Fordham University School of Law

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Say It Ain’t So: Leading Logical Fallacies in Legal Argument–Part 2

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Say It Ain’t So: Leading Logical Fallacies in Legal Argument – Part 2

Part 1 of this column, which appeared in the July/August 2016 issue of the Journal, covered formal fallacies in legal argument.

Informal Fallacies
Informal fallacies are fallacious because of their content. The following is a list of informal fallacies and what makes them fallacious.

1. One-Sided Argument
When crafting arguments, “[i]t is fallacious to ignore countervailing evidence or arguments in attempting to persuade.”

Example: The reputation evidence shows that the defendant is the kind of person who’d never killed a bug. The evidence also shows that he’s easygoing and has lots of friends. Therefore, the defendant didn’t kill his wife.

The fallacy: The reputation evidence might be true and relevant, but countervailing evidence might refute the conclusion.

2. Amphiboly
It’s fallacious to argue based on an ambiguity in the grammatical structure in a sentence.

Example: Ms. Smith hit and injured a person while riding his motorcycle. She should be held accountable.

The fallacy: It’s impossible to conclude from the premise that Ms. Smith should be held accountable for the injury. Based on the grammatical structure of the premise, we don’t know whether she was driving the motorcycle. The ambiguity in the structure makes the conclusion invalid.

3. Accent
An accent fallacy creates an ambiguity in the way a word or words are accented.

Example: A reporter asks a member of Congress whether she favors the President’s new missile-defense system. She responds, “I’m in favor of a missile defense system that effectively defends America.”

The fallacy: Her answer could mean that she favors the President’s missile-defense system or that she opposes it because the system is not effectively defending America. She creates an ambiguity in which word is accented. If the word “favor” is accented, her answer is likely in favor of the missile-defense system. If the words “effectively defends” are accented, she likely opposes the defense system.

4. Complex Question
The complex-question fallacy “occurs when the question itself is phrased in such a way as to presuppose the truth of a conclusion buried in that question.”

Example: “Why is the free market so much more efficient than government regulation?”

The fallacy: The question assumes that a free market is more efficient than government regulation. A free market might or might not be more efficient, but one may not assume a fact not yet in evidence.

5. Equivocation
Equivocation uses ambiguous language to hide the truth. If “the same word or form of the same word is used in two different contexts, it must mean the same thing in both contexts.”

Example: Mr. Parker told his friends that he passed the bar. His friends congratulated him on his accomplishment.

The fallacy: Mr. Parker equivocated the meaning of passing the bar. Passing the bar has two meanings. Mr. Parker might have lied in suggesting that he passed the bar exam. He could simply have walked past the bar in a courtroom separating the public from the well where the lawyers argue and the judge sits.

6. Red Herring
The fallacy of “the red herring is a deliberate diversion of attention with the intention of trying to abandon the original argument.”

Example: The prosecution argued at trial that the defendant acted immorally. The defense attorney asserted that morality is subjective and that there’s no single definition of morality.

The fallacy: The defense attorney diverted the conversation from the defendant’s actions to a discussion of morality.

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7. Straw Man
The straw-man argument is a common fallacy that “involves refuting an opponent’s position by mischaracterizing.”¹⁹

Example: Ms. Jones argues that the United States shouldn’t fund a space program. Mr. Smith counters that science classes are an important part of a student’s education.

The fallacy: Mr. Smith is mischaracterizing Ms. Jones’s argument to include cutting funding for science classes in schools. Smith can’t imply that Jones also wants to stop funding science in school.

8. Genetic Fallacy
A genetic fallacy occurs when one “attempt[s] to prove a conclusion false by condemning its source — its genesis.”¹⁰

Example: Ms. White is a member of Congress. She drafted a bill that will help fund law schools. People opposing White’s bill argue that because White lacks a law degree, the bill shouldn’t be passed.

The fallacy: The fallacy is that people opposing the bill unfairly challenge it because White wrote it. The opposition isn’t challenging the bill’s language or content.

9. Ad Hominem, or Appeal to the Person
“Ad hominem” means “to the person.” An ad hominem fallacy attacks a person’s character, not the person’s ideas.

Example: Ms. Robinson argues that mandatory sentences for criminals should be lowered. Mr. Johnson challenges Ms. Robinson because she’s a convicted felon. Therefore, Robinson can’t be trusted.

The fallacy: Mr. Johnson’s argument is fallacious. He attacks Ms. Robinson’s character. Johnson doesn’t challenge Robinson’s idea on its merits.

10. Tu Quoque
“Tu quoque” means “you do it yourself.” Writers use tu quoque arguments when they contend that because an individual or group is allowed to do something, everyone should be allowed to do it.

Example: Mr. Mozzarella is a member of the Departmental Disciplinary Committee for New York’s First Judicial Department. He violated the New York Rules of Professional Conduct last year. Therefore, it’s acceptable to act unethically in Manhattan and the Bronx.¹¹

The fallacy: A tu quoque argument makes it “impermissible to justify one wrong by another.”¹² That Mr. Mozzarella acted unethically doesn’t entitle other lawyers to act unethically.

11. Nirvana Fallacy
The nirvana fallacy occurs when the writer rejects a solution to a problem. The solution is rejected because it isn’t perfect.¹³

Example: Mr. Brown doesn’t support a new bill to reduce greenhouse gas emissions. He argues that this bill won’t completely eliminate greenhouse gases and thus it shouldn’t be passed.

The fallacy: Mr. Brown rejects the bill because it isn’t a perfect solution. It’s fallacious to argue against a bill on the sole ground that the bill isn’t perfect. Brown is entitled to hold out for a better bill, but he can’t logically argue that the bill should be rejected because it doesn’t advance all his goals.

12. Poisoning the Well
Poisoning the well presumes your adversary’s guilt by forcing your adversary to answer a question.

Example: The lawyer asked the witness, “When did you stop beating your wife?”

The fallacy: The question assumes that the witness used to beat his wife, that he stopped beating his wife, that he’s married, and that he’s married to a woman.

13. Appeal to Authority
The “appeal to authority” fallacy assumes that a person who excels in one area is credible and authoritative in unrelated areas.

Example: Ms. Peterson told Mr. Stevens, a partner at her law firm, that she had a headache. Mr. Stevens told Ms. Peterson to take antibiotics. Peterson took the antibiotics because Stevens, a partner, must be smart.

The fallacy: Mr. Stevens is an excellent attorney. Therefore, he must know how to treat a headache. The conclusion to take the antibiotics is unwarranted. His credibility doesn’t extend to medicine.

14. Etymological Fallacy
The etymological fallacy dictates that the present-day meaning of a word or phrase should be similar to historical meaning.

Example: In Muscarello v. United States, 524 U.S. 125 (1998), the issue was how to interpret the phrase “carries a firearm” and whether Congress intended by that term to include the notion of conveyance in a vehicle.¹⁴ To define “carries,” Justice Breyer cited several dictionaries showing that the origin of the word “carries” includes “conveyance in a vehicle.”

The fallacy: Sometimes courts look to a term’s language of origin, “[b]ut these historical antecedents are not necessarily related to contemporary usage.”¹⁵ Historical meaning doesn’t always coincide with present-day meaning.

15. Appeal to Popularity
Appeal to popularity uses popular prejudices as evidence that a proposition is truthful.

Example: The current trend is that defendants are representing themselves at trial. Therefore, all defendants should represent themselves.¹⁶

The fallacy: Representing yourself at trial is the right thing to do. But a decision to represent yourself is unwarranted based on the premise.

16. Appeal to Consequences
This fallacy suggests that if the consequences are desirable, the proposition is true; if undesirable, the proposition is false.

Example: If there’s objective morality, then good moral behavior will be rewarded after death. I want to be rewarded; therefore, morality must be objective.
The fallacy: The argument doesn’t address the merits of the conclusion. The conclusion is reached by appealing to the consequences of the result.17

17. Appeal to Emotion
Appeals to emotion are frequently used tactics in arguments and fall into “the general category of many fallacies that use emotion in place of reason in order to attempt to win the argument. It is a type of manipulation used in place of valid logic.”18

The best way to avoid and detect fallacies is to become familiar with them.

Example: Judges may react to the pain and anguish a given law or doctrine causes, and they may point to the painful or existential consequences of that law as reason to change it.19

The fallacy: Emotions shouldn’t be the basis on which to make decisions. Appealing to emotion is a powerful tool. But it’s logically fallacious.

18. Guilt by Association
Writers use guilt-by-association arguments when they support or attack a belief or person by an unrelated association.

Example: Ms. Smith was convicted of armed robbery. Ms. James was friends with Smith. James was charged with conspiracy because of her friendship with Smith.

The fallacy: Ms. James is guilty because of her association with Ms. Smith. Their relationship is not evidence of guilt.

19. Composition
The fallacy of composition assumes that a feature of the individuals in a group is also a feature of the group itself.

Example: The plaintiff’s case relies solely on circumstantial evidence. No witness for the prosecution showed that the defendant committed the crime. Therefore, the prosecution didn’t prove its case beyond a reasonable doubt.20

The fallacy: Although no single witness offered sufficient evidence to convict the defendant, the totality of the circumstantial evidence might be enough for a conviction.

20. Division
Division is the converse of the composition fallacy. If a group has a feature, the individuals in the group have that feature.

Example: The defendant was part of a cult. The cult is known for committing violent acts. Therefore, the defendant is a violent person.

The fallacy: The defendant must be a violent person because he’s part of the cult. The fallacy of division suggests that the defendant is violent because the cult he’s a part of is violent.

21. Appeal to Ignorance
The logical fallacy of appealing to ignorance occurs by “forgetting that absence of evidence is not evidence of absence.”21 One can’t assume that a proposition is true or false just because some information is absent.

Example: Scientists can’t prove that aliens haven’t visited earth. Therefore, aliens must have visited earth.

The fallacy: The lack of evidence in this case is not evidence of the conclusion. The conclusion is based on a lack of evidence.

22. Begging the Question
Begging the question draws a conclusion based on an unproven assumption. To beg the question isn’t to evade the issue or to invite an obvious question.22

Example: Murder is wrong because killing another human is wrong.

The fallacy: The fallacy here is that the premise is used to support itself. Murder is wrong, but the conclusion is invalid based on the premise.

23. Circular Reasoning
Circular reasoning is used when the writer “assumes the truth of what one seeks to prove in the very effort to prove it.”23

Example: The defense attorney argues this in summation: “My client couldn’t have committed this crime. He isn’t a criminal.”

The fallacy: The fallacy in the argument — even though reputation evidence is admissible — is that the defendant is innocent just because he’s not a criminal. The logic is circular. Circularity is an invalid method of reasoning.

24. Scapegoating
Scapegoating passes to another target the blame for an unfortunate event.

Example: The Widget Company manufactures cars. Widget didn’t properly inspect its brakes in the cars. As a result, the brakes in Widget’s cars were faulty. The faulty brakes caused many injuries. Widget blamed the Application Company for the faulty brakes. Application manufactured the brakes for Widget’s cars.24

The fallacy: The Widget Company’s argument relies on the scapegoating fallacy. Widget should have inspected the cars it sold. Widget passed the blame on to the Application Company because Application manufactured the faulty brakes.

25. Non Causa Pro Causa
This fallacy occurs when the writer “incorrectly assumes an effect from a cause.”25

Example: I forgot my umbrella today. Therefore, it’ll rain today.

The fallacy: The speaker invalidly concludes it’ll rain. It’s impossible to conclude from the initial premise that it’ll rain.

26. Fake Precision
The fake-precision fallacy occurs “when an argument treats information as more precise than it really is. This happens when conclusions are based on imprecise information that must be taken as precise in order to adequately support the conclusion.”26
27. False Dilemma
The false-dilemma fallacy occurs when the writer “make[s] choices based on a perceived set of variables that do not effectively identify the real choices available to the decision-maker.”

Example: A lawyer asks a witness, “Would you say that the defendant gets drunk about once a week, twice a week, or more often?”

The fallacy: The defendant is drunk at least once a week. The possibility exists that the defendant never drinks. The question posed allows only for a limited number of options.

28. Slippery Slope
The speaker argues that once the first step toward a particular event is taken, the first step will inevitably lead to the worst possible outcome.

Example: Tuition for school is too expensive. If the tuition increases, students won’t be able to afford it. If students can’t afford to go to school, they’ll inevitably turn to a life of crime to make money.

The fallacy: The conclusion relies on the slippery-slope fallacy. The premises don’t support the conclusion that students will become criminals if they can’t afford tuition.

29. Faulty Analogy
The fallacy of faulty analogy occurs when items in an analogy are dissimilar. When analogies are dissimilar, the conclusion becomes inaccurate.

Example: To illustrate an idea about security interests, Ms. Daniel relates them to the principles under which bankruptcy contracts operate.

The fallacy: Bankruptcy contracts don’t function the same way security interests do. The items in the analogy are dissimilar. The method of reasoning is inaccurate.

30. Hasty Generalization
The fallacy of a hasty generalization occurs when the writer takes a limited sampling to justify a broad conclusion.

Example: Chief Court Attorney Samson never edits draft opinions from his law department. All chief court attorneys are lazy.

The fallacy: Because one chief court attorney doesn’t edit draft opinions, all chief court attorneys must be lazy. Just because Mr. Samson doesn’t edit drafts doesn’t mean that he or any other chief court attorney is lazy. Countless reasons can explain why only Samson doesn’t edit drafts.

31. Fallacy of Accident
The fallacy of accident occurs when there’s an “improper application of a general rule to a particular case.”

Example: Murder is illegal. Anyone who kills an ant should be charged with murder.

The fallacy: The general law that murder is illegal is improperly applied to the specific case of killing ants. This is opposite of the fallacy of the hasty generalization.

32. False Cause
False cause is also known as post hoc ergo propter hoc. This means “after this; therefore, because of this.” This fallacy assumes that because one event occurs after another, the first event caused the second. These types of “arguments fail because they imply a causal relationship without a basis in fact or logic.”

Example: Every time I brag about how well I write, I submit a document with lots of typos.

The fallacy: If you don’t brag about your writing, you’ll submit typo-free documents. No causal link connects bragging and submitting typo-free documents.

33. Appeal to Tradition
An appeal to tradition suggests that a practice is justified because of its continued past tradition.

Example: Law X has been in effect for generations. Therefore, Law X shouldn’t be repealed.

34. Special Pleading
A special pleading is a fallacy people use to claim that something is an exception, even without proper evidence to support that claim.

Example: Drunk drivers should be punished. But Mr. A is an exception. Today’s his birthday.

The fallacy: That today is Mr. A’s birthday isn’t an adequate reason for an exception.

35. The Prosecutor’s Fallacy
The Prosecutor’s Fallacy results from confusion between the probability that (a) any individual will match the description of the guilty person and (b) an individual who does match the description is actually guilty.

Example: The perpetrator was described as seven feet tall, with blond hair, walking with a limp, the exact characteristics of the defendant in the courtroom. An expert testifies that the odds of any given person matching that description is 0.00000072 (72 out of 100 million). The prosecutor argues that the odds that the defendant is the guilty party are approximately 1.4 million to 1.

The fallacy: The prosecutor has ignored the size of the population in question. The New York metropolitan area has a population of more than 20 million people. If the case were in New York, the odds that the defendant is the guilty party (without any other information) are only 1 in 14.4, or less than 7 percent (i.e., 0.00000072 times 20 million).

After reading through this list of fallacies, readers might find it difficult to believe that any argument can be wholly free of them. The best way to avoid fallacies in arguments is to become familiar with them. The following six guidelines, from University of Memphis Professor Andrew Jay McClurg, are a good start for any
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attorney Professionalism forum
material misstatements deserve your ciously pick your battles over which cannot demonstrate it. If you judi that you are right. Telling the court lying. But you need to show the court right lie or whether it is a matter of each and every statement is an out attorneys that bicker about whether want to spend their time overseeing case in the long run. Judges do not annoy the judge and undermine your cited by opposing counsel, you may where there may be issues of fact or hand, you decide to resort to name ultimately decide the case. If, on the other hand, you decide to resort to name calling before the judge, especially where there may be issues of fact or multiple interpretations of the cases cited by opposing counsel, you may annoy the judge and undermine your case in the long run. Judges do not want to spend their time overseeing attorneys that bicker about whether each and every statement is an outright lie or whether it is a matter of interpretation. You may be correct when you say that your opponent is lying. But you need to show the court that you are right. Telling the court that you are right will not help if you cannot demonstrate it. If you judiciously pick your battles over which material misstatements deserve your strongest assertion of impropriety, and you have the evidence to support your contention, you are unlikely to irritate the judge, you will protect the reputation of you and your client, and you will have diligently represented your client’s interests.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

My client insists that we use a private investigator to “dig up” dirt on his adversary to use in our litigation. I certainly can see the benefits of doing so, but I’m also concerned about the ethical pitfalls and my obligations with respect to a third-party over whom I may not have control. What are the ethical issues I should be aware of? Should I have my client retain the private investigator? Would that protect me if the private investigator goes AWOL? Am I responsible in any way for the private investigator’s actions if he or she is taking directions from my client and is not adhering to the guidelines I provide? How do I protect myself?

A.M. I. Paranoid

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3. Adapted from id.
5. Id.
8. McClurg, supra note 1, at 90.
9. Id. at 89.
15. Id.
22. Inspired by and adapted from Gertrude Block, Language Tips, 85 N.Y. St. B.J. 61, 61 (May 2013).
23. Ramee, supra note 4, at 6.

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