A Design-Focused Approach to Legal Argument and the Logical Fallacy of Equivocation

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The design of legal argument deserves careful attention. Comparing how the design of legal argument is similar and different from the work of other design professionals reveals some consistent logical themes useful not only in describing diverse design processes but also in more fully understanding them. Philosophical logic has long played a role in the understanding and development of theories of argument generally. Similarly, concepts of philosophical logic have an important role to play in legal argument and have frequently been explicitly described in judicial opinions. One concept of philosophical logic frequently cited by courts in evaluating the design of legal argument is the logical fallacy. One such fallacy is called the fallacy of equivocation.

The logical fallacy of equivocation provides one example of how concepts of philosophical logic can be deployed as tools in legal argument. Importantly, the fallacy of equivocation is among a set of tools that require focus on the design of legal argument rather than its legal and factual component parts. Focusing on logic's role in argument design provides lawyers, judges, and law students with a new vantage point for creating, evaluating, refining, and testing, the persuasiveness of legal argument. More specifically, the fallacy of equivocation can be a design-level tool for identifying problems with ambiguity in legal argument and provide conceptual and language tools for explaining why arguments that use this fallacious argument design should be disregarded as unpersuasive.

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I. A NEW PERSPECTIVE ON THE DESIGN OF LEGAL ARGUMENT

Lawyers regularly focus on the legal and factual basis for a legal argument. In fact, most legal strategy in practice focuses on attacking the legal and factual premises in legal arguments. However, this focus, while important, ignores how facts and law can be arranged in different kinds of arguments. These different kinds of arguments represent different approaches to argument design. This article proposes that concepts of philosophical logic provide a framework for evaluating legal argument design and that, specifically, the logical fallacy of equivocation is a useful tool for understanding the nature of and for identifying a common weakness in legal argument design. However, even considering some of the ways that logic might provide a conceptual framework for considering and developing how lawyers are designers when they engage in creating and communicating legal argument is useful for providing a new, design-focused perspective on legal argument. Because the law has not developed a detailed, consistent set of categories and language tools to discuss legal argument design, an example is a useful starting place.

For example, one day while I was waiting for my motion to be called later in the morning's civil docket, I watched an experienced lawyer argue a motion for summary judgment in a different case. I do

not recall the subject matter of the dispute, only the most basic details about its procedural posture. I do not recall anything about the facts of the case or the substantive legal issues involved in the hearing. I remember only two things. First, I remember the skillfulness of the advocate. Second, I remember the design he employed to successfully persuade the judge to grant his motion. He delivered what seemed to be most of his prepared argument in the ordinary way.[1] He set out the legal standard for a motion for summary judgment, and as the moving parties predictably do in such motions, he walked the court through the disputed facts in the case, noting points where the parties seemed to be in agreement on the facts and points where there might be disagreement and explained why the disagreements were not dispositive issues in the case. His opposing counsel made a responsive argument. He then returned to the podium for rebuttal. As his rebuttal argument seemed to be winding down, he was interrupted with a few questions from the judge. He answered the questions convincingly. He invited further questions from the judge on the point the judge had asked about, and his wish was granted. After settling the judge's thoughtful question, counsel provided an answer that to which the entire court room heard and reacted.

The answer was memorable not because of its substance, its poetic word selection, its tone, its volume, or its passion; it was memorable because of its design. As soon as the judge's patiently awaited question was asked, counsel began his response. For the first time in his presentation, he stepped just to the right of the podium, placed his arm atop the podium's edge, and recited, seemingly verbatim, substantially a short paragraph from an important appellate opinion that seemed not only to be controlling of the legal issues central to the hearing but also a precise answer to the judge's question. Once the obviously memorized quotation had been recited, counsel slowly returned to his position behind the podium, while concluding his rebuttal argument. Some lawyers in the audience, waiting for their cases to be called, looked at one another, making subtle expressions

1. Motions for summary judgment require that the court be convinced that there is no genuine dispute of material fact, and the moving party is entitled to a judgment as a matter of law, viewing the evidence in the light most favorable to the nonmoving party. FED. R. CIV. P. 56(a); *see also* Sedar v. Reston Town Ctr. Prop., LLC, 988 F.3d 756, 761 (4th Cir. 2021).

indicating that the argument was an impressive one. It was impressive not just because counsel memorized a paragraph of a state supreme court opinion; it was impressive because counsel designed an argument that elicited a question from the judge, waited patiently for the anticipated question to appear, and then deployed the answer masterfully, even using his posture and position to emphasize the words and authority of the appellate court.

It would take a few elements combined in the right proportion and order to so effectively deploy the argument. The advocate would have to know that the quote from the case was pivotal, if not dispositive, to the particular motion. The advocate would have to know that the court would be interested in that point or create interest in a way that elicited the question from the judge. The advocate would have to be patient not to blurt out the quote at the beginning of their argument where it might be forgotten or where its relevance might not be appreciated. In fact, waiting for the court to ask a question that prompted the answer would require significant discipline. Taken together, this was not an argument that happens by mistake. The argument was designed to happen that way.

In the military-decision-making concept referred to as "levels of war," names are given to various strategies, operations, and tactics.[2] For example, one ancient military maneuver, which is described as a

2. In the study and practice of military analysis, these "levels of war" are separated into three categories: strategic, operational, and tactical. "The strategic level of war involves national (or multinational) guidance and resources to achieve national- or theater-level objectives. The strategic level of analysis would analyze any actions taken that involve national (or multinational) guidance, resources, or objectives and end state. The operational level of war involves planning and execution of campaigns and major operations using operational art to achieve military objectives. The operational level of analysis would analyze any actions taken that involve operational art and planning and execution of campaigns and major operations. The tactical level of war involves the planning and execution of battles and engagements by the 'ordered arrangement and maneuver of combat elements in relation to each other and the enemy to achieve combat objectives.' The tactical level of analysis would analyze any actions taken that involve those activities." Andrew S. Harvey, *The Levels of War as Levels of Analysis*, MILITARY REV., Nov.–Dec. 2021, at 80 (quoting DOCTRINE FOR THE ARMED FORCES OF THE U.S. I-8 (2013), https://irp.fas.org/doddir/dod/jp1.pdf).

"double envelopment,"[3] involves encircling an enemy force on three sides, then attacking the force from behind. The deployment of this tactic by Hannibal when he led the Carthaginian military forces against the Romans at the Battle of Cannae is described this way:

> At the beginning of the battle, the Carthaginian cavalry quickly drove off the Roman cavalry. The Roman infantry, however, found better luck against the weak center of the Carthaginian line and it began to be pushed backwards. Despite this, the stronger infantry anchoring the ends of the Carthaginian line held firm. Hannibal intended the center to experience a controlled withdrawal as the Romans drew deeper into the Carthaginian line. When they had advanced to a critical point, Hannibal's heavy infantry turned 90° and were in immediate position to face the vulnerable Roman flanks. The Roman infantry was suddenly hemmed in on three sides. The weak center was then rallied by Hannibal himself and managed to hold firm as the rest of the Carthaginian line closed in on the Roman flanks.[4]

The design of military strategy determines success on the battlefield. Strategic military decision-makers have well-developed conceptual language tools for evaluating and communicating about the strategic, operational, and tactical designs.

Similarly, in the game of football, teams use various strategies to win a game. While there are different ways to win a game, each is a function of the dynamics of the respective teams, weather conditions, and the changes in scoring and personnel during the game. A common strategic design for a team that has already scored more points than their opponent with limited time left in a game is to advance a "ball-control" strategy designed to leave their opponent with as little time as

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3. *See, e.g.*, G. Weinerth, *The Constructal Analysis of Warfare*, 5 INT. J. DESIGN & NATURE AND ECODYNAMICS 268, 275 (2010) (describing the double envelopment maneuver and tracing its history to Hannibal's victory at the Battle of Cannae in 215 BC); *see also* Lieut. Guido von Hovath, *War Game VIII—The Effect of the Successful Double Envelopment*, 144 SCI. AM. 476 (1916).

4. *See, e.g.*, Weinerth, *supra* note 3, at 275.

possible to score.[5] The team deploying this strategy focuses on advancing the football toward the goal by running the ball—handing the ball to a "running back" rather than passing the ball to a "receiver." Running the ball results in the game clock running without frequent pauses and limits the risk that the ball will be "turned over" to the other team. This ball-control strategy is a design used by teams that want to limit the number of plays in a game, thus leveraging a team's ability to move the ball forward with running plays, and either not allowing the opposing team a chance to possess the football or if a change-of-possession is inevitable, allowing the change to take place with limited time left to score.[6] Even the specific plays run by a team within a particular strategic design have their own names, and understanding the design concepts and terminology are important to winning at football or even being a fan interested in observing, evaluating, and predicting the outcome of a football game.

Curiously, while I sat in the courtroom and observed counsel successfully deploy his carefully designed argument, unlike the football coach or the field general, I did not have a name for his strategy. If I did, that would be useful. I could talk to a colleague to explain what argument design the lawyer used and how it was successfully deployed. We might compare the particular design, or some of its elements, and uses in different contexts. Understanding why the law does not employ a detailed taxonomy of argument design and suggesting an approach to deploying one is one objective of this article. [7]

Conceptual and language tools that evaluate and discuss legal argument design are important, but frequently neglected, in legal argument. Without them, explaining why a legal argument is strong,

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5. *See* Bryan Beasley et. al., *NFL Time Management: The Role of Timeouts in End-Game Scenarios*, 4 J. SPORT 47, 49-64 (2016).

6. *Id.*

7. Some efforts have been made to categorize legal arguments. S*ee*, *e.g.*, Wilson R. Huhn, *Teaching Legal Analysis Using a Pluralistic Model of Law*, 36 GONZ. L. REV. 433, 440–449 (2001) (suggesting five categories of legal argument based on text, intent, precedent, tradition, and policy); *see also* NOAH A. MESSING, THE ART OF ADVOCACY: BRIEFS, MOTIONS, AND WINNING STRATEGIES OF AMERICA'S BEST LAWYERS 56 (2013) (suggesting five categories of legal arguments: fact-based arguments, textual arguments, arguments built on legislative and statutory history, policy arguments, and historical arguments).

distinctive, weak, or unpersuasive or whether a legal professional's process in making or evaluating a legal argument was appropriate can be challenging. With the right conceptual and language tools, an advocate can credibly identify and explain a weakness in a legal argument. One author, considering the problem of describing the nature and process of professional design generally, has suggested the language and constructs of logic as a starting place for designing arguments:

> To build up a conceptual framework that is fundamental enough to anchor the variety of approaches that designers take, and connect the many descriptions of design thinking that have arisen in design research, it may be strategic to temporarily suspend the generation of "rich" descriptions of design and instead take a "sparse" account as our starting point. Logic provides us with a group of core concepts that describes reasoning in design and other professions. A "sparse" description derived from logic will help us to explore whether design is actually very different from other fields—and should provide us with some insight on the potential value of introducing elements of design practice into other fields.[8]

The use of logic as a method for describing design "sparse[ly]" fits well in considering the design of legal argument as well. Logic even provides some more specific tools for describing legal argument design more "rich[ly]."[9] I learned something important that day in the courtroom about rhetorical devices and the art of storytelling. While

8. Kees Dorst, *The Core of "Design Thinking" and Its Application*, 32 DESIGN STUD. 521, 522 (2011).

9. *Id.*

much has been said and written about rhetoric[10] and storytelling[11] in legal argument, a legal argument is not just about rhetorical flourishes. The best advocacy does not (always) happen spontaneously "from the hip" or "on one's feet." A brilliantly *designed* argument does not seem to receive the same amount of attention as a brilliantly *delivered* argument.

This Article proposes that concepts of philosophical logic provide a framework for evaluating legal argument design, and that, specifically, the logical fallacy of equivocation is a useful tool for understanding the nature of legal argument design and for identifying a common weakness in legal argument design. However, even considering some of the ways that logic might provide a conceptual framework for considering and developing how lawyers are designers when they create and communicate legal argument is useful for better understanding the art and science of legal argument.

II. ARGUMENT DESIGN AND THE FALLACY OF EQUIVOCATION

Understanding how concepts of logic can be valuable tools for evaluating the design of legal argument starts with understanding what logic is and what its role is in legal argument. This section will begin

10. *See, e.g.*, Jennifer Kruse Hanrahan, *Truth in Action: Revitalizing Classical Rhetoric As A Tool for Teaching Oral Advocacy in American Law Schools*, 2003 B.Y.U. EDUC. & L.J. 299 (2003); Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85 (1994); Brian Porto, Esq., *Rhetoric Revisited: A Second Look at How Rhetorical Techniques Improve Writing*, 42 VT. B.J. 31 (2016); Brian Porto, Esq., *Making It Sing: How Rhetorical Techniques Can Improve Your Writing*, 40 VT. B.J. 36 (2014); Susan McCloskey, *Rhetoric Is Part of the Lawyer's Craft*, 74 N.Y. ST. B.J. 8 (2002); Tenielle Fordyce-Ruff, *Five Tools for Writing Fixes: Stocking the Legal Writer's Toolbox*, 54 ADVOC. 45 (2011).

11. *See e.g.*, K. Jane Childs, *(Re)counting Facts and Building Equity: Five Arguments for an Increased Emphasis on Storytelling in the Legal Curriculum*, 29 B.U. PUB. INT. L.J. 315, 317 (2020); Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239 (2012); Christine Metteer Lorillard, *Stories That Make the Law Free: Literature As A Bridge Between the Law and the Culture in Which It Must Exist*, 12 TEX. WESLEYAN L. REV. 251 (2005); Nancy L. Cook, *Outside the Tradition: Literature As Legal Scholarship*, 63 U. CIN. L. REV. 95 (1994); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989); Sarah E. Warner, *The Power of Storytelling*, 87 J. KAN. B. ASS'N 6 (2018); Jeffrey D. Jackson, *For Effective Persuasion, Don't Neglect the Narrative*, 84 J. KAN. B. ASS'N 12 (2015).

with an explanation of logic and the concept of a logical fallacy. Next it will explore a specific logical fallacy called the fallacy of equivocation. Last, the article will consider how courts have used the fallacy of equivocation to evaluate legal argument and how the fallacy of equivocation can be a design-level tool for identifying problems with ambiguity in legal argument and provide conceptual and language tools for explaining why arguments that use this fallacious argument design should be disregarded as unpersuasive.

A. Logic as a Tool for Evaluating the Design of Legal Argument and the Concept of "Fallacy" in Legal Analysis and Argument

Logic plays an important role in arguments generally and in legal arguments specifically. It is a core component of how argument has been defined for more than a thousand years.[12] Classical rhetoric organizes persuasion into three categories: ethos, logos, and pathos. [13] Ethos refers to the persuasiveness through credibility and trustworthiness.[14] Logos refers to persuasiveness of logic and reasoning.[15] Pathos refers to persuasiveness through emotion or passion.[16] Ethos, logos, and pathos can be combined to design a persuasive argument tailored to a particular audience."[17] The study of place of logic in legal argument is the study of an argument's logical appeal in isolation of an argument's emotional appeal and credibility. An argument's logical appeal is an essential element of the persuasiveness of legal argument. Some consider legal argument's

12. *See* JOHN WOODS, A HISTORY OF THE FALLACIES IN WESTERN LOGIC, HANDBOOK ON THE HISTORY OF LOGIC 515 (Dov. M Gabbay et. al. eds., 1st ed. 2012) (describing Aristotle as the "founder of systemic logic").

13. JOAN M. ROCKLIN ET. AL., AN ADVOCATE PERSUADES 6 (2d ed. 2022).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

focus on logic to be essential to legal argument's very nature. "[L]ogic, it has been said, is 'the lifeblood of American law' . . . . In a sense, logos is the message's content, exclusive of the audience or the source. Thus, regardless of the source and their credibility, regardless of the audience, a message must always be rationally and logically presented to be persuasive."[18]

The concept of separating the quantum and credibility of the evidence and the preconceptions and prejudices of the audience from the logic of the argument itself is not a topic regularly considered in the study, presentation, or evaluation of legal argument. However, logic is an important element of the design of a legal argument and evaluating the logic of an argument and understanding an argument's logical appeal is an important and often neglected aspect of legal argumentation despite the dominant role logic is said to play in legal argument. In part, the neglect is a consequence of the lack of a conceptual framework and the language tools necessary to describe arguments. Rather than describing argument in terms of its persuasive type, form, or approach, lawyers tend to describe arguments in reference to the argument's substance—for example, a "good

18. *Id.* at 10 (citations omitted). Others have suggested that the logical nature of legal argument is essential to the concept of "thinking like a lawyer." *See, e.g.*, Susan Tanner, *Rhetorical Use of the Enthymeme in Supreme Court Opinions*, 20 W. MICH. U. COOLEY J. PRAC. & CLINICAL L. 169, 172 (2019) (citing Ruggero J. Aldisert, Stephen Clowney & Jeremy Peterson, *Logic for Law Students: How to Think Like a Lawyer*, 69 U. PITT L. REV. 1 (2007)).

argument,"[19] a "frivolous argument,"[20] the argument "lacks merit,"[21]—or in reference to the argument's subject matter—for example, a "procedural argument,"[22] "substantive argument,"[23] "damages argument,"[24] or "liability argument"[25]—rather than describing an argument in reference to its argumentative or persuasive design. Conceptual and language tools describing the persuasive design of a

19. *See e.g.*, Morales v. United States, 373 F.2d 527, 527 (9th Cir. 1967) ("The government makes a good argument that the hearings associated with the first trial were enough."); Corso v. Petrovsky, 704 F.2d 424, 425 (8th Cir. 1983) ("While appellant makes a good argument on policy grounds . . . ."); Eady v. Stewart Dredging & Const. Co., 463 So. 2d 156, 157 (Ala. 1985) ("In addition, appellee makes a good argument that it is prejudiced by the appellant's failure to comply with the rules . . . ."); Garcia v. State, 661 S.W.2d 754, 755 (Tex. App. 1983) ("Appellant makes a good argument and cites all the right cases on this subject."); People v. Roberts, 274 N.W.2d 30, 31 (1978) ("The dissent makes a good argument for the literal interpretation of the language . . . .").

20. Siderius, Inc. v. M.V. Ida Prima, 613 F. Supp. 916, 922 (S.D.N.Y. 1985); Kahre-Richardes Fam. Found. v. Vill. of Baldwinsville, N.Y., 953 F. Supp. 39, 42 (N.D.N.Y. 1997*), aff'd sub nom*. Kahre-Richardes Fam. Found. v. Vill. of Baldwinsville, 141 F.3d 1151 (2d Cir. 1998); *In re* Plott, 220 B.R. 596, 597 (Bankr. N.D. Ohio 1998); *In re* Pharmatrak, Inc., 329 F.3d 9, 21 (1st Cir. 2003).

21. *See*, *e.g.*, Mason v. Mitchell, 95 F. Supp. 2d 744, 757 n.3 (N.D. Ohio 2000), *aff'd in part, rem'd in part*, 320 F.3d 604 (6th Cir. 2003); Dongguan Sunrise Furniture Co. v. United States, 865 F. Supp. 2d 1216, 1226 (Ct. Int'l Trade 2012); Hazime v. Martin Oil of Indiana, Inc., 792 F. Supp. 1067, 1070 (E.D. Mich. 1992); Smith v. Costa Lines, Inc., 97 F.R.D. 451, 452 (N.D. Cal. 1983); State v. Langley, 711 So. 2d 651, 659, *on reh'g in part* (La. 1998); Robles v. Coughlin, 195 A.D.2d 1004, 1004 (N.Y. App. 1993).

22. *See*, *e.g*, United States v. Baldwin, 68 F.4th 1070, 1074 (7th Cir. 2023); Commonwealth v. Moore, 664 S.W.3d 582, 587 (Ky. 2023); Broadwater Cnty. v. Ellsworth, 530 P.3d 843, 846; M.R. Pittman Grp. v. United States, 68 F.4th 1275, 1281 (Fed. Cir. 2023).

23. Design Neuroscience Ctrs., P.L. v. Preston J. Fields, P.A., 359 So. 3d 1232, 1235 (Fla. Dist. Ct. App. 2023); State v. Hammond, 884 S.E.2d 767, 770 (N.C. Ct. App. 2023); Alcantara v. Allen-McMillan, 291 A.3d 288, 293 (N.J. Super. Ct. App. Div. 2023); United States v. Dix, 64 F.4th 230, 232 (4th Cir. 2023).

24. Mkt. St. Bancshares, Inc. v. Fed. Ins. Co., 962 F.3d 947, 949 (7th Cir. 2020); Labella Winnetka, Inc. v. Gen. Cas. Ins. Co., 259 F.R.D. 143, 147 (N.D. Ill. 2009); United States ex rel. Landis v. Tailwind Sports Corp., 292 F. Supp. 3d 211, 218 (D.D.C. 2017).

25. Butler Mfg. Co. v. Americold Corp., 841 F. Supp. 1113, 1115 (D. Kan. 1993); Pelliccio v. United States, 253 F. Supp. 2d 258, 260 (D. Conn. 2003).

legal argument can provide an important perspective for understanding and communicating the manner and means by which an argument seeks to persuade. What would be even more useful is if lawyers embraced nomenclature for not only describing the persuasive method used by an argument but also describing the effectiveness and weaknesses of such manners and means.

Regularly, in disciplines outside of law, and occasionally within legal discourse and analysis, arguments that fail (or are weak) in their logical appeal are called "fallacies." One writer defines "fallacy" as "a form of deceptive argument; an argument which seems valid, but is not."[26] Borrowing from philosophy's well-used and refined taxonomy of argument[27] is a reasonable starting point for "naming" legal arguments that are (or should be) of dubious persuasive power. In fact, many courts have done just that, using the concept of "fallaciousness" to evaluate legal argument and explain weaknesses in legal argument.[28]

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26. Andrew Jay 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, 758 (1988) (citing IRVING M. COPI, INTRODUCTION TO LOGIC 72 (4th ed. 1972)). The author also provides a detailed history of the concept of fallacy in philosophical thought. *Id.* at 742–46; *see also* WOODS, *supra* note 12, at 514 ("Roughly speaking, the traditional concept of fallacy is that of a mistake of reasoning which people in general tend to commit with a notable frequency and which, even after successful diagnosis, are subject to this same inclination to commit."); CHRISTOPHER W. TINDALE, FALLACIES AND ARGUMENT APPRAISAL 2 (2012) ("A fallacious argument, as almost every account from Aristotle onwards tells you, is one that *seems to be valid* but *is not* so.") (citing C. L. HAMBLIN, FALLACIES, 12 (1970)) (emphasis in original); Barbara A. Kalinowski, *Logic Ab Initio: A Functional Approach to Improve Law Students' Critical Thinking Skills*, 22 LEGAL WRITING: J. LEGAL WRITING INST. 109, 136–37 (2018) ("Informal fallacies could be described as mistakes in 'the content (and possibly the intent) of the reasoning.'").

27. Philosophy views the study of argument, and logic, as a separate area of its discipline. *See, e.g.*, JACQUES MARITAIN, AN INTRODUCTION TO PHILOSOPHY 87 (2015) (However, clarifying that "[l]ogic is therefore, strictly speaking, not so much a department of philosophy as a science or art, of which philosophy (and indeed all the sciences) makes use, and the introduction to philosophy. It is a propaedeutic to science. The other sciences are dependent upon logic as an instrument of acquiring inasmuch as it teaches the method of procedure in the acquisition of knowledge, and we are obliged to possess the means or tools of knowledge before we can acquire knowledge itself.").

28. *See, e.g.*, Kozulin v. I.N.S., 218 F.3d 1112, 1117 (9th Cir. 2000); State v. Jeske, 436 P.3d 683, 694 (2019); Delivery Express, Inc. v. Washington State Dep't of

There are many benefits to using the concept of fallacy in legal argument. First, while not prolific in the history of legal analysis, logical fallacies are well-defined and have a long, rich, history of use in philosophical analysis and literature.[29] Second, mastering any particular fallacy is relatively simple. While it might take a lot of elements successfully assembled to make a good argument, it only takes one failure or infirmity to make a bad argument. Applying the name "fallacy" to an argument is as simple as recognizing the hallmark of any particular fallacy. Last, explaining the fallacy is similarly simple, making the fallacy a tool for legal argument that is as simple to deploy as it is to arm. Labeling an argument as fallacious, or better yet, as having committed a specific, recognized fallacy solves a problem in legal argument. It empowers the arguer to move beyond the generic naming conventions of "good," "bad," "frivolous," or "meritless," and instead apply more vivid naming conventions that not only signal that the argument is unpersuasive (even potentially deceptive) but communicate to the audience something important and authoritative about why such argument is unpersuasive.

In the study of philosophical logic, an argument commits a logical "fallacy" if it commits "an error in argument due to faulty assumptions or to irrelevances occurring in stating the evidence for a

Lab. & Indus., 442 P.3d 637, 644 (Wash. Ct. App. 2019); O'Conner v. Commonwealth Edison Co., 807 F. Supp. 1376, 1391 (C.D. Ill. 1992), *aff'd*, 13 F.3d 1090 (7th Cir. 1994); McGill Restoration, Inc. v. Lion Place Condo. Ass'n, 959 N.W.2d 251, 256, 277–78 (Neb. 2021); Thurmond v. Prince William Pro. Baseball Club, Inc., 574 S.E.2d 246, 251 (Va. 2003); Vigilant Ins. Co. v. Travelers Prop. Cas. Co. of Am., 243 F. Supp. 3d 405, 432 (S.D.N.Y. 2017); Cook Inv. Co. v. Harvey, 20 Fed. R. Serv. 2d 612 (N.D. Ohio 1975); Lawrence v. State, 41 S.W.3d 349, 358 (Tex. App. 2001), *rev'd*, 539 U.S. 558 (2003).

29. *See generally* WOODS, *supra* note 12.

conclusion."[30] Philosophers sometime distinguish between formal[31] and informal fallacies: "[I]n informal fallacies, there is something merely persuasive about the premise, but the argument has the 'psychological power to fool the audience into accepting the conclusion anyway.'"[32] As a result, when considering informal

30. *See, e.g.*, MALCOLM MURRAY & NEBOJSA KUJUNDZIC, CRITICAL REFLECTION: A TEXTBOOK FOR CRITICAL THINKING 397 (2005) ("Formal fallacies are violations of logic . . . . Whether an argument is valid or invalid concerns merely the logic of the argument, and not the truth of the premises and conclusion, that is, soundness of the argument. If an argument is invalid, a fallacy has been committed. This type of fallacy, then, is what we mean by 'formal fallacies' . . . . [I]nformal fallacies . . . should act as warning signs. They give us reason to challenge the argument. Although they will often provide sufficient reason to reject the argument, further reflection may deem the argument worth accepting . . . . [T]he detection of [informal] fallacies is neither sufficient nor necessary to show that we should reject the argument. They tell us to investigate further, or to pass the burden of proof back to the arguer.") (alteration in original) (emphasis omitted); *see also* STERNBERG, ET. AL., APPLIED INTELLIGENCE 204 (2009) ("In the broader sense, fallacies are mistakes that occur in arguments and that affect the argument's strength. The Latin verb fallere signifies deception. Indeed, fallacious reasoning may be deceptive, because it comes across as sensible reasoning. However, in its modern meaning, fallacious reasoning refers to reasoning that is invalid or irrelevant because it accepts the premises without enough grounds to do so, or fails to use the relevant known facts. Fallacy is often hard to detect—it is simply an error in reasoning or falseness in an argument that seems sound.").

31. This article will focus on an informal fallacy: the fallacy of equivocation. Formal fallacies arguments that do not comply with the strict rules of formal logic. Deductive arguments can be organized into a common argumentative structure called a syllogism. A syllogism includes a major premise, a minor premise, and a conclusion. In deductive logic, if the premises are true and if the syllogism complies with the rules of deductive logic, then the conclusion must be true. However, where any one of the rules of syllogistic logic is not adhered to, the argument is said to commit a formal fallacy. For a discussion of formal fallacies in legal argument see generally, STEPHEN M. RICE, THE FORCE OF LOGIC: USING FORMAL LOGIC AS A TOOL IN THE CRAFT OF LEGAL ARGUMENT (2017).

32. ARNOLD VANDER NAT, SIMPLE FORMAL LOGIC: WITH COMMON-SENSE SYMBOLIC TECHNIQUES 288 (2010) (explaining that not all informal fallacies are invalid); s*ee also* PATRICK J. HURLEY, A CONCISE INTRODUCTION TO LOGIC 122–23 (11th ed. 2012) (describing informal fallacies as those detectible only by examining their argumentative content, rather than simply by examining the form of the argument.).

fallacies, like the fallacy of equivocation,[33] identifying the fallacious design does not entirely diffuse the argument. Instead, it merely reveals a weakness or potential lack of persuasiveness in the argument.[34] Additionally, the fact that an argument is fallacious does not necessarily mean that the conclusion the fallacious argument purports to advance is wrong. It simply means that the argument contains some infirmity that requires more scrutiny or a different argument to support the conclusion.

B. The Fallacy of Equivocation

Next, this article will focus on the Fallacy of Equivocation. First, it will explore what the Fallacy of Equivocation is and how it helps people think about the problem of ambiguity in argument. Second, it will explore how pervasive the problem of ambiguity is in language generally and in legal argument specifically. Last, the article will consider examples of the Fallacy of Equivocation in legal argument, considering how courts of addressed the problem of ambiguity and how the Fallacy of Equivocation can be a design-focused tool for evaluating legal argument.

1. The Fallacy of Equivocation is the Name for an Argument that Manipulates Ambiguity and Takes an Argumentative Advantage.

The Fallacy of Equivocation is an ancient[35] description of an argument that manipulates the meaning of language for some argumentative advantage.[36] The fallacious argument seizes on an

33. *See* MALCOLM MURRAY & NEBOJSA KUJUNDZIC, *supra*, note 30.

34. *Id.*

35. WOODS, *supra* note 12, at 531 (attributing the fallacy of equivocation to Aristotle in his ON SOPHISTICAL REFUTATIONS).

36. *See, e.g.*, ROBERT B. HUBER ET AL., INFLUENCING THROUGH ARGUMENT, INTERNATIONAL DEBATE EDUCATION ASSOCIATION 167 (2005) ("Many words have two or more meanings. The fallacy of equivocation occurs when a word with two or more meanings is used in the development of a particular argument. We have already defined equivocation under deduction in discussing the fallacy of four terms, and several examples were given. The fallacy of equivocation occurs particularly in arguments involving words that have a multiplicity of meanings, such as capitalism, government regulation, inflation, depression, expansion, and progress. This fallacy

alternative context for meaning of a word, phrase, or concept in an argument, and attempts to build an argument on that alternative meaning rather than the relevant meaning at work in the dispute. For example, you might take your first sip of hot coffee first thing in the morning. After savoring that first, delicious sip, you might declare to your colleague that, "nothing is better than hot coffee on a cold morning."[37] If your colleague heard this, they might decide to argue with you about that. The argument might look something like this:

You: Nothing is better than hot coffee on a cold morning.

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may sometimes be committed when the debater is cornered and is trying to find a way out. A person caught in the act of gossiping may equivocate by suggesting that he was sharing information with his friends."). DOUGLAS WALTON, INFORMAL FALLACIES: TOWARDS A THEORY OF ARGUMENT OF CRITICISMS 241 (1987) ("Equivocation is said to occur where an ambiguous term occurs in an argument that appears to be valid. What is meant by 'appears to be valid,' in the context of equivocation, is that the sentential structure of the 'argument' resembles that of a valid form of argument."); *see also* STERNBERG, *supra* note 30, at 216 ("The fallacy occurs when the same words are used with different meanings . . . . Such ambiguities can lead to fallacies when an expression's meaning shifts during the course of an argument. This can result in a misleading appearance of validity."). Courts have described the fallacy similarly. *See, e.g.*, Taylor v. Univ. of Utah, 466 P.3d 124, 129 (Utah Ct. App. 2020) ("The fallacy of equivocation is an argument that 'exploits the ambiguity of a term or phrase which has occurred at least twice in an argument, such that on the first occurrence it has one meaning and on the second another meaning.'" (quoting Hans Hansen, *Fallacies*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (May 29, 2015), https://plato.stanford.edu/entries/fallacies/#CorFal)); Richmond v. Dow, 712 So. 2d 149, 155 n.6 (La. Ct. App. 2020) (Byrnes, J., concurring) ("The fallacy of equivocation is the logical fallacy that occurs when we use the same term more than once in the same context, but with slightly shifting senses of meaning without recognizing that the meaning has changed."); E.L.A. v. Northwestern Selecta, Inc., 185 D.P.R. 40, 105 (P.R. 2012) ("A fallacy of equivocation is committed when the meaning of words is accidentally or deliberately confused in the course of logical reasoning or when the words are given in a sense that is contextually inappropriate." (citing I.M. COPI & CARL COHEN, INTRODUCCIÓN A LA LÓGICA, (Mexico ed. (2003))).

37. This argument and example of the fallacy of equivocation come from *Gonzalez v. Liberty Mut. Fire Ins. Co.*, discussed in more detail, *infra.* Gonzalez v. Liberty Mut. Fire Ins. Co., 981 F. Supp. 2d 1219, 1220 (M.D. Fla. 2013) ("For example: (1) Nothing is better than hot coffee on a cold morning; (2) lukewarm coffee is better than nothing on a cold morning; therefore, (3) lukewarm coffee is better than hot coffee on a cold morning.").

Colleague:	That is not true.
You:	My friend, it is true. I am enjoying a delicious cup of hot coffee right now. Nothing is better than this."
Colleague:	Well, lukewarm coffee is better than nothing on a cold morning, right?
You:	I mean, I suppose that is true, but . . . .
Colleague:	Lukewarm coffee is something isn't it?
You:	Yes.
Colleague:	Then it is inaccurate to say, "Nothing is better than hot coffee on a cold morning."

You might be disappointed with your colleague for making the argument. But, if you were being objective and fair-minded, you might also decide that your colleague both had a point and missed your point. Evaluating why you and your colleague have taken the positions you have is useful for two reasons. First, it serves as a good example of the problem of equivocation in argument. Second, it demonstrates how powerful evaluating the role of argument design in legal argument can be. An argument that focuses on a potentially ambiguous term in the argument and shifts from the intended context for meaning of that work to a different context in order to achieve an argumentative advantage commits the fallacy of equivocation.[38] The word "nothing" comes into focus when viewed through the lens of the fallacy of equivocation. Although you intended the term "nothing" to have "one meaning, over the course of the argument[,] another meaning of the same term [was] introduced or assumed" by your colleague.[39] You did not intend the word "nothing" to be taken literally to exclude all other things in the physical universe. Instead, you used the word hyperbolically. Your colleague responded with an argument that ignored your intended use of the word "nothing." Your colleague's argument was built on a literal, rather than hyperbolic, meaning of the word. As a result, the argument commits a logical fallacy, the fallacy of equivocation, and loses much of its persuasive force.

38. *Id.*

39. TINDALE, *supra* note 26, at 59.

The example illustrates the pattern this fallacious argument takes and why it is of dubious persuasive force. Philosopher Dr. Christopher Tindale describes the fallacy of equivocation this way:

> We may have a word or concept that has more than one potential meaning in a given context. Hence, it is ambiguous. In most cases, the context itself will tell us which of the potential meanings is most likely to have been intended. Again, an entire phrase or statement can be similarly ambiguous until we resolve the ambiguity through consideration of the context. While these kinds of ambiguity are clearly problems with language that can impede communication and even mislead, they are not obviously fallacious, if we restrict ourselves to the argument condition for fallacies. Equivocation, however, involves the shifting of meaning of a term, concept, or phrase within the process of an argument. Hence, arguments that equivocate in this way are fallacious arguments. "For example, although a term may be introduced with one meaning, over the course of the argument another meaning of the same term is introduced or assumed."[40]

Philosopher Dr. Douglas N. Walton explains it this way:

> There are some arguments that contain ambiguous terms and have a syntactic structure that is a valid form, but do not commit the fallacy of equivocation. And if so, then the characterization of fallacies of ambiguity as arguments that appear syntactically valid in form but contain words that, either singly or in combination, can be understood in more than one sense, is somewhat too broad to pin down exactly what is fallacious about equivocation. What is fallacious as an equivocation about [the example] is not just the surface validity and ambiguity in the argument, but a contextual shift . . . . So

40. *Id.*

> equivocation involves contextual shift as well as validity and ambiguity.[41]

It is useful to explore not just why this argument is fallacious, but why your colleague might make a fallacious argument rather than a non-fallacious one. Remember that your colleague has many arguments available to them. For example, they might have argued that a cup of hot tea or a cold glass of freshly squeezed orange juice would be better than hot coffee. They could have selected any other alternative to hot coffee, but they did not make any such selection. In fact, the only other alternative beverage introduced in the argument was "lukewarm coffee." Nobody likes lukewarm coffee. It is introduced not for the purpose of proposing an alternative but instead to take issue with your use of the word "nothing." Similarly, your colleague did not make a legitimate argument that the physical and psychological benefits of fasting might be better than those of drinking coffee. The colleague did not suggest that caffeine consumption has some negative health consequences that would be better to avoid.

The aim of the argument reveals something about its lack of persuasiveness. It also demonstrates something about why arguments like this one earn the title "fallacy." What is the relationship between your colleague's decision to proffer a weak argument and the justification for concluding argumentative weakness from fallacious argument? Logically fallacious arguments take a pattern that suggests weakness. If that is true, why would an arguer offer a fallacious argument? Of course, they might just be unskilled or careless about argument. Is your colleague really trying to disprove your argument? Are they just engaged in banter? Are they just in a bad mood? We might look for less obvious explanations. Are they legitimately confused? Keep in mind that they are not entirely wrong about the fact that lukewarm coffee, in the right conditions, is better than no coffee at all. Your use of the word "nothing" is part of the problem here, and you might consider whether the value of using hyperbole is worth the potential confusion or exposure to an argument like the one deployed by your colleague.

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41. WALTON, *supra* note 36, at 242.

The second benefit from considering this simple example is that it demonstrates how thinking about argument design provides new ways to consider, evaluate, and dialogue about argument. Particularly in legal argumentation, practitioners are focused on evaluating the legal principles that support an argument and the facts that support an argument. There is plenty of room for lawyers to maneuver within these two components of legal argument. Interpreting the contours of legal principles suffers from enough indeterminacy[42] that lawyers regularly seem to focus on arguments about just what the legal premises are in a legal argument. Similarly, in many cases, the parties have different perspectives about the facts of a case, what facts are relevant, what competing facts are most relevant, and what inferences can be drawn from the facts.[43] Combined, the facts and the law provide much to argue about in many cases. So much, that lawyers do not always think about the design of the arguments as much as they think about the legal and factual components of those arguments.

Whether we are arguing about the merits of hot coffee on cold mornings or the proper application of the standard for granting a motion for summary judgment in a civil dispute, taking a design-centric perspective on legal arguments opens up a new way to make and

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42. *See, e.g.*, David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 483 (1990) ("The entire reason that the lawyer is engaged in the process of legal interpretation is to facilitate her client's ability to achieve some concrete objective. She has, in other words, a particular purpose for engaging in legal analysis. This purpose will invariably lead her to attempt to discover the subset of plausible legal interpretations that best supports her client's goals, a tendency expressly sanctioned by the rules of professional conduct. When the weight of the relevant legal rules supports her client's objectives, this task will seem sufficiently distant from 'the bounds of the law.' When the client's aim is novel or controversial, however, the goal of achieving the client's objectives is destined to push the lawyer toward discovering gaps, conflicts, and ambiguities in the relevant legal materials. Partisanship, therefore, encourages lawyers to exploit indeterminacy.") (citations omitted); Ken Kress, *Legal Indeterminacy*, 77 Cal. L. Rev. 283 (1989); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 513–14 (1988); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L.J. 949, 1008–12 (1988).

43. *See, e.g.*, Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 17, 19 (2008) ("It has long been known that facts are slippery things . . . ."); Tom Baker, *Teaching Real Torts: Using Barry Werth's Damages in the Law School Classroom*, 2 NEV. L.J. 386, 401–02 (2002).

evaluate legal argument. It not only encourages a more robust and wholistic approach to evaluating an argument, but it also helps us understand the dynamic of said argument that provides us with guidance on what to focus on in defeating a legal argument as well as why fallacious arguments might be advanced. Whether the lawyer is on the path to resolving a dispute or litigating one, evaluating what manner of argument is made, why the manner (separate from the legal or factual components of the argument) is weak or strong, and why a party might be advancing a weak, fallacious argument yield substantial benefits. In our example, a little understanding of the fallacy of equivocation, might lead us to explain ourselves more completely to our colleague, or better yet, buy them a cup of coffee.

In legal argument, having a new perspective focused on argument design also provides new tools for resolving and winning legal arguments. A party might make a fallacious argument because they do not disagree with your perspective on the law or facts. In fact, when a party is trying to manufacture an argument using a contrived, different meaning, they might be exposing a significant weakness in the merit of their argument. Giving that weakness a name—fallacy—is an important step toward understanding, evaluating, and explaining why you have the better position.

Of course, the problem of ambiguity pervades the law, legal analysis,[44] and the use of language generally.[45] As a result, opportunities to make arguments that commit the fallacy of equivocation are common in legal argument. Historically, courts have occasionally viewed such arguments in much the same way that philosophy has: naming them as fallacious and discounting their persuasive value.

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44. *See, e.g.*, Meredith A. Holland, *The Ambiguous Ambiguity Inquiry: Seeking to Clarify Judicial Determinations of Clarity Versus Ambiguity in Statutory Interpretation*, 93 NOTRE DAME L. REV. 1371, 1372 (2018); Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 T. JEFFERSON L. REV. 167, 167 (2002).

45. THOMAS WASOW, *Ambiguity Avoidance is Overrated*, *in* AMBIGUITY: LANGUAGE AND COMMUNICATION (Susanne Winkler ed., 2015) (discussing ambiguity in language generally, and describing three distinct types of ambiguity in language: lexical, structural, and scope).

2. Ambiguity, and Opportunity for Equivocation, are Common Problems in the Law

Resolving ambiguity and accompanying equivocation[46] is a common problem in legal argument. For example, contract disputes regularly involve the problem of ambiguity in interpreting contract terms. Few examples are as carefully studied by lawyers as the case of *Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.*, in which the parties to a contract to import chicken disagreed about the kind and quality of chicken sufficient to satisfy the contract.[47] In that case, Judge Friendly famously stated the "issue" in the case: "The issue is, what is chicken?"[48] Various arguments were proffered by the buyer and seller.[49] All of the arguments revolved around the meaning of the word "chicken." They included arguments contrasting the English-language meaning of chicken[50] with the German-language meaning of the word.[51] They included arguments based on industry practitioners[52] and experts.[53] They included arguments based on the understanding of the buyer[54] and the seller.[55] Evidence of dictionary definitions,[56] industry

46. Some philosophers note the difference between ambiguity and equivocation. *See, e.g.*, WALTON, *supra* note 36, at 242. ("It has often been cogently pointed out, for example by Hamblin (1970) that there is a difference between ambiguity and equivocation. Ambiguity need not be fallacious. Indeed, on the assumption that a fallacy is a fallacious argument, ambiguity cannot be fallacious. For ambiguity is a property of sentences rather than arguments. At any rate, the crux of this basic point is that the fallacy of equivocation resides in the fallacious deployment of ambiguity in arguments."); *contra*, STERNBERG, *supra* note 30 (defining the fallacy as the "fallacy of ambiguity.").

47. Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960).

48. *Id.*

49. *Id.*

50. *Id.* at 118.

51. *Id.*

52. *Id.* at 119.

53. *Frigailment Importing Co.*, 190 F. Supp. at 119–120.

54. *Id.* at 121.

55. *Id.*

56. *Id.* at 117.

publications,[57] and government regulations[58] were offered regarding the meaning of the word "chicken."

The case is not only a good example of the problem of language, meaning, and ambiguity, but it is also a good example of how lawyers use differences in meaning to design their arguments. The focus of contract interpretation is to understand what the parties intended when they assented to a contractual obligation.[59] A definition of the same word in a federal regulation might manifest a very different purpose and meaning from the same word contained in a contract. A lawyer using a regulatory definition as evidence of a different contractual meaning of the same word is much like your colleague seizing on a literal definition of "nothing" when you were using the word hyperbolically. The argument commits the fallacy of equivocation, should be more carefully evaluated, and might reveal an inability by your opponent to viably support their argument.

However, while words might be susceptible to different meanings, not all of those different meanings are appropriate for purposes of establishing or resolving an ambiguity. In fact, at least one case has explained why some alternative meanings might not be useful for purposes of resolving questions of meaning or designing arguments where meaning is central. In *United Services Automobile Assn. v. Bagget*,[60] a central issue in the case was the definition of "accident" in an insurance policy. The insurer filed a declaratory action seeking a declaration of its obligations under an automobile insurance policy.[61] The specific policy language at issue was the phrase "for all damages . . . resulting from any one auto accident."[62] The Court stated:

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57. *Id.* at 119.

58. *Id.* at 120.

59. *See, e.g.*, 11 WILLISTON ON CONTRACTS § 32:1 (4th ed.) ("Interpretation, by its nature, requires determining the parties' intent from the words they have used; in this sense, then, even clear and unambiguous language must be construed and interpreted: first, it must be construed to determine whether it is ambiguous, and second, if it is determined to be ambiguous, it must be interpreted to determine the intent of the parties, whereas, if it is unambiguous, it must be further construed to determine its legal meaning and effect.").

60. United Servs. Auto. Ass'n. v. Baggett, 209 Cal. App. 3d 1387 (Cal. Ct. App. 1989).

61. *Id.* at 1389.

62. *Id.* at 1392.

> The collection of definitions of "accident" in *Oil Base, Inc.* merely indicates the word's ambiguity in the abstract. We would commit the fallacy of equivocation to conclude such abstract ambiguity renders the word ambiguous as used in insurer's policy. "Accident" can be used unambiguously in an insurance policy despite its number of meanings in the abstract.[63]

Accordingly, while ambiguity abounds in language and in legal argument, not every ambiguity is relevant, and, as shown above, at least one court has suggested that seizing on every ambiguity is, itself, a commission of the fallacy of equivocation.[64] Instead, the fallaciousness of the argument is manipulating different meanings in different contexts.[65] One philosopher has suggested the following definition for the kinds of arguments that are worth serious consideration as committing the fallacy of equivocation: "Hence a good case of the

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63. *Id.* at 1396 (citation omitted).

64. *Id*. Philosophers, similarly, have noted the distinction between ambiguity and the fallacy of equivocation.

> Terms in natural language are virtually always vague to some extent. Therefore this phenomenon of the equivocability of arguments with vague terms in them is a constant danger in evaluating arguments in natural language. What the phenomenon suggests is that there is always a certain potential latitude open to a critic in evaluating and interpreting an argument in natural language. The critic must—if he or she is fair—try to interpret the premisses and conclusion, if there is scope for strictness or looseness of interpretation, to make the propositions in the argument come out as being plausible. However, there are limits in how far a critic can or should go. One such limit is posed by equivocation. The sentences in the argument should charitably be interpreted to make each of them most plausible, but not at the cost of equivocating. That is, the concessions to charity can only go so far when a choice must be made between plausible premisses (or conclusion) and a valid argument.

DOUGLAS WALTON, INFORMAL FALLACIES TOWARD A THEORY OF ARGUMENT CRITICISMS 248 (1987).

65. *Id.* at 244.

fallacy of equivocation, worth our serious study, should be (1) an incorrect (invalid) argument, (2) based on meaning-shift, and (3) the putting forward of which is part of a strategy of deception or significant mischief in argumentation."[66] In this stricter definitional sense, the fallacy of equivocation is not a function of two parties who are merely confused or simply disagree about meaning. Instead, a shift in meaning that is designed to deceive or commit "significant mischief," which is required before the argument is properly described as fallacious.[67] Courts discussing the fallacy of equivocation in legal argument are not always so strict in their application or justification of the fallacy of equivocation.

C. The Fallacy of Equivocation in Legal Argument

Studying examples of courts using the fallacy of equivocation in legal argument demonstrates the pattern of argument as well as provides the authority for using these concepts of philosophical logic in legal argument.[68] In the examples that follow, the courts do not address a specific disagreement about the law or the facts at issues in

66. *Id.* at 249.

67. *Id.*

68. Studying case examples that explicitly employ concepts of logic as tools for legal reasoning is an effective and longstanding way to learn about logic, law, and legal argument. Many judicial opinions discuss concepts of philosophical logic, including logical fallacies, in conjunction with discussions about substantive and procedural legal rules and principles. These cases provide examples of lawyers and judges communicating about principles of philosophical logic, like logical fallacies, and applying them in legal argument. The discussion of the cases that follow is based on my reading and interpretation of the facts and arguments as revealed in the decisions of the courts. I have no personal knowledge of any case discussed in this article beyond my own reading and interpretation of those judicial opinions. This article uses those cases and examples of argument for understanding how lawyers use logic in argument, and not as an effort to report on the parties, their arguments, or the facts of their cases, and the article should not be relied on as an effort to accomplish any such report. In fact, judicial opinions ordinarily only recite or refer to a portion of the legal arguments made in any case. Better, more complete perspectives on those matters can be found in the opinions themselves, reviewing the records of those cases, and speaking directly with the witnesses, parties, and their attorneys involved in those cases. Of course, one would expect those witnesses, parties, and attorneys to have different perspectives on the nature, facts, and arguments presented in those cases.

the case. Instead, the courts are focused on the design of one party's argument, finding it fallacious, and ultimately unpersuasive. For example, in *Encana Oil & Gas, Inc. v. Zaremba Family Farms, Inc.*,[69] one of the issues focused on the meaning of the word "tacit" in the context of an antitrust claim.[70] The court recognized that "[t]acit agreements may be unreasonable agreements under the Sherman Act."[71] The court started its analysis on this point by defining the fallacy of equivocation: "Encana's argument on this point suffers another fallacy; Encana employs a semantic fallacy, also known as equivocation. This occurs when a word or phrase has different meanings in different contexts. Encana's argument turns on the meaning of the word 'tacit.'"[72]

In *Encana Oil and Gas*, one party argued that expert witness testimony should be excluded.[73] The argument advanced was that the expert witness had testified about a concept called "tacit collusion."[74] The court observed that when the expert witness was questioned about tacit collusion, "he understood the question to be about an unstated agreement rather than an expressed one."[75] The court contrasted that definition with the definition of "tacit collusion" used by Encana Oil and Gas: "When Dr. Kneuper was asked about 'tacit' collusion, his answers reflect that he understood the question to be about an unstated agreement rather than an expressed one. That meaning of 'tacit' is different from the meaning of 'tacit' in *Ohio ex rel. Montgomery* and *Brooke Group*, where 'tacit' was used to describe parallel pricing that maximized profits."[76] The defendant in Encana Oil and Gas argued that there was legal authority that "tacit collusion," as used in the cases,

69. Encana Oil & Gas, Inc. v. Zaremba Fam. Farms, Inc., No. 1:12-CV-369, 2015 WL 12883545 (W.D. Mich. Sept. 18, 2015).

70. *Id.* at *2.

71. *Id.* at *5. The court explained further: "Dr. Kneuper's opinion is relevant to the first element of a Sherman Act violation. Agreements, even unstated ones, that unreasonably restrict commerce are illegal. However, independent behavior that merely reflects profit maximization, albeit parallel behavior, is not illegal." *Id.* at *6.

72. *Id.* at *6.

73. *Id.* at *1.

74. *Id.* at *5–6.

75. *Id.* at *6.

76. *Id.*

State of Ohio ex rel. Montgomery v. Louis Trauth Dairy, Inc. and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, was not illegal.[77] The court found the argument unpersuasive because it used a definition of "tacit collusion" that differed from the expert witness' definition.[78] It suggested that the argument committed the fallacy of equivocation. [79]

Similarly, in *Horrocks v. Kanawha Energy Co.,* the word "nominal" was central to the parties' arguments regarding whether there was diversity jurisdiction over the dispute.[80] Here, the defendant removed the action filed in state court to the United States District Court for the Southern District of West Virginia, and the plaintiff moved to remand the matter to state court, claiming that the federal court lacked diversity.[81] The plaintiffs named some of the defendants as parties to the lawsuit, but did not intend to pursue a judgment against them since they had been granted a discharge of liability in bankruptcy.[82] Instead, plaintiffs were seeking a judgment against those defendants in order to collect from the defendants' insurer.[83] Plaintiff sought to remove the case to state court, claiming that some of the defendants' were citizens of West Virginia, precluding complete diversity of citizenship.[84] Defendant argued that the rule that merely "nominal parties" are not considered for evaluating complete diversity of citizenship for jurisdictional purposes.[85] Defendant argued that plaintiff could not argue that those defendants were nominal for

77. *Id.* ("Encana's authority on this point *State of Ohio ex rel. Montgomery*, cites *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). Both cases, *Ohio ex rel. Montgomery* and *Brooke* Group, hold that 'tacit collusion,' which is another way of describing 'ologopolistic price coordination' or 'conscious parallelism,' is not illegal." (citing *Brooke Group*, 509 U.S. at 227; *Ohio ex rel. Montgomery*, 925 F.Supp. at 1253.")).

78. *Id.*

79. *Id.*

80. Horrocks v. Kanawha Energy Co., No. 2:18-CV-01202, 2018 WL 4781255, at *1 (S.D.W. Va. Oct. 3, 2018).

81. *Id.*

82. *Id.* at *2.

83. *Id.*

84. *Id.*

85. *Id.*

purposes of collecting a judgment but not nominal for purposes of jurisdictional analysis.[86] The court observed:

> In this context, the word "nominal" has two different meanings. On the one hand, the plaintiff is suing the Alpha defendants "nominally" against the discharge injunction because the plaintiff is not seeking money damages from the debtor, only liability. . . . On the other hand, the Alpha defendants are not "nominal" for diversity because they are the main party in interest whose conduct is the central issue of the controversy. The plaintiff cannot sue the insurer without first obtaining a judgment that the debtor is liable for its conduct.[87]

The court concluded that the defendant's argument that "the plaintiff cannot not sue the Alpha defendants 'nominally' in regard to the discharge injunction while at the same time saying they are not 'nominal' for diversity purposes" committed the fallacy of equivocation.[88]

In *In re Guardianship of Vavra*,[89] the court addressed the question of whether statements by appellants' counsel regarding the capacity of a party to the guardianship constituted an admission on the question of capacity.[90] One argument focused on the meaning of the word "capacity."[91] It was alleged that appellant's lawyer made a statement suggesting that the party had capacity to execute a power of

86. *Id.*

87. *Id.* at *3 (citations omitted).

88. *Id.* at *2 ("Defendant National, however, argues that the plaintiff cannot not sue the Alpha defendants 'nominally' in regard to the discharge injunction while at the same time saying they are *not* 'nominal' for diversity purposes. But this argument has been consistently rejected. Defendant National, like the insurer in *Monroe*, has fallen victim to an equivocation fallacy." (citing *Monroe*, 807 F. Supp. 2d at 1133–34) (distinguishing "nominally liable" for § 524(a) purposes and "nominal parties" for diversity purposes)).

89. *In re* Guardianship of Vavra, 365 S.W.3d 476 (Tex. App. 2012).

90. *Id.* at 482.

91. *Id.*

attorney.[92] The appellees argued that the lawyer's statement about capacity required a conclusion that the appellant was capable to manager her property.[93] The court disagreed stating:

> The statements by appellants' counsel do not meet the requirements for a judicial admission. A judicial admission must be a clear, deliberate, and unequivocal statement. The statements by appellants' counsel did not meet those requirements. Further, it does not logically follow that Evelyn had the capacity to manage her property as a reasonably prudent person because she had the capacity to execute a power of attorney. The inference drawn by appellees would appear to be a logical fallacy of equivocation, i.e., the term "capacity" has a different meaning in different contexts.[94]

Like the preceding cases and examples, there was not a specific disagreement about the law or the facts as it related to the admission argument. Instead, the court focused on the design of the appellees' argument, finding it fallacious, and ultimately unpersuasive.[95]

Gonzalez v. Liberty Mutual Fire Insurance Co.[96] involved an insurance dispute focused on what the language "structural damage to the building, including the foundation, caused by sinkhole activity" meant in an insurance policy.[97] The court described the parties' argument this way:

> The plaintiffs insist that "structural damage to the building" means "any damage to the building," a construction that depends on the truth of the proposition that all "building damage" is "structural damage." Liberty Mutual counters that the modifier "structural"

92. *Id.* at 481–82.

93. *Id.* at 482.

94. *Id.* (citations omitted).

95. *Id.*

96. Gonzalez v. Liberty Mut. Fire Ins. Co., 981 F. Supp. 2d 1219 (M.D. Fla. 2013).

97. *Id.* at 1221.

> conveys a distinguishing meaning and, accordingly, meaningfully modifies the phrase "damage to the building" and that "structural damage to the building" means "damage to the structural integrity of the building."[98]

Accordingly, the two arguments were based on different understandings of the meaning of the word "structure." The court held that the differences in definitions was essential to the outcome of the case, given the consequence of the fallacy of equivocation: "An elaboration will follow, but note that every building is a structure but not every structure is a building. 'Building' and 'structure' are not terms fully interchangeable without risk of a changed meaning and without risk of a flawed conclusion—without risk of an error."[99]

The court explained the fallacy of equivocation, utilizing the coffee conversation discussed above as an example:

> An error in a syllogism, otherwise a venerable tool of logic, can assume many forms. In some forms, the faulty syllogism offends the reader immediately, even before the reader identifies precisely the flaw in a premise, because the reader instantly recognizes the flaw in the conclusion. For example:
>
> (1) Nothing is better than hot coffee on a cold morning.
> (2) Lukewarm coffee is better than nothing on a cold morning; therefore,
> (3) Lukewarm coffee is better than hot coffee on a cold morning.
>
> Why is this syllogism producing an obviously erroneous conclusion? Because the syllogism suffers from the "fallacy of equivocation," by which a single term ("nothing" in this example), used in each premise,

98. *Id.*
99. *Id.*

> acquires from the different context in each premise a different meaning—and because a flawed premise yields a false conclusion. Although logical rigor in a syllogism demands that "nothing" mean the same thing in each premise in the syllogism, the first "nothing" means "no other coffee among all available coffee" or "no beverage among all morning beverages" or the like, but the second "nothing" means "having no coffee at all" or "having no morning beverage at all" or the like. The first contemplates all coffee, any other coffee; the second contemplates no coffee, the absence of coffee. Although this false syllogism appears superficially to permit a sound deduction about coffee, the conclusion is plainly erroneous. Important to remember is that in no sense is this flawed syllogism—this flawed premise and this flawed conclusion—"ambiguous." Erroneous, certainly; perhaps; but ambiguous, never. On the contrary, the syllogism is unambiguously flawed, and the conclusion is unambiguously wrong.[100]

The court's use of the concept of fallacy to discuss the argument's design here is detailed. Notably, the court's discussion is not about what the legal standard applicable in the case is. Nor is the discussion about what the relevant facts are. There is no dispute about what language was central to the dispute. Instead, this seems to be a case where the dispositive aspect of the dispute is the design of the parties' arguments. The court cites one party with making an argument that commits a logical fallacy.[101] The court's extensive discussion of what the fallacy is, and why a fallacious argument should not be persuasive brings the parties' arguments' designs into sharp focus and provides a rich example of how design-focused thinking about legal argument provides a new perspective to evaluate it.[102]

The observation that the crux of the problem with arguments that commit the fallacy of equivocation is that the argument shifts

100. *Id.* at 1220.

101. *Id.*

102. *Id.*

context of meaning from an appropriate context to an inappropriate one was also the focus of the dissenting opinion in *Bennett v. Rancho California Water District.*[103] Here, the dissenting opinion in *Bennett* focused on the phrase "burden of proof" and Justice Thompson went on to say:

> The term burden of proof can be used in the sense of identifying the quantum or standard of proof which is required, such as beyond a reasonable doubt. The term burden of proof can also be used in the sense of identifying which party bears the burden of going forward to prove the elements of a claim or defense. While the former sense of the term is relevant in the collateral estoppel context, the latter sense is not.[104]

After identifying the two contexts for meaning of the term "burden of proof"—the distinction between who bears the burden and the quantum of burden—the dissenting judge described the impact of this ambiguity on the majority opinion's conclusion, in which he stated:[105]

> Collateral estoppel would not apply if the quantum of proof required in the prior action was less than in the subsequent action. But that was not the case here. The quantum of proof required in the prior and subsequent actions was the same. In both actions Bennet's employee status had to be proven or disproven according to the preponderance of the evidence standard. Thus, the issue was identical for collateral estoppel purposes.[106]

Bennett provides a good example of the scenario where the alternative context or meaning is highly plausible the risk of a

103. Bennett v. Rancho Cal. Water Dist., 248 Cal. Rptr. 3d 21, 37–38 (Cal. Ct. App. 2019) (Thompson, J., concurring in part and dissenting in part).

104. *Id.*

105. *Id.*

106. *Id.* at 38 (citations omitted).

fallacious argument is greater and more challenging to detect.[107] In *Bennett* the concept of burden of proof is familiar to lawyers and judges. Its use in both arguments is familiar and plausible. The result of the familiarity and plausibility is a risk that the term might be used in different contexts with different meanings and avoid detection. Conversely, at the other end of the plausibility spectrum, are words that might have one meaning in one context, but wildly different meanings in different contexts. For example, the legal concepts of "consideration," and "battery" all have significantly, even unrelated, meaning in common usage. In its legal context, the contract law concept of consideration is defined as a bargain-for exchange.[108] Outside of its legal context, the word consideration takes a different meaning: "The action of considering"[109] in its legal context, the criminal law concept of battery is defined as the intentional harmful or offensive touching.[110] However, to many people, the word "battery"

107. WALTON, *supra* note 36, at 246 ("It is the plausibility of the proposition that pulls the equivocal interpretation along, so to speak.").

108. "Consideration is defined as '[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act.'" Int'l Paper Co. v. Cohen, 126 P.3d 222, 225 (Colo. App. 2005) (citing BLACK'S LAW DICTIONARY 324 (8th ed. 2004)); "'Consideration is defined as a benefit to the party promising, or a loss or detriment to the party to whom the promise is made.' It is undoubted that the benefit or detriment may be very slight." Esakovich v. Groudine, 14 A.2d 850, 854 (Pa. Super. Ct. 1940) (citing Hillcrest Foundation v. McFeaters, 332 Pa. 497, 2 A.2d 775 (Pa. 1938)); "Consideration is defined as a present exchange bargained for in return for a promise." Cherokee Commc'ns, Inc. v. Skinny's, Inc., 893 S.W.2d 313, 316 (Tex. Ct. App. 1994) (citing Roark v. Stallworth Oil and Gas, Inc., 813 S.W.2d 492 (Tex. 1991)); "Consideration is defined as a bargained-for exchange whereby the promisor receives some benefit or the promisee suffers detriment." LKQ Corp. v. Thrasher, 785 F. Supp. 2d 737, 742 (N.D. Ill. 2011) (citing Vassilkovska v. Woodfield Nissan, Inc., 830 N.E.2d 619, 624 (Ill. App. Ct. 2005)).

109. *Consideration*, Oxford English Dictionary Online, OXFORD UNIVERSITY PRESS, www.oed.com/view/Entry/39602 (last visited July 12, 2023).

110. "A battery is defined as an actual infliction of violence on the person, or an unlawful, that is, an angry, rude, insolent, or revengeful touching of the person." Newman v. Christensen, 31 N.W.2d 417, 417 (Neb. 1948); "Battery is defined as (1) intentionally or recklessly causing bodily harm to another person; or (2) intentionally causing physical contact with another person when done in a rude, insulting, or angry manner." State v. Harris, 264 P.3d 1055, 1055 (Kan. Ct. App. 2011); "Battery is

typically refers to a device for storing electricity.[111] Here, misuse of those alternate contexts would be readily apparent, and implausible.[112]

III. A DESIGN-CENTERED APPROACH TO LEGAL ARGUMENT

Once armed with an understanding of this simple tool for evaluating argument design, the concepts of logical fallacy and the fallacy of equivocation, open a new perspective for thinking about, evaluating, and responding to arguments with unsound legal foundations. Consider this example, typical of many legal disputes focused on the meaning of language.

A property owner enters into a development agreement with a real estate broker to locate an appropriate long-term tenant for the property. The development agreement provided the amount of the

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defined as 'the intentional use of force or violence upon the person of another.'" State v. Miller, 746 So. 2d 118, 119 (La. App. 3 Cir. 1999).

111. "A combination of simple instruments, usually to produce a compound instrument of increased power; applied originally with a reference to the *discharge* of electricity from such a combination." *Battery*, Oxford English Dictionary Online, OXFORD UNIVERSITY PRESS, https://www.oed.com/view/Entry/16256?redirectedFrom=battery (last visited July 12, 2023).

112. *See* Davies v. Johanes, 409 F. Supp. 2d 1150, 1157 (W.D. Mo. 2006) ("Defendants equate the 1992 regulation's concept of 'agricultural value' with the 2002 regulation's concept of 'highest and best use' because the highest and best use in 2002 was determined to be agricultural. This position suffers from the legal fallacy known as equivocation on terms: the phrase 'agricultural value' has different meanings and implications in the two contexts."); Powers v. Texas Mut. Ins. Co., No. 11-08-00088-CV, 2010 WL 337144, at *4 (Tex. App. Jan. 29, 2010) ("Powers's challenge on appeal is that the blood alcohol test results should not have been admitted as evidence because there were gaps in the chain of custody; therefore, the expert opinions of Dr. Avery and Hambrick that relied on the blood sample should have been excluded. Powers cites *Gammill v. Jack Williams Chevrolet, Inc.*, for the proposition that expert testimony is unreliable if 'there is simply too great an analytical gap between the data and the opinion proffered.' The part of his argument that relies on *Gammill* commits the fallacy of ambiguity (equivocation). The 'gap' referred to in *Gammill* is one of analytical reasoning. The 'gap' challenged here is whether the chain of custody from the time the blood sample was taken until it was analyzed by Hambrick was established by the evidence; it was not a 'gap' in an expert's analytical reasoning." (citing *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998)).

commission that would be due to the broker and the terms of its payment as follows: "The Owner agrees to pay a leasing commission of Five Hundred Thousand Dollars ($500,000.00) to the Broker for the development of an 85,000 square foot retail building. The leasing commission shall be conditioned on payable one-half upon execution of the lease and one-half upon occupancy of the Property by the Tenant."

The broker found an appropriate tenant for the building. The property owner made the first required installment payment of the commission in the amount of $250,000 when the lease was signed by the tenant on January 1. The tenant's general manager walked through the leased property on three occasions during the month of January. However, on February 1, before the tenant completed the establishment of its business at the location, the tenant entered into an agreement with the property owner to terminate the lease agreement.

The Owner claims that the tenant never moved into the property, never established its business at the property, and never exercised any possession or control of the property. Since the tenant never moved into the space for purposes of conducting its business, the owner claimed there was never an "occupancy" of the property.

Conversely, the broker demanded the second installment of its commission. The broker's argument was based on a dictionary definition defining occupancy as "the action or fact of occupying a place." According to the broker, the fact that an agent of the tenant went into the leased space on three occasions after the lease was signed, the space was occupied, and the commission balance was due.

Like the several cases discussed in Section II, *supra*, the parties make arguments centered on meaning. The problem of ambiguity of language pushes the parties to different perspectives on what the word "occupancy" means in the contract. Of course, identifying the problem of ambiguity in contract interpretation is nothing new. But, thinking about the arguments in terms of the strength and weakness of their respective designs, is not the traditional approach to legal argument. Willingness to take a design-centered approach to considering the arguments here brings the potential weakness of the broker's argument into perspective. While the parties are faced with the problem of understanding the intended meaning of occupancy in a real estate

brokerage contract for a large retail leasehold, the broker designs an argument that rests on a common, simple definition of occupancy.

Why is the broker's argument weak and potentially fallacious? It is because the broker seems to attempt to shift the context of the definition it proffers away from the context of the dispute to a more generalized, less relevant context—one that happens to use a definition of "occupancy" more suitable to broker's desired conclusion. That kind of "contextual shift" in the face of ambiguity is the hallmark of the fallacy of equivocation.[113] Once identified and properly named, describing a legal argument as fallacious provides a powerful advocacy tool for criticizing a logically infirm argument. The process for accomplishing this result is simple: look for the problem of ambiguity in legal argument, identify argument designs that respond to ambiguity by shifting the context of proffered meaning of ambiguous terms, and justify why that shift constitute fallacious reasoning.

IV. CONCLUSION

The design of legal argument deserves careful attention. Comparing how legal argument design is similar to and different from the work of other design professionals reveals an internal logic useful not only in describing diverse design processes in legal argument but also in more fully understanding them. Logic has long played a role in the philosophical development of argument. Similarly, logic has an important role to play in legal argument and has frequently been explicitly described in judicial opinions. One concept of logic frequently cited by courts in evaluating legal argument is the logical fallacy.

The fallacy of equivocation is just one example of how concepts of philosophical logic, in this case, one of several informal logical fallacies, are to be deployed as tools in legal argument. Importantly, it is among a set of tools that require focus on the design of legal argument, rather than its legal and factual component parts. Focusing on design provides lawyers, judges, and law students with a new vantage point for creating, evaluating, refining, and testing the persuasiveness of a given legal argument. More specifically, the

113. WALTON, *supra* note 36, at 242.

fallacy of equivocation can be a design-level tool for identifying problems with ambiguity in legal argument and a conceptual and language tool for explaining why arguments that use this fallacious argument design should be disregarded as unpersuasive.