

Critical Thinking and the Law

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CRITICAL THINKING AND THE LAW

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LOGICAL FALLACIES IN LEGAL WRITING

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Logic in Legal Argument



- A strong legal argument doesn't just “make sense”, it must contain “pristine logic”.
- In order to exhibit “pristine logic,” a legal argument should adhere to the form of the *logic syllogism*.
- *Syllogism?*
 - *Major premise*
 - *Minor premise*
 - *Conclusion*

LEGAL SYLLOGISM (general form)



- **Major Premise** – states the general rule
 - statement of law/rule of law
- **Minor Premise** – factual assertion
 - statement of fact
- **Conclusion** – applying law to facts
 - analysis

Example of Legal Syllogism



- To qualify as a “citizen” of a state for purposes of diversity jurisdiction, a party must (1) currently reside in that state and (2) intend to remain there indefinitely. Here, the plaintiff does not currently reside in North Carolina. Therefore, the plaintiff cannot be a “citizen” of North Carolina for jurisdictional purposes.

Logic in Legal Argument



- In order to exhibit “pristine logic,” a legal argument must be *valid*.
- A syllogism is *valid* if, given the truth of its premises, the conclusion “follows” logically such that it, too, must be true.
- **NOTE:** An argument is not valid simply because its premises and conclusion are all true.

IS THIS ARGUMENT VALID?



- Major Premise: All cats are mammals.
 - TRUE
- Minor Premise: Some mammals are excellent swimmers.
 - TRUE
- Conclusion: Therefore, some cats are excellent swimmers.
 - TRUE
- VALID?
 - NOPE

EXPLANATION



- Each of these statements is true. Cats are indeed mammals. Some mammals (e.g. whales and dolphins) are excellent swimmers. And, as it happens, some cats (e.g. tigers and jaguars) are also excellent swimmers. But this argument is not valid. The fact that cats are mammals and that some mammals are excellent swimmers doesn't prove anything about the swimming ability of cats. Based on the information we're given in the premises, it is logically possible that no cat in the history of the world has ever stepped foot in water. Because it is logically possible for the premises to be true and the conclusion to be false, this argument is not logically valid.

○ THIS MAKES THE CAT ARGUMENT FALLICIOUS

In case you don't see the value in recognizing logical fallacies in legal arguments...



- “Many fallacies are committed in legal argument. Indeed it seems as if much legal argument consists of the deliberate commission of informal fallacies. With one exception, lawyers are good at discovering the informal fallacies committed by their opponents. That is because when lawyers are committed to their clients' causes, and familiar with the facts of their cases, they can easily see through their opponents' tricks, especially when it comes to fallacies of irrelevance.”

The 15 MOST common fallacies in legal writing

- 
- Appeal to Inappropriate Authority
 - Disconnected Premises
 - Irrelevant Conclusion
 - False Cause
 - Overzealous Application of a General Rule
 - Hasty Generalization
 - Circular Argument
 - Complex Question
 - Ambiguity
 - Composition
 - Division
 - Argument from Ignorance
 - Attack Against the Person
 - Argument from Force
 - Appeal to Emotion

Appeal to Inappropriate Authority



- Arises when the authority invoked has no legitimate claim in the matter at hand.
- In legal writing, this fallacy occurs when we cite a secondary authority or a case from another jurisdiction as controlling authority.
- It also occurs when we cite the opinion of an expert in a matter outside his or her expertise.

Appeal to Inappropriate Authority - Examples



- “In North Carolina, adverse possession requires actual entry and exclusive, open and notorious possession, adverse and under a claim of right, for the full statutory period. *Benton v. Rennick*, 22 So. 2d 173 (Fla. 1973); Black’s Law Dictionary 545 (17th ed. 1999).”
 - What’s the problem?...Where’s the fallacy?
 - ✦ The case cited is from *Florida*, and thus is not controlling in *North Carolina*. Black’s Law Dictionary may be used to cite a general definition of adverse possession, but not as support for what the law in North Carolina is.

Appeal to Inappropriate Authority - Examples



- “The possession of nuclear weapons is a moral abomination. Even Edward Teller, the ‘father of the hydrogen bomb,’ urged the United States to halt production once the full extent of their destructive power became known.”
 - What’s the problem?...Where’s the fallacy?
 - ✦ While it may seem persuasive that even the “father” of the hydrogen bomb disapproved of its development, note that Teller was a physicist, not a cleric or moral philosopher. His views on morality are completely outside his expertise.

Disconnected Premises



- In a standard logic syllogism, there must be exactly three basic concepts:
 - a “major term” that occurs in the major premise,
 - a “minor term” that occurs in the minor premise, and
 - a “middle term” that occurs in both the major and minor premises, but not in the conclusion.
- The conclusion should connect the major and minor terms.
- The middle term is the glue that holds the argument together. In a typical legal syllogism, the middle term will consist of either the elements of a cause of action or the definition of some term of art.

Disconnected Premises - Examples



- “Murder is the intentional killing of a human being. *State v. Jones*, 12 N.C. 345, 34 S.E.2d 56 (1929). Here, the defendant is an escaped convict who was already serving a life sentence for the murder of a police officer and was apprehended just two miles from where the victim’s body was found. Therefore, the defendant is guilty of murder.”
 - What’s the problem?...Where’s the fallacy?
 - ✦ No middle term –
 - Major Premise – definition of “murder”
 - Conclusion – D is guilty of murder
 - Minor Premise (w/ middle term) SHOULD connect the two.
 - ✦ What should the 2nd sentence show?
 - D’s conduct satisfied each of these elements. The elements of the crime should be the “middle term” that connects the premises together.

Disconnected Premises - Examples



- “An ‘attractive nuisance’ is a dangerous thing or condition that could foreseeably cause children to trespass onto land and be injured. *Smith v. Jones*, 123 N.C. 45, 56 S.E.2d 78 (1963). Here, the defendant’s goldfish pond is clearly an attractive nuisance. Therefore, the defendant may be liable for an injury sustained by a child in that pond.”
 - What’s the problem?...Where’s the fallacy?
 - ✦ There are four basic concepts, not three, and the premises are not properly connected by a “middle term.”
 - ✦ The major premise defines a term of art – “attractive nuisance.” The definition of this term, not the term itself, should be the “middle term” that connects the premises together. But the minor premise does not even mention the definition of an “attractive nuisance;” it merely asserts that the defendant’s goldfish pond is one.
 - This is “conclusory.”

Disconnected Premises – Examples



- The minor premise should...?
 - show us how the defendant's goldfish pond satisfies the definition of an attractive nuisance.
 - ✦ HOW?
 - Point out that a child could easily drown in the pond and that children are naturally curious about bodies of water, and therefore that the pond is both dangerous and likely to cause children to trespass. This would logically lead to the conclusion that the defendant's goldfish pond is an “attractive nuisance.”
- Original **Conclusion**?
 - **Liability**
 - ✦ This is the 4th term that is inappropriately placed. You would need to set up an additional argument/syllogism to establish liability.

Irrelevant Conclusion



- Occurs when the premises “miss the point” and fail to substantiate the conclusion, instead supporting some other, perhaps unstated, conclusion.
- Often, this fallacy arises when we advocate for a particular objective, but offer only generalized support for that objective that could equally well support an alternative approach.
- An irrelevant conclusion may also be called a...?
 - *non sequitur*.

Irrelevant Conclusions - Example



- “My aunt wants to move somewhere warm and buy property for her retirement. She also wants to avoid a high property tax. She had been thinking about Texas, but the property taxes are quite high there. Therefore, she shouldn’t move to Texas – she should move to Florida.”
 - What’s the problem?...Where’s the fallacy?
 - ✦ The premises (my aunt wants to move somewhere warm, my aunt wants to avoid a high property tax, and Texas has a high property tax) do support the conclusion that my aunt should not move to Texas.
 - ✦ However, they don’t support the conclusion that she should move to Florida. We aren’t told whether Florida is warm and whether Florida charges a high rate of property tax. Even assuming Florida is warm and does not charge a high rate of property tax, the premises don’t tell us why my aunt should move to Florida, as opposed to Mississippi. Therefore, this part of the conclusion is a *non sequitur*; it is logically irrelevant to the premises.

False Cause



- Treating something as a cause that is not, or should not be assumed to be, a cause.
- Most commonly, the mistake is in assuming that A caused B simply because A preceded B.

False Cause - Example



- “The defendant fled the state just hours after the crime was committed. Therefore, he was clearly involved in one way or another with its planning or execution.”
- What’s the problem?...Where’s the fallacy?
 - ✦ The assumption is one thing (the defendant’s decision to leave the state at a certain time) was caused by something that immediately preceded it (the crime).
 - ✦ But the mere fact that one thing precedes another is not enough to prove causation. Certainly many people left the state shortly after this crime was committed. Should we assume that they were *all* criminal accomplices?

Overzealous Application of a General Rule



- Occurs when we apply a generalization to an individual case that it does not necessarily govern.
- The mistake often lies in failing to recognize that there may be exceptions to a general rule.

Overzealous Application of a General Rule - Example



- “The First Amendment guarantees freedom of speech. Therefore, our client can not be held liable for anything she has said.”
- What’s the problem?...Where’s the fallacy?
 - ✦ The First Amendment does not give an absolute, unqualified right to free speech. For example, the client could be liable in tort if her words defamed someone. Here, the major premise is overzealously stated without regard to several important exceptions qualifying the general rule.

Hasty Generalization



- Occurs when we move too quickly to establish a broad principle or general rule based on specific factual observations.

Hasty Generalization - Example



- “In the present case, the dog that attacked the small child clearly had a ‘vicious propensity.’ Two years earlier, that same dog had bitten a postal worker who came on the property to deliver the mail.”
- What’s the problem?...Where’s the fallacy?
 - ✦ The premise is that the same dog that bit the child had bitten a postal worker two years earlier. The conclusion is that the dog has a “vicious propensity.” Without some strong precedential support, this argument would almost certainly fail in court. Two incidents in the span of two years hardly seems enough to establish a “propensity.” This argument makes a hasty generalization from two quite possibly isolated events.

Circular Argument



- Occurs when one assumes the truth of what one seeks to prove in the very effort to prove it.
- In other words, the conclusion lies buried in the premises used to reach that conclusion.
- Also known as *begging the question*.
- Question-begging arguments often mask themselves in clever rhetoric.
- They can be easy to miss because they often sound good.

Circular Argument - Example



- “The Supreme Court’s power of judicial review is inherently undemocratic. When unelected judges reign supreme in the exposition of the Constitution, it cannot be said that we have a government ‘of the people, by the people, and for the people.’”
- What’s the problem?...Where’s the fallacy?
 - ✦ The speaker is assuming the truth of what she is trying to prove in the very effort to prove it. If you look at these two sentences closely, you will see that they are essentially paraphrases of one another. Because the second sentence is longer and more complex, it tends to trick us into thinking that it is a logically distinct idea – but it is not.

Complex Question



- Occurs when the question itself is phrased in such a way as to presuppose the truth of a conclusion buried in that question.
- The solution is generally to root out the buried assumption by “dividing the question.”

Complex Question – Examples



- “Why is the free market so much more efficient than government regulation?”
 - What’s the problem?...Where’s the fallacy?
 - ✦ : This question presupposes that the free market *is* more efficient than government regulation. It may not be.
 - In order to avoid this fallacious assumption, the speaker would need to “divide the question” by asking...?
 - ✦ “Is the free market more efficient than government regulation? If so, why?”

Complex Question - Examples



- “Isn’t it true that your sales increased dramatically after these misleading advertisements were published?”
 - What’s the problem?...Where’s the fallacy?
 - ✦ This question presupposes that the advertisements were misleading. Either a yes or a no answer might suggest that the witness had done something wrong.
 - Opposing counsel should object to the question, and ask that it be “divided.” HOW?
 - ✦ “Isn’t it true that your advertisements were misleading? Isn’t it true that your sales increased dramatically after these advertisements were published?”

Ambiguity



- When we use a key word or phrase to have two or more different meanings in the same argument, we commit the fallacy of ambiguity.
- Because many words and phrases are naturally ambiguous (have two or more meanings, or even a range of meanings), this fallacy often escapes notice.

Ambiguity - Examples



- “An elephant is an animal. Therefore, a small elephant is a small animal.”
 - What’s the problem?...Where’s the fallacy?
 - ✦ The word “small” is a relative term; its meaning is not fixed and unchanging.
 - ✦ When it qualifies “animal” it has a different range of meaning than it has when it qualifies “elephant.”
 - ✦ Thus, the seemingly logical argument is fallaciously ambiguous.

Ambiguity - Examples



- “No man will take counsel, but every man will take money; therefore, money is better than counsel.”
 - What’s the problem?...Where’s the fallacy?
 - ✦ The problem here is an ambiguity in the word “take.” To “take” counsel means to listen to and heed advice. To “take” money means to accept a gift of cash.
 - To understand why this equivocation between two meanings is fallacious, see what happens when we use one meaning of “take” consistently throughout the argument:
 - ✦ “No man will listen to and heed advice, but every man will listen to and heed money. Therefore, money is better than advice.”

Composition



- When we mistakenly impute the attributes of a part of a whole to the whole itself.

Composition - Example



- “The prosecution has offered nothing but circumstantial evidence. As we have seen, not one of these pieces of evidence conclusively proves that my client committed the robbery. Therefore, the prosecution has not carried its burden of proof beyond a reasonable doubt.”
- What’s the problem?...Where’s the fallacy?
 - ✦ This argument is fallacious because it imputes an attribute of each individual piece of evidence (insufficiency to prove guilt beyond a reasonable doubt) to the totality of the evidence. However, the sum of the evidence – considered together – may very well prove guilt beyond a reasonable doubt.

Division



- Reverse of the fallacy of composition.
- Occurs when we mistakenly argue that attributes of a whole must also be present in each part or constituent of that whole.

Division - Example



- “A rope is strong, and can easily support the weight of a full-grown person. A rope is nothing but a collection of individual strands. Therefore, a strand of rope is strong, and can easily support the weight of a full-grown person.”
 - What’s the problem?...Where’s the fallacy?
 - ✦ Assumes that each composite part of a rope (a strand) must share an attribute possessed by the whole (strength).
 - Mirror image of Composition...so, what would the fallacy of composition look like in this argument?
 - ✦ “A strand of rope is weak, and cannot possibly support the weight of a full-grown person. A rope is nothing but a collection of weak strands. Therefore, a rope cannot possibly support the weight of a full-grown person.”

Argument from Ignorance



- Maintains that a proposition is true because it has not been proved false or false because it has not been proved true.
- Also known as...?
 - Appeal to Ignorance

Argument from Ignorance - Examples



- On the Senate floor in 1950, Joseph McCarthy said of a State Department employee suspected to be a Communist, “there is nothing in the files to disprove his Communist connections.”
- One’s inability to disprove one’s guilt cannot be taken to establish it. Such an inference is not just contrary to the values of the American justice system; it is also irrational.
- “The Big Bang theory is a complete and utter lie. This ‘theory’ has been bandied about for decades and no one has ever been able to point to any conclusive proof.”

Attack Against the Person



- Occurs when the thrust of an argument is directed, not at a conclusion, but at the person who asserts or defends it.
- Also known as...”
 - *Ad hominem*

Ad hominem - Examples



- A lawyer tells a jury that evidence of a witness's criminal past proves that the witness was lying.
 - Evidence of this kind may be relevant to establishing the witness's general credibility (or lack thereof), but it does not independently prove that the witness was lying on this occasion.
 - In common legal parlance, this evidence is “probative, not dispositive.”
- During closing argument, a defense lawyer does not respond to the evidence and legal arguments offered by the plaintiff's attorney, but instead characterizes the plaintiff's attorney as an untrustworthy “ambulance-chaser” who is only out to collect his contingent fee.
 - Even if this characterization is correct, it has no bearing on the evidence and logical arguments offered by the plaintiff's attorney.

Argument from Force



- Substitutes veiled threats for logical persuasion
 - OR
- Asserts that something must be the case because “that’s just the way things are.”

Argument from Force - Examples



- White House Chief of Staff Howard Baker once opened a cabinet meeting over allegations of misconduct on the part of Attorney General Ed Meese as follows: “The President continues to have confidence in the Attorney General and I have confidence in the Attorney General and you ought to have confidence in the Attorney General, because we work for the President and because that’s the way things are. And if anyone has a different view of that...he can tell me about it because we’re going to have to discuss your status.”
- What’s the problem?...Where’s the fallacy?
 - ✦ Mr. Baker did not provide any reasoned explanation for his conclusion that the other cabinet members should have confidence in the Attorney General. This argument substitutes a thinly veiled threat for the use of reason.

Appeal to Emotion



- Occurs when expressive language designed to excite an emotion like outrage or pity is used in place of logical argumentation.

Appeal to Emotion - Examples



- “Ladies and gentlemen of the jury, if found guilty, my client faces 20 years in prison. But I ask you, can you in good conscience send a devoted husband and father of four children, a man who has dedicated his life to providing for his family, who has participated actively in his church, and who given over 10% of his income to charities, to prison for such a length of time that he will not be able to watch his children grow up or support them financially through their college years?”
- What’s the problem?...Where’s the fallacy?
 - ✦ The defendant’s character is irrelevant to the question of his liability.
 - ✦ Counsel is appealing to the jury’s pity instead of offering a logical argument in support of her client.

OPEN DISCUSSION



- We should abandon capital punishment.
- Non-violent criminals should not be sentenced to incarceration.
- Driving and texting should be illegal.