake about it. The NRA is on the other side of the issue." *Id.* at H2861 (statement of Rep. Hughes). Jeremy Bentham labeled this type of argument the fallacy of vituperative personalities. BENTHAM, *supra* note 5, at 83-92. This fallacy consists of arguing for the rejection of a measure based on the allegedly bad character of those who favor it. *Id.* at 83-92. The fallacy is one form of *ad hominem*. For a discussion of *ad hominem*, see *infra* notes 82-116 and accompanying text.

violence. However, as American Civil Liberties Union Attorney David B. Kopel noted, to the extent the Brady bill raises constitutional issues regarding the proper interpretation of the Second Amendment, deference to police opinion is inappropriate.⁷⁸ The police, he reminded, are not noted for their dedication to protecting individual liberties.⁷⁹ On this point he is correct that unqualified deference to police organizations' judgment is unwarranted.

With Ronald Reagan, the police, and other stalwarts on their side,⁸⁰ the pro-Brady bill forces simply (if the pun can be forgiven) outgunned the NRA in the contest for popular support. Lacking the endorsements of presidents and major police organizations, Brady bill opponents were reduced to trumpeting such generic good will associations as "we have NRA members that are policemen, ministers, doctors, lawyers, scout leaders, little league coaches[, and so on.]"⁸¹

4. *Ad hominem*

Whatever either side lacked in positive emotional identifications between issues and personalities was made up for with negative connections. A time-honored rule of effective persuasion is that it may be more profitable to attack the arguer than it is to attack the argument.⁸² This is the fallacy of *argumentum ad hominem*, or "argument directed against the man."⁸³ Few fallacies are more potent or more often employed.

Ad hominem works because of the emotional transference that occurs from listeners' feelings about a speaker to their feelings about

78. Kopel, *supra* note 56, at S9048.

79. Kopel, *supra* note 56, at S9048. Kopel explained his position as follows:

The opinion of police chiefs is not the arbiter of our Constitutional rights. Some police executives criticize the exclusionary rule; they claim that a strong Fourth Amendment causes crime. Some police executives criticize the *Miranda* decision, and claim that a strong Fifth Amendment causes crime. Many police executives say that a strong Second Amendment causes crime. In every case the executives are wrong.

Id.

80. The American Medical Association (AMA) also endorsed the Brady bill. See 137 CONG. REC. H2824 (daily ed. May 8, 1991) (statement of Rep. Hoagland) ("The Nation's doctors urge us to help them in a vital mission—saving lives. The AMA asks that we act swiftly to put in place a measure to keep guns out of the hands of those who should not have them."). The AMA, though certainly a distinguished body, is a questionable source of authority regarding the wisdom of waiting periods and background checks, however.

81. *Id.* at H2830 (statement of Rep. Solomon).

82. The classic tale, presumably apocryphal, involves an English barrister who had neglected to prepare for trial, counting instead on a solicitor to investigate and prepare the case. When the barrister arrived on the morning of trial, the solicitor handed him the trial brief. Surprised by its thinness, the barrister opened it and found only a note reading: "No case; abuse the plaintiff's attorney." COPI, *supra* note 5, at 60.

83. See COPI, *supra* note 5, at 54 (discussing and defining *ad hominem* fallacies).

his or her argument.⁸⁴ If an audience has a negative opinion about the speaker, that opinion is likely to carry over to the speaker's argument. For example, if one wanted to rebut Senator Edward Kennedy's support for gun control with an *ad hominem* attack, the argument might be: "I wonder if Senator Kennedy took any time out from his drinking and carousing to study this issue."⁸⁵ By generating negative emotions about the Senator, the speaker might also convince the audience to discount the Senator's views concerning gun control. The fallacy is that however distasteful Senator Kennedy's personal character and lifestyle might be to some, these factors are logically irrelevant to the soundness of his judgment about gun control.

Ad hominem comes in two basic forms.⁸⁶ The first form, abusive *ad hominem*, involves a direct attack on the speaker.⁸⁷ The attack may relate to the speaker's character, judgment, intelligence, or even the person's inability to dress properly.⁸⁸ The hypothetical involving Senator Kennedy is an example of abusive *ad hominem*. The second form of the *ad hominem* fallacy is circumstantial *ad hominem*, which

84. See COPI, *supra* note 5, at 55 (analyzing effectiveness of *ad hominem* on audience).

85. In fact, Senator Kennedy has frequently been the target of just this kind of *ad hominem* attack. For example, after Kennedy lambasted David Duke's candidacy for the governorship of Louisiana, the former Grand Wizard of the Ku Klux Klan lashed back by saying, "I'd rather be an ex-Klansman than the hero of Chappaquiddick. I'm very proud that Teddy Kennedy is attacking me. It must mean that I'm doing something well." Ron Ridenhour, *Duke Foes Join in Uneasy Coalition*, S.F. EXAMINER, Oct. 27, 1991, at A6, A7.

86. See DAMER, *supra* note 6, at 79-80 (discussing both types of *ad hominem* arguments and providing examples). Many other authors have analyzed *ad hominem* arguments and have often classified the arguments in more than two categories. See BENTHAM, *supra* note 5, at 83-92 (classifying six groups of *ad hominem* attacks); STUART CHASE, GUIDES TO STRAIGHT THINKING: WITH THIRTEEN COMMON FALLACIES 58-64 (1956) (identifying fallacies and discussing identification scheme); COPI, *supra* note 5, at 54-57 (discussing irrelevance of *ad hominem* attacks to rational decisionmaking); FEARNside & HOLThER, *supra* note 5, at 97-104 (analyzing four types of *ad hominem* fallacies); HAMBLIN, *supra* note 5, at 41-42 (giving historical overview of *ad hominem* label).

87. DAMER, *supra* note 6, at 79.

88. See FISCHER, *supra* note 7, at 291 (illustrating abusive *ad hominem* attack with example of closing argument used by Abraham Lincoln to destroy his opponent's esteem). Lincoln's law partner, William H. Herndon, remembered the future President's argument in this way:

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

Id. (quoting WILLIAM H. HERNDON, HERNDON'S LIFE OF LINCOLN 291 (Paul Angle ed., 1965)).

consists of disparaging a person's views based on some relationship between those views and the person's special circumstances.⁸⁹ Both varieties of this fallacy were in plentiful supply during the Brady bill debate.⁹⁰

The dominant theme of *ad hominem* attacks by the anti-gun control movement has been to paint supporters of gun control as soft on crime and as being more concerned with controlling guns than criminals. One extreme example of this during the Brady bill controversy was a song targeting gun control activists composed by the leaders of an organization called Jews for the Preservation of Firearms Ownership.⁹¹ Sung to the tune of "America the Beautiful," the song, called "Ode to Felons," included these lyrics: "We are the friends of felons, we want felons to be free; To murder, rape and sell cocaine from L.A. to D.C."⁹²

A less creative but equally mean-spirited way to attack advocates of gun control was simply to invoke the dreaded "L" word.⁹³ The Brady bill debate was peppered with references to the "liberal political conspiracy,"⁹⁴ "ultra-liberal newspapers and congressmen,"⁹⁵ the "liberals' anti-gun propaganda"⁹⁶ and—employing the most dis-

89. See FISCHER, *supra* note 7, at 81 (furnishing example of circumstantial *ad hominem* fallacy wherein attorney's position on legal reform was attacked on basis of same person's occupation as attorney).

90. See, e.g., Mitchell Locin, *Texas Gunfire Changes 1 Vote*, CHI. TRIB., Oct. 18, 1991, at M1 (quoting Representative Randy Cunningham in his abusive *ad hominem* attack on Representative John Bryant, claiming that because Bryant did not serve in military or fight in combat, he is not qualified to state that nobody needs assault weapons); Vivienne Walt, *NRA Weapon Against Gun Ban Grows Bigger*, NEWSDAY, Feb. 24, 1991, at 13 (questioning reasoning and motives of representatives accepting donations from NRA by making circumstantial *ad hominem* attacks); John Wellings, *Gun Control Won't Help*, HOUS. CHRON., Oct. 27, 1991, at B3 (making circumstantial *ad hominem* attack on Sarah Brady for supporting gun control because husband was shot).

91. See *Gun Lobby Plays at New Level of Hardball*, States News Service, June 7, 1991, available in LEXIS, Nexis Library, Current File (reporting that Preservation of Firearms Ownership organization distributed literature on Capitol Hill sharply criticizing "pro-criminal" Brady bill).

92. *Id.* The Jews for the Preservation of Firearms Ownership also purchased an advertisement in a gun magazine in which the group called New York Representative Charles Schumer a "stupid Jew" for supporting the Brady bill. Stephanie Saul, *Schumer Defended on Gun Stance*, NEWSDAY, Apr. 30, 1991, at 15. The NRA disavowed any connection with the organization. *Id.*

93. Cf. BENTHAM, *supra* note 5, at 92 (attributing ready willingness with which people resort to *ad hominem* argumentation, of which calling someone "liberal" is example, to fact that it requires "neither labor nor intellect").

94. See William D. Nveske, *Letterline*, USA TODAY, May 22, 1991, at 9A (reprinting letter to editor characterizing Brady bill as first step in "liberal conspiracy" to totally disarm populace).

95. See William A. Rossbach, *Brady Gun Bill Passes in House*, L.A. TIMES, May 15, 1991, at B6 (denouncing efforts of conservative newspapers and legislators to criticize and classify Brady bill as part of liberal agenda).

96. See Robert Hohl, *Times Takes a Poke at the National Rifle Association*, WASH. TIMES, May 13, 1991, at D2 (questioning objectivity of media in Brady bill debate).

paraging slur possible in the war of liberal versus conservative politics—comparisons to Ted Kennedy.⁹⁷

Some *ad hominem* arguments promoting this theme were more subtle. In the House debate, one representative, without explanation or elaboration, obliquely commented, "It is . . . interesting to note that a large number of supporters of the Brady bill oppose the imposition of the death penalty and other 'get tough' measures with criminals."⁹⁸ Why was this "interesting"? For the same reason it would be "curious." Used in this context, these terms are code words of disparagement. The representative's statement was a thinly veiled attempt to paint supporters of the Brady bill as liberals who are soft on crime.⁹⁹

The campaign to brand all supporters of gun control as liberals shares characteristics of both abusive and circumstantial *ad hominem*.¹⁰⁰ It constitutes abusive *ad hominem* because in the wake of the 1988 Republican presidential campaign, being labeled a "liberal" had almost the same potency to malign as "commie" once did.¹⁰¹ It is also circumstantial *ad hominem* because it is calculated to effect rejection of speakers' opinions based solely on their special circumstances, in this case, their political philosophies. The message is, "Well, what do you expect her to say? She's a liberal." The implication is that the speaker holds the opinion only because it is consistent with liberal political philosophy and not because she believes there are good reasons supporting it. To the extent that being a liberal can be equated with being a Democrat, this is not entirely fallacious as applied to members of Congress, because representatives often do vote the party line.¹⁰² But in the context of the

97. See Saul, *supra* note 15, at 85 (describing NRA's use in negative campaign against gun control advocates of Senator Edward Kennedy's reputation as advocate for liberal causes). After Representative James Sensenbrenner, a Republican from Wisconsin, voted in favor of the Brady bill in the House Judiciary Committee, the NRA sent a letter to his constituents that included the comment, "Ha! With support like that, you might as well have Ted Kennedy representing you." *Id.*

98. 137 CONG. REC. H2852 (daily ed. May 8, 1991) (statement of Rep. Rohrabacher).

99. *Cf. id.* at H2828 (statement of Rep. Inhofe) (pointing out in more direct attack on Brady supporters that "if we look at the Members who are behind the Brady bill, . . . we find Members who are opposed to the death penalty, Members opposed to the Violent Crime Act, Members opposed in general to punishment for a deterrent to crime").

100. See *supra* notes 86-92 and accompanying text (defining types of *ad hominem* fallacies).

101. "Commies" have not been completely forgotten. See *Wally's Right About Brady Bill*, ARK. DEMOCRAT, June 10, 1991, at 7B (stating in letter to editor that "[t]hose commies that instigated high crime by bringing in probation, plea bargaining, early releases and weekend passes are now trying to disarm the law-abiding citizens at a time when they can't even control the criminals").

102. See generally ROGER H. DAVIDSON & WALTER J. OLLESEK, CONGRESS AND ITS MEMBERS 346 (3d ed. 1990) (noting high incidence of party unity votes in Congress). The authors state that between 1970 and 1988, "the average legislator vote[d] with his or her party two-thirds to four-fifths of the time." *Id.*

overall debate, it is certainly a fallacy to imply that a person supports gun control only because he or she is a "liberal."¹⁰³

Another *ad hominem* theme of the anti-Brady bill forces was dictatorialism. Brady bill supporters were cast as "anti-Second Amendment"¹⁰⁴ and "power-hungry"¹⁰⁵ individuals for their perceived indifference to the Second Amendment right to keep and bear arms. A popular gun magazine published a list of "America's Top Ten, 'Gun Grabbers,'" which charged Brady-sponsor Edward Feighan, a Democratic representative from Ohio, with responsibility for "more legislative efforts to take away your rights than nearly anyone else in Congress."¹⁰⁶ The magazine leveled a similar charge against Ohio Senator Howard Metzenbaum, stating that he "can be counted on to try to destroy as many of your Second Amendment rights as he possibly can."¹⁰⁷

At its lowest point, the debate degenerated into ugly name-calling. The anti-Brady bill side enhanced the nomenclature of gun control with such affronts as "bullet-heads,"¹⁰⁸ "gun-phobes,"¹⁰⁹ "stupid Jew,"¹¹⁰ and "lily-livered bleeding hearts."¹¹¹ Brady bill supporters were somewhat more subtle and restrained in their *ad hominem* attacks. Rather than come right out and call their opponents idiots, the bill's supporters repeatedly extolled the "common sense" of the legislation.¹¹² The implicit message was that oppo-

103. See Povich, *supra* note 55, at 1 (reporting that in final House of Representatives vote on Brady bill, 60 Republican representatives who usually are considered "conservatives" cast their support for gun control).

104. Alan M. Gottlieb, *Brady Bill Assaults Our Rights*, USA TODAY, May 7, 1991, at 10A (enumerating criticisms of Brady bill supporters).

105. *Id.* (characterizing Brady bill as attempt by liberal politicians to encroach on citizens' rights).

106. Larry Pratt, *America's Top Ten "Gun Grabbers"*, GUNS AND AMMO, July 1991, at 97 (listing names and activities of prominent gun control activists).

107. *Id.* at 25.

108. *Gunning for Control*, WASH. TIMES, Apr. 29, 1991, at G2 (describing Brady bill as attack on personal liberty).

109. *Id.* (referring to Brady bill supporters). The *Washington Times* denounced the Brady bill as doing "absolutely nothing to curb violent crime and everything to harass and hamper law-abiding citizens." *Id.*

110. See *supra* note 92 (discussing verbal attack on New York Representative Charles Schumer).

111. *Gun Control Bill Is Condemned*, ARK. DEMOCRAT, June 6, 1991, at 11B (proffering opinion in letter to editor that gun control will lead to erosion of constitutional rights).

112. 137 CONG. REC. S8938 (daily ed. June 27, 1991) (statement of Sen. Simon) ("We have to have some common sense."); 137 CONG. REC. H2846 (daily ed. May 8, 1991) (statement of Rep. Panetta) ("These facts make obvious that waiting periods and background checks make sense—perfect, clear, logical sense."); *id.* at H2844 (statement of Rep. Roemer) ("[The Brady bill] makes sense."); *id.* at H2836 (statement of Rep. Roukema) ("[T]he Brady bill is a matter of simple common sense."); *id.* at H2832 (statement of Rep. Schumer) ("[T]he Brady bill is the very model of common sense."); *id.* at H2824 (statement of Rep. Levine) ("[W]hat we are about to do is put some common sense and reason into a policy that is nonexistent."); *Brady Bill Will Save Many Lives*, USA TODAY, May 7, 1991, (Editorial), at 10A

nents of the legislation lacked common sense. Rather than directly accuse House members who supported a weaker, NRA-backed substitute bill¹¹³ of being liars and hoodwinkers, representatives attacked the substitute bill as a "blatant ruse,"¹¹⁴ a "sham,"¹¹⁵ and a "smokescreen."¹¹⁶

All of the fallacies discussed to this point encourage the listener to substitute emotion for reason as the basis for deciding an issue. The rhetorician attempts to manipulate us to form opinions about a proposal based on fear or pity,¹¹⁷ or because it is the popular or patriotic thing to do,¹¹⁸ or because we like and respect some other person who has expressed an opinion about the proposal and who has been presented to us as an authority on the subject,¹¹⁹ or because we have negative feelings about a person who supports or opposes the proposal.¹²⁰ But these appeals divert us from focusing on the wisdom of the proposal, which is the only real issue. Whether a proposal is wise can only be determined after a reasoned analysis of

("If Congress can muster a little courage and common sense, it can save hundreds of lives that otherwise will be lost to gunfire."); Charles Schumer, *The Brady Bill's Right on Target*, *NEWSDAY*, May 6, 1991, at 36 ("It seems that such a simple, common sense proposal should be easily approved.").

113. H.R. 1412, 102d Cong., 1st Sess. (1991), 137 CONG. REC. H2855-56 (daily ed. May 8, 1991). This was the so-called Staggers bill, named after its sponsor, Representative Harley Staggers of West Virginia. The bill called for the creation of an instant point of sale check system that would immediately identify felons who attempted to purchase handguns. *Id.* An effective instantaneous screening system would eliminate the need for a waiting period, but unfortunately, the Office of Technology Assessment estimated that development of such a system would require five to ten years and hundreds of millions of dollars. 137 CONG. REC. S8935 (daily ed. June 27, 1991) (statement of Sen. Metzenbaum). As a result, the House rejected the Staggers proposal. 137 CONG. REC. H2876 (daily ed. May 8, 1991). The Senate rejected a similar proposal sponsored by Senator Ted Stevens of Alaska. 137 CONG. REC. S8946 (daily ed. June 27, 1991). The version of the Brady bill ultimately adopted by the Senate and subsequently by House and Senate conferees approved both a waiting period and the establishment of an instant check system. *See supra* note 3 (discussing history of Brady bill). Under the Brady bill, the federally mandated waiting period will be phased out after the instant check system is certified as operational. H.R. 7, 102d Cong., 1st Sess. (1991); S. 1241, 102d Cong., 1st Sess. §§ 2701-2703 (1991).

114. 137 CONG. REC. H2837 (daily ed. May 8, 1991) (statement of Rep. Roukema) (questioning feasibility of Staggers bill). Representative Roukema, a supporter of the Brady bill, also referred to the Staggers bill as "an obvious ploy to provide political cover for Members who want to look as though they are voting for handgun control but are actually killing it for years to come." *Id.*

115. *See id.* at H2841 (statement of Rep. Sensenbrenner) ("The Staggers bill is a sham. It is so riddled with exemptions that it really is not effective.").

116. *See id.* at H2847 (statement of Rep. Panetta) (questioning whether handgun and murder statistics are needed to demonstrate superiority of Brady bill over Staggers bill).

117. *See* FEARNSIDE & HOLTHER, *supra* note 5, at 128-29 (discussing how fear of one alternative can lead to support for another).

118. *See* FEARNSIDE & HOLTHER, *supra* note 5, at 92 (noting fallacies contained in appeals to "get on the bandwagon").

119. *See* FEARNSIDE & HOLTHER, *supra* note 5, at 84 (discussing effect on reasoning process of appeals by reliable or knowledgeable personalities).

120. *See* FEARNSIDE & HOLTHER, *supra* note 5, at 92 (asserting that association of idea with unpopular figure results in rejection of idea).

relevant factors is undertaken, such as whether the proposal's goal will be beneficial to society, whether it will be possible to implement as a practical and legal matter, whether, if enacted, it will achieve its intended goal, and what the cost of implementation will be.

The cost of implementation includes not only the economic but also the human cost. In considering this factor, it is important to distinguish illicit appeals to emotion from legitimate appeals to humanistic values and moral judgments,¹²¹ because the latter are vital components of the "logic" of public decisionmaking. Most law reform proposals will have consequences that affect the lives of real people. Decisions as to which consequences society wants to encourage, and which it prefers to avoid, necessarily depend on value preferences.

Thus, belief in the sanctity of human life and compassion for victims of crime make it proper to consider whether a waiting period for handguns will save more innocent lives than it will cost. Similarly, the interest in individual freedom to act makes it appropriate to consider whether a waiting period is an onerous burden on that freedom or only a minor inconvenience. In these examples, compassion and liberty are appealed to not as disconnected emotional symbols to incite adoption or rejection of the Brady bill, but as part of a reasoned inquiry concerning the consequences of the legislation. Will the legislation promote or inhibit desirable or undesirable values? In contrast, the fallacies discussed in this section are not designed to facilitate cognitive consideration of values. Instead they are intended to stimulate an affective state of consciousness that will preempt cognitive consideration of the issues.

B. Fallacies of Diversion

The fallacies of emotion discussed in the preceding section are diversionary in that they are intended to shift attention away from honest and valid reasoning about the merits of a proposal. However, because these fallacies all accomplish this by the same means, by appeals to raw emotion, they warranted treatment as a separate category. Emotion is the strongest bond tying them together.

The fallacies evaluated in this section are less well-connected. They are diversionary, but unlike the fallacies of emotion, they do not achieve diversion by appealing to some more powerful force. In other words, they do not operate by forsaking reason in favor of

121. See DAMER, *supra* note 6, at 89 (making point that appeal to pity, which would normally be fallacious, would not be fallacious if purpose was to draw attention to moral principle).

some other basis for making a decision. Instead, the fallacies in this section operate by distorting the reasoning process in ways intended to make the audience lose track of or ignore the real point.¹²² This is accomplished through overstatement and understatement, by making irrelevant connections between premises and conclusions, and by drawing irrelevant analogies.¹²³

1. *Hyperbole*

One of the most elementary fallacies of diversion is hyperbole. Hyperbole is an exaggeration for rhetorical effect.¹²⁴ To the extent hyperbole is used only to add ornament or flourish to speech, it is not objectionable and may even contribute positively to discourse. The world would be a drab place if we demanded that all discussion of public issues be couched in dispassionate and colorless terms. Imagery, euphony, adornment, and metaphor breathe life into language. When the issue is vital and the consequences of a decision are great, it may be necessary to speak bluntly and even stridently. In such cases, false euphemism would only detract from clear thinking.¹²⁵

Nevertheless, audiences need to be wary of sophists who use hyperbole to overstate the clarity and certainty of their positions. By representing a matter as indisputable, a speaker may convince an audience that it is not necessary to think about a problem or may forestall disagreement from those who do think about it.¹²⁶ Lawyers and judges are experts at accomplishing this by using a single word or phrase, such as "clearly," "plainly," "obviously," "absolutely," "completely," or "it is axiomatic."¹²⁷

122. See FEARNSIDE & HOLTHERR, *supra* note 5, at 121 (examining use of diversionary fallacies).

123. See *id.* (explaining diversionary methods and providing examples).

124. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1112 (3d ed. 1981).

125. See FEARNSIDE & HOLTHERR, *supra* note 5, at 80 (advocating frankness as means of serving truth).

126. See FEARNSIDE & HOLTHERR, *supra* note 5, at 101 (referring to fallacy of "Forestalling Disagreement" as means to prevent debate).

127. In a passage directed at historians but applicable to everyone, David Fischer explained why all such assurances should be evaluated with skepticism:

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."

FISCHER, *supra* note 7, at 270-71.

One of the most prominent issues in the Brady bill debate was whether the legislation would accomplish what it was intended to accomplish; that is, whether waiting periods and background checks would really prevent criminals from obtaining guns. Opponents of the measure asserted that the legislation would not do this and sought to bury any doubts about the question under an avalanche of hyperbole. They made bold assertions that the law "would have absolutely no effect upon criminals,"¹²⁸ "will do absolutely nothing to curb violent crime,"¹²⁹ "would do nothing to prevent criminals from obtaining guns,"¹³⁰ "will not prevent a single criminal who wants a handgun from getting one,"¹³¹ and "would do nothing to curb the incidence of crime and violence on America's streets."¹³² "Predicting," some wise person once said, "is a risky venture, especially with regard to the future." The truth is that no one knows what effect the Brady bill will have on gun violence. Each of the claims listed above is fallacious because it represents a matter as certain when in fact the matter is largely speculative.¹³³ This observation would be true even if the predictions proved to be accurate. In

128. Rossbach, *supra* note 95, at B6 (advocating presidential veto of Brady bill).

129. *Gunning For Control*, *supra* note 108, at G2.

130. 137 CONG. REC. H2852 (daily ed. May 8, 1991) (statement of Rep. Rohrabacher).

131. *Id.* at H2863 (statement of Rep. Hancock).

132. 137 CONG. REC. S8936 (daily ed. June 27, 1991) (statement of Sen. Symms). Strong hyperbole of this type also commits the fallacy of *ipse dixit*, which translates to "[he] himself said it." BLACK'S LAW DICTIONARY 743 (5th ed. 1979). An *ipse dixit* fallacy is an assertion made with no proof or authority to support it. These fallacies are difficult to address effectively in argument because while they can be disputed, they are difficult to refute, particularly if they relate to evaluative matters.

133. For example, proponents of the Brady bill countered the anti-Brady bill hyperbolic arguments exemplified in the text accompanying notes 128-32, *supra*, by promulgating their own hyperbole, claiming that the law would save hundreds and even thousands of lives. See 137 CONG. REC. H2834 (daily ed. May 8, 1991) (statement of Rep. Sangmeister) ("The answer is we save lives—potentially, thousands of lives."); *Brady Bill Will Save Many Lives*, *supra* note 112, at 10A ("If Congress can muster a little courage and common sense, it can save hundreds of lives that otherwise would be lost to gunfire.")

Related to this kind of hyperbole is a fallacy that Madsen Pirie calls "Every Schoolboy Knows." PRIE, *supra* note 5, at 62-65. This fallacy is committed when the speaker overstates the obviousness of a particular point to shame the opposition into accepting it. See *id.* at 62 (suggesting that labeling concept as universally accepted results in acceptance without debate). For example, if a speaker stated, "Even a child knows that criminals do not buy their guns from gun shops," the opponent might be reluctant to disagree out of the shame and fear of appearing to know less than a mere child.

Brady bill partisans used such fallacies in subtle and effective ways by repeatedly hammering the message that the Brady bill was a matter of plain common sense. See *supra* note 112 (documenting use of appeal to common sense as rallying cry by Brady bill supporters). Opponents could voice disagreement only at the risk of appearing to lack common sense. A more extreme example of the fallacy occurred when a pro-Brady bill representative challenged his colleagues with the question, "Who in the world, in this body or in this country, can argue with the fact that we should have a waiting period of 7 days, to find out if someone has been in a mental institution, or if someone has a criminal record, before we sell them a handgun?" 137 CONG. REC. H2840 (daily ed. May 8, 1991) (statement of Rep. Derrick). The implied, unstated answer to the question was "only a fool."

other words, the fact that a speculative prediction turns out to be true does not change the fallacious nature of the prediction at the time it was made.

The converse of using hyperbole to overstate a position is employing deprecatory hyperbole to understate it. As overstatement is used to bolster a speaker's position, deprecatory hyperbole is used to minimize the weight of competing evidence or arguments. Deprecatory hyperbole consists of such words as "merely," "simply," or "only."

The most notable illustration of this fallacy in the Brady bill debate involved the same issue discussed above: whether the law would prevent convicted felons from obtaining guns. The Brady bill would apply only to handgun purchases from licensed firearms dealers.¹³⁴ Thus, the evidence most relevant to predicting the impact of the law comes from studies showing the percentage of convicted felons who obtain handguns from conventional retail outlets. Figures cited in the gun control debate on this point ranged from twelve to thirty percent.¹³⁵ Brady bill backers viewed these statistics as providing support for the legislation.¹³⁶ Opponents of the bill, however, minimized the significance of the numbers by framing them in deprecatory hyperbole. A Senator argued that of all the guns acquired by criminals, "only about 12 percent . . . came from stores."¹³⁷ Similarly, a newspaper editorial stated that "only one-sixth [of convicted felons] obtained their weapons in a retail transaction."¹³⁸ And a criminologist emphasized that a Florida study showed "only thirty percent of handgun murderers and assaulters reported acquiring their guns from dealers."¹³⁹

134. Both the House and Senate versions of the bill applied only to licensed importers, manufacturers, and dealers of firearms. H.R. 7, 102d Cong., 1st Sess. § 2(a)(s)(1) (1991); S. 1241, 102d Cong., 1st Sess. § 2701(a)(u)(1) (1991).

135. See, e.g., JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND DANGEROUS, A SURVEY OF FELONS AND THEIR FIREARMS 4-7 (1986) (exploring relationship between convicted felons, use of firearms, and incidence of violent crime by examining survey data collected from nearly 2,000 convicted felons incarcerated in state prisons around country). Responding to a question in the Wright/Rossi survey as to how they obtained handguns, only 16% of convicted felons who acknowledged having owned a handgun said they purchased their most recent handgun from a conventional retail source. WRIGHT & ROSSI, *supra*, at 185.

136. See 137 CONG. REC. H2846 (daily ed. May 8, 1991) (statement of Rep. Panetta) ("I feel it is highly important to point out that statistics have shown that around one in six criminals who have committed crimes with handguns bought their weapons from a licensed dealer."); Norm Brewer, *Gun Law Debate Hangs on Stories, Not on Statistics*, USA TODAY, Apr. 17, 1991, at 1 (quoting spokesperson for Handgun Control, Inc. as stating that avoidance of handgun sales to one in six convicted felons is "very important").

137. 137 CONG. REC. S8937 (daily ed. June 27, 1991) (statement of Sen. Gramm) (emphasis added).

138. *Gunning For Control*, *supra* note 108, at G2 (emphasis added) (citing United States Department of Justice study of 1800 felons).

139. Gary Kleck, *Policy Lessons from the Recent Gun Control Research*, 49 LAW & CONTEMP.

It is entirely possible, of course, that these were not intentional attempts to fallaciously depreciate the statistics, but instead were honest value judgments regarding the benefits of the Brady bill as measured against its costs. In either case, the effect was the same. Use of the word "only" worked to understate the magnitude of the numbers. When the percentages are converted to absolute numbers, they seem to favor the pro-Brady bill side. Accepting that "only" twelve to thirty percent of convicted felons purchase their handguns over the counter means that from 12,000 to 30,000 of every 100,000 handguns acquired by convicted felons would be covered by the Brady bill.¹⁴⁰ Regardless of the speakers' intent, the attempt to minimize these numbers by use of the word "only" constituted fallacious deprecatory hyperbole.

2. *The slippery slope*

A specialized application of hyperbole with great relevance to gun control consists of attacking a proposal by raising the spectre of terrible results that will follow if the proposal is adopted. In classical terminology, this is the "slippery slope" argument.¹⁴¹ In this type of argument, any restriction, no matter how harmless in itself, is

PROBS. 35, 55 (1986). Professor Kleck discussed gun policy generally in his article and not the Brady bill specifically. In the article, he employed deprecatory hyperbole to minimize other statistics relevant to gun control. For example, he recited that "in 1979 *only* about nine percent of rape offenders were armed with a gun" and stated that "[t]he presence of a gun in *even these few rapes* was often incidental and not necessary in the commission of the crime. . . ." *Id.* at 39 (emphasis added). In 1979, there were 76,390 reported rapes. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 173 (1990). If we accept Kleck's percentage estimate as correct, that means 6875 rapists were armed with guns in 1979. It is questionable whether the use of modifiers such as "only" or "these few rapes" is appropriate in describing this figure.

Some Brady antagonists characterized the statistics regarding over-the-counter handguns purchased by convicted felons in terms that could be regarded as transgressing beyond hyperbole to outright falsehood. See 137 CONG. REC. S8933 (daily ed. June 27, 1991) (statement of Sen. Stevens) (insisting that "[v]irtually no felon" buys firearms from retail stores); 137 CONG. REC. H2874 (daily ed. May 8, 1991) (statement of Rep. Geren) (asserting that Wright and Rossi study "prove[s] that felons simply do not get guns from legitimate sources"); *id.* at H2863 (statement of Rep. Hancock) (arguing that criminals "almost always" obtain their weapons by means other than purchases from retail dealers).

Brady defenders directed their deprecatory hyperbole against the waiting period, describing it as "only" a "minor" or "mere" inconvenience. See *id.* at H2851 (statement of Rep. Collins) ("What is wrong with this country that we place a mere 7-day wait for a weapon above the lives of our citizens?"); *id.* at H2845 (statement of Rep. Downey) ("[The waiting period] asks only that [gun purchasers] endure a minor inconvenience for the sake of saving lives.").

140. Cf. 137 CONG. REC. H2850 (daily ed. May 8, 1991) (statement of Rep. Ackerman) (citing Office of Technology Assessment (OTA) study assessing feasibility of instant background checks before gun sales that estimates that convicted criminals purchase at least 50,000 firearms each year from gun stores).

141. See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 361-62 (1985) (defining slippery slope as argumentative claim "that a particular act, seemingly innocuous when taken in isolation, may yet lead to a future host of similar but increasingly pernicious events").

subject to being assailed as "[t]he camel's nose . . . in the tent."¹⁴² Because the strategy has nothing to do with the reasonableness of a particular gun control measure under consideration, it is always available.

So it was in the contest over the Brady bill. In the end, the crux of the dispute over the legislation was the provision establishing a waiting period to purchase a handgun.¹⁴³ While some Brady bill opponents attacked waiting periods as onerous burdens on law-abiding gun purchasers,¹⁴⁴ they did not succeed in generating much public outrage in this regard. A 1991 Gallup poll showed that eighty-seven percent of the American people favored a national waiting period for handgun purchases.¹⁴⁵

Perhaps in recognition of this popular support for waiting periods, many Brady bill adversaries resorted to the slippery slope strategy. Under this approach, waiting periods were no longer the issue. Instead, members of Congress were told that they were voting on "just the beginning of a flood of restrictions,"¹⁴⁶ "the first step toward eliminating our second amendment rights,"¹⁴⁷ "the first step in the total disarmament of the American populace,"¹⁴⁸ and "the ugly foot in the door."¹⁴⁹ These slippery slope arguments diverted the focus of the debate away from the merits of waiting periods by drawing noisy attention to other, more severe restrictions that were not actually at issue.

Was this fallacious? The consequences of a proposal are certainly relevant to deciding whether to adopt it. One potential consequence of imposing a reasonable restriction on a constitutional right is that it may represent the proverbial "first step" toward the next

142. *Id.* at 361 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 402 (1973) (Stewart, J., dissenting)).

143. See Povich, *supra* note 55, at 1 (describing NRA's eleventh hour attempt to avoid federally mandated waiting period for handguns by throwing its support behind computerized check system contained in Staggers bill to perform instantaneous background checks on handgun purchasers); see also *supra* note 113 (explaining provisions of Staggers bill).

144. See 137 CONG. REC. S8940 (daily ed. June 27, 1991) (statement of Sen. Hatch) ("I hope most of us will stand up and vote for our right to keep and bear arms and for not having these onerous provisions.").

145. See Alex Prud'homme, *A Blow to the N.R.A.; The House Takes an Overdue Stand for Gun Control*, TIME, May 20, 1991, at 26 (citing increasing support for gun control legislation).

146. 137 CONG. REC. S8934 (daily ed. June 27, 1991) (statement of Sen. Stevens).

147. *Id.* at S8937 (statement of Sen. Murkowski) (arguing against passage of Brady bill).

148. Nveske, *supra* note 94, at 9A (printing letter to editor remarking that "[g]uns made us free and guns will keep us free").

149. Isikoff, *supra* note 65, at A12 (quoting NRA member); see also *Gun Down the Brady Bill*, WASH. TIMES, Apr. 10, 1991, at G2 ("Some analysts say the bill is a sneaky little effort to get complete control of handguns."); Saul, *supra* note 15, at 19 (quoting aide to Representative Harley Staggers as stating, "The Brady bill is the first step in whittling away . . . [the right to bear arms].").

restriction, which may be an unreasonable one. However, this concern is valid only if relevant empirical facts establish some real likelihood that the next step will in fact be taken.¹⁵⁰ To the extent an argument raises exaggerated fears of an uncontrolled tumble down the slippery slope, with no evidence realistically supporting those fears, it is fallacious. It crosses the line from a legitimate concern about a proposal's consequences to something that has been referred to as the fallacy of the "unnecessary parade of horrors."¹⁵¹

The question of where to draw the line on the slippery slope is a problem in virtually all decisionmaking.¹⁵² Usually, there is no clear point demarcating where the line should be drawn. Nevertheless, public decisionmakers must draw lines somewhere, even if the lines are arbitrary, or they abdicate their decisionmaking responsibility. When individual rights are implicated, line placement is determined by balancing the rights of individuals against the interests of the community. No right emerges from this process absolute.

Nor should it. There is no right to disseminate child pornography, to yell "Fire!" in a crowded theater, or to libel a person, even though the First Amendment provides that "no law" shall be made abridging free speech.¹⁵³ Similarly, while we enjoy complete freedom of belief with regard to religious practices, the First Amendment does not always protect the right to act on those beliefs.¹⁵⁴ The Fourth Amendment is subject to an interpretation that all searches require warrants issued pursuant to probable cause, but the Supreme Court continues to expand the situations in which warrantless searches are permitted.¹⁵⁵ And the Sixth Amendment pro-

150. See Schauer, *supra* note 141, at 381 (discussing proper context for examining slippery slope arguments).

151. SCHLAG & SKOVER, *supra* note 22, at 31-32 (referring to rhetorical technique of suggesting dire consequences that are neither relevant nor likely to occur). Commentators have also termed this approach "The Wicked Alternative." FEARNSIDE & HOLTHIER, *supra* note 5, at 128-29.

152. See *Irwin v. Gavit*, 268 U.S. 161, 168 (1925) (Holmes, J.) (opining that "where to draw the line . . . is the question in pretty much everything worth arguing in the law").

153. See *New York v. Ferber*, 458 U.S. 747, 756-64 (1982) (denying First Amendment protection for child pornography); *New York Times v. Sullivan*, 376 U.S. 254, 279-83 (1964) (establishing First Amendment standards for libel actions against public officials); *Schenk v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) (discussing limitations on First Amendment freedoms).

154. See *Reynolds v. United States*, 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions and while they cannot interfere with mere religious belief and opinions, they may with practices."). The Court upheld an Act of Congress prohibiting bigamy in the territory of Utah. *Id.*

155. See, e.g., *Colorado v. Bertine*, 479 U.S. 367, 369 (1987) (approving warrantless search of suspect's backpack found in vehicle as lawful inventory search); *United States v. Ross*, 456 U.S. 798, 823-25 (1982) (approving warrantless searches of containers in automobiles); *United States v. Robinson*, 414 U.S. 218, 236 (1973) (approving full body search without search warrant as lawful search incident to custodial arrest); *Terry v. Ohio*, 392 U.S. 1, 27

vides for the assistance of counsel at trial, but criminal defendants are not entitled to have the state pay for the counsel of their choice in defense.¹⁵⁶ The list could go on.

Most gun owners probably would agree with these restrictions on individual liberties and with the general principle that individual rights must yield at some point to the interests of the community. Why is it, then, that proposed restrictions on guns are invariably met with the argument: "If we let them do *x* today, they'll be coming to take away our hunting rifles tomorrow?" Why are restrictions on the Second Amendment viewed as different, as somehow more diabolical and treacherous than restrictions on other rights? Is there an empirical reality to the fear that a waiting period to purchase a handgun is really just the first step toward the obliteration of the Second Amendment?

Although gun control advocates are reluctant to admit it, the evidence suggests that gun aficionados have some cause to be nervous about gun control measures like the Brady bill. To a large extent, passing the Brady bill, as even some of its proponents conceded, was more a symbolic victory over the NRA than the implementation of an effective means of keeping criminals from getting guns.¹⁵⁷ And while many supporters of the measure took pains to pledge their allegiance to the right to bear arms,¹⁵⁸ others candidly suggested that the Brady bill was, literally, the "first step" toward more stringent controls on gun ownership.¹⁵⁹

(1968) (approving warrantless body frisks based on reasonable suspicion that suspect is armed and dangerous).

156. *Faretta v. California*, 422 U.S. 806, 810 n.5 (1975) (discussing denial of defendant's motion for appointment of counsel from outside public defender's office).

157. See, e.g., 137 CONG. REC. H2824 (daily ed. May 8, 1991) (statement of Rep. Traficant). Representative Traficant, a pro-Brady bill partisan, stated that:

Mr. Speaker, neither the Brady bill, nor the substitute, will have much impact on crime in America. My colleagues know it, and I know it. Today's debate is not about gun laws or waiting periods. Today's debate is: Who in America will write the future gun laws: the U.S. Congress or the National Rifle Association?

Id.

158. See, e.g., *id.* at H2843 (statement of Rep. Valentine) ("I am a gun owner and collector. I have been a hunter. I may even be what some people refer to as a 'gun nut.' I firmly support the right of law-abiding citizens to own and use firearms for lawful purposes."); *id.* (statement of Rep. Carper) ("I rise in strong support of my right and privilege to keep and bear arms. I hunted in northern Indiana as a young boy, and I hope someday my children have that same right."); *id.* at H2841 (statement of Rep. Andrews) ("I have always opposed gun control [in general]. As a prosecutor in Houston, as an avid hunter, I have always felt that gun control laws tend to restrict and hurt lawful gun owners, as opposed to criminals.").

159. Perhaps the clearest statement to this effect came from Pete Shields, chairman emeritus of Handgun Control, Inc., who made the following remarks in an interview:

We're going to have to take one step at a time, and the first step is necessarily—given the political realities—going to be very modest So then we'll have to start working again to strengthen that law, and then again to strengthen the next law, and

There is no doubt that the agenda of many Brady bill proponents encompasses much more than the adoption of waiting periods and background checks. Many Brady bill supporters want to prohibit private possession of handguns altogether.¹⁶⁰ This is what differentiates the Second Amendment slippery slope argument from most other arguments. Persons who believe in a civil remedy for libel are not ultimately looking to abolish newspapers. People who opposed polygamy in the 19th century did not want to outlaw the Mormon church. Most people who advocate wider search and seizure authority for the police do not want to do away with the Fourth Amendment. But many of those who support waiting periods and background checks for handgun purchases do want to completely ban handguns.

That the prohibition of handguns is the goal of many gun control advocates gives some credence to the slippery slope arguments advanced against the Brady bill, but not enough to make them non-fallacious. Despite the yearnings of many champions of gun control, guns are so deeply entrenched in this country's history and culture that there is virtually no chance they ever will be banned. Guns are inextricably identified with the frontier spirit that Americans idealize.¹⁶¹ Even peaceful people idolize celluloid killers like Stallone, Eastwood, Gibson, and, more recently, Seagal and Van Damme. The very fact that the notion of having to wait a few days to buy a

maybe again and again. Our ultimate goal—total control of handguns in the United States—is going to take time.

Pratt, *supra* note 106, at 24. Members of Congress echoed Mr. Shields' sentiment. See, e.g., 137 CONG. REC. H2851 (daily ed. May 8, 1991) (statement of Rep. Stokes) (affirming also that Brady bill "is one step in the right direction"); *id.* at H2846 (statement of Rep. Serrano) ("[T]he Brady bill is but a first step in our Nation's journey toward a society free of handgun violence."); *id.* at H2841 (statement of Rep. Hayes) (stating that bill "is one step in the right direction"); *id.* at H2836 (statement of Rep. Mazzoli) (asserting that Brady bill "is one step in that direction").

160. For example, the National Coalition to Ban Handguns advocates a total ban on handguns. See James B. Jacobs, *Exceptions to a General Prohibition on Handgun Possession: Do They Swallow Up the Rule*, 49 LAW & CONTEMP. PROBS. 5, 5 n.4 (1986) (quoting from National Coalition to Ban Handguns pamphlet that supports banning of manufacture, sale, and private possession of handguns). One writer asserts that the abolition of handguns is also the true agenda of Handgun Control, Inc. See Kopel, *supra* note 56, at S9054 (noting that "Handgun Control, Inc.'s former chairman has stated that he favors intermediate control as a waystation to near-total handgun prohibition").

161. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE CITIZEN'S GUIDE TO GUN CONTROL* 70 (1987) (discussing prevalence of guns in American society). Zimring and Hawkins note that historian Richard Hofstadter attributes the American identification of guns with the frontier as a nostalgic reference back to an era of less complexity and more rural existence. *Id.* Hofstadter notes "[i]t is very easy in interpreting American history to give the credit and the blame for almost everything to the frontier, and certainly this temptation is particularly strong where guns are concerned." *Id.* Nevertheless, he adds, "when the frontier and its ramifications are given their due, they fall far short of explaining the persistence of the American gun culture." *Id.*

handgun generated such intense controversy is itself a testament that we are nowhere near the brink of a free-fall toward stringent gun restrictions. While the extreme views of many gun control supporters make the slippery slope argument understandable, assertions that the Brady bill is "the first step in the total disarmament of the American populace"¹⁶² remain hyperbolic exaggerations.

3. *The straw man and the red herring*

Two related fallacies of diversion that were well utilized during the Brady bill controversy are the fallacies of the straw man and the red herring. The straw man fallacy involves refuting an opponent's position by mischaracterizing it. The argument that is then met is not the real argument at all but only a "straw man" that can be easily knocked down.¹⁶³ One way to accomplish this is by exaggerating the true argument to absurd lengths. For example, in the Brady bill debate, a House member opposed to the measure mounted a passionate argument against the idea that "disarming everyone makes people equal in strength."¹⁶⁴ The flaw in this argument is that supporters of the Brady legislation were not arguing in favor of disarmament, but only in favor of waiting periods and background checks for handgun purchases. Either unwilling or unable to deal with these narrow issues on their merits, the representative chose to build a more easily assailable straw man and knock it down instead. His diatribe is reminiscent of the tale of the judge who, after listening patiently to a young lawyer's eloquent argument, told the lawyer, "That's a fine argument, young man. Let us hope that someday you find a case to which it applies."

Not to be outdone, the pro-Brady bill side of the debate offered up this transparent straw man:

I leave you with this simple question that I have asked myself and answered by supporting the Brady bill. Do you believe that it is a constitutionally guaranteed right for any mentally incompetent person, convicted felon, drug addict, or illegal alien to walk into a gun store, fill out a form, sign their name, and walk out with a handgun, with no questions even being asked by anyone?¹⁶⁵

162. See *supra* note 148 and accompanying text (quoting letter to editor printed in *USA Today*).

163. See DAVID L. ALLEN & JANE C. PARKS, *ESSENTIAL RHETORIC* 111-12 (1969) (describing characteristics of straw man attacks); DAMER, *supra* note 6, at 99 (labeling straw man arguments as fallacy of "Distortion"); SCHLAG & SKOVER, *supra* note 22, at 22-23 (noting effectiveness of dismantling argument through attack on straw man).

164. 137 CONG. REC. H2840 (daily ed. May 8, 1991) (statement of Rep. Smith) (describing circumstances where guns can make potential victims and criminals more equal in terms of power).

165. *Id.* at H2859 (statement of Rep. Stenholm).

Fortunately for the speaker, the question was framed as a rhetorical one. Otherwise, he would have risked being hooted off the podium by a unanimous and resounding, "Hell no!" No one, not even the NRA, has ever suggested that convicted criminals and mental patients have a constitutional right to buy handguns, with or without questions asked. Everyone apparently agrees that these people should be prohibited from purchasing handguns. The issue in the Brady bill debate was whether waiting periods and background checks are the appropriate means for accomplishing this. As in the previous example, the speaker grossly distorted the real issue to give himself an easier target to attack.¹⁶⁶

The distinction between the straw man and the red herring is subtle. While the straw man diverts attention by unreasonably exaggerating an opponent's position, red herrings divert attention by sending the audience chasing down the wrong trail after a non-issue.¹⁶⁷ An example of this involves Ronald Reagan's endorsement of the Brady bill.¹⁶⁸ Most Brady bill opponents simply opted not to mention the former President because his position was a painful thorn in their side. One brave soul was not deterred, however. In an amazing exhibition of obfuscation, an anti-Brady bill representative managed to address Mr. Reagan's endorsement without confronting it. He accomplished this by shifting the focus of the argument from Mr. Reagan's endorsement to the way Democrats had ridiculed the former President's views when he was in office, as follows:

[T]he proponents of the Brady bill seize upon the Ronald Reagan statements and the Ronald Reagan who has come to the support

166. Cf. George Papajohn, *NRA Takes a Shot at CHA Ban on Guns*, CHI. TRIB., May 18, 1991, at 1 (relating particularly flagrant straw man argument advanced in gun control dispute concerning authority of Chicago Housing Authority (CHA) to ban firearms in residential communities operated by CHA). In response to a letter from the NRA questioning the constitutionality of the ban, CHA Chairperson Vincent Lane said, "It's crazy for [the NRA] to be a proponent of the continuing slaughter of young black males in these communities." *Id.* Questioning the constitutionality of the housing authority restriction in no way equated to being a proponent of murdering young African-American males. This argument was a flimsy and quite irresponsible straw man.

167. The red herring fallacy is named after a trick used in fox hunting. When the dogs are following the wrong scent during a fox hunt, a herring, cooked to a brownish-red color, is dragged across the trail to shift the scent and, hence, the trail being followed. In rhetoric, the trail is the argument and the red herring is an irrelevant issue used to draw attention away from the real issue. See CORBETT, *supra* note 4, at 92 (discussing elements of red herring diversion); DAMER, *supra* note 6, at 102-04 (describing use of red herring rhetorical ploy); FEARNside & HOLThER, *supra* note 5, at 124-25 (calling red herring fallacy "the patron saint of those being overwhelmed in argument").

168. See *supra* notes 70-75 and accompanying text (describing President Reagan's support of both NRA and Brady bill).

of the Brady bill as being the last word in support of their proposition that is embodied in the Brady bill.

Mr. Speaker, where were these individuals when Ronald Reagan was proposing the death penalty for individuals who used guns to kill? They scorned him. They laughed at Ronald Reagan. Where were they when Ronald Reagan proposed . . . exclusionary rules [so] that gun-carrying criminals could not walk out of court on a technicality? They ridiculed President Reagan and his proposals on the exclusionary rule. Where were they on the whole comprehensive crime package which was sure to focus on the gun-carrying criminal in this country and to try to do something about violence? Nowhere to be found. They laughed at Ronald Reagan.¹⁶⁹

This speaker fallaciously (albeit somewhat ingeniously) shifted attention from the damning effect of Mr. Reagan's blessing of the Brady bill to the red herring of whether Brady bill supporters agreed with the former President on earlier proposals.

This reasoning is defective because whether Brady supporters believe in the correctness of Ronald Reagan's opinions about other issues is irrelevant to whether they believe he is right about the Brady bill. Irrelevancy is the flaw in all red herring and straw man arguments.¹⁷⁰ The irrelevancy stems from the dissimilarity between the real point in issue and the distorted point in the case of a straw man or the non-point in the case of a red herring. A person can support the Brady bill but still oppose disarming the populace. Likewise, a person can oppose the Brady bill but still be against convicted criminals purchasing handguns. To argue about an issue that is unconnected to the real issue, whether by distorting the real issue or by dredging up a non-issue, is to argue irrelevantly.

4. *Faulty analogies*

This is also the case with respect to faulty analogies, another diversionary fallacy that was prevalent in the Brady bill dispute. Analogies are a persuasive form of reasoning because consistent treatment of similar situations strikes most people as not only logical, but fair. Children intuit this principle at an early age. Hence, parents for all time have been forced to contend with the argument: "Why can't I? Suzy's parents let her [go to the party, stay up late, dye her hair purple, etc.]" If a person perceives two situations as similar, the person expects them to be treated similarly.

169. 137 CONG. REC. H2824 (daily ed. May 8, 1991) (statement of Rep. Gekas).

170. See FEARNSIDE & HOLTHER, *supra* note 5, at 124-25 (explaining that red herring and straw man arguments do not respond to real question).

To reason by analogy is to reason inductively, that is, to assume that certain things are probably true because we know certain other things to be true.¹⁷¹ In the law, analogical reasoning is the means by which courts honor the doctrine of *stare decisis*. Judges make decisions by searching for similar cases from which to extract a rule to apply to the case under consideration.¹⁷²

For an analogy to be valid, the situations being analogized must be truly similar. Moreover, they must be alike in ways that are important to the reason why the analogy is being drawn.¹⁷³ There may be many similarities between two events, but if they are not relevant to the heart of the dispute, any attempt to draw an analogy between the two events would be fallacious. Two cases involving automobile accidents may involve a host of amazing similarities such as the color and model of the car, the day of the week on which the accident occurred, and that both drivers wore the unusual combination of Chanel suits and Birkenstock sandals. However, these similarities do not make the cases analogous for purposes of extracting a rule to apply to both of them.

In the Brady bill debate, opponents of the legislation repeatedly attempted to analogize waiting periods for handgun purchases with waiting periods to purchase other commodities, such as a waiting period to purchase an automobile, a baseball bat, or cocaine. With regard to automobiles, Representative Smith argued:

Of course guns do kill but automobiles are the instrument involved in killing many more times than guns are, and sometimes they kill people within the first 7 days of ownership, but we don't hear a proposal to delay the purchase of an automobile by 7 days or that it would reduce the number of people killed by automobiles.¹⁷⁴

Representative Schulze offered the analogy to purchasing baseball bats: "Baseball bats killed 29 people in the city of Chicago in 1989. Should we require a waiting period on baseball bats?"¹⁷⁵ Finally, Representative Staggers asserted the analogy to purchasing cocaine: "A 7-day waiting period is a simplistic answer. In the same logic, if

171. See generally COPI, *supra* note 5, at 348 (describing theories of analogy and inductive reasoning).

172. See EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1949) (describing this process of "reasoning by example" in classic book about legal reasoning). For a more recent work explaining analogical reasoning in the law, see James R. Murray, *The Role of Analogy in Legal Reasoning*, 29 UCLA L. REV. 833 (1982).

173. See COPI, *supra* note 5, at 358-60 (explaining necessity of relationship between subjects of analogy).

174. 137 CONG. REC. H2840 (daily ed. May 8, 1991) (statement of Rep. Smith).

175. *Id.* at H2862 (statement of Rep. Schulze) (noting also use of other inanimate objects besides baseball bats, including knives and fireplace poker, in commission of violent crimes).

we would wait, say, 7 days to purchase cocaine, we could solve the drug problem."¹⁷⁶

These analogies are ridiculously defective. The situations being compared are very different, and the similarities that do exist are irrelevant to the reasons supporting a waiting period for the purchase of handguns. The only similarities between purchase transactions for handguns and purchase transactions for automobiles, baseball bats, or cocaine are: first, the transactions involve purchases, and second, the items purchased are capable of inflicting death or serious bodily injury on human beings.

These similarities are irrelevant to the reasons underlying waiting periods for handgun purchases. The primary purpose for imposing a waiting period to buy a handgun is to give police an opportunity to perform a background check to determine whether the purchaser is a convicted felon or is otherwise prohibited from possessing a firearm.¹⁷⁷ Waiting periods to purchase automobiles and baseball bats have no logical connection to this purpose because no laws prohibit convicted felons from buying these items. With respect to cocaine, it is illegal for any person to purchase the drug under any circum-

176. *Id.* at H2856 (statement of Rep. Stagers).

177. H.R. 7, 102d Cong., 1st Sess. § 2(a)(s)(1)(A) (1991); S. 1241, 102d Cong., 1st Sess., § 2701(a)(u)(2) (1991). Some Brady bill proponents argued that the waiting period would serve as a "cooling off" period in addition to allowing time for the performance of background checks. 137 CONG. REC. H2816 (daily ed. May 8, 1991) (statement of Rep. Lloyd). The rationale behind a cooling off period is that a person intent on buying a gun to kill someone might deliberate about the matter and change his or her mind if forced to wait several days to obtain the gun. This justification for a waiting period was de-emphasized as the debate progressed, however. In agreeing on a bill that would have phased out the federally mandated waiting period once a computerized instant check system became operational, House and Senate conferees implicitly rejected the notion that the waiting period would serve double duty as a cooling off period. See *supra* note 3 (discussing legislative history and evolution of Brady bill).

Even if an interval for deliberation was one of the justifications for a waiting period, this would not render the attempted analogies any more sound. Theoretically, it is true that people buying baseball bats to use as murder weapons might change their minds if they were required to wait a few days before obtaining the bats. But of course, the same could be said about thousands of products capable of being used for mayhem: knives, rakes, frying pans, rat poison, rope, and so on. Guns are unique in that they are the only product capable of inflicting immediate death from a safe distance in a relatively clean and efficient manner. Many people capable of pulling the trigger of a gun probably are not capable, for physical as well as psychological reasons, of bludgeoning or garroting another human being to death. It is not simply a coincidence that guns, particularly handguns, are the clear weapons of choice for killing people. The Statistical Abstract of the United States shows that guns were the cause of death in approximately 60% of all murders in the years 1980 and 1985-88. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 173 (1990). Handguns were responsible for 44% of all murders during those years. *Id.* Instruments used to cut or stab came second to guns as the choice instrument for murder, being used approximately 20% of the time. *Id.* Blunt objects, including baseball bats and any other instrument that could be used to bludgeon, placed third at roughly 5.5% of all murders in 1980 and 1985-88. *Id.*

stances, so discussion of a waiting period to buy cocaine makes little sense.

The dissimilarities between these purchases make analogies between them inapposite. While all the products present a danger of inflicting great harm, only handguns have that as their primary purpose. The purpose of automobiles is to travel. The purpose of baseball bats is to pursue the national pastime. The purpose of handguns is to kill. Any kind of rational risk-utility analysis would seem to support greater restrictions on handguns than on products that have common everyday utility to large segments of society.

Brady bill foes made other strange analogies. Attempting to demonstrate inconsistency on the part of "liberal" supporters of the bill, anti-gun control partisans analogized waiting periods for handgun transactions to waiting periods for free speech.¹⁷⁸ The argument was that if a person is willing to support a waiting period to buy a gun, the person should also support waiting periods to speak freely. For example, the person should support provisions obliging newspaper editors to wait seven days before publishing the news. The flaw, of course, is that there is no similarity between handgun purchases and free speech, other than that both are the subject of constitutional provisions. As stated above, the primary purpose for imposing a waiting period for handgun purchases is to prevent illegal sales to convicted felons. Obviously, no similar purpose would be achieved by requiring a waiting period before a newspaper could publish the news.

The most irresponsible analogy of the Brady bill debate came from Oklahoma Representative Bill Brewster. In arguing against a waiting period, Representative Brewster said, "To tax these individuals with a 7-day waiting period *is the same* as telling criminals that they have a 7-day hunting period on America's innocent families."¹⁷⁹ Obviously, a seven-day waiting period to buy a gun is not

178. See 137 CONG. REC. H2819 (daily ed. May 8, 1991) (statement of Rep. Walker). Representative Walker stated:

I wonder what the reaction would be of those people if we, for instance, said you may say anything you want in our society, but first of all there has to be a 7-day cooling off period. Mr. Editor, you can write anything you want in your newspaper, but first of all you have to apply to the Federal Government and tell them what you are going to write about.

Id.; see also *id.* at H2856 (statement of Rep. Staggers). Representative Staggers stated:

The same logic is that if in fact we said to journalists, "Wait 7 days before you file your stories," we would have no libel suits. Now I assume that if we could wait 7 days . . . for our second amendment rights, the same logic would say we can wait 7 days for our first amendment rights.

Id.

179. 137 CONG. REC. H2862 (daily ed. May 8, 1991) (statement of Rep. Brewster) (emphasis added) (declaring Brady bill "an outrage and an assault on common sense").

"the same" as an open hunting season on American families. This assertion was so wild as to not warrant serious analysis.

While their analogies were not as bizarre as some of those offered by Brady bill opponents, supporters of the legislation propounded their own faulty analogies. Describing it as a "perfect analogy,"¹⁸⁰ a pro-Brady bill representative compared a waiting period to buy a handgun to the noncontroversial requirement that visitors to the United States Capitol pass through a metal detector to gain access to the building.¹⁸¹ This analogy, however, is far from perfect. First of all, there is no constitutional right to enter the Capitol building, whereas handgun waiting periods arguably have constitutional implications.¹⁸² Moreover, a short delay waiting in line to pass through a metal detector is not equal to the burden of a seven-day waiting period to purchase a gun. Finally, there is a much more direct means/end connection with respect to the Capitol metal detector than there is in the case of waiting periods to purchase handguns. Metal detectors presumably are effective in preventing persons from bringing most kinds of weapons into the Capitol, whereas the extent to which waiting periods for handgun purchases will keep criminals from obtaining guns is questionable.¹⁸³

As seen in this discussion, analogies have dual persuasive potential.¹⁸⁴ Analogies can be employed to generate opposition to a proposal by comparing the proposal to measures that most people would find objectionable. This was the case when Brady bill foes analogized handgun waiting periods to waiting periods to purchase automobiles or to speak freely.¹⁸⁵ Because most people would re-

180. *Id.* at H2838 (statement of Rep. Gilchrest).

181. *Id.*

182. *See id.* at H2838-39 (statement of Rep. Poshard) (arguing that Staggers bill requiring immediate background checks is less restrictive of constitutional right to bear arms than Brady bill's seven-day waiting period); J. Jennings Moss, *Senate Votes 5-Day Wait for Handguns*, WASH. TIMES, July 1, 1991, at A5 (relating NRA lobbyist's argument that waiting period of any kind to purchase handguns is unconstitutional).

183. *See* Robert J. Philhower, *Automatic Sentences for All Gun Crimes*, N.Y. TIMES, Apr. 25, 1990, at A28 (polling over 16,000 police chiefs and sheriffs and concluding that over 76% of these law enforcement officers do not believe handgun waiting period will have effect on criminal obtaining firearm); *cf.* 137 CONG. REC. H2838 (daily ed. May 8, 1991) (statement of Rep. Gilchrest) (supporting metal detectors at Capitol until better security system is available and likewise supporting Brady bill as best currently available means to deter criminal gun purchases).

184. *See* CORBETT, *supra* note 4, at 115-20 (explaining that analogies are basically comparisons used to show either similarities or differences).

185. *See also* 137 CONG. REC. H2823 (daily ed. May 8, 1991) (statement of Rep. Unsoeld) (arguing that fundamental principle supporting constitutional rights such as free speech, free exercise of religion, and women's right to choose abortion is that citizens need not wait for governmental approval prior to exercising these rights); *cf. id.* at H2843 (statement of Rep. Carper) (analogizing seven-day waiting period to purchase handguns with inconvenience of obtaining driver's license or registering to vote).

ject waiting periods to buy cars or to speak as unreasonable, they would also be likely to reject the Brady bill if they were convinced the situations were similar. Analogies can also be used to engender support for a proposal by comparing the proposal to existing measures that most people agree are sensible.¹⁸⁶ In this way, the Brady bill supporter mentioned earlier sought to persuade the audience that handgun waiting periods are a good idea by comparing them to the metal detectors at the Capitol, which most people probably believe to be a reasonable safety precaution. Because these analogies did not involve truly similar situations, however, the comparisons were fallacious diversions into irrelevancy.¹⁸⁷ It is irrelevant that waiting periods to buy automobiles are not wise because such delays are not analogous to waiting periods to buy handguns. Similarly, it does not matter whether metal detectors at the Capitol make sense, because metal detectors have nothing in common with handgun waiting periods.

C. *Fallacies of Proof*

The fallacies evaluated in this section involve problems of proof. Proof in argumentation constitutes the premises from which conclusions follow.¹⁸⁸ Sound conclusions generally require convincing evidence to sustain them.¹⁸⁹ Where evidence is ignored, distorted, or otherwise manipulated, the argument is fallacious.¹⁹⁰ The gun control controversy provides ample rhetoric to illustrate these fallacies.

1. *One-sided assessment*

It is fallacious to ignore countervailing evidence or arguments in attempting to persuade.¹⁹¹ Virtually any argument can be made to sound convincing if relevant authority tending to disprove the argument is overlooked. Such one-sided assessments or half-truths¹⁹²

186. See CORBETT, *supra* note 4, at 115-20 (describing how comparison of similarities is basic principle behind all inductive argumentation and analogy).

187. See generally CHASE, *supra* note 86, at 81-82 (discussing fallacy of false analogy).

188. See COHEN & NAGEL, *supra* note 29, at 7 (explaining that conclusions are implied by premises of complete evidence or proof and that reasoning or inference from premises is called deductive reasoning); IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 5-14 (1990) (providing analysis of arguments that consist of multiple propositions of which one, called conclusion, is claimed to follow from others).

189. See FEARNside & HOLThER, *supra* note 5, at 2 (observing that it is of little comfort to know argument is entirely logical, that is, that conclusions are drawn from premises and rules of syllogism are observed, if premises include fraud or delusion).

190. See DAMER, *supra* note 6, at 54-64 (explaining that fallacious arguments lacking in proper evidentiary support include arguments that ignore, suppress, or minimize importance of obvious evidence unfavorable to other side's position).

191. DAMER, *supra* note 6, at 60-62.

192. The one-sided assessment fallacy travels under a variety of names. See, e.g., DAMER,

may not seem pernicious to attorneys or students of the law because effective advocacy requires skill at emphasizing favorable evidence and deemphasizing or distinguishing unfavorable evidence. For example, if a defense lawyer in a capital case insisted during summation on giving an evenhanded, objective analysis of the testimony, he or she would be rendering ineffective assistance of counsel.¹⁹³ Pursuit of the truth, some might say, is the lawyer's goal only if the truth happens to coincide with the client's interests. What makes such sleight of hand proper in this context is the adversarial nature of the legal process.¹⁹⁴ If there is competent counsel on both sides, the fact-finder ultimately will hear the important arguments and evidence on both sides.¹⁹⁵ However, the fact that one-sided assessments are accepted as part of partisan advocacy does not make them sound.¹⁹⁶ They remain fallacious and defective.

Outside of the legal process, half-truths become more insidious. Where debate occurs in an arena not structured so as to ensure that the arguments and evidence on both sides are fully and fairly presented, a danger exists that opinions will be formed in an unenlightened way.¹⁹⁷ This includes debate on most social and political issues such as affirmative action, abortion, and gun control. It is true that relevant facts and argument on both sides of prominent issues will be disseminated, but in public debate, the dissemination is likely to be fractured and unbalanced. In a trial, the fact-finder cannot avoid hearing both sides because both the judge and jury sit through the trial from beginning to end. Outside of the court room

supra note 6, at 60-61 (calling fallacy "Neglect of Relevant Evidence"); HAMBLIN, *supra* note 5, at 25 (referring to fallacy as "special pleading or half truth"); SCHLAG & SKOVER, *supra* note 22, at 19 (naming fallacy as "Competing Authority"); Jack L. Landau, *Logic for Lawyers*, 13 PAC. L.J. 59, 93 (1981) (labeling one-sided assessment fallacy as fallacy of "Suppressed Evidence").

193. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1991) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1991) (noting that lawyers should "represent a client zealously within the bounds of the law"); see also HAMBLIN, *supra* note 5, at 25 (surmising that attorney could not build successful practice without using fallacy of half-truth).

194. See DAMER, *supra* note 6, at 61 (noting that attorneys' adversarial role in judicial proceedings is exempt from truth-seeking process because it is jury and judge and not attorney that must scrutinize and evaluate truthfulness of evidence in arriving at judgment).

195. See DAMER, *supra* note 6, at 61 (examining two situations, adversarial method of judicial procedure and debating clubs, where slanting or neglecting evidence is culturally acceptable because it is presumed that each side will attack or reveal irrelevancies and inconsistencies on other side and that neutral party will decide issue being litigated or debated on basis of evidence and arguments presented).

196. See DAMER, *supra* note 6, at 61 (arguing that winning debate or court case is not principal concern of those interested in truth or rational decisionmaking).

197. See DAMER, *supra* note 6, at 61 (explaining that failure to evaluate counter-evidence to one's own claim violates standard methodological principle of inquiry that one should investigate all sides to issue and then accept position best supported by evidence).

the discourse is less structured, and listeners are likely to receive only bits and pieces of the relevant argument. Through unconscious self-selection, listeners also are likely to hear only those parts of the debate with which they already agree.¹⁹⁸ This fact makes balance a crucial element in public discourse.

Fundamental to any discussion of gun control is the proper interpretation of the Second Amendment, which provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."¹⁹⁹ The Amendment is subject to two very different interpretations. One view is that the Amendment affords no individual right to bear arms, but rather protects only a collective "state" right to maintain an organized militia.²⁰⁰ Proponents of this "collective right" position assert that the Second Amendment was promulgated to allow states to protect themselves from the threat of the new national government's standing army by maintaining militias. They find support for their interpretation in the linguistic structure of the Amendment, arguing that the "well regulated Militia" preamble serves to restrict the clause relating to the right to keep and bear arms. Proponents of the competing view argue that the Second Amendment guarantees and protects an individual right to keep and bear arms.²⁰¹ Adherents to this "individual right" view rebut the

198. See ANTOINE ARNAUD, *THE ART OF THINKING* 266 (James Dickoff & Patricia James trans., 1964) (1962) (discussing personal beliefs and self-interest as sources of believing whether statement is true).

199. U.S. CONST. amend. II.

200. For commentary espousing the collective view of the Second Amendment, see Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 42 (1984) (commenting on long-held position that right was designed to maintain collective militia, not grant specific individual right); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 57 (1989) (arguing that Framers' intent behind Second Amendment was to assure states that they would retain right to organized and effective militia, not to create broad individual right); Peter B. Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 Nw. U. L. REV. 46, 67-70 (1966) (asserting that Second Amendment refers to collective right of body politic of every state to be protected by independent state militia); Ralph J. Rohrer, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U. L. REV. 53, 77-80 (1966) (advocating approach to avoid debate over whether right to bear arms is individual or collective one; namely, "the nature of the right to bear arms should be expressed in terms of the purposes for which firearms can conceivably be used"); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 1000-01 (1975) (explaining that adoption of Second Amendment "was result of political struggle to restrict power of national government and to prevent disarmament of state militias," and consequently, delegates at Constitutional Convention had no intention of establishing personal right to bear arms); John C. Santee, Note, *The Right to Keep and Bear Arms*, 26 DRAKE L. REV. 423, 444 (1977) (accepting collective view of right to bear arms and concluding that Second Amendment operates solely as restriction on Federal Government).

201. For commentary espousing the individual right view, see David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31, 40 (1976-77) (arguing that first Congress, in enacting Second Amendment, stated that well-regulated militia was "neces-

linguistic argument by noting that in the 18th century, the "militia" included all able-bodied citizens of the community and not simply those who were members of state defense organizations equivalent to the modern day National Guard.²⁰²

Both sides in this interpretive debate bolster their respective positions with extensive historical and ideological analysis.²⁰³ In fact, it has been observed that both sides often draw on the same historical data to support their opposing views.²⁰⁴ Each side asserts its position with conviction and certitude. The problem is that there is little basis in this debate for conviction or certitude. A review of the literature reveals strong arguments and evidence on each side. Yet, in order to persuade readers to adopt their own strongly held beliefs, the writers sometimes ignore opposing arguments and evidence.²⁰⁵ This results in biased, one-sided analysis.

Illustrative of the one-sided analysis is the disagreement as to whether the United States Supreme Court has adopted the collective right or the individual right interpretation of the right to bear arms. The centerpiece of the Court's Second Amendment jurispru-

sary" to security of free state and not "sufficient" to security of free state, and that Congress recognized that ordinary processes of law may be insufficient to protect people at all times); Robert Dowling, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 100-01 (1983) (arguing that Framers' intent must be liberally construed and that inherent in right to bear arms to secure well-regulated militia was right to self-defense); Richard E. Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63, 95 (1982) (rejecting distorted interpretation of Second Amendment that deprives individuals of right to bear arms and embracing original and plain meaning of right based on historical premise); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 561 (1986) (concluding that individual right interpretation of right to bear arms is only approach that has any validity given historical evidence, Framers' intent, and need to maintain consistent standard of constitutional interpretation); Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 267-68 (1983) (arguing that Second Amendment language and philosophical background support individual right interpretation for three purposes: (1) crime prevention or self-defense; (2) national defense; and (3) preservation of individual liberty); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 613-14 (1982) (stating that "the Second Amendment did not intend for Americans of the late eighteenth century to possess arms for their own personal defense").

202. E.g., Levinson, *supra* note 20, at 646-47 (arguing that term "militia" in 18th century referred to all people or at minimum to those individuals treated as full citizens, and providing historical basis for conclusion).

203. Compare THE GUN CONTROL DEBATE, *supra* note 11, at 25-34 (using historical, political, and social evidence to support strict gun control position) with THE GUN CONTROL DEBATE, *supra* note 11, at 93-107 (criticizing arguments in favor of strict gun control using historical, statistical, and ideological factors).

204. See Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROB. 125, 125 (1986) (arguing that because both sides of gun control debate use same historical data to support their views, historical context in which Second Amendment originated has been obscured).

205. See DAMER, *supra* note 6, at 54-55 (explaining how conclusions are often based on ignorance); HAMBLIN, *supra* note 5, at 43-44 (discussing fallacy of *argumentum ad ignorantiam* that deals with purposeful refusal to examine opposing evidence).

dence is its decision in *United States v. Miller*.²⁰⁶ The defendants in *Miller* were charged with transporting an unregistered sawed-off shotgun in interstate commerce in violation of the National Firearms Act of 1934.²⁰⁷ The district court quashed the indictment, agreeing with the defendants' demurrer that the Firearms Act of 1934 violated the Second Amendment.²⁰⁸ On direct appeal, in an opinion offering a little something for everyone, the Supreme Court held that possession of the sawed-off shotgun was not protected by the Second Amendment.²⁰⁹

206. 307 U.S. 174 (1939).

207. *United States v. Miller*, 307 U.S. 174, 175 (1939).

208. *Id.* at 177.

209. *Id.* at 178. While the correct interpretation of *Miller* is not the concern of this discussion, a brief summary of the opposing arguments in the interpretive debate may assist the reader. The key passage in the opinion, from which both sides draw support, is the following paragraph:

In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Miller, 307 U.S. at 178. Supporters of gun control argue that by casting the issue in terms of whether a sawed-off shotgun bears a reasonable relationship to the maintenance of the militia, the Court endorsed the collective right interpretation of the Second Amendment. See Maynard H. Jackson, Jr., *Handgun Control: Constitutional and Critically Needed*, 8 N.C. CENT. L.J. 189, 196 (1977) (pointing to Court's reasoning in prohibiting use of sawed-off shotgun because weapon does not contribute to effectiveness of militia as support for collective right interpretation); M. Truman Hunt, Note, *The Individual Right to Bear Arms: An Illusory Public Pacifier*, 1986 UTAH L. REV. 751, 757 (1986) (highlighting Court's emphasis on well-regulated militia to support collective interpretation of Second Amendment). Opponents counter by quoting the Court's observation that the militia is comprised of "all males physically capable of acting in concert for the common defense." *Miller*, 307 U.S. at 179; see Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 74 (1989) (noting Court's refusal to take judicial notice that right to arms bears reasonable relationship to militia). This, goes the argument, makes the Court's emphasis on the militia consistent with an individual right interpretation of the amendment. Dowlut, *supra*, at 74.

Adherents of the individual right view suggest that the defendants in *Miller*, who did not appear before the Supreme Court, *Miller*, 307 U.S. at 175, lost only because of a failure in proof. See, e.g., Dowlut, *supra*, at 73-88 (opining that *Miller* opinion is defective in that Court only considered plaintiff government's view); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 130 (1987) (emphasizing lack of evidence, defendants' disappearance following trial court's dismissal, and defendants' failure to brief their side of argument as justifications for defendants' loss); Weatherup, *supra* note 200, at 999 (suggesting that after failure of defendants to appear it was understandable that Court in *Miller* viewed the issues as simple and not needing much analysis). Stressing the Court's caveat in the above-quoted passage that in the absence of evidence the Court would not take judicial notice that a sawed-off shotgun is a weapon that could be used by the militia to contribute to the common defense, adherents of the individual right theory assert that *Miller* can be read to guarantee protection for any weapon with proven military utility. See Dowlut, *supra*, at 74 ("*Miller* leaves unanswered whether modern arms of mass destruction may be possessed by individuals."); Levinson, *supra* note 20, at 654-55 ("Ironically, *Miller* can be read to support some of the most extreme anti-gun control arguments, e.g., that the individual citizen has a right to keep and bear bazookas, rocket launchers and other armaments that are clearly relevant to modern warfare, including, of course, assault weapons."); Jacob

Critics and supporters of gun control both cite *Miller* as authority for their respective views regarding the proper interpretation of the Second Amendment.²¹⁰ While some of this commentary is balanced, much of it presents an unwarrantedly one-sided assessment of the issue.²¹¹ This bias is reflected in the underwritten and overconfident conclusions on the meaning of *Miller* offered by some members of the collective right faction. One advocate of the collective right theory recently cited *Miller* for the assertion that the Supreme Court has "ruled . . . that the Second Amendment has nothing to do with individual rights to bear arms but rather the right of the states to an armed militia."²¹² A reporter for the *New York Times* echoed this sentiment when he stated that the Court has "ruled at least three times that the Second Amendment has not the slightest thing to do with an individual's right to bear arms."²¹³ The writer described *Miller* as "the most trenchant of these decisions."²¹⁴ And a scholar discussing *Miller* concluded that "[t]he second amendment as interpreted within this context refers to a collective right and not an individual right."²¹⁵ Another commentator, seizing on two sentences from the opinion in *Miller*, stated confidently, "[t]hese words alone undercut any individual right interpretation of the Second Amendment."²¹⁶ These conclusions not only ignored relevant counterarguments derived from a fair reading of the *Miller* opinion, but also failed to provide proper analysis to reach the particular conclusion.

Sullum, *Devaluing the 2d Amendment*, CHI. TRIB., May 7, 1991, at 23 (asserting that under *Miller* test, weapons such as assault rifles and machine guns "are clearly covered by the 2d amendment").

210. See *supra* note 209 (providing numerous views on proper interpretation of Second Amendment following *Miller*).

211. See *supra* notes 191-200 (discussing fallacy of one-sided assessment or half-truth).

212. Amitai Etzioni, *Gun Control: A Vanilla Agenda*, 1 RESPONSIVE COMMUNITY 6, 9 (1991). Etzioni also quoted former Solicitor General and Dean of Harvard Law School Erwin Griswold as stating, "[T]hat the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American constitutional law." *Id.* Another pair of commentators used almost the same words to assert this point. Ehrman & Henigan, *supra* note 200, at 40 ("[T]he proposition that the second amendment does not guarantee each individual a right to keep and bear arms for private, non-militia purposes may be the most firmly established proposition in American constitutional law.").

213. King, *supra* note 11, at 82.

214. *Id.*

215. Jackson, *supra* note 209, at 196.

216. Weatherup, *supra* note 200, at 999. The "words" in *Miller* that Weatherup referred to are: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." *Id.* at 999 (quoting *Miller*, 307 U.S. at 178). However, these words must be read in context with the Court's subsequent statement that the "[M]ilitia comprised all males physically capable of acting in concert for the common defense." *Miller*, 307 U.S. at 180. For a more complete discussion of the content of the *Miller* opinion, see *supra* note 209.

Supporters of the "individual right" theory have, for the most part, presented a more in-depth analysis of *Miller*.²¹⁷ This may be due to the fact that a cursory reading of the case more readily suggests a collective right interpretation,²¹⁸ and, therefore, opponents of that view may feel they have more explaining to do. Nevertheless, while the analyses offered by those who advance the individual right theory are generally more complete, their conclusions are just as one-sided. For example, in stark contrast to the collective right interpretations quoted above, a partisan of the individual right camp offered this slant on the case: "[I]t is clear that *Miller*, even with its limitations, supports the view that the second amendment guarantees an individual right to keep and bear arms, including handguns."²¹⁹ Another supporter of the individual right view offered this equally one-sided assessment of the case: "[D]espite the shortcomings of the *Miller* opinion, the Supreme Court correctly concluded that the Second Amendment protects an individual's right to keep and bear arms and thus rejected the untenable collective right theory."²²⁰

Obviously, these polar interpretations of *Miller* cannot both be correct.²²¹ It is doubtful that either is correct. The most accurate assessment of *Miller* is that the opinion did not clearly indicate whether the Second Amendment creates an individual right or only a collective right.²²² The correct interpretation of *Miller* is not really the issue here. The issue is the process used to arrive at one interpretation or the other. To present *Miller* as standing clearly for either the collective right view or the individual right view is to commit the fallacy of one-sided assessment, because such a presentation depends on ignorance of strong competing evidence and arguments.²²³

217. See *supra* note 201 and accompanying text (surveying individual right interpretations of Second Amendment); *infra* notes 219-20 and accompanying text (same).

218. See *United States v. Miller*, 307 U.S. 174, 178 (1939) (reasoning that if sawed-off shotgun is not "part of the ordinary military equipment" nor contributes to common defense, the Second Amendment does not guarantee right to bear such instrument); see also *supra* note 209 and accompanying text (discussing various interpretations of *Miller*).

219. Gardiner, *supra* note 201, at 92.

220. Lund, *supra* note 209, at 110.

221. But see Levinson, *supra* note 20, at 642 (dismissing any approach to Second Amendment or Constitution that condemns opposing view as simply wrong due to "politics of interpretation" that explain why one approach appeals to certain analysts at certain times while other analysts favor different approach).

222. One possibility is that the Court in *Miller* endorsed what is known as the "hybrid" interpretation of the Second Amendment, which holds that "individuals, not the organized militia, are beneficiaries of a right to bear arms, but that the right is applicable only to militia or military-related arms" Hardy, *supra* note 201, at 620.

223. A related kind of one-sided and incomplete assessment takes the form of relying on anecdotal evidence to establish the truth of a proposition. Fischer calls this the fallacy of the

2. Causal fallacies

Lawyers who remember their first-year torts class know that few legal doctrines are as bereft of meaningful content as that of causation. Even ignoring the illusory principles of proximate or legal cause and concentrating on the comparatively concrete concept of causation in fact, "causality may have no more reality than a dragon or a mermaid."²²⁴ This is because the search for a causal nexus, within or outside the law, requires that we apply a hypothetical alternative test in which we must compare what happened under a set of known circumstances to what would have happened under a different set of circumstances. The problem is the uncertainty involved in ascertaining what would have happened under different circumstances. Such determinations are seldom subject to any kind of empirical proof.²²⁵

As a result, we are often forced to draw inferences from nothing more than the assumption *post hoc, ergo propter hoc* (after this, therefore because of this). In other words, we reason that because one event followed another, the latter was caused by the former. *Post hoc* reasoning is generally condemned as fallacious.²²⁶ This is not al-

lonely fact. FISCHER, *supra* note 7, at 109. The fallacy is well-illustrated by Fischer's story about a scientist who published an astonishing conclusion concerning the behavior of rats. *Id.* A doubting colleague came to visit the scientist and asked to review the data on which he based his generalization. *Id.* "Here they are," the scientist said as he handed over a sheaf of materials. *Id.* Then, pointing to a cage in the corner, he added, "there's the rat." *Id.*

In the disagreement over the Brady bill, both sides tried to prove their positions with anecdotal evidence showing that waiting periods either would or would not be effective. In arguing that the nation's "rogue's gallery of armed felons would be little deterred by any over-the-counter gun control measure," then-Attorney General Richard Thornburgh described six heinous crimes where the criminal involved obtained the gun by a means other than a retail transaction. Richard Thornburgh, *Six Real Guns* . . . , WASH. POST, May 2, 1991, at A19. Other opponents of the Brady bill pointed to the case of Bonnie Elmasri, a Wisconsin woman whose battering husband killed her the day after she was prevented from obtaining a firearm because of a two-day waiting period. 137 CONG. REC. H2862 (daily ed. May 8, 1991) (statement of Rep. Schulze); *id.* at H2859 (statement of Rep. Vucanovich). Waiting period advocates countered with their own anecdotes involving cases where convicted felons or mental patients purchased weapons over the counter that subsequently were used to commit crimes. *See id.* at H2837 (statement of Rep. Roukema) (pointing to shooting of President Reagan's press secretary James Brady and numerous other instances where background check may have prevented injuries or deaths); 137 CONG. REC. S9827 (daily ed. July 11, 1991) (statement of Sen. Byrd) (describing scenarios where convicted felons and ex-convicts purchased guns without background checks and proceeded to kill their victims). No valid generalizations can be drawn from such scant evidence, however. In a nation where millions of people own millions of firearms and where more than 20,000 murders occur each year, the inventory of gun-related tragedies is extensive enough to permit probably any conclusion to be drawn from isolated cases.

224. W.P. MONTAGUE, *THE WAYS OF KNOWING, OR THE METHODS OF PHILOSOPHY* 199 (J.H. Muirhead ed., 1928) (noting that causation may be merely product of human imagination).

225. *See generally* FEARNSIDE & HOLTHUR, *supra* note 5, at 17-21 (examining faulty causal generalizations).

226. For a discussion of the *post hoc* or false cause fallacy, see DAMER, *supra* note 6, at 68-69 (providing examples of *post hoc* fallacies and explaining that chronological relationship is only

ways true, however. In many instances, our everyday experiences allow us to draw reasonable inferences of causation from a sequence of events. This is common in the law. Thus, where a person falls while hurrying down a defendant's stairs, which were unlit and had no handrail, a reasonable inference can be drawn that the defendant's negligence caused the fall.²²⁷

Post hoc reasoning is valid when applied to such simple, everyday occurrences because a substantial body of community experience exists by which to evaluate the events. While it is possible that the person would have fallen even if the stairs had been properly lit and a handrail provided, common experience tells us that traversing unlit stairs with no handrail greatly increases the likelihood that an accident will occur. Falling down unsafe stairs is a natural and ordinary sequence of events.²²⁸ *Post hoc* reasoning in these circumstances is not fallacious.

The more complex the events, however, the more likely it is that *post hoc* reasoning will be unsound.²²⁹ As the number of causal variables increases, the ability to draw reasonable inferences of causation based on a mere sequence of events decreases. A remark made during the 1991 San Francisco mayoral race is illustrative. Commenting to a reporter about incumbent mayor Arthur Agnos' drop in the polls the month before the election, an advisor to a competing candidate said, "[Agnos] spent \$1 million to drop five points. If he had spent \$2 million, would he have dropped 10 points?"²³⁰ This statement suggests that Mayor Agnos' drop in the polls was caused by his spending \$1 million on the campaign, when, in fact, it is doubtful that any such correlation existed. Most likely, far more complex factors than campaign spending were responsible for Agnos' decline in support. To establish a causal relationship involving any complex sequence of events requires more in the way of

one factor in establishment of causal relationship); FEARNside & HOLther, *supra* note 5, at 21-22 (discussing *post hoc* reasoning with examples and comments); FISCHER, *supra* note 7, at 166-67 (explaining *post hoc* fallacies in historical scholarship); HAMBLIN, *supra* note 5, at 37-38 (reviewing philosophers' debate over false cause fallacy).

227. See, e.g., *Reynolds v. Texas & Pac. Ry. Co.*, 37 La. Ann. 694, 698 (La. 1885) (explaining that where defendant's negligence greatly multiplies chance of plaintiff's accident and is of character naturally leading to occurrence of accident, mere possibility that accident might happen without plaintiff's negligence is insufficient to break chain of causation between negligence and injury).

228. See *id.* at 698 ("Courts in such matters, consider the natural and ordinary course of events, and do not indulge in fanciful suppositions.").

229. See FEARNside & HOLther, *supra* note 5, at 21-22 (explaining difficulty of determining causality due to complexity of causal variables).

230. Jerry Roberts, *Mayor Race Gets More Bizarre—Debate Follows Twilight Zone*, SAN FRAN. CHRON., Oct. 26, 1991, at A8 (quoting Eric Jaye, advisor to mayoral candidate Angela Alioto). Agnos lost to challenger Frank Jordan. Jennifer Warren & Richard Paddock, *Jordan Defeats Agnos in S.F. Mayor's Race*, L.A. TIMES, Dec. 11, 1991, at A3.

proof than simply showing that one event followed another.²³¹

This same analysis holds true with respect to the reverse process of reasoning that one event does *not* cause another event because the latter does *not* invariably follow the former. Where events are complex and many potential causal variables exist, a mere sequence of events is not enough to disprove a causal relationship.

This flawed process of reasoning about causality infects one of the primary arguments against gun control generally and the Brady bill in particular. The argument is that gun control does not work because gun-related crime has risen in jurisdictions where gun control laws have been adopted.²³² Cast in the language of causation, the argument is that gun control does not cause a reduction in gun crime because such a reduction has not followed the enactment of gun control. The fallacy of this argument is that it omits both known and unknown variables that help explain this sequence of events. It is an overly simplified assessment of the causal relationship between guns and violent crime based on select information.²³³

The fallacy is attributable to a failure to appreciate the distinction between necessary and sufficient causes. A necessary condition of an event is one that must be present for the event to occur but that is not by itself sufficient to produce the event.²³⁴ A sufficient condition is one without which the event definitely will not occur.²³⁵ Gun control is a necessary condition, but not a sufficient one, to the reduction of gun-related violent crime in the United States. It is not a

231. See FEARNSIDE & HOLTHER, *supra* note 5, at 21 (discussing fallacy of *post hoc* reasoning; positing that valid causal relationship depends on many similarities between events said to be related with no relevant instances of dissimilarity).

232. See, e.g., 137 CONG. REC. S8938 (daily ed. June 28, 1991) (statement of Sen. Murkowski) (noting that crime has not decreased in states with waiting periods and asserting that "evidence overwhelmingly points to waiting periods having no effect on crime"); 137 CONG. REC. H2860 (daily ed. May 8, 1991) (statement of Rep. Williams) (suggesting that because "[c]rime is rampant, and we now have 20,000 gun control laws and regulations on the books in America," gun control does not work); *id.* at H2826 (statement of Rep. Volkmer) (citing murder statistics from cities with gun control laws and concluding that "[g]un control laws simply do not work"); *id.* at H2816-17 (statement of Rep. DeLay) (arguing that District of Columbia's rising murder rate despite ban on handguns shows "there is no control in gun control"); Paul Gallant, *The Brady Bill Won't Stop Crime*, NEWSDAY, Apr. 12, 1991, at 68 ("The skyrocketing violent crime in New York City and Washington, D.C., attests to the failure of the most stringent and oppressive gun laws in this country."); *Gun Down the Brady Bill*, *supra* note 149, at G2 (arguing that gun control does not work as evidenced by rising crime rate in five states with waiting periods).

233. Cf. 137 CONG. REC. H2842 (daily ed. May 8, 1991) (statement of Rep. Valentine) (stating that many arguments on gun control are more emotional than logical).

234. DAMER, *supra* note 6, at 65 (cautioning that people often confuse necessary condition for sufficient one).

235. DAMER, *supra* note 6, at 65-66. Damer illustrates the difference between necessary and sufficient conditions using a pianist as an example. He explains that the mere fact that the musician has practiced piano for two hours a day over a 15-year time period is not a sufficient condition for the person to become a concert pianist, although surely it is a necessary one. *Id.*

sufficient condition because the ready availability of guns is only one of many causes that contribute to violent crime. A significant reduction in violent crime will occur only when other causes such as poverty, drugs, and the disintegration of the family are dealt with effectively and comprehensively. Nevertheless, while gun control will not alone eradicate violent crime, violent crime probably will not be eradicated without gun control.

The argument that rising crime in places where gun control has been enacted shows that gun control does not work is also defective for omitting known facts that are relevant to assessing the causal nexus between gun control and violent crime. It is true, for example, as the anti-gun control forces assert, that violent crime has increased in New York City despite stringent restrictions on handgun ownership.²³⁶ What the argument fails to address, however, is that as many as ninety percent of the handguns used to commit crimes in New York City are transported there from states without stringent gun control laws.²³⁷ It is impossible to measure the potential success of gun control under the patchwork of conflicting and inconsistent state and local laws presently in existence. Only uniform, national standards will enable us to determine whether restrictions such as waiting periods work to reduce violent crime.

3. *Arguments from ignorance*

Because of the many complex variables involved, it is unlikely that anyone will ever be able to prove that gun control laws either do or do not work to diminish violent crime.²³⁸ Such proof simply does not exist and probably never will. But the absence of this proof

236. See *supra* note 232 and accompanying text (arguing gun control is ineffective because gun-related crime has increased in jurisdictions where gun control has been adopted). New York has enacted many laws to combat handgun and other types of violence. See, e.g., N.Y. PENAL LAW § 265.40 (McKinney 1992) (prohibiting residents of New York from purchasing, otherwise obtaining, or transporting rifles or shotguns in contiguous state unless otherwise eligible to possess same in New York). Additionally, in 1990, Mayor Dinkins announced a 60-day amnesty in New York City for individuals who turn in illegal guns to police. See Laurie Goodstein, *Children Caught in 'Nightmare' of N.Y. Gunfire: Midsummer Crime Takes Its Toll of Innocents*, WASH. POST, Aug. 5, 1990, at A3.

237. 137 CONG. REC. H2846 (daily ed. May 8, 1991) (statement of Rep. Panetta). In 1990, the New York Police Department seized nearly 17,000 guns that originally were purchased outside the state. Schumer, *supra* note 112, at 36. Similarly, only eight percent of the handguns used in crime in Detroit were purchased in Michigan. 137 CONG. REC. H2846 (daily ed. May 8, 1991) (statement of Rep. Panetta).

238. But see David Perlman, *Medical Researchers Track Gun Control, Shooting Deaths*, S.F. CHRON., Dec. 5, 1991, at A2 (discussing study conducted by members of Violence Research Group at University of Maryland's Institute of Criminal Justice and Criminology that compared murder rate in District of Columbia to that in surrounding metropolitan areas of Virginia and Maryland and concluded that District of Columbia's tough gun laws continued to have preventive effect on numbers of homicides that nonetheless increased due to drugs and other factors).

does not support a valid conclusion concerning either the efficacy or non-efficacy of gun control.²³⁹ To argue that lack of evidence supports either position is to commit the fallacy of *argumentum ad ignorantiam*, that is, an argument from ignorance. This fallacy occurs whenever one argues that the absence of evidence in support of a thesis establishes that the thesis is false, or conversely, that the absence of evidence in opposition to the thesis establishes that the thesis is true.²⁴⁰ In most cases, this assumption is flawed. For example, one could not argue validly that ghosts do not exist because no one has ever proven they do exist.²⁴¹ Nor could one validly conclude that ghosts do exist simply because no one has ever been able to prove they do not exist.²⁴²

Both opponents and proponents of gun control commit the fallacy of *argumentum ad ignorantiam* when they argue that the absence of proof concerning the efficacy of gun control supports their respective positions. Gun control opponents assert that the lack of proof that gun control reduces violent crime supports the conclusion that it does not.²⁴³ Gun control proponents advance essentially the opposite proposition, challenging the other side to prove that gun control does not reduce violent crime.²⁴⁴

Both arguments constitute a specific type of argument from ignorance that historian David Fischer has labeled the fallacy of negative proof.²⁴⁵ Both sides are arguing, in effect, that "there is no evidence of *x*; therefore, not-*x*."²⁴⁶ This method of argumentation is defective because the only acceptable means of showing not-*x* is by producing affirmative evidence of not-*x*.²⁴⁷ "No evidence" means

239. See DAMER, *supra* note 6, at 54-55 (explaining that using lack of evidence for one claim as positive evidence for another is really no evidence at all and consequently conclusion is based on ignorance).

240. See COPI, *supra* note 5, at 76 (arguing that no conclusion should be drawn concerning truth or falsity of proposition due to absence of proof); see generally DAMER, *supra* note 6, at 54-55 (explaining fallacy of negative proof); HAMBLIN, *supra* note 5, at 43-44 (discussing *argumentum ad ignorantiam* fallacy).

241. See HAMBLIN, *supra* note 5, at 43-44 (discussing ghost hypothetical).

242. COPI, *supra* note 5, at 76. An exception exists in situations where a thorough investigation would be likely to uncover proof regarding the matter but the investigation has been undertaken unsuccessfully. *Id.* at 77. Thus, it would not be fallacious to argue that a person does not have a criminal record based on a thorough investigation of the person's background that failed to disclose the existence of any criminal record.

243. E.g., 137 CONG. REC. S8938 (daily ed. June 27, 1991) (statement of Sen. Murkowski) (asserting "there is no evidence that a waiting period will help reduce crime").

244. See 137 CONG. REC. H2859 (daily ed. May 8, 1991) (statement of Rep. Stenholm) ("What evidence do they [the NRA] have to support this claim and how do they know a nationally implemented waiting period won't help fight crime?").

245. FISCHER, *supra* note 7, at 47 (defining fallacy of negative proof as attempt to sustain factual proposition by negative evidence alone).

246. FISCHER, *supra* note 7, at 47.

247. See FISCHER, *supra* note 7, at 47 (explaining that historian may declare there is no

only that one does not know whether a thing exists, which is much different from knowing that it does not exist.²⁴⁸ When an issue is not subject to empirical proof, one cannot reach a valid conclusion regarding the issue based solely on the lack of such proof.²⁴⁹ A causal connection between gun control and a decrease in gun-related crime may never be shown, but this does not by itself warrant the conclusion that gun control is unnecessary to crime control.

CONCLUSION

In the year that has passed since Congress debated the Brady bill, an estimated four million new firearms entered the stream of commerce in the United States,²⁵⁰ bringing the total number of guns possessed by American citizens to approximately 200 million.²⁵¹ If the country is concerned about altering its current gun policies, it should act sooner rather than later. Each year that passes without meaningful gun control reform will make it that much harder to implement such reform. But as stated at the beginning of this Article and demonstrated by the debate over the Brady bill, we cannot hope to engage in meaningful law reform until we first reform the debate.

What is it about the issue of gun control that makes us unable or unwilling to engage in rational discussion? Why do we choose fallacious reasoning over sound logical reasoning? Fallacies occur in argument for two basic reasons. First and most simply, fallacious reasoning is an effective tool of persuasion.²⁵² People engaged in argument prefer winning over losing, so there is a natural inclination to resort to any effective means available to achieve that end. Jeremy Bentham, for example, believed that most fallacies are employed intentionally, usually for bad purposes.²⁵³ Even a person in-

evidence of not-*x* but that only correct empirical procedure is to find affirmative evidence of not-*x*, which is not possible).

248. FISCHER, *supra* note 7, at 48. Fischer illuminated this point by quoting the following exchange between Alice and the King:

"I see nobody on the road," said Alice.

"I only wish I had such eyes," the King remarked in a fretful tone. "To be able to see Nobody! And at that distance too!"

FISCHER, *supra* note 7, at 48 (quoting THE COMPLETE WORKS OF LEWIS CARROLL 223 (Modern Lib. ed.)).

249. FISCHER, *supra* note 7, at 48 (discussing need for affirmative evidence because not knowing whether something exists is different from knowing it does not exist).

250. See Alan Farnham, *Inside the U.S. Gun Business*, FORTUNE, June 3, 1991, at 191 (stating that in 1989, most recent year for which precise figures are available, American manufacturers produced following numbers of firearms for nonmilitary use: 1,376,000 pistols, 622,000 revolvers, 1,382,000 rifles, and 688,000 shotguns).

251. Eckholm, *supra* note 57, at A1.

252. See COPI, *supra* note 5, at 5 (examining psychological persuasiveness of fallacies).

253. See BENTHAM, *supra* note 5, at 227-28 (listing common characteristics of all fallacies). According to Bentham, the following characteristics pertain to all fallacies:

clined to avoid fallacies may be tempted to use them when matched against an opponent who does not feel similarly restrained, because failure to do so might result in a competitive disadvantage.²⁵⁴

However, although many fallacies are intentional rhetorical tricks designed to gain a competitive edge, this does not fully explain why rhetoricians use them. Fallacies also result from unconscious self-deception.²⁵⁵ We often believe ideas or principles not so much because they have been proven to us, but because our passion, interest, and self-love allow us to deceive ourselves.²⁵⁶ In other words, we believe what we want to believe; truth and utility become one and the same.²⁵⁷ This self-deception allows us to kill or at least suppress any doubts we might have in forming opinions about an issue. The result is that the judgments we make and accept concerning the issue are false. These false judgments, in turn, lead us to faulty

1. Whatever the measure in hand, they are irrelevant to it.

2. They are all of them such that their application affords a presumption either of weakness or of the total lack of relevant arguments on the side on which they are employed.

3. To any good purpose they are all of them unnecessary.

4. All of them are not only capable of being applied, but are actually in the habit of being applied to bad purposes, that is—to the obstruction and defeat of all such measures as have for their object the removal of abuses or other imperfections still discernible in the frame and practice of the government.

5. By means of their irrelevancy they all consume and misapply time, thereby obstructing the course and retarding the progress of all necessary and useful business.

6. By the irritative quality which, in virtue of their irrelevancy and the improbity and weakness of which it is indicative, they all possess (especially those that deal in personalities), they are productive of ill-humor, even at times of bloodshed, and continually of waste of time and hindrance of business.

7. On the part of those who give utterance to them they are indicative either of improbity or intellectual weakness, or of a contempt for the understandings of those on whose minds they are destined to operate.

8. On the part of those on whom they operate, they are indicative of intellectual weakness; and on the part of those in and by whom they are pretended to operate, they are indicative of improbity in the shape of insincerity.

The practical conclusion is, that in proportion as the acceptance and hence the utterance of these fallacies can be prevented, the understanding of the public will be strengthened, the morals of the public will be purified, and the practice of government will be improved.

Id.

254. See BENTHAM, *supra* note 5, at 240. Bentham suggested:

The opposers of a pernicious measure may sometimes be driven to employ fallacies because of their supposed utility in answering counter-fallacies. Such is the nature of men (they may say) that these arguments, weak and inconclusive as they are, nevertheless are those which make the strongest and most effectual impression upon the bulk of the people (upon who ultimately everything depends).

Id. (challenging ability of individual to employ clear and sound reasoning because processes ongoing in mind are so rapid as to leave no trace in one's memory).

255. Logicians have long emphasized this point. See, e.g., WHATELY, *supra* note 34, at 132.

256. See ARNAULD, *supra* note 198, at 266 (discussing faulty arguments advanced in public life and everyday affairs).

257. See *id.* (explaining how individuals judge things not based on what they are in abstract but rather on what things represent in relation to that individual).

reasoning.²⁵⁸

The more an issue stimulates our passion or threatens our personal interests, the more likely it is that we will resort to faulty reasoning in debating the issue and the more likely it is that we will accept faulty reasoning from others. This observation helps to explain why, although fallacies occur in much of political discourse, they dominate the discussion of emotional issues. These issues involve deeply ingrained beliefs; they are issues we are either "for or against." When no common ground can be found regarding an issue, there is no room for compromise. To acknowledge that there are reasonable and meritorious arguments on the other side in such a case is to discredit one's own beliefs. Abortion is an example of such an issue. It presents a wholly irreconcilable conflict between the right of the fetus to be born into the world and the right of the mother to choose to terminate her pregnancy. To recognize the right of the fetus to be born is necessarily to reject the right of the mother to choose and vice versa. There simply is no middle ground in this conflict.

With respect to gun control, the conflict is one between community and individual rights.²⁵⁹ Advocates of gun control view coercive communitarian restrictions as the only commonsense answer to escalating gun violence.²⁶⁰ Gun enthusiasts view gun control as an unwarranted encroachment on individual liberty.²⁶¹ Ordinarily, conflicts between community rights and individual rights do not involve irreconcilable positions painted in black and white. Usually there is some reasonable middle ground and hence some room for using reasoned debate as a way to achieve a fair compromise. It is possible to believe strongly in individual rights and yet recognize that these rights must give way at some point for the protection of the community, just as it is possible to recognize that the community

258. *Id.* at 264.

259. See generally EARL R. KRUSCHKE, *THE RIGHT TO KEEP AND BEAR ARMS* 13-45 (1985) (interpreting collective versus individual development of right to bear arms); see also *supra* notes 200-01 and accompanying text (explaining collective versus individual viewpoints).

260. See *supra* note 112 (articulating Brady supporters' "common sense" views).

261. See, e.g., 137 CONG. REC. S8939 (daily ed. June 28, 1991) (statement of Sen. Hatch) ("If you believe in the second amendment and the right to keep and bear arms, which has been time honored in this country, this is your chance to vote for it."); *id.* at S8936 (statement of Sen. Craig) ("We are in fact saying to that average American citizen we are going to for just a moment squeeze those rights that for over 200 years we have deemed as sacred."); 137 CONG. REC. H2852 (daily ed. May 8, 1991) (statement of Rep. Rohrabacher) ("Let us not put a bullet hole in the second amendment of the Constitution."); *id.* at H2838 (statement of Rep. DeLay) ("All the Brady Bill does is to take a little of that precious freedom away from our fellow Americans."); *Gun Down the Brady Bill*, *supra* note 149, at G2 ("The truth is that the Brady Bill will . . . trample the rights of law-abiding Americans."); Nveske, *supra* note 94, at 9A (printing letter to editors of *USA Today* stating that "[t]he Brady bill is a liberal political conspiracy and the first step in the total disarmament of the American populace").

must endure some costs in order to protect individual liberties. Courts forge this delicate balance every day in cases involving free speech and procedural protections for suspects of crime.²⁶²

What sets gun control apart from other dialogues about the balance between community responsibility and individual rights is that gun owners truly believe that *any* restriction on gun ownership will be only the first step toward gun confiscation.²⁶³ While this fear is unjustified as a matter of political reality, it has some basis in the fact that banning guns (or at least handguns) is the true agenda of many gun control proponents.²⁶⁴ Accordingly, it is difficult if not impossible to decouple arguments concerning the reasonableness of any particular gun control measure from the much larger argument regarding whether society should ban guns altogether. As to the latter issue, the positions are firmly fixed miles apart.

But we need not view the issue of gun control so rigidly. We could find common ground in the debate if both sides would temper their positions. Gun control proponents who are serious about accomplishing anything should abandon their rhetoric calling for a complete ban on gun ownership. Not only will a complete ban never happen, it is questionable whether we should even want it to happen. With 200 million guns already in circulation, it is likely that a legal ban on guns would prevent only law-abiding citizens from possessing them. Unless and until a way is developed to take all the guns out of the hands of criminals, even staunch anti-gun proponents should be uneasy about the prospect of banning legal ownership of guns.

Opponents of gun control, on the other hand, need to relinquish

262. See, e.g., *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542-43 (1992) (discussing balancing of free speech issues against other concerns in First Amendment analysis); *Katz v. United States*, 389 U.S. 347, 349-52 (1967) (discussing opposing concerns of privacy and state interests and revealing that almost all governmental action interferes with personal privacy to some extent). One curious paradox of gun control is that it reverses the traditional roles in the community responsibility/individual rights debate. Gun control is the liberals' responsibility issue and the conservatives' rights issue. No other issue casts liberals as strong proponents of communitarian restrictions and conservatives as staunch defenders of individual rights. Only in the topsy-turvy world of Second Amendment discourse would one find the American Civil Liberties Union advancing a restrictive interpretation of a constitutional liberty that recognizes no protection for individuals, ACLU Policy Statement No. 47, cited in Levinson, *supra* note 20, at 644 n.40, and a conservative United States Senator characterizing the same liberty as the "right most valued by free men." *The Right to Keep and Bear Arms, Subcomm. on the Constitution of the Comm. on the Judiciary*, 97th Cong., 2d Sess. viii (1982) (preface by Sen. Hatch).

263. See *supra* notes 141-62 and accompanying text (exploring slippery slope belief of gun control opponents that any restriction would be first step in eliminating right guaranteed by Second Amendment).

264. See *supra* notes 159-60 and accompanying text (discussing ban on handguns as one ultimate goal of gun control advocates).

their unnecessarily alarming slippery slope arguments and be more willing to consider reasonable measures to keep guns out of criminals' hands. The public interest demands that gun control opponents be more amenable to making reasonable concessions concerning their private interests.²⁶⁵ The gun control measures that have managed to receive serious consideration thus far have been very modest. Certainly, the Brady bill seems to fall into this category. Gun owners should evaluate gun control proposals on their true merits, rather than on the spectre of what might come next. We impose restrictions on other individual rights for the benefit of the community and have been successful in avoiding free falls down the slippery slope. There is no reason to believe we could not be just as successful with respect to regulating guns.

The lesson to be learned from studying the rhetoric used in the debate over the Brady bill is important. Jeremy Bentham believed that fallacies are used almost exclusively to perpetuate wickedness.²⁶⁶ Bentham's assessment is perhaps too harsh given that fallacies often result from unwitting self-deception. But even if fallacies are used only to perpetuate blindness and ignorance, that is bad enough.

It does not require much argument to support the proposition that we should make important social policy decisions in a climate of reason rather than in the fog of fallacy. We certainly try to abide by this principle in our personal lives. For example, suppose a person is faced with the decision whether to move out of an apartment and buy a particular house. The prospective homeowner hears the following arguments from friends and real estate agents: (1) "I have a friend who decided not to buy a house and she got struck by lightning the next day";²⁶⁷ (2) "Everybody who is anybody owns their

265. Gun owners have the most to lose in the gun control debate. People who want to impose gun control are, for the most part, people who do not own guns and have no desire to own guns. They may champion the community's interest without any risk of loss to themselves. This is not true of gun owners, who must give something up in order to promote the community's interest.

It has already been noted that self-interest clouds our ability to reason without the intrusion of fallacies. See *supra* notes 255-58 and accompanying text (discussing self-deception involved in fallacious reasoning). Jeremy Bentham asserted that when private interests collide with the public interest, private interests always take precedence. He went so far as to argue that "[t]aking the whole of life together, there never has existed nor can there ever exist a human being in whose instance any public interest he can have had, will not, insofar as it depends upon himself, have been sacrificed to his own personal interest," and accepted the supposition that "on the part of every individual whose conduct is thus to be shaped and regulated, the cause which will determine his conduct will be interest, his own private interest." BENTHAM, *supra* note 5, at 230.

266. See *supra* note 253 (outlining characteristics thought by Bentham to be common to all fallacies).

267. See *supra* notes 224-30 and accompanying text (discussing causal fallacy of *post hoc ergo*

own house";²⁶⁸ and (3) "If you don't buy that house, you won't own your own place."²⁶⁹ These arguments are absurdly defective and it is unlikely a person would be influenced by them in deciding whether to buy a house. Yet in the debate over the Brady bill involving a major national policy decision, we accepted arguments as absurd as these. To echo Jeremy Bentham's optimism concerning the destiny of political fallacies in Parliament, we can only hope that the next time a gun control measure comes before the people of the United States, the first person to utter a fallacy will be greeted not with approval, "but with voices in scores crying aloud 'Stale! Stale! Fallacy of Authority! Fallacy of Distrust' and so on."²⁷⁰

propter hoc). *Post hoc* reasoning consists of assuming that because one event followed an earlier event, the second occurrence was caused by the earlier event. FEARNside & HOLThER, *supra* note 5, at 21. It is doubtful that there is any causal relation between the demise of the speaker's friend and her decision not to buy a house.

268. See *supra* notes 61-66 and accompanying text (discussing fallacy of *argumentum ad populum*). This appeal involves an implicit argument that a course of action is wise because it is accepted by a large number of people. See also COPI, *supra* note 5, at 79-80 (discussing "bandwagon" approach that establishes particular propositions as true because "everyone" accepts idea). The fallacy commonly appears in advertising campaigns of the type touting that "Two million satisfied customers can't be wrong." This fallacy also involves an element of snob appeal. See *id.* (explaining that snob appeal argument attempts to associate acceptance of conclusion with other desirable things). The fact that everyone else owns a house is logically irrelevant to whether our potential house buyer should purchase one.

269. This is a fairly blatant example of begging the question. Begging the question consists of assuming as an argument's premise the very conclusion that is sought to be proved. COPI, *supra* note 5, at 83 (explaining that argument that begs question is fallacious in sense that incorrect procedure is employed for establishing truth of conclusion). The argument in the text asserts in effect that the person should buy the house because, otherwise, he or she will not own a house. In other words, it accepts as a premise that the person should buy the house to prove the conclusion that the person should buy the house.

270. BENTHAM, *supra* note 5, at 259.

