LOGIC, FALLACY, AND THE ART OF FRAMING A LEGAL ISSUE: THE TEXAS SHARPSHOOTER FALLACY

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Concepts of philosophical logic, like the Texas sharpshooter fallacy—the name given to an argument that assigns unwarranted significance to certain evidence—are useful tools for judges, lawyers, and law students seeking to develop new perspectives on common problems in legal argument. The tools of philosophical logic have been used for over one thousand years, providing objective frameworks for evaluating arguments. One such time-tested tool, the logical fallacy, is used in modern legal opinions on a weekly basis providing perspective, conceptual language, and reliable criteria for evaluating the persuasiveness of an argument's design and propriety of framing of issues and evidence in legal arguments. The Texas sharpshooter fallacy, like other logical fallacies, has been used by lawyers and judges to explain why legal arguments are not always effectively designed and why one argument's design might be more persuasive than another's. This article explains how learning about the Texas sharpshooter fallacy and its application in legal argument unlocks new perspectives on thinking about legal argument that go beyond arguing about the facts and the law. It empowers new thinking about framing legal issues and encourages legal thinkers to consider, evaluate, and discuss the design of legal argument as much as they consider the persuasive value of law and the facts.

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I. A SHORT STORY ABOUT LOGIC, FALLACY, AND FRAMING LEGAL ISSUES

Judges, lawyers, and law students grapple daily with the problem of perspective in legal argument, whether they fully appreciate it or not. Limited perspective can manifest in different ways in legal argumentation and analysis[1]. Limited perspective might result in failing to appreciate important facts, legal principles, or legal issues[2]. Similarly, limited perspective might result in framing legal issues incorrectly, too broadly, or too narrowly[3]. Developing an appreciation of new perspectives on the design and deployment of legal argument can be important for architects of legal argument seeking to think comprehensively and creatively about the legal arguments they design, deliver, and respond to. Tools of philosophical logic, including the concept of logical fallacy, provide powerful, accessible perspectives on evaluating legal arguments generally and how to frame issues specifically. This article explains the logical fallacy known as the Texas sharpshooter fallacy and how it can be a valuable tool for evaluating how to frame issues in legal argument.

Understanding legal issues in a legal dispute starts with understanding the common, undisputed elements of the argument. It is important to recognize that every legal dispute has common elements[4]. The undisputed elements might include facts and law. The parties may have different versions or ways of describing the facts. One party's list of facts likely includes and omits some facts from the opposing party's list of facts. Sometimes those differences in the facts are legally dispositive. Other times there are no differences in the facts, or the differences are not legally dispositive. In many cases, there is no dispute about the facts.

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[1] *See infra* Part II, Sections C, E (*addressing Exxon Corp. v. Mafoski*, 116 S.W.3d 176 (Tex. App. 2003)*; Boughton v. Cotter Corp.,* 65 F. 3d 823 (10th Cir. 1995).

[2] *See infra* Part II, Sections C, E.

[3] *See, e.g.*, Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 SCRIBES J LEGAL WRITING 1 (1994-1995) ("Indeed, poor issue-framing is the most serious defect in modern legal writing.").

[4] *See, e.g.*, David G. Owen, *The Five Elements of Negligence,* 35 HOFSTRA L. REV. 1671, 1672 (2009) (discussing ways in which negligence claims are split into elements).

The parties' lawyers will likely add the law to the dispute, identifying the legal issues involved in the case and the legal rules that apply, describing the contours of the legal rules, and evaluating the application of the legal rules to the facts of the case. Lawyers might disagree about what the law is, where the rules begin and end, and how they should be applied to the facts. In other cases, the lawyers might agree on what the legal rules are.

But in many cases, the litigants and their lawyers are not just arguing about what the facts are, and they are not just arguing about what the law is. In many cases, the lawyers are (or should be) arguing about something entirely different: how to "frame" the disputed factual and legal issues in the case. Framing the legal issue in a case is frequently a function of perspective. The perspective taken by a lawyer or judge in framing the issue can have a dramatic impact upon the design and outcome of legal arguments. This article explores how concepts of philosophical logic can provide a new perspective in making and evaluating legal arguments generally and framing issues in legal argument specifically.

The power and problems inherent in framing legal issues require an intentional, if not methodological, response. While lawyers are experts at evaluating and advocating around the facts and the law, they frequently lack precise tools for discussing and describing the ways they design and evaluate legal argument. This is, in part a consequence of the fact that the discipline of legal argument does not have a well-developed and defined set of rules dictating how to design an argument and what the criteria are for good or bad argument design. Most lawyers learn about a simple framework for legal argument in law school. Designing a legal argument frequently begins with simple building blocks of legal analysis. Legal analysis is commonly taught through the acronym IRAC. IRAC represents each of four basic elements of legal argument: (1) issue, (2) rule, (3) application, and (4) conclusion.[5] It is a useful device for disciplining legal reasoning[6] and writing[7] and provides a familiar, relatively comprehensive framework for disciplined legal analysis and designing a simple legal argument. Importantly, the IRAC framework is rooted in concepts of logical argument.[8] However, the IRAC framework does

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[5] Barbara A. Kalinowski, *Logic Ab Initio: A Functional Approach to Improve Law Students' Critical Thinking Skills*, 22 LEGAL WRITING: J. LEGAL WRITING INST. 109, 145 (2018) ("Basic IRAC structure (Issue, Rule, Analysis, Conclusion)--the hallmark of legal writing organization--represents a deductive syllogistic process."); *see also* James Ottavio Castagnera, *Why the Nation Needs More Lawyers*, 22 T. MARSHALL L. REV. 19, 26 (1996) ("IRAC is to legal analysis what 'Force = Mass x Velocity' is to Newtonian physics"); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 75 n.136 (1994) ("This acronym stands for Issue, Rule, Application, and Conclusion, an oversimplified version of deductive reasoning useful in some legal writing contexts as an introduction, but not in others.").

[6] *See* Castagnera, *supra* note 5, at 25.

[7] *See* Kalinowski, *supra* note 5.

[8] *See, e.g.*, Brian K. Keller, *Whittling: Drafting Concise and Effective Appellate Briefs*, 14 J. APP. PRAC.&

not answer all of the questions presented by every dispute. First, it does not help lawyers and judges understand how to frame or describe a legal rule, how to determine what facts are legally significant, or how to frame a legal issue at the intersection of the facts and law. Judgments as to description, determination, and framing are left up to the lawyers. This absence of guidance includes the essential first step that impacts each of the remaining three elements of IRAC: defining the issue.

Among the tools of legal advocacy secured in the lawyer's tool belt is the ability to frame the legal issue in a way that fairly advances the client's position toward a just and justifiable conclusion, and, as you might expect, the parties and their lawyers will likely have different perspectives on how to frame the issue. Controlling which perspective is adopted by the judge makes all the difference. So, what rules apply to how the court picks a perspective and decides what the real issue in the case is? When an advocate rejects the way a legal issue is framed by opposing counsel or a lower court, how do they justify why their framing of the issue is a better choice?[9] When a court rules that a party or lower court framed the legal issue improperly, how does it justify that conclusion?[10]

Some rules are hard to describe. Those hard-to-describe rules are occasionally the most important ones. When rules or principles are hard to describe, a story occasionally explains the rule or principle better than a carefully drafted description of the rule will. Such is the case here, where an important, valuable truth directly applicable to framing legal issues is best explained with a story about logic, Texas, and a sharpshooter. While the details of the story of the Texas sharpshooter vary from telling to telling, they are largely consistent.[11] Once upon a time, there was a sharpshooter who lived

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PROCESS 285, 295 (2013) ("IRAC traces its roots from propositional logic directly back to Aristotelian logic.").

[9] *See, e.g.*, Heavener v. Comm'r of Soc. Sec., No. 1:09-CV-493, 2010 WL 3824368, at *2 (W.D. Mich. Sept. 24, 2010); Hansen v. United States, No. 2:15-CV-223-DN-BCW, 2016 WL 1629271, at *1 (D. Utah Apr. 22, 2016); Morgan v. Coughlin, 887 N.E.2d 313 (Mass. App. Ct. 2008).

[10] *See, e.g.*, RLI Ins. Co. v. Langan Eng'g, 834 F. App'x 362, 363 n.1 (9th Cir. 2021); United States v. Amaya, 828 F.3d 518, 530 (7th Cir. 2016); United States v. Parker, 762 F.3d 801, 806 n.3 (8th Cir. 2014); United States v. Lawrence, 662 F.3d 551, 559 (D.C. Cir. 2011); White v. Divine Invs. Inc., 286 F. App'x 344, 346 (9th Cir. 2008); United States v. Gansman, 657 F.3d 85, 93 (2d Cir. 2011); Nick v. Morgan's Foods, Inc., 270 F.3d 590, 596 n.4 (8th Cir. 2001); Tokyo Sushi Buffett & Grill, Inc. v. Fortune Grp. Holdings, LLC, No. CIV.A. 13-1457, 2014 WL 31271, at *1 (W.D. Pa. Jan. 3, 2014); DePriest v. Barber, 798 So. 2d 456, 459 (Miss. 2001); Am. Home Assur. Co. v. Taveras, 643 N.Y.S.2d 355 (App. Div. 1996); Commonwealth. v. Reyes-Rodriguez, 111 A.3d 775, 780 (Pa. Super. Ct. 2015).

[11] *See, e.g.*, *Boughton* , 65 F.3d at 835 n.20; Greenley v. Laborers' Int'l Union of N. Am., 271 F. Supp. 3d 1128, 1145 (D. Minn. 2017); Kolakowski v. Sec'y of Health & Hum. Servs., No. 99-0625V, 2010 WL 5672753, at *138 (Fed. Cl. Nov. 23, 2010); Exxon Corp., 116 S.W.3d at 186; IVERSON ET. AL., *Misdiagnosis of Cognitive Impairment in Forensic Neuropsychology*, NEUROPSYCHOLOGY IN THE COURTROOM EXPERT ANALYSIS OF REPORTS AND TESTIMONY 249-250 (Robert L. Heilbronner ed., 2002); DUNCAN C. THOMAS, STATISTICAL METHODS IN ENVIRONMENTAL EPIDEMIOLOGY 196 (Oxford University Press, Inc., 2009); Michael A. Carome*, Public Citizen's Advocacy Campaign Opposing FDA Approval of Aducanumab for Alzheimer's Disease: The Fight Against Regulatory Capture,* 32 HEALTH

in Texas. The sharpshooter lived in Texas, I suppose, because generally, he is always referred only by the name "the Texas sharpshooter." The Texas sharpshooter was well-known throughout Texas for being a skilled shooter. He was said to be able to consistently hit the center of a target, "the bullseye," by firing his rifle[12] from a significant distance. In order to demonstrate his sharpshooting prowess, he would station himself some distance from a barn. He would discharge his rifle one time[13] toward the barn. Apparently, anxious to make his reputation as a sharpshooter known, he would show others the bullet hole in the barn. The bullet hole always appeared within the bullseye in the target. However, what he would not reveal to his impressed audiences is that he would not shoot his rifle at the target. Instead, he would shoot a hole in the barn, and then, draw a target, with distinctive red, white, and black colored circles, right around the bullet hole he made in the barn. Of course, the audience members, unaware of the Texas sharpshooter's technique, were impressed with the Texas sharpshooter, but only because of the proximity of the bullet hole to the target. They were unaware that he placed his target around his bullet holes, rather than placing bullet holes in a pre-existing target.

The story of the Texas sharpshooter illustrates an important principle that, in the study of philosophical logic, is called a logical fallacy. A logical fallacy is a pattern of argument that sounds persuasive but may not be persuasive at all.[14] In fact, this particular logical fallacy is aptly named "the

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MATRIX 31, 39 (2022); Chad J, Pomeroy, *The Shape of Property,* 44 SETON HALL L. REV. 797, 816-17 (2014); Robert F. Blomquist, *Bottomless Pit: Toxic Trials the American Legal Profession and Popular Perceptions of the Law,* 81 CORNELL L. REV. 953, 960 n.41 (1996); Dave Trott, *Texas Sharpshooter Advertising*, CAMPAIGN U.S. (August 29, 2019), https://www.campaignlive.com/article/texas-sharpshooter-advertising/1595057; Ian Pinkerton, *Formulate a stronger argument with these fallacies*, TOWERLIGHT: TOWSON U. (October 7, 2019).

[12] In some versions of the story the sharpshooter discharges a pistol, or pistols, or a shotgun. Trott, *supra* note 11.

[13] In some versions of the story the sharpshooter discharges the firearm several times "grouping" holes together in one location of the barn. *Id*.

[14] H. V. Hansen, *The Straw Thing of Fallacy Theory: The Standard Definition of 'Fallacy'*, 16 ARGUMENTATION 133, 133 (2002) (quoting CHARLES L. HAMBLIN, FALLACIES 12 (Methuen 1970)). Hanson collects and considers several definitions of fallacy: "A fallacious argument, as almost every account from Aristotle onwards tells you, is one that seems to be valid but is not so." *Id.* at 133 (quoting HAMBLIN, *supra*, note 14, at 12 (1970); "It has been customary for books on logic to contain a separate section or chapter on fallacies, defined as errors in reasoning." *Id.* at 137 (citing COHEN AND NAGEL, AN INTRODUCTION TO LOGIC AND THE SCIENTIFIC METHOD 376 (1934)). "A *fallacy* is an argument that *seems* to be sound without being so in fact. An argument is 'sound' for the purpose of this definition if the conclusion is reached by a reliable method and the premises are known to be true. This definition agrees well with *one* common meaning of 'fallacy'" *Id.* at 138 (quoting MAX BLACK, CRITICAL THINKING 229-230 (2nd ed. 1952)). "The word 'fallacy' is used in various ways. One perfectly proper use of the word is to designate any mistaken idea or false belief, like the 'fallacy' of believing that all men are honest. But logicians use the term in the narrower sense of an error in reasoning or in argument. A fallacy, as we shall use the term, is a type of incorrect argument." *Id.* at 139 (quoting IRVING COPI, INTRODUCTION TO LOGIC 52 (2nd ed. 1961)).

Texas sharpshooter fallacy." As will be discussed in more detail below, the fallacy is committed when a theory is designed around a limited set of evidence, ignoring the absence of evidence, or ignoring other important evidence.[15]

The Texas sharpshooter illustrates a principle of philosophical logic that unlocks a new perspective on the designing of legal arguments generally and framing legal arguments specifically. This article will begin by explaining the Texas sharpshooter fallacy as a concept of philosophical logic.[16] Next, the article will explore the role of logical fallacy generally, and the Texas sharpshooter fallacy specifically, in United States jurisprudence.[17] Lastly, the article will explore the value of taking a logical perspective in the design of legal argument, and how lawyers, judges, and law students, can apply these simple concepts of philosophical logic to the art and science of framing legal issues in legal argumentation.[18]

II. PHILOSOPHICAL LOGIC, FALLACY, AND FRAMING LEGAL ISSUES

A. The Intersection of Logic, Fallacy, and Legal Argument

Unlocking the value of the Texas Sharpshooter Fallacy as a tool for designing and deconstructing argument in a legal context begins with understanding and embracing the story of the Texas sharpshooter in its logical context. Understanding the story of the Texas Sharpshooter in its logical context requires a basic understanding of just a few simple, foundational concepts of philosophical logic and the power of something philosophers call a logical fallacy.

B. What is "Logic" and What Role Does it Play in Legal Argument?

While a comprehensive description of philosophical logic is unnecessary to and would go beyond the scope of this article, it has been summarized as "the theory of whatever is good in the way of reasoning."[19]

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[15] William C. Thompson, *Painting the target around the matching profile: the Texas sharpshooter fallacy in forensic DNA interpretation Law*, 8 PROBABILITY AND RISK 257, 257-58 (2009) ("The Texas sharpshooter fallacy is the name epidemiologists have given to the tendency to assign unwarranted significance to random data by viewing it post hoc in an unduly narrow context.") (citing Atul Gawande, *The cancer-cluster myth,* NEW YORKER, Feb. 8, 1999, at 34–37).

[16] *See supra* Part I.

[17] *See infra* Part II.

[18] *See infra* Part III.

[19] Susan Haack, *On Logic in the Law: "Something, but Not All"* 20 RATIO JURIS. 1, 9-10 (2007) ("[I]n an old philosophical tradition going back at least to Aristotle, logic has been conceived as a theoretical discipline: the theory of whatever is good in the way of reasoning. Logic, so understood, is a normative enterprise—as distinct, most importantly, from a descriptive study of how people actually reason. 'Good,'

Logic is a branch of philosophy, and is sometimes described as the study of what makes sound argument.[20] The genesis of the formal study of logic is typically credited to Aristotle.[21] Many readers will be familiar with Aristotle's three rhetorical appeals in speech and writing: ethos, pathos, and logos.[22] The focus of the study of logic is on the "logos" component of persuasion—the rational appeal of an argument[23].

Of course, logic is at work in legal argument in much the same way it is at work in philosophical argument and, for that matter, in other forms of argument.[24] Most lawyers would describe the arguments they make as being "logical" even though they may not have a precise formal understanding of what it means to be logical or familiarity with how philosophers might describe logic. Some degree of logical appeal is at work in every legal argument[25]. It would be unusual for a lawyer to concede that their argument was "illogical,"[26] yet still persuasive. But lawyers do not generally describe

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in such a theory, is focused on the avoidance of contradiction and on validity, the capacity of an argument to preserve truth—as distinct, most importantly, from its persuasiveness to this or that audience. In this usage, 'logic' encompasses both systematic, formal representations of valid arguments and theorems, and informal, philosophical explorations of such concepts as *term, proposition, argument, truth,* etc. Recently, however, the word has come to be more often used in a narrower sense in which it refers to those formal logical systems exclusively; philosophical explorations of key logical concepts are now more likely to be classified, rather, under the rubric 'philosophy of logic.'").

[20] Rick Lewis, *Thinking Straight*, PHIL. NOW, https://philosophynow.org/issues/51/Thinking_Straight (last visited Oct. 12, 2023) ("Just as philosophy in a sense underlies all other branches of human enquiry, so logic is the most fundamental branch of philosophy. Philosophy is based on reasoning, and logic is the study of what makes a sound argument, and also of the kind of mistakes we can make in reasoning. So study logic and you will become a better philosopher and a clearer thinker generally."); *see also* TRUDY GOVIER, PROBLEMS IN ARGUMENT ANALYSIS AND EVALUATION 203 (1987). ("Logic is also regarded as the science of argument assessment, as a study that will teach us how to understand and appraise the justificatory reasoning that people actually use.").

[21] R.E. HOUSER, LOGIC AS A LIBERAL ART : AN INTRODUCTION TO RHETORIC AND REASONING, 50 (2019). ("In short, Aristotle invented logic as an "art" or skill to be learned from a teacher and a book, which means he wrote the first logic textbook.").

[22] *Id*. at 35-38. Ethos is the component of argument focusing on the speaker or writer's knowledge, appeal, and credibility. Pathos is the component of argument focusing on the audience's emotional response to the argument. Logos is the component of argument focusing on the rational appeal of the argument. *Id*. at 36-37.

[23] *Id.* at 37.

[24] JAMES A. GARDNER, LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF EFFECTIVE ADVOCACY 8 (1993) ("The power of syllogistic argument leads to the only significant rule about crafting legal arguments: *every good legal argument is cast in the form or a syllogism*."); *see also* JUSTICE ANTONIN SCALIA AND BRIAN GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 42 (2008) (describing legal argument in the form of deductive logic: "Legal argument generally has 3 sources of major premises: a text (constitution, statute, regulation, ordinance, or contract), precedent (case law, etc.), and policy (i.e., consequences of the decision). Often that major premises is self-evident and acknowledged by both sides. The minor premises, meanwhile, is derived from the facts of the case. There is much to be said for the proposition that 'legal reasoning revolves mainly around the establishment of the minor premise.'" (citing O.C. JENSEN, THE NATURE OF LEGAL ARGUMENT 20)).

[25] Stephen M. Rice, *Leveraging Logical Form in Legal Argument: The Inherent Ambiguity in Logical Disjunction and Its Implication in Legal Argument,* 40 OKLA. CITY U.L. REV. 551, 555 (2015).

[26] Nonetheless, some courts expressly embrace arguments and conclusions unsupported by strict logic. *See, e.g.*, XR Commc'ns, LLC v. Google LLC, No. 6:21-CV-00625-ADA, 2022 WL 3702271, at *4 (W.D.

arguments in terms of logic. Instead, lawyers and judges generally[27] limit their categorization of legal arguments to "persuasive," "unpersuasive," "meritless," "frivolous," "substantive," or "procedural."[28] These sorts of descriptions are not well-defined and some of the common descriptions of legal argument are more categorical than evaluative.[29] Legal reasoning provides a well-defined taxonomy of the law and procedure, but it does not have a well-defined taxonomy of the forms or persuasiveness of particular categories or methods of argument.[30]

In contrast to the limited use of argumentative taxonomy in legal argument, the discipline of philosophy has developed a rich history and accompanying language tools to describe different categories of arguments.[31] Furthermore, philosophical logic even ascribes names for those categories of arguments that are logically valid and those that are not.[32] These language tools for argument allow philosophers to go beyond evaluating and communicating about the substance of the argument and instead evaluate and communicate about the argument from a different perspective.[33] Philosophical logic provides a metalanguage for argument.[34] A

Tex. Aug. 26, 2022); Allen v. Swarthout, No. CIV S-10-3257 GEB, 2011 WL 6046444, at *4-5 (E.D. Cal. Dec. 5, 2011); Fourniotis v. Woodward, 211 N.E.2d 571, 572 (Ill. App. Ct. 1965); State v. Comsa, No. 82 X 4, 1983 WL 3130, at *2 (Ohio Ct. App. Mar. 1, 1983).

[27] Some authors may identify and use categories, but that use is often limited to the legal subject matter they are analyzing. *See, e.g.,* Colin Starger, *Constitutional Law and Rhetoric,* 18 U. PA. J. CONST. L. 1347, 1359-62, 1378 (2016) (Proposing a way to taxonomize constitutional argument, contending that "[c]oherent classification of argument in turn facilitates understanding of constitutional debates."); Po Jen Yap, *A Taxonomy of Constitutional Arguments,* 35 STATUTE L. REV. 211, 212 (2014) (discussing a taxonomy of constitutional arguments (textual, historical, precedential, and consequentialist) used by the Supreme Court of the United Kingdom and the House of Lords in interpreting the Human Rights Act 1998). For other examples of taxonomy of legal argument see Colin Starger, *The DNA of an Argument: A Case Study in Legal Logos,* 99 J. CRIM. L. & CRIMINOLOGY 1045, 1052, 158-65 (2009); Jay Feinman & Marc Feldman, *Pedagogy and Politics,* 73 GEO. L.J. 875, 916–17 (1985).

[28] Stephen M. Rice, *Argument's Design: The Post Hoc Ergo Propter Hoc Fallacy in Legal Argument and Analysis,* 89 UMKC L. Rev. 279, 280 (2020) (discussing categories of legal argument).

[29] *Id.* at 281-82.

[30] *Id.* at 323.

[31] *See* Fernando Leal & Hubert Marraud, *Argumentation in Philosophical Controversies*, 36 ARGUMENTATION 455 (2022) ("From the beginning, philosophers have directed their acuity of mind towards the claims and arguments made by other philosophers as well as themselves. For it was in philosophy that the very concepts of claim and argument were first invented; and it was philosophers who pioneered their analysis and evaluation. In that respect, we could say that philosophers have always had what Peirce called a *logica utens*—a theory of philosophical argumentation largely implicit in the different ways they have tried to analyze and evaluate philosophical claims and arguments.") (Citations omitted).

[32] Douglas Walton, *Why Fallacies Appear to be Better Arguments Than They Are*, 30 INFORMAL LOGIC 159, 160 (2010) (describing logical fallacies as "illusions and deceptions that we as human thinkers are prone to. They are said to be arguments that seem valid but are not.").

[33] Rice, *supra* note 28, at 322.

[34] Scott F. Aikin & Robert B. Talisse, *Democracy, Deliberation, And The Owl OF Minerva Problem,* THE CRITIQUE (Jan. 15, 2017), http://www.thecritique.com/articles/democracy-and-the-owl-of-minerva. ("In order to discuss arguments as arguments, we must develop a language about the argumentative use of language. That is, we must develop a metalanguage. The objective in developing a metalanguage about argument is to enable us to

metalanguage for argument provides a new perspective on argument design. Importantly, a metalanguage also provides new tools for communicating about the different approaches to legal argument that the persuasive force of those approached[35]. Lawyers can learn a lot about the merit of the arguments they design, deploy, evaluate, and respond to by adjusting their perspective beyond myopic attention to the law and the facts, and considering the persuasiveness of the design of the argument they encounter.[36] Borrowing some of the language of philosophical logic, specifically the concept of logical fallacy, is one way of focusing on the structure and design of legal argument and gaining a new perspective of the persuasiveness of legal argument.[37]

C. What is a Logical Fallacy and What Role Do Logical Fallacies Play in Legal Argument?

The broad study of the philosophy of logic is sometimes divided into two categories: formal logic and informal logic. [38] In formal logic, the focus is on specific rules of logic and their application to test the persuasiveness of an argument.[39] Formal logic typically organizes arguments into a common framework: the syllogism.[40] The syllogism is a simple argumentative form

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talk about a given argument's quality without taking a side in the debate over the truth of its conclusion. Accordingly, with the metalanguage in place, we can assess the quality of a given argument without reference to our own view of the matter under dispute. Among other things, the metalanguage of logic enables us to criticize the arguments offered by people with whom we agree, and it similarly allows us to recognize that sometimes a powerful argument can be produced for a conclusion that we know is false. But perhaps most importantly, the metalanguage enables certain crucial critical self-assessments; it is by means of the metalanguage that we can assess our arguments as lacking without thereby adopting a skeptical stance with regard to our own conclusions.").

[35] *Id.*

[36] Rice, *supra* note 28, at 323.

[37] *Id.*

[38] "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." MALCOLM MURRAY & NEBOJSA KUJUNDZIC, CRITICAL REFLECTION: A TEXTBOOK FOR CRITICAL THINKING 397 (2005) (alteration in original) (emphasis omitted). There are other categories or systems of logic as well. SUSAN HAACK, PHILOSOPHY OF LOGICS 4 (1978).

[39] GOVIER, *supra* note 20 ("In our century, logic is typically identified with formal logic, and formal logic is the study of proofs and rules of inference in axiomatized formal systems.").

[40] *See* 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, 764 (1988) ("Formal fallacies are arguments that are defective because of their improper form, without regard to content. The form is dictated by the rules of formal logic developed in the context of an Aristotelian 'syllogism.' A syllogism is a deductive argument consisting of three terms (minor, major and middle) and

made up of two premises and one conclusion.[41] The relationship between the two premises in the syllogism and the conclusion can be tested against five rules of syllogistic logic.[42] If the premises are true and if the syllogism complies with the five rules of syllogistic logic, then the conclusion must be true.[43]

Another category of the study of logic is informal logic.[44] Informal logical fallacies are not so concerned with the strict, syllogistic form of the argument[45] or with using specific, technical rules to test the persuasiveness of the argument.[46] Instead, informal logic considers the general design of the argument and the persuasiveness of the method of appeal used in the argument.[47]

While formal logic and informal logic have different foci, they share a common tool: the concept of the logical fallacy. A logically fallacious argument is an argument that "seems to be [logically] valid but is not so."[48] Arguments that commit formal fallacies cannot be relied upon to ensure the truth of their conclusion.[49] Conversely, arguments that commit informal fallacies, merely suggest weakness that follow from the method or design of argument used rather than the argument's failure to adhere to a formal rule for testing a syllogistic argument structure.[50] While formal logic requires an

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three propositions (major premise, minor premise and conclusion). Deductive arguments are those in which the conclusion *necessarily* follows from the premises. If the premises of a syllogism are true and the syllogism is valid, the conclusion must also be true.").

[41] *Id*.

[42] *See generally* STEPHEN M. RICE, THE FORCE OF LOGIC: USING FORMAL LOGIC AS A TOOL IN THE CRAFT OF LEGAL ARGUMENT (2017).

[43] *See generally* CHARLES L. HAMBLIN, FALLACIES 190-99 (1970).

[44] David Hitchcock, *Informal Logic and the Concept of Argument*, ON REASONING AND ARGUMENT 447-48 (2017) ("According to its namers, informal logic "is best understood as the normative study of argument. It is the area of logic which seeks to develop standards, criteria and procedures for the interpretation, evaluation and construction of arguments and argumentation used in natural language." . . . . The name "informal logic" is somewhat unfortunate. For those who use "logical" as a synonym of "formal", it is an oxymoron. In any case, the research programme of informal logic does not preclude the use of formal methods or appeal to formal logics.") (Citations omitted).

[45] There is some philosophical dispute about this point. *See, e.g.*, GOVIER, *supra* note20, at 203-04.

[46] *See* Kalinowski, *supra* note 5, 109, 136-37 ("Informal fallacies could be described as mistakes in 'the content (and possibly the intent) of the reasoning.' Logicians have identified hundreds of distinct types of informal fallacies; therefore, a comprehensive list of them is unworkable here. But some are so common—and so effective—that learning to recognize them should be considered a critical law-school skill.") (Citations omitted).

[47] *Id.*

[48] Hans V. Hansen, *The Straw Thing of Fallacy Theory: The Standard Definition of 'Fallacy',* 16 ARGUMENTATION 133, 133 (2002) (quoting HAMBLIN, *supra* note 43).

[49] That is not to say that the conclusion is necessarily false. The commission of a formal fallacy simply means that the argument cannot be relied upon to ensure the truth of the conclusion.

[50] *See, e.g.*, GOVIER, *supra* note 20, at 204 ("The informal fallacies, historically a central topic in informal logic, involve mistakes in reasoning which are relatively common, but neither formal nor formally characterizable in any useful way. The fact that an account of an informal fallacy makes it out to be just that does not show that it is imprecise or lacking in rigor.").

understanding of important but less familiar rules of formal logic,[51] informal fallacies are generally easier to understand, frequently intuitive, and in many cases familiar even to lawyers who have not studied philosophical logic. A "straw man" argument[52] or an argument "*ad hominem*"[53] are informal logical fallacies that are familiar to most lawyers. Importantly, both formal and informal fallacies have been used by courts in evaluating legal arguments[54]. Because informal fallacies are, by definition, of dubious persuasive value, when a legal argument fits into the pattern of the Texas sharpshooter fallacy its method of persuasion suggests that it is subject to infirmity.

Whether formal or informal, the concept of the fallacy is an important tool in making and evaluating argument, including legal argument.[55] Much of the importance of the fallacy is its consequence.[56] Defining an argument as committing a fallacy requires an important consequence: the argument is suspect in its support of the conclusion[57]. Accordingly, identifying an argument as fallacious is a powerful tool for defusing an argument—it is a name that means the argument should not be persuasive or is of doubtful persuasive value[58]. Moreover, the name and the consequence have substantial support in the history of philosophy[59] (and in many cases, the law). The language tools of logic provide symbols of lack of persuasiveness that can be applied to an argument, but there is also a basis for justifying the application of these badges on arguments.[60] In fact, logical fallacies have over a thousand-year history of justification.[61]

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[51] In formal logic, an argument is said to be fallacious when it violates one or more of the six specific rules of logic. *See* IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 231, 244-49 (13th ed. 2009).

[52] *See* CHRISTOPHER W. TINDALE, FALLACIES AND ARGUMENT APPRAISAL 20 (2007) ("The Straw Man fallacy involves the attribution or assumption of a position, which is then attacked or dismissed. The problem is that the position dismissed by the argument is not the real 'man' or 'person', but a caricature of the real position held. In a dialogue, a position may be explicitly attributed to an opponent. But for whatever reason, either that position is not one that the opponent actually holds, or the opponent does not hold the position in quite the way that has been attributed. Hence, an argument that attacks and dismisses the attributed position diverts attention from the real position and is therefore fallacious.").

[53] *See* RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 255 (3rd ed. 1997) ("This fallacy shifts an argument from the point being discussed (ad rem) to irrelevant personal characteristics of an opponent (ad hominem).").

[54] *See infra* notes 61-70 and accompanying text.

[55] Scott F. Aikin & Robert B. Talisse, *supra* note 34. ("The whole point of developing the diagnostic language of fallacies is to create a vocabulary with which we can argue about the argument itself, rather than the first-order claims at issue within it.").

[56] *See* COPI, *supra* note 51, at 118-19.

[57] *Id.*

[58] *See* Hansen, *supra* note 48, at 141 (quoting WARD FEARNSIDE & WILLIAM HOLTHER , FALLACY: THE COUNTERFEIT OF ARGUMENT 3, 3 (1959)) ("The word 'fallacy' is sometimes used as a synonym for any kind of position that is false or deceptive, and sometimes it is applied in a more narrow sense to a faulty process of reasoning or to tricky or specious persuasion.").

[59] *See generally,* HAMBLIN, *supra* note 43.

[60] *See generally id.*

[61] *See generally id.*

The power of these names and justifications can be leveraged by lawyers who are looking for new tools and perspectives for evaluating the legal arguments they make and respond to. Taking a logical perspective on legal argument is efficient. The lawyer need not be a philosopher, or logician, or any kind of expert in philosophy or logic. They do not need to understand all of the logical rules regarding what makes an argument logically sound. Instead, they only need to know one tool for identifying what makes an argument unpersuasive in order to put philosophical logic to work in legal argument. The logical fallacy is just such a tool.

Logical fallacies even have an established role in legal argument. Courts have recognized formal logical fallacies, like the fallacy of the undistributed middle,[62] affirming the consequent,[63] and denying the antecedent,[64] as bases for evaluating legal arguments. Even more frequently, informal logical fallacies that have been utilized in judicial opinions in evaluating legal arguments with names like *post hoc ergo propter hoc,*[65] *argumentum ad hominem,*[66] *argumentum ad populum*,[67] begging the

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[62] *See, e.g.*, Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 134 (1948); Spencer v. Texas, 385 U.S. 554, 578-79 (1967); Creation Supply, Inc. v. Selective Ins. Co., 995 F.3d 576, 582 (7th Cir. 2021), *reh'g denied*, 2021 U.S. App. LEXIS 18149 (7th Cir. June 17, 2021); Allied Erecting & Dismantling Co. v. USX Corp., 249 F.3d 191, 202 & n.1 (3rd Cir. 2001); Lucas Aerospace v. Unison Indus., L.P., 899 F. Supp. 1268, 1287 (D. Del. 1995); Delivery Express, Inc. v. Wash. State Dep't of Lab. & Indus., 442 P.3d 637, 644 (Wash. Ct. App. 2019); Nickolas F. v. Super. Ct., 144 Cal. App. 4th 92, 113 (2006); Grand Victoria Casino & Resort, L.P. v Ind. Dep't of State, 789 N.E.2d 1041 (Ind. Tax 2003); Atl. Aluminum & Metal Distrib., Inc. v. U.S., 47 C.C.P.A. 88, 90 (1960).

[63] *See, e.g.*, Gilliam v. Nev. Power Co., 488 F.3d 1189, 1197 n.7 (9th Cir. 2007); State v. Jeske, 436 P.3d 683, 694 (Idaho 2019); City of Green Ridge v. Kreisel, 25 S.W.3d 559, 563 (Mo. Ct. App. 2000); Paulson v. State, 28 S.W.3d 570, 572 (Tex. Crim. App. 2000); Culton v. State, 95 S.W.3d 401, 405 (Tex. App. 2002).

[64] *See, e.g.*, TorPharm Inc. v. Ranbaxy Pharms., Inc., 336 F.3d 1322, 1329 & n.7 (Fed. Cir., 2003); Bell Atl. Corp. v. MFS Commc'ns Co., 901 F. Supp. 835, 849 (Del. 1995); State v. Wiedmeyer, 881 N.W.2d 805, 808 & n.7 (Wis. 2016); Villines v. Harris, 11 S.W.3d 516, 520 & n.2 (Ark. 2000); Health Pers. v. Peterson, 629 N.W.2d 132, 134 n.3 (Minn. App. 2001); Iams v. DaimlerChrysler, Corp., 174 Ohio App. 3d 537, 553 (2007); Edwards v. Riverdale Sch. Dist., 220 Ore. App. 509, 516 (2008); Hale v. Water Res. Dep't, 55 P.3d 497, 502 (Ore. App. 2002); Thompson v. State, 108 S.W.3d 269, 278 (Tex. Crim. App. 2003); In re Luna, 175 S.W.3d 315, 320 (Tex. App. 2004); New LifeCare Hosps. of N.C. LLC v. Azar, 466 F. Supp. 3d 124, 137 (D.D.C. 2020).

[65] *See, e.g.*, Mascow v. Bd. of Educ. of Franklin Park Sch. Dist. No. 84, 950 F.3d 993, 995 (7th Cir. 2020); McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1243 (11th Cir. 2005); Abebe v. Thermo Fisher Sci., Inc., 711 F. App'x 341, 342 (7th Cir. 2018); Cripe v. Henkel Corp., 858 F.3d 1110, 1112 (7th Cir. 2017).

[66] *See, e.g.*, Cook Inv. Co. v. Harvey, 20 Fed. R. Serv. 2d 612 (N.D. Ohio 1975); Cook Inv. Co. v. Harvey, 20 Fed. R. Serv. 2d 612 (N.D. Ohio 1975); SFM Corp. v. Sundstrand Corp., 102 F.R.D. 555, 560 (N.D. Ill. 1984).

[67] *See, e.g.*, Sigalas v. Lido Mar., Inc., 776 F.2d 1512, 1519 (11th Cir. 1985); Vigilant Ins. Co. v. Travelers Prop. Cas. Co. of Am., 243 F. Supp. 3d 405, 432 (S.D.N.Y. 2017); Catfish Farmers of Am. v. U.S., 36 ITRD 1481 (Ct. Int'l Trade 2014).

question,[68] hasty generalization,[69] equivocation,[70] and amphiboly,[71] to merely begin the list.[72] Accordingly, use of logical fallacies, like the Texas sharpshooter fallacy, have a recognizable place in the history of American jurisprudence. Further, this history provides examples of precisely how fallacies can be employed to design, disarm, and discuss the logical appeal of legal arguments.

D. The Texas Sharpshooter Fallacy

The Texas sharpshooter fallacy, like other informal logical fallacies, provides a useful way of explaining weakness in argument. One definition of the Texas Sharpshooter Fallacy is "[i]gnoring the difference while focusing on the similarities, thus coming to an inaccurate conclusion."[73] Sometimes, focusing on similarities and ignoring differences is seen as good legal advocacy.[74] However, arguments that embrace this approach, should be subject to scrutiny. One potentially effective method for scrutinizing the approach to legal argument is to label it as fallacious, where merited.

The problem with arguments that focus on similar facts or legal rules to the exclusion or ignorance of dissimilar (or potentially unfavorable) facts or legal rules is that they attempt to suggest that the conclusion is justified by focusing on some data and ignorance of other data. That is what made the Texas sharpshooter famous. He used the target to distract his audience from the width and breadth of the entire side of the barn, rich with places to draw a target, and possibly riddled with holes created by his bullets.[75] He placed the target, both the bullseye and the size of the rings around it, to avoid other areas of the barn.[76] As a result, the Texas sharpshooter's work is more that of

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[68] *See, e.g.*, Ross Dress for Less, Inc. v. Makarios-Oregon, LLC, 210 F. Supp. 3d 1259, 1269 (D. Or. 2016); Rosen v. Unilever U.S., Inc., No. C 09-02563 JW, 2010 WL 4807100, at *5 (N.D. Cal. May 3, 2010); In re Sundquist, 570 B.R. 92, 97 & n.1 (Bankr. E.D. Cal. 2017).

[69] *See, e.g.*, State v. Smith, 212 P.3d 232, 233 (2009), *aff'd*, 247 P.3d 676 (2011).

[70] *See, e.g.*, Encana Oil & Gas, Inc. v. Zaremba Family Farms, Inc., No. 1:12-CV-369, 2015 WL 12883545, at *6 (W.D. Mich. Sept. 18, 2015).

[71] *See, e.g.*, In re Bank of New England Corp., 359 B.R. 384, 388 & n. 24 (Bankr. D. Mass. 2007); Lawrence v. State, 41 S.W.3d 349, 358 & n.21 (Tex. App. 2001), *rev'd*, 539 U.S. 558 (2003).

[72] *See* Kevin W. Saunders, *Informal Fallacies in Legal Argumentation*, 44 S.C. L. REV. 343 (1993) (collecting and discussing several examples of informal logical fallacies in legal argumentation); *see also* DOUGLAS WALTON, INFORMAL FALLACIES, TOWARD A THEORY OF ARGUMENT CRITICISMS 3-16 (1987) (summarizing the "fifteen (plus) or so major fallacies given by the standard treatment of current and traditional logic texts, depending on how you divide them up.").

[73] BO BENNETT, LOGICALLY FALLACIOUS 213 (2015); *see also* MATTHEW WILCOX, THE BUSINESS OF CHOICE: HOW HUMAN INFLUENCE EVERYONE'S DECISION 49 (2020) (Defining the Texas Sharpshooter Fallacy as a cognitive bias, "the human tendency to focus on a small subset of a larger pool and see patterns that wouldn't appear if you considered the larger set as a whole.").

[74] *See* WILCOX, *supra* note 73.

[75] *See supra* notes 12-16 and accompanying text.

[76] *See* Wilcox, *supra* note 73.

an artist than a sharpshooter, and the audience should not be impressed with the placement of his bullet hole.

When an argument focuses on too small a set of data, ignores the potential that the data is simply random, or ignores the existence of other data, that argument might commit the Texas sharpshooter fallacy.[77] It attempts to assign a theory to a small set of data ignoring the potential that the data is focused on is not significant.[78] The application to legal argument from this logic-based perspective fits into the same pattern. A lawyer designs a legal theory focused on a limited set of factual evidence, ignoring other evidence, some of which might contradict the lawyer's proffered conclusion, might commit the Texas sharpshooter fallacy. Similarly, a lawyer who selects one court's statement of a legal rule to the exclusion of other courts' statements of a legal rule[79] might commit the Texas sharpshooter fallacy. A lawyer who applies a factored legal test, focusing on one factor and ignoring the other factors in the test, might commit the Texas sharpshooter fallacy.[80] In each example, the lawyer attempts to design a legal argument that frames a legal issue using the same logically fallacious methodology that the Texas sharpshooter employed.

E. The Texas Sharpshooter Fallacy in Legal Argument

While the Texas sharpshooter fallacy has application to a broad range of arguments, in one sense, the Texas sharpshooter fallacy is a statistical fallacy focusing on the proper use of data.[81] One useful starting place for evaluating the application of the Texas sharpshooter fallacy in legal argument

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[77] *See also* Bennett, *supra* note 73.

[78] *See* Wilcox, *supra* note 73, at 49; Bennett, *supra* note 73, at 213.

[79] Tonya Kowalski, *Toward A Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 CLINICAL L. REV. 285, 369 (2010) ("If not well-settled, a rule statement (r) or main rule must sometimes be synthesized356 (compiled and integrated) from disparate authorities into a harmonized whole, and often with subsidiary rules (subrules) and exceptions.")

[80] *See infra* Example D.

[81] *See, e.g.*, Thompson, *supra* note 15, at 257-58, 270 (citing Gawande, A., *The cancer-cluster myth*. NEW YORKER, Feb 8, 1999, at 34–37).

is to study cases[82] involving arguments for causation based on statistics.[83] In *Exxon Corp. v. Makofski*, the plaintiffs sought to prove that a person contracted acute lymphocytic leukemia because of exposure to benzene in the local water supply, and that the benzene exposure was the defendant's fault.[84] A jury concluded the defendant caused the person's acute lymphocytic leukemia.[85] The jury's finding on/of? causation was the focus of the appeal.[86]

One specific issue on appeal was whether a study by the Agency for Toxic Substances and Disease Registry (ATSDR), a division of the federal Department of Health and Human Services, supported the jury verdict of causation.[87] The ATSDR study evaluated evidence regarding the existence of benzene in the local water supply and the occurrence of acute lymphocytic leukemia in the population.[88] The peer-reviewed study resulted in a published report .[89] The court held that the study reported statistically significant increases in conditions, and statistically significant decreases for other

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[82] Studying case examples that explicitly employ concepts of logic as tools for legal reasoning is a traditional and effective method for learning about logic, law, and legal argument. Many published judicial opinions involving diverse legal and procedural issues also involve concepts of philosophical logic. These judicial opinions provide summary examples of lawyers and judges communicating about concepts of logic, including logical fallacies, and applying them in legal argument. I base my discussion of the cases in this article on my own reading and interpretation of the facts and arguments as revealed in the opinions 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, as described in those judicial opinions, in pursuit of understanding how lawyers and judges use logic in argument, and not as an effort to report on the parties, their arguments, or the facts of their cases, and this article should not be relied on as an effort to accomplish the latter. Better, more complete, and more accurate perspectives on those matters can be found in the court opinions, reviewing the records of those cases, and speaking directly with the witnesses, parties, and the attorneys involved in those cases. Of course, one would expect those witnesses, parties, and attorneys to have differing perspectives, opinions, and characterizations on and of the nature, facts, and arguments presented in the courts' opinions.

[83] "The Texas sharpshooter fallacy is the name epidemiologists have given to the tendency to assign unwarranted significance to random data by viewing it post hoc in an unduly narrow context (Gawande, 1999). The name is derived from the story of a legendary Texan who fired his rifle randomly into the side of a barn and then painted a target around each of the bullet holes. When the paint dried, he invited his neighbours to see what a great shot he was. The neighbours were impressed: they thought it was extremely improbable that the rifleman could have hit every target dead centre unless he was indeed an extraordinary marksman, and they therefore declared the man to be the greatest sharpshooter in the state. Of course, their reasoning was fallacious. Because the sharpshooter was able to fix the targets after taking the shots, the evidence of his accuracy was far less probative than it appeared. The kind of post hoc target fixing illustrated by this story has also been called *painting the target around the arrow*." Thompson, *supra* note 15.

[84] *Exxon Corp.*, 116 S.W.3d at 182.

[85] *Id*.

[86] *Id*.

[87] *Id.* at 185.

[88] *Id.* at 185. The court noted "Benzene has been known to be potentially harmful to humans for more than a century. Thus, a large number of epidemiological studies have been conducted on its effects. The parties' experts agreed that benzene has been shown to cause acute myelogenous leukemia (AML), the most common form of leukemia found in adults." *Id.* at 183.

[89] *Id.* at 185.

conditions among the population studied.[90] There were no specific findings reported for cancer or acute lymphocytic leukemia.[91]

The court held that the report and study did not support a finding of causation.[92] Among the justifications supporting the court's conclusion was the Texas sharpshooter fallacy.[93] The court observed:

> Third, the ATSDR also noted another potential source for false positives—the large sample size and number of comparisons in the study. This comment apparently refers to the unfortunately-named "Texas Sharpshooter Fallacy," in which natives of this state are alleged to shoot at the side of a barn and then draw a target where the most holes are located, thereby establishing the accuracy of their marksmanship. Epidemiologists use the term to identify the phenomenon that when a large number of health effects are surveyed, there is an increased likelihood that random chance will produce a statistically significant association when in fact none exists.[94]

Here, the court recognizes the pattern of problematic argumentative design.[95] The allegation about the argument is that, sometimes, a group of bullet holes is not indicative of good aim. Instead, it might just be a random cluster of shots.[96] Drawing a target around the random cluster does not necessarily justify a conclusion about the proficient aim of the shooter, any more than theorizing an explanation that might explain the cluster justifies conclusions offered into evidence at trial.[97] Of course, one problem with fallacies is that, on their face, they frequently appear to be quite persuasive.[98] At first glance, without a more complete perspective, arguments might seem to be supported by evidence or principle, but a more complete analysis exposes reasons to doubt the arguments.[99]

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[90] *Id*.
[91] *Id*.
[92] *Id*. at 185-186.
[93] *Id*. at 186.
[94] *Id*.
[95] *Id.*
[96] *See* Bennett, *supra* note 73, at 213. *See also* Thompson, *supra* note 15, at 257.
[97] *See* Bennett, *supra* note 73, at 213. *See also* Thompson, *supra* note 15, at 257.
[98] MARK BATTERSBY, IS THAT A FACT? A FIELD GUIDE TO STATISTICAL AND SCIENTIFIC INFORMATION 24 (2nd ed. 2016) ("Fallacies are common arguments that seem persuasive but do not provide adequate support for their conclusion.")
[99] *See* Hansen, *supra* note 14.

Similarly, in *Boughton v. Cotter Corp.*,[100] the plaintiffs alleged that they were injured by exposure to hazardous emissions of a uranium mill owned by the defendant.[101] One of the plaintiffs' claims was couched as a claim for nuisance.[102] The court described the specific issue: "The issue at hand is whether unfounded fears of disease are a form of recoverable annoyance and discomfort damages."[103] The trial court held that the allegations of fear of disease were grounded by substantial evidence and that such grounding was a prerequisite to a recovery.[104] The United States Court of Appeals for the Tenth Circuit affirmed that conclusion.[105] It supported its justification with a reference to the Texas sharpshooter fallacy:

> Even if the elevated levels of lung cancer for men had been statistically significant a court might well take account of the statistical "Texas Sharpshooter" fallacy in which a person shoots bullets at the side of a barn, then, after the fact, finds a cluster of holes and draws a circle around it to show how accurate his aim was. With eight kinds of cancer for each sex there would be sixteen potential categories here around which to "draw a circle" to show a statistically significant level of cancer. With independent variables one would expect one statistically significant reading in every twenty categories at a 95% confidence level purely by random chance. Therefore, a court might reasonably look for some medical or other scientific evidence that the alleged exposure would be expected to cause lung cancer in men to be affected differently than other forms of cancer and lung cancer in women before concluding that higher rates for just this one form of cancer in this one segment of the population were anything more than a coincidence.[106]

Like the court in *Boughton,* the court in *Exxon Corp.* recognized an important weakness in the plaintiff's argument design.[107] The court concluded that the evidence relied upon by the plaintiff might not be as statistically significant

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[100] *Boughton*, 65 F.3d at 825.
[101] *Id.*
[102] *Id.* at 831.
[103] *Id*. at 833.
[104] *Id*. at 835.
[105] *Id.* at 838.
[106] *Id.* at 835 n.20; *see also*, Branham v. Rohm and Haas Co., No. 06053590, 2006 WL 7069771 (Pa.Com.Pl. Apr. 27, 2011).
[107] *Boughton,* 65 F.3d 823 at 838; *Exxon Corp.,* 116 S.W.3d at 188.

as the plaintiff had argued.[108] The court diminished the persuasive power of the evidence by describing the Texas sharpshooter fallacy and explaining how it applied to the plaintiff's argument.[109] The use of the name "fallacy" not only provides some authority for the problem with the argument but an explanation for what the problem is and why the problem suggests weakness in the argument.[110]

The application of the Texas sharpshooter fallacy in legal argument goes beyond statistical applications seen in *Exxon Corp.* and *Boughton*. A court dismissed the persuasive power of a physician's expert testimony using the Texas sharpshooter fallacy in *Kolakowski v. Sec'y of Health & Human Services*.[111] Petitioners in the *Kolakowski* case filed a petition seeking compensation under the National Childhood Vaccine Injury Act of 1986 alleging that Thimerosal,[112] contained and administered within two Hepatitis B vaccinations, caused their son's death.[113] One issue in the *Kolakowski* case was whether there was evidence of causation.[114] One expert testified regarding the relationship between myocarditis and mercury poisoning.[115] The court stated: "In any event, [the expert's] insistent interpretation of myocarditis is ultimately irrelevant in the absence of a theoretical framework of a causation theory. As it is, [the expert's] argument about myocarditis is an exercise in the colloquially-termed 'Texas sharpshooter fallacy.'"[116] The court explained: "As Procrustes to his houseguests, [the expert] chopped and stretched the evidence to fit his designs. Moreover, in the same rebuttal/surrebuttal disputation, [the expert] focused on any (inflammatory) white blood cell on the heart section slides as evidence of an inflammatory process, even if it were rather isolated, well below the concentration of an actual inflammatory reaction, averring that one cell is all he would need to see to declare an inflammatory response."[117]

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[108] *Exxon Corp.*, 116 S.W.3d at 188.

[109] *Id.* at 186.

[110] *Id.*

[111] Kolakowski v. Sec'y of Health & Hum. Servs., No. 99-0625V, 2010 WL 5672753, at *438 (Fed. Cl. Nov. 23, 2010).

[112] Thimerosal is a mercury-based preservative that has been used in some vaccines. *See* Coal. for Mercury-Free Drugs v. Sebelius, 671 F.3d 1275, 1277 (D.C. Cir. 2012).

[113] *Kolawkowski*, 2010 WL 5672753, at *1.

[114] *Id.* at *1. ("In order to prevail on a petition for compensation under the Vaccine Act, a petitioner must show by preponderant evidence that a vaccination listed on the Vaccine Injury Table either caused an injury specified on that Table within the period designated therein, or else that such a vaccine actually caused an injury not so specified.").

[115] *Id.* at *138.

[116] *See id.*

[117] *Id.* at *137. The court's reference to Procrustes is a reference to a character in Greek mythology. Procrustes would invite guests to spend the night at his home, specifically offering them a bed to sleep in. However, he would kill each houseguest either by dismembering houseguests who were taller than the bed he offered them, or by stretching those houseguests to death who were shorter than Procrustes' bed. *See, e.g.*, NASSIM NICHOLAS TALEB, THE BED OF PROCRUSTES: PHILOSOPHICAL AND PRACTICAL

The Texas sharpshooter fallacy is not just an error or weakness in reasoning employed by testifying experts. Lawyers commit the fallacy too.[118] The *Kolakowski* court's description of the problem with this logically fallacious argument design as "chopp[ing] and stretch[ing] the evidence to fit his designs"[119] might sound a lot like what lawyers regularly do with the legal arguments they make. Lawyers regularly design arguments that leverage and emphasize the more favorable legal principles and facts available to them and understate the less favorable legal principles and facts available to them.[120] Frequently, those lawyers consider their chopping and stretching "good advocacy" rather than logically fallacious.[121] For example, one author describes an application of the Texas sharpshooter fallacy in the design of legal argument as "shallow research."

> First the advocate shoots at a blank target. Then she draws concentric circles around the bullet hole she just made. Then she offers this as proof of what a great shooter she is. This, of course, is a fallacy because the minor premise ("I shot the bullseye!") is entirely fabricated.
>
> The legal equivalent of this fallacy is "shallow research". A sharpshooter relies on [electronic legal research tools] to do a Google-type search, seizes on the first case that pops up to

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APHORISMS, at xi (2010). The story of Procrustes is frequently used as a metaphor for the problem of making known facts or data fit into a particular theory. The problem is conceptually similar in many applications to the Texas sharpshooter fallacy. *See also* Spectrum Scis. & Software, Inc. v. United States, 98 Fed. Cl. 8, 22 n.20 (2011) (citing PLUTARCH, VITA THEASEI § 11 a); Manitowoc Cnty. v. Loc. 986B, AFSCME, AFL-CIO, 168 Wis. 2d 819, 826, 484 N.W.2d 534, 536 (Wis. 1992) (citing EDITH HAMILTON, MYTHOLOGY 210–11 (1942)).

The court went on to identify another informal logical fallacy in the expert's testimony: "Dr. Shane committed a similar logical fallacy when he latched onto the findings reported in the Cinca article, and attempted to portray Thomas Kolakowski's pathological findings as similar. Although the authors of the study did not attribute certain findings to the mercury toxicity specifically, but merely described the profile of symptoms that manifested, Dr. Shane did attribute certain symptoms and pathological findings in that study to the mercury toxicity suffered by its subjects, and then strained to find similar findings in Thomas Kolakowski's records, in order to diagnose mercury toxicity. This is the '*cum hoc ergo propter hoc*' or "with this therefore because of this" fallacy, which is another variant of the '*non causa pro causa*' fallacy. Once again, without a rubric within which to understand causation, this strained reasoning is unpersuasive, to the extent it is not downright irrelevant.". *Kolawkowski*, 2010 WL 5672753, at *138.

[118] *See* RUTH ANNE ROBBINS & STEVE JOHANSEN, YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING 183 (2021).

[119] *Kolawkowski*, 2010 WL 5672753, at *137

[120] *See* Linda Edwards, *Advocacy as an Exercise in Virtue: Lawyering, Bad Facts, and Furman's High-Stakes Dilemma*, 66 MERCER L. REV. 425, 429 (2012) ("The virtually unquestioned standard advice about writing a fact statement is to write in the voice of an advocate, minimizing bad facts and maximizing helpful facts.").

[121] *See id.*

> the top of the results list, and then makes the whole argument about that result.[122]

In the same way a testifying expert might manipulate the choice of statistical data they evaluate in order to support their desired conclusion, a lawyer might be making the same logical error (either intentionally or inadvertently) by ignoring legal issues, legal rules, characterizations of rules, or case facts in favor of other without some justification.[123] The Texas sharpshooter fallacy provides an effective method of critiquing these weakness in argument design whether they are purely statistical errors, errors in evaluating or characterizing the law, errors in evaluating or characterizing the law, or a combination of both.

Of course, distinguishing the applicability of legal precedent and making sound, logical, ethical judgments regarding what precedents to emphasize in legal argument[124] and what precedents to de-empathize or distinguish is often part of the art of effective, ethical, zealous advocacy[125]. However, when an advocate ignores authority, there is power in being able to effectively scrutinize their decision or oversight by categorizing their argument as fallacious. The lawyer's decision to argue that one or a few cases to the exclusion of other cases can be synthesized to support a statement of

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[122] ROBBINS & JOHANSEN, *supra* note 122. For examples of courts characterizing arguments as focusing on some facts and ignoring others, see Pierorazio v. Thalle Const. Co., No. 13 CV 4500 VB, 2014 WL 3887185, at *3 (S.D.N.Y. June 26, 2014) ("Although the Court may not "selectively consider some factors while ignoring others," it remains free to focus on those factors most relevant to the facts before it.") (citations omitted) and Brumbelow v. Mathenia, 855 S.E.2d 425, 425 (2021) (Dillard, J., concurring) ("Suffice it to say, although it is well within the province of a trial court to resolve conflicts in the evidence, that court should not be permitted to cherry pick some undisputed facts while conveniently ignoring others in order to achieve a seemingly predetermined result.7 This may now be the law, but it ought not be.").

[123] *See* Robert Spohrer & Roger Dodd, *Spotting 10 Logical Fallacies*, TRIAL, February 2021, at 46, 49 ("In court, this occurs when a party focuses only on the evidence that supports their position, ignoring all the contradictory evidence.")

[124] *See, e.g.*, Gerald Lebovits, *Drafting New York Civil-Litigation Documents: Part XLVI-Best Practices for Persuasive Writing*, N.Y. ST. BAR ASS'N J., November/December 2015, at 64, 55 ("Organize your legal argument. Start with your strongest points--those on which you're most likely to win. If two points are equally strong, go first with the point that'll win the largest relief.").

[125] Rule 3.3 of the American Bar Association's Model Rules of Professional Conduct require that "(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or . . . ." MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2020). Comment 4 to that rule provides that "Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is *not required to make a disinterested exposition of the law*, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case." *Id.* at cmt. 4. (Emphasis added).

the law that supports their conclusion is similar to an expert witness who has a choice of data to evaluate stretching from 1980 to 2022, but limits their analysis to data from 2008 to 2020 because that data supports a desired conclusion. In both cases, the law and the expert are ignoring other data that might complicate or undermine their conclusion. Avoiding that complication or undermining might fall within the range of permissible zealous advocacy in many cases, so it would be unfair to describe the argument as unethical.[126] There might be some legal support for the argument, so it would be inaccurate to describe it as "meritless." The best description of weakness in the argument's design might be that it falls within the pattern of argument described as the Texas sharpshooter fallacy.

Examples of this category of weakness in the design of legal arguments are common.[127] For example, in *Commonwealth v. Whitson*, the dissenting justice alleged this category of weakness in the appellee's argument, albeit without describing the weakness as fallacious:

> In support of its contention that the delay in this case was not prohibited by Rule 118*, the Commonwealth relies solely upon a passing reference* in Futch to a casual dictum in the concurring opinion of Judge (now Chief Justice) Burger in Adams v. United States, 130 U.S.App.D.C. 203, 399 F.2d 574, 579 (1968):
>
> 'Necessary delay can reasonably relate to time to administratively process an accused with booking, fingerprinting and othe r steps and sometimes even to make same (sic) limited preliminary investigation into his connection with the crime for which he was arrested, especially when it is directed to possible exculpation of the one arrested.'
>
> *This argument, however, simply ignores our more recent cases.* Thus, for example, in Commonwealth v. Williams, 455 Pa. 569, 573, 319 A.2d 419, 421 (1974), we admonished:
>
> 'This Court has held pre-arraignment delay unnecessary unless required to administratively process an accused.[128]

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[126] *See id.*
[127] *See, e.g.*, Commonwealth v. Whitson, 334 A.2d 653, 657 (1975) (Roberts, J., dissenting).
[128] *Id.* (emphasis added).

The dissent's suggestion here seems to be that the Commonwealth circled its argument around a single legal authority (an authority the dissent describes as dictum at that).[129] Importantly, the dissent also describes the argument as ignoring other legal authorities that might undermine the accuracy of the Commonwealth's proffered conclusion in the appeal.[130] This type of fallacious argument design is not uncommon[131] and the Texas sharpshooter fallacy seems ready-made for effectively explaining what is unpersuasive about this argumentative design.

III. ISSUE FRAMING IN LEGAL ARGUMENT AND ANALYSIS

A. The Texas Sharpshooter Fallacy in Legal Issue-Framing

The preceding discussion has provided several examples of the Texas sharpshooter fallacy, illustrating the diverse ways that this weakness in reasoning can appear in legal argument. The fallacy might be committed by focusing on some legal rules to the exclusion of others.[132] The fallacy might be committed by focusing on some facts to the exclusion of others.[133] Alternatively, the fallacy might be woven throughout the entirety of the design of the legal argument, impacting each of the IRAC elements (issue,

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[129] *Id.*

[130] *Id.*

[131] *See, e.g.*, Poole v. City of Kankakee, 94 N.E.2d 416, 423 (Ill. 1950) ("*Relying on the cases of* City of Joliet v. Alexander, 194 Ill. 457, 62 N.E. 861, and Schnell v. City of Rock Island, 232 Ill. 89, 83 N.E. 462, 14 L.R.A., N.S., 874, where it was held that the mortgage of existing property and income created a debt which put the cities there involved beyond their constitutional debt limit, appellees urged that the pledge of revenues from existing meters is invalid on the same general principle involved in the cited cases, because the city of Kankakee will be deprived of the use of such revenues for other purposes. *Such argument ignores the modification of those cases contained* in Maffit v. City of Decatur, 322 Ill. 82, 152 N.E. 602; Ward v. City of Chicago, 342, Ill. 167, 173 N.E. 810, and Simpson v. City of Highwood, 372 Ill 212, 23 N.E.2d 62, 124 A.L.R. 1459, where it is stated that where no property of a city is pledged to secure payment of an indebtedness, it does not violate the constitutional debt limitation to pledge the revenues both from the facility being extended and from the extension.") (Emphasis added); All Metro Health Care Servs., Inc. v. Edwards, 884 N.Y.S.2d 648, 653 (N.Y. Sup. Ct. 2009) ("In arguing that a waiver has occurred, defendant cites New York cases holding that a waiver will be found where the party's degree of participation in the litigation is inconsistent with an assertion of the right to arbitrate. [Citations omitted]. However, defendant's reliance on these cases ignores the substantial authority under the FAA which holds that where the parties have not provided for New York law to govern the enforcement of their agreement, it is for the arbitrator to decide whether allegations of waiver or delay constitute a defense to arbitrability. [Citations omitted]"); Colonial Imports, Inc. v. Carlton Nw., Inc., 853 P.2d 913, 918–19 (Wash. 1993) ("Colonial's attempt to limit the "clear, cogent, and convincing evidence" standard to only certain situations is unpersuasive. The two cases Colonial discusses as applying the lower standard are not convincing, as in neither case was the standard of proof actually an issue. [Citations omitted]. Moreover, Colonial's argument ignores the numerous cases in which we have applied this standard outside of the context of claims against the government or claims involving an interest in real property. [Citations omitted].").

[132] *See supra* Part II, Section E.

[133] *See generally* Battersby, *supra* note 98.

rule, application and conclusion).[134] These elements frequently coalesce in the way the "issue" in IRAC is described by the advocate.[135] Accordingly, while the case examples above are focused on the Texas sharpshooter fallacy as a concept of philosophical logic, lawyers reading those examples might describe the cases as being about issue-framing where the lawyers frame the factual and legal issues too narrowly or too broadly.[136] That characterization would be accurate, leading us to a common application of a concept of philosophical logic in legal argument design: improperly, or at least unpersuasively, framed legal issues.

B. The Problem of Issue-Framing: "Selection and Salience"

Lawyers and judges frequently disagree on the all-important question: "what is the issue?" While the concept of framing issues is not unique to legal analysis or argument,[137] issue-framing has an essential role to play in legal argument. "Issues are the essence of a legal controversy."[138]

The Texas sharpshooter fallacy, like other informal logically fallacies, provides a useful way of explaining weakness in argument. But, for lawyers and judges, the fallacy's usefulness as an explanation might be most effective as a tool for evaluating how advocates frame legal issues.

"Framing issues is among the most important part of writing briefs and inter- or intra office memorandums. Issues create the boundary of a legal controversy."[139] Some describe the problem of legal issue-framing as being about designing the proper question for the judge or jury to answer.[140]

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[134] *See supra* Part I.

[135] The "issue" in the traditional IRAC organization of legal analysis and argument is a function of the intersection of the legal rules and essential relevant facts in the dispute. *See, e.g.*, Tonya Kowalski, *Toward A Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 CLINICAL L. REV. 285, 368 (2010) (Explaining the "issue" in IRAC "should also contain a reason that essentializes in a nutshell how key terms of art from the *governing rule* apply to *pivotal facts*.") (Emphasis added).

[136] *See supra* Part II, Section E.

[137] Kirk Hallahan, *Seven Models of Framing: Implications for Public Relations*, J. PUB. REL. RES. 207, 207 (1999) ("Framing essentially involves selection and salience. To frame is to select some aspects of perceived reality and make them more salient in the communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation and/or treatment recommendation for the item described. Frames, then, define problems—determine what a causal agent is doing and costs and benefits, usually measured in terms of cultural values; diagnose causes—identify the forces creating the problem; make moral judgments—evaluate causal agents and their effects; and suggest remedies—offer and justify treatments for the problem and predict their likely effects. ") (quoting R. M., Entman, *Framing: Toward a clarification of a fractured paradigm,* 43 J. COMM. 51, 55 (1993)).

[138] Gerald Lebovits, *You Think You Have Issues? The Art of Framing Issues in Legal Writing — Part I*, N.Y. ST. BAR ASS'N, 64, 64 (2006).

[139] *Id.*; *see also* Garner, *supra* note 3 (proposing a methodology for framing issues).

[140] G. Fred Metos, *Drafting Effective Statements of Issues,* CHAMPION, March 1998, at 49. ("An appeal, by its very nature, involves the resolution of one or more questions. Getting the desired answer to a question generally requires that the right question be placed before the court.").

Designing that issue requires managing the proper intersection of facts and law. In legal argument, effectively designing that issue requires prompting a question in a way that advocates for a particular answer.[141] "Framing essentially involves selection and salience."[142]

Accordingly, regardless of the context, issue-framing is the important work of focusing the argument audience's attention on the essential information necessary persuade them of the truth of the proffered conclusion.[143] The cases discussed above demonstrate efforts, in different contexts, of doing that very thing. Some cases frame the issue based on the universe of statistical data that the advocate wants the audience to focus on.[144] Other cases focus on the evidence[145] or the legal authority the advocate wants the audience to focus on.[146] The correct degree of focus when framing the legal issue places the audience's attention on the precise legal and factual concepts necessary to make a correct decision.[147]

While there are sources for guidance on how to frame legal issues,[148] that process is not dictated by a simple, strict legal rule. An advocate has an obligation to frame the issues in a case fairly.[149] However, some advocates

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[141] *Id.*

[142] Hallahan, *supra* note 137. One author describes the process as "interpretive construction" and explains it this way: "By interpretive construction, I refer to processes by which concrete situations are reduced to substantive legal controversies: It refers both to the way we construe a factual situation and to the way we frame the possible rules to handle the situation. What then follows logically, if not chronologically, is rational rhetoricism—the process of presenting the legal conclusions that result when interpretive constructs are applied to the "facts." This rhetorical process is the "stuff" of admirable legal analysis: distinguishing and analyzing cases, applying familiar policies to unobvious fact patterns, and emphasizing the degree to which we can rely on the least controversial underlying values." Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 592 (1981)

[143] Bryan A. Garner, *supra* note 3 ("Though critical to good legal writing, issue-framing is a subject mired in confusion").

[144] *See, e.g.*, *Boughton*, 65 F.3d at 834-35; *Exxon Corp.*, 116 S.W.3d at 185.

[145] *See, e.g.*, *Kolakowski*, 2010 WL 5672753, at *438-39.

[146] *See, e.g.*, *Whitson*, 334 A.2d at 657.

[147] Joseph Kimble, *First Things First: The Lost Art of Summarizing,* 8 SCRIBES J. LEGAL WRITING 103, 104 (2002) ("The term "deep issue" was coined by Bryan Garner, who explains that "the surface issue does not disclose the decisional premises; the deep issue makes them explicit. It yields up what Justice Holmes once called the 'implements of decision.'").

[148] However, useful efforts have been made to provide guidance for framing good issue statements. *See, e.g.*, Garner, *supra* note 3 ("The well-written issue — what I call a "deep" issue — should:

- Consist of separate sentences.
- Contain no more than 75 words.
- Incorporate enough detail to convey a sense of story.
- End with a question mark.
- Appear at the very beginning of a memo, brief, or judicial opinion — not after a statement of facts.
- Be simple enough that a stranger, preferably even a nonlawyer, can read and understand it.").

[149] Judith D. Fischer, *Got Issues? An Empirical Study About Framing Them*, 6 J. ASS'N LEGAL WRITING DIRECTORS 1, 22 (2009) ("[A] question presented should advocate for the client. The lawyer must do this with subtlety, though, lest he or she lose credibility with the court. The question should be stated fairly, in a measured and professional tone, to "appeal to the court's sense of equities and fairness. It must not overstate or distort the client's case. And it should not assume a point that the court must decide.").

will, either intentionally or unintentionally, attempt to focus the audience on the wrong issue.[150] The wrong issue might be identified because of a focus on the wrong legal issue, rule of law, or facts. Of course, a wrong issue might be identified because of a combination of incorrect or imprecise legal or factual focus. Given the diverse kinds and purposes of issue statements[151] and the different legitimate perspectives on how to frame a legal issue effectively,[152] describing what is wrong with an advocate's statement of the issue can be challenging, in the midst of the amalgam of discretion of how to frame a rule, what facts to incorporate, indeterminacy of what the facts are, how to characterize those facts, what law to apply, indeterminacy of what the law is, and how to characterize the law.

The problem of issue-framing is complicated by the fact that there are many different ways to frame issues.[153] The important work of framing legal issues is similar to the process that the Texas sharpshooter employs when painting his target. In the same way a legal advocate focuses his audience's attention on a limited universe of legally-significant facts and rules, the Texas sharpshooter builds his ruse on getting his audience to focus on the location of the hole in proximity to the target, excluding other places that the target could have been painted and other holes that might be discovered in other areas of the barn's wall.[154] Like the Texas sharpshooter, the way the issue is framed is the target that the law and facts are aimed at. If those laws and facts do not fall within the circumference of the target, they are of little or no persuasive value. As a result, lawyers and the Texas sharpshooter might have similar motives when placing and determining the breadth and width of the issue they frame. If issue framing is about "selection and salience,"[155] lawyers who commit the Texas sharpshooter fallacy in the way they frame a legal issue create an illusion that the proximity of case facts to legal principles require a specific outcome. That is, the lawyer who designs this fallacious argument makes decisions about selection by either selecting certain facts or legal principles and frames the issue in a way that makes these selections salient, requiring a particular legal conclusion.[156] When lawyers do this fairly, they are good advocates. When they do this poorly, they may commit the Texas sharpshooter fallacy in the design of their arguments.

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[150] United States v. Amaya, 828 F.3d 518, 530 (7th Cir. 2016); United States v. Parker, 762 F.3d 801, 806 n.3 (8th Cir. 2014); United States v. Lawrence, 622 F.3d 551, 559 (D.C. Cir. 2011).

[151] *See, e.g.*, Wayne Schiess & Elana Einhorn, *Issue Statements: Different Kinds for Different Documents*, 50 WASHBURN L. J. 341, 342 (2011).

[152] *See, e.g.*, Fischer, *supra* note 149.

[153] *See generally* Schiess & Einhorn, *supra* note 151.

[154] *See* Blomquist, *supra* note 11 at 960 n.41. *See also* Hansen, *supra* note 14.

[155] *See* Hallahan, *supra* note 137.

[156] *Id.*

C. Four Examples of the Texas Sharpshooter Fallacy and Design of Legal Issues and Arguments

The Texas Sharpshooter Fallacy frequently provides a conceptual tool for meeting the important challenge of evaluating the design of a legal issue or argumentative focus and explaining why the issue or argument is improperly framed. Understanding the Texas sharpshooter fallacy helps lawyers think about the conceptual, issue-framing work that lawyers and judges do from a new perspective. It provides a construct for sharpening an advocate's own issue-framing skills and provides a tool for criticizing other advocates' use of those skills. The following hypothetical examples are illustrative.

Four Examples: Example A, An argument for the applicable rule of law, based on three available rule-statements

A plaintiff's lawyer is evaluating the standard for the measure of recovery of damages by her client, a wrongfully discharged employee pursuing an employment breach of contract case in their jurisdiction. One issue in the case is whether the amount of damages claimed should be reduced by the amount the employee could have earned through accepting other available employment offered by her former employer after her employment was wrongfully terminated.[157] Some cases in that jurisdiction do not require a reduction of damages for an employee's refusal to accept employment that was a "different or inferior kind" from the kind of employment from which the employee was wrongfully discharged.[158] Other cases describe the standard differently: "'substantially similar' [employment,]. . . 'comparable employment[,]'. . . employment 'in the same general line of the first employment[,]' . . . [employment] 'equivalent to his prior position[,]' . . . [and] 'employment in a similar capacity.'"[159] What is the result if the employee was offered alternative employment opportunities by the defendant employer that were in some ways "different . . . in kind" from the original employment but that might be described as "substantially similar", "comparable" or "in the same general line of the first employment?"

Why might the plaintiff's lawyer focus on one standard and ignore the others? Is there an argumentative or ethical problem with that? Does the law provide a name for the category of argument that focuses on the "different" standard and ignores the "substantially similar", "comparable",

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[157] *See, e.g.*, Parker v. Twentieth Century-Fox Film Corp., 474 P.2d 689, 692-93 (Cal. 1970).
[158] *Id.* at 692.
[159] *Id.* at 695 (Sullivan, J., dissenting).

and "in the same general line of the first employment" standards? Does the plaintiff's lawyer's focus on one standard to the exclusion of others constitute the kind of weakness in the argument that might be described as fallacious? Does the focus on one standard to the exclusion of others fit into the pattern of the Texas sharpshooter fallacy? The example and these questions bring into focus both the problem of issue-framing in legal argument and the role logical fallacy might play in evaluating and responding to certain arguments.[160] In one sense there is nothing wrong with the argument that focuses on one standard to the exclusion of two other standards. It might even be said that the various judicial statements of the standards are simply imprecise or inconsistent efforts to describe a singular legal standard. The argument states an accurate and applicable legal rule. Further, the argument does not misstate or ignore any relevant facts. The weakness of the argument is not within the facts or the law but, instead, the logical design of the argument. However, describing that weakness is challenging.

Four Examples: Example B, An argument for a particular factual conclusion, based on three available witness observations

A criminal defense lawyer is representing a defendant in a shoplifting case. Five patrons at the store and in the store parking lot witnessed the defendant stealing an item from the store, and then walking hastily to the defendant's car in the parking lot. While the defendant at the time of the alleged shoplifting had red hair and a red beard, one witness described the defendant as having a "red mustache." The other four witnesses described the shoplifter as having a beard. The defense lawyer argues that an eyewitness described the shoplifter as having a "red mustache," that the defendant did not merely have a mustache, and as a result the jury could not find that the defendant committed the shoplifting. What is the best way to respond to that argument? Is the defense lawyer's argument persuasive? If not, why not? Does the argument fall within the pattern of argument that can be fairly described as the Texas sharpshooter fallacy?

Like Example A, the weakness in the argument is its focus on one set of data—here, one witnesses' perspective of the facts—to the ignorance of other data—four other witnesses' perspectives of the facts[161]. Further, the argument ignores potential consistencies among all of the witnesses' perspectives. The difference between Example A and B is simply that the former is focused on a universe of legal rules and the latter is focused on a

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[160] *See, e.g.*, Hallahan *supra* note 137, at 217; *See also* Hansen *supra* note 15, at 137.
[161] *See supra* Example A.

universe of factual statements.[162] Logically speaking, both arguments take the same argumentative pattern and bear the hallmark of the logical weakness: they attempt to create a theory that explains a desired conclusion, but build the theory around a single legal or factual perspective, rather than by accommodating or at least explaining the entire universe of law or facts.

Four Examples: Example C, An argument framing a legal issue in a way that supports a desired conclusion

A defendant's lawyer is evaluating whether a contractual duty to pay commercial rental payments is discharged because of the contract law doctrine of frustration of purpose.[163] The doctrine requires evaluation of whether the principal purpose of a the contract is substantially frustrated by circumstances transpiring after the parties assented to their contract.[164] The case involves a tenant at a strip mall who learned, six-months in to their five-year lease, that she would no longer be able to conduct her business, an immediate care medical clinic offering walk-in and national telemedicine services, at the location because of legislation limiting telemedicine practices. The defendant wants to design an argument that delivering telemedicine services from the leased property was the principal purpose of the lease agreement and-- as a result of the new legislation barring its telemedicine practice, the principal purpose of the contract, has been substantially frustrated; the duty to pay further rent is excused; and that the tenant should be allowed to abandon the lease without consequence. The parties consider a number of different descriptions of the "principle purpose" of the contract: (1) to operate a medical practice offering telemedicine services throughout the United States at the strip mall, (2) to operate a medical practice having a component of the business's telemedicine services at the strip mall, (3) to operate a medical practice at the strip mall, (4) to operate a professional practice at the strip mall;, and (5) to operate a business at the strip mall. The defendant's lawyer argues that the principal purpose of the contract was to conduct a telemedicine practice at the leased property. Of course, the defendant's lawyer also argues that that principal purpose was substantially frustrated, if not entirely frustrated, by the new legislative act limiting telemedicine practices within the jurisdiction.

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[162] *See supra* Example A.

[163] RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981) ("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.").

[164] *Id.*

Why would the defendant's counsel frame the issue of purpose narrowly, rather than broadly? Is framing the purpose narrowly inaccurate, dishonest, or unethical? What legal rules will manage the way the defendant frames the issue of purpose? If the defendant's framing of the issue of purpose is consistent with the law and the facts, how should the plaintiff's counsel respond to the way the defendant's counsel framed the issue? Does the argument fall within a category of arguments that take on a fallacious pattern of reasoning? Does the story of the Texas sharpshooter help understand the weakness of the defendant's lawyer's argument design? How is this argumentative design similar to those arguments in Examples A and B?

Four Examples: Example D: An argument that focuses on one factor among a multi-factored analytical test

A software developer contracts to create a custom customer relationship management system for a wealth management firm. The developer agrees to design, develop, and deploy the system so it is accessible by the employees, either working both on-site or remotely, at the firm's three regional offices. The system is to be delivered on or before December 31. The developer timely designs, develops, and deploys the system with partial success; the system is not accessible to the firm's employees who work remotely—an essential part of the firm's workforce. As a result, the firm refuses to make payment to the developer, claiming that the failure to include remote functionality constitutes a material breach of the contract. The developer claims that the breach is immaterial, and that firm should pay for the system with a discount for the limited functionality for remote employees. Many courts use a five-factor test for evaluating the materiality of a contractual breach.[165] One of the factors in the test strongly suggests the breach is immaterial. Three of the factors suggest the breach is material. One of the factors favors neither a finding of materiality nor immateriality. The developer designs an argument focused exclusively around the single factor

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[165] *See, e.g.*, Am. Diabetes Ass'n v. Friskney Fam. Tr., LLC, 177 F. Supp. 3d 855, 868 (E.D. Pa. 2016) ("Pennsylvania courts employ a multi-factor materiality analysis outlined in the Restatement (Second) of Contracts to determine whether a breach is 'simple' or 'material.' Int'l Diamond Importers, Ltd., 40 A.3d at 1273. According to the Restatement, there are five factors that courts should consider in evaluating whether a particular breach is material:

(a) the extent to which the injured party will be deprived of the benefit which it reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which it will be deprived;

(c) the extent to which the party failing to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing." (citing RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981))).

that supports its claim of immaterial breach. Is that argument appropriate? Is it a strong argument or a weak argument? Does the Texas sharpshooter fallacy provide a means for evaluating and describing the weakness in the developer's argument?

D. Using the Texas Sharpshooter Fallacy to Evaluate the Precision and Propriety of Issue-Framing

The questions raised by these hypothetical legal arguments have answers that can be provided by evaluating the problems through the lens of logical fallacy.[166] To a certain degree, and in different ways, each hypothetical argument implicates a Texas sharpshooter fallacy problem. Remembering that, in its strictest sense, the Texas sharpshooter fallacy is a statistical fallacy gives us a new perspective on these legal problems.[167] We do not ordinarily think about a universe of judicial opinions as data. We do not ordinarily think about a set of evidence elicited through investigation or discovery as data. Of course, this information is data, and it is the data that judges and lawyers use to craft arguments and decide cases. When lawyers evaluate what data they will assemble to complete their argumentative design, they make decisions about "selection and salience"[168] that are inherent in the process of framing legal issues.

When we think about legal rules and evidence as data, the applicability of the Texas sharpshooter fallacy is plain. A lawyer who focuses on too small a set of cases when advocating for the court to adopt a legal rule falls into this fallacious pattern of argument.[169] Similarly, a lawyer who focuses on too small a set of evidence in support of his case seems a little like the Texas sharpshooter, urging us to look only at the bullet hole in the bullseye and asking us to disregard any other holes in the barn.[170]

In the employment wrongful discharge case above,[171] the plaintiff's lawyer's focus on only one of several standards of when a plaintiff can recover damages after declining offers of employment is subject to scrutiny. If a plaintiff's lawyer describes the legal standard exclusively referring to one court's statement of the standard without disclosing and distinguishing the other authorities, there is a certain weakness in the design of their argument that is effectively described by referring to the Texas sharpshooter.

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[166] *See* Aikin & Talisse, *supra* note 34.
[167] Thompson, *supra* note 15, at 257.
[168] Hallahan, *supra* note 137.
[169] Thompson, *supra* note 15, at 265.
[170] *Id.* at 257.
[171] *See supra* Example A.

Plainly, the defense lawyer who seizes on one witness's testimony that the defendant had a "red mustache" is making a weak argument.[172] A response to the argument might simply be to point out that the defendant's counsel is ignoring other witnesses who described a man with a red beard as the perpetrator. A response might simply be to point out that a beard is regularly understood to include a mustache, and that a witness who says a man has a mustache is not necessarily excluding the potential that he also has a beard. While those responses might be effective, the concept of fallacy seems to strike at the heart of the problem. The problem is not that the defendant's counsel is lying about the evidence. The problem is not about some indeterminacy in the law or facts. The parties do not necessarily disagree about the facts or the law. The dispute is about the argument's design. The defendant's counsel is making the kind of argument that should not be persuasive and giving that unpersuasive argument a name that explains the weakness in and lack of persuasiveness of arguments like this one. The fallacy provides a more powerful tool for convincing a judge or jury that the defendant's argument is wrong, and importantly, justifying why the argument is unpersuasive[173].

Similarly, the lawyer raising frustration of purpose as a defense to a breach of contract claim[174] must deal with all the potential descriptions of the principal purpose of the contract. They do not have to agree with all of them, but their ignorance of them weakens their argument. The solution that the fallacy of the Texas sharpshooter provides is an explanation for why the argument is not well-designed. It is not a construct that focuses on the facts or the law, but the argument itself. Conceptual argumentative tools that focus on the design of the argument, pointing out weaknesses and strengths of such argumentative designs, provide new perspectives for advocacy. In the right cases, these argumentative tools can be persuasive.

Lastly, the lawyer responding to a material breach of contract argument[175] that focuses exclusively on the one of five factors that support its proffered conclusion has, in the logical fallacy, an additional perspective from which to evaluate and respond to the argument. Of course, not only can the lawyer for the firm make their own argument built around the factors that support a finding of materiality, but it also has conceptual and language tools to attack the design of the argument. Such tools are particularly useful in cases like this one, where the parties' disagreement is not about the law (both parties agree on the test for materiality) or the facts (both parties agree that the software does not conform to the requirements of the contract) but,

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[172] *See supra* Example B.
[173] *See generally* HAMBLIN, *supra* note 43.
[174] *See supra* Example C.
[175] *See supra* Example D.

instead, the nature of the argument advanced by the defendant. However, it seems the force of the label "Texas sharpshooter fallacy" is a function of the degree of unfairness the advocate employs with the law and facts that it focuses on. Is the advocate who focuses on one factor employing an argument that is much more fallacious than the opposing advocate who focuses on two factors?

That is the power of logic generally and fallacies like the Texas sharpshooter fallacy specifically. They provide a mechanism and metalanguage for focusing on the design of the argument, rather than the facts or law upon which the argument is based. Much of the power is in attaching the fallacy's badge of disrepute to the fallacious argument. This power simply requires a willingness to focus on the design of the argument, a little knowledge of the concept of philosophical logic, some understanding of its place in legal argument, and fair application of the label of fallacy when merited. Once utilized, the concept of logical fallacy provides a new tool for discussing and evaluating legal arguments and legal issue-framing. Importantly, this is a qualitative tool. That is, fallacy provides a way to explain that an issue is wrongly or weakly framed. It is not merely descriptive, or quantitative, like saying an issue is framed "broadly" or "narrowly." Those quantitative descriptions do little to help an advocate diffuse an argument's persuasive power. Conversely, if the issue is framed fallaciously, it is of dubious value in supporting its proffered conclusion.

Of course, it is not fair to label every argument as fallacious. At one extreme, one might say every argument that ignores a fact or a legal authority commits the Texas sharpshooter fallacy. To say that might be tempting but would be wrong. Importantly, saying that would be inconsistent with the problem the Texas sharpshooter fallacy identifies, and it might be part of why the Texas sharpshooter fallacy, unlike other fallacies, is not typically described by a rule but, instead, is best described by telling a story. It is hard, maybe impossible, to precisely define just how much unfavorable legal authority can fairly and ethically be deemphasized or ignored when making a legal argument. It is challenging to define precisely when unfavorable facts must be confronted in legal argument and when it is permissible to ignore or de-empathize them. So, fallacies generally, and the Texas sharpshooter fallacy specifically, must be handled with caution. Its application is deserved only where the advocate, like the Texas sharpshooter, is painting a target around the bullet hole, rather than making a well-placed shot directly on the target.

IV. CONCLUSION

Framing legal issues fairly and effectively is challenging. It requires different perspectives to manage indeterminacy regarding several different inputs, including facts, law, characterizations, and prudential and ethical evaluations about these elements. If the essential work of framing issues is about "selection and salience,"[176] the discretion that lawyers exercise over the selection and salience of the law and facts they marshal comes into focus as one of the most important skills lawyers bring to their role in seeking justice as advocates in our legal system. As important and complex as framing legal issues is to the process, evaluating and responding to the decisions an advocate makes is equally important.

The tension between two arguments, designed by two advocates, with two ends in mind is at work in every legal dispute. The law provides limited guiding principles for resolving this tension. While the law is replete with rules describing substantive rights, duties, and even the minute details of the procedural path that litigation takes, it provides very few rules for how lawyers should design their legal arguments. Whether a legal argument is well-designed or poorly designed is frequently determined by the outcome of an argument, rather than any objective criteria for what constitutes good legal argument. The philosophy of logic is just one perspective on providing some objectivity here. The concept of fallacy has a long history of providing tools for evaluating legal argument.

The Texas sharpshooter fallacy is one concept of philosophical logic with the potential for broad application in legal argument. When an advocate makes errors in "selection and salience,"[177] the Texas sharpshooter fallacy provides a categorization for the argument as fallacious, a construct for explaining what is missing from the fallacious argument, and a ready-made explanation for why the argument should not persuade its audience. Argument designs that simply paint a target around a bullet hole should not impress the proffered legal conclusion on their audience any more than the Texas sharpshooter's audience should be impressed with his aim.

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[176] Hallahan, supra note 137.
[177] Hallahan, *supra* note 137.