Definition can be a method of persuasion in legal writing. Although the meaning of a rule is partially fixed by its wording or its application, there is frequently room for maneuver, room for your own explanation of what is or is not meant by the term. In the following paragraph, the author argues that under even a broad definition of delivery, Davis was improperly served with a summons.

Example 2: Definition

Generally, service under C.P.L.R. § 308[1] is accomplished by delivering the summons within the state to the person to be served. However, a line of cases has interpreted "delivery" more broadly and upheld service under C.P.L.R. § 308[1] even if the summons was not handed to the person to be served. Thus, in *Daniels v. Eastman*, the court upheld service although the process server erroneously handed the envelope to Dr. Zippen instead of Dr. Lutker when the two were sitting together. The court ruled that the erroneous delivery and the subsequent redelivery to the intended recipient were "so close in time and space that [they] can be classified as part of the same act." *Id.* The delivery to Ms. Jones, however, was not so close in time and space to the redelivery to Mr. Davis as to constitute one act. Whereas, in *Daniels,* Dr. Lutker was sitting with Dr. Zippen at the time of delivery, Davis was not even present when the process server delivered the summons to Ms. Jones. Moreover, Ms. Jones did not redeliver to him until later in the day.

E. Cause and Effect

A cause and effect analysis requires a writer to explain the reasons for an occurrence. Because one frequently engages in causal analysis of facts, it is important to be alert to the complexity and subtlety of establishing and developing causal connections. Although a cause must precede an event, you cannot assume that whatever precedes an event causes it. Even if event X precedes event Y, X may be entirely unrelated to Y. You should not confuse seriality and causality, i.e., the temporal and the logical orders. To do so is to commit the fallacy of *post hoc ergo propter hoc* (after this therefore because of this). It is also important not to be too superficial or simplistic about identifying causes. A cause can be either necessary, contributory, or

sufficient. A necessary cause is one which must be present for an effect to occur but which cannot alone produce that effect. A contributory cause is one that may produce an effect but cannot produce it alone. A sufficient cause is one that alone produces the effect. Do not, therefore, identify one cause but ignore others of equal significance. Many events involve multiple causes.

Example: Cause & Effect

Not only was Bob's failure to repair his refrigerator a breach of his duty to protect a business invitee against dangers he knew or should have known about, but that breach was the proximate cause of Bull's injury. When the refrigerator tray broke, frozen hamburgers spilled onto the counter, knocking the mugs that were there onto the floor. Bull slipped on the spilt liquid and fell onto the shards of the broken mugs. As a result of this fall, he broke his ankle and cut his hands. Therefore, there was a reasonably close causal connection between the duty breached and the resulting injury. Bob's failure to have the refrigerator unit inspected and repaired was the proximate cause of the accident from which Bull suffered injuries.

F. Narration and Chronology

For a paragraph concerned with narration—as in the Statement of Facts—you will probably want to develop events in clear chronological order, that is, the order of their occurrence. You would also follow chronology to describe a process; for example, you would relate the steps necessary for filing a suit in small claims court in the order required by the court. When writing a chronological narrative, be careful not to confuse the reader by changing the sequence of events or by omitting important events.

In a descriptive paragraph, you may need to convey to your reader the setting in which some event occurred by establishing the location of persons or objects in a scene. Although there is no one way to describe a person, a place, or the location of persons or things in a scene, you will need to supply such spatial directions as "to the right," "in the foreground," or "five yards from the fire hydrant."

In the heat of creation, you may not be aware of how you developed a paragraph. At the less frenzied stage of rewriting, however, you may become aware that an idea needs explication and that one of these methods of development would clarify and strengthen your argument.

Exercise 9–C

The following exercise is a review exercise of some of the principles covered in earlier chapters and in Appendix A. Reread Exercise 2–H1; then read and edit the following sample answer to the Peterson exercise in Chapter 2. Consider the following questions:

1. Does the statement of the issue include enough information about the rule of law and relevant facts?
2. Does the "thesis" or introductory paragraph end with a conclusion that relates the law to the facts of the case? If not, write one.
3. Can you eliminate wordiness and improve sentence coherence?
4. Do the topic sentences effectively introduce the point of each paragraph?
5. Does the writer include the relevant law and facts from the precedent in the second paragraph?
6. What problems with paragraph unity does the third paragraph have?

The issue that we must explore in this case is the question whether the father is responsible for the injuries resulting from his son's misuse of a hammer. The applicable rule would be that a person has a duty to protect another against unreasonable risks. A person who breaches this duty is negligent and liable for injuries resulting from his negligence. It must be shown that leaving the tools in the basement was an unreasonable risk.

In the present case, the father left his tools in the basement. Tools are not "obviously and intrinsically dangerous." The case must be discussed in light of relevant precedent. The *Smith* case clearly applies to the case herein. In *Smith,* the court sustained defendant's demurrer to the complaint, challenging the sufficiency of the complaint. In *Smith,* the children were playing with a golf club. Many similarities obviously can be

pointed out between *Smith* and the present case. The children were identical in age. The instruments were left in an area played in by children; the accidents occurred without warning the victims.

Plaintiff herein may claim that the tools should not have been left where children could reach them. Defendant may state that in *Smith,* the golf club was left in the backyard, also a play area for children. The golf club was not held to be intrinsically dangerous. We must also be concerned with whether tools, although not inherently dangerous, can be considered more dangerous in the hands of a child than a golf club. Tools are like a golf club because they are not weapons; however, they may be misused by a child.

10

Sentence Structure

As discussed in the chapter on paragraphs, the flow of a discussion depends on the effective use of topic and transition sentences, paragraph organization, and transition words. But coherence on the paragraph level cannot be achieved unless there is coherence on the sentence level as well. Poor diction, punctuation, and sentence construction break a chain of thought by forcing readers to stop to decipher the meaning of a particular sentence. Thus, even if law students and lawyers do everything else right (display deft organization and incisive analogies), they are not communicating effectively if their sentences need translation.

It is surprising—but true—how many lawyers have sentence level problems, a phenomenon caused in part by the complex ideas that are the core of many legal documents. To write about these complex matters clearly, to communicate effectively with such diverse audiences as law professors, clients, colleagues, judges, witnesses, and juries, law students and lawyers need to pay special attention to syntax: they must make clear and logical connections between the parts, even the words, of a single sentence. The bulk of this chapter is, therefore, devoted to giving you specific suggestions that will help you avoid common sentence level problems. Before enumerating these "do's and don'ts," however, it might be fruitful to reflect a little on what a sentence actually is.

A sentence is traditionally defined as a set of words that expresses a complete thought and that contains, at the very least, a subject (a noun) and a predicate (a verb). Yet this is a somewhat bloodless definition that directs a writer to grammatical requirements of a sentence at the expense of giving a writer a "feel" for readable sentence structures.

It takes only a moment's reflection to realize that many sentences are narratives about real characters who perform real acts. Less ap-

parent is the impact this realization should have on sentence structure. Yet the fact that sentences are often narratives about characters and their actions should lead you to write sentences that follow the action of the narrative rather than sentences that bury the characters and their actions in passive voice constructions or that begin with abstract nouns. Sentences are clearest when the character in the sentence is the subject of the sentence and when the verb in the sentence describes what the character did, does, or should do.[1]

In this regard, you should be aware that many sentences about abstract ideas—principles of law, for example—are nonetheless also sentences with characters who perform actions. Sometimes these characters are mistakenly concealed:

> Contractual choice-of-forum clauses are "prima facie valid" and should be enforced unless it can be shown that enforcement would be unreasonable or that the clause was affected by fraud or overreaching.

The characters in this sentence go unidentified, although a reader could guess at their identities. The character who should enforce a choice of forum clause is the court, and the character who must show unreasonableness or fraud is the resisting party to the suit.

Because your reader probably needs information about each party's responsibilities, the sentence should chart those parties and their obligations, as in the following rewrite:

> Because a contractual choice-of-forum clause is "prima facie valid," a court will enforce it unless the resisting party can show that enforcement would be unreasonable or that the other party to the suit procured the clause through fraud or overreaching.

Of course, not all sentences are about actions. Some describe people, things or conditions. Others are about ideas and concepts. Sentences about ideas often have abstract nouns as their subjects and frequently define or comment on that subject, as in, "Truth is Beauty," or "The necessity of protecting the first amendment rights of the press from the chilling effects of defamation actions makes

[1] See Joseph M. Williams, *Style: Ten Lessons in Clarity and Grace* (6th ed. 2000), for a fuller discussion of some of the ideas in this chapter.

summary judgment an appropriate procedure." In most analytic writing, some sentences will inevitably begin with abstract subjects. Yet abstract subjects, or long subjects that present a lot of new and complex information, tend to strain the reader's concentration. To alleviate that strain, you should begin as many of these sentences as possible with easily comprehensible, short, and specific subjects: "Summary judgment is an appropriate procedure for protecting the first amendment rights of the press from the chilling effects of defamation actions."

A first-year law student might worry that short, specific subjects and simple active voice sentences will fail to impress professors, associates, clients, and courts. Yet legal writing is often a lawyer's single opportunity to tell a client's story and to reveal its legal significance to audiences that are pressed for time and unwilling to translate archaic diction and contorted sentence constructions. Thus, simple and direct sentences are more effective than convoluted sentences. In fact, the ability to write about complicated matters in a straightforward manner is the art of lawyering.

The following suggestions will help you write clear and persuasive sentences.

1. *Whenever Possible, Use Short, Concrete Subjects*

A subject is that part of a sentence about which something is being said. It may consist of a single word or of many words (a simple subject and all its attendant modifiers). The easiest sentences to read, however, have short subjects that use concrete rather than abstract nouns. No reader wants to wade through a fifteen word subject, comprised in the following sentence of "use" and its modifiers.

> Defense counsel's use of racially discriminatory peremptory challenges arising out of a state-created statutory privilege deprives excluded jurors of their equal protection rights.

Your reader would much prefer you to start with a short, concrete noun.

> Jurors are deprived of their equal protection rights by defense counsel's use of racially discriminatory peremptory challenges arising out of a state-created statutory privilege.

2. *Use Short, Active Predicates—Not Nominalizations*

The predicate is that part of a sentence that says something about what the subject is or is doing. Sentences are more dynamic and more concise when you use short verbs that express actions rather than states of existence.

Not: The actions of the transit authority in firing appellants for criticizing fare increases were a violation of the appellants' first and fourteenth amendment rights.

But: The transit authority violated the appellants' first and fourteenth amendment rights when it fired them for criticizing fare increases.

Sentences are more forceful if they focus on a verb rather than on a noun. Yet many writers convert verbs into cumbersome nouns called nominalizations. Instead of writing "the judge decided to continue the trial," they write "the judge made a decision to continue the trial." Instead of writing "the defendant knew injury could result from his negligence," they will write "the defendant had knowledge that injury could result from his negligence." The latter sentence, with the nominalization "had knowledge," dissipates the energy of the verb.

3. *Whenever Possible, Use Active Rather than Passive Voice*

In the introduction to this chapter, we suggested that sentences focus on characters and actions. To achieve such a focus, you should write most of your sentences in the active voice, that is, you should follow a subject-verb-object sequence (actor—action—object of action). Active voice sentences are easier to read because they begin with a short specific subject who then explicitly does something to someone. They have the additional virtue of being somewhat shorter than passive voice sentences.

A passive construction follows an object-verb-subject sequence (object of action-action-actor). It is constructed from forms of the verb "be" and the past participle of the main verb. In passive construction, you do not have to include the actor to have a grammatical sentence, although you risk obscuring the narrative if you end the sentence without identifying the actor.

Passive voice may be appropriate, however, if you do not know or do not want to emphasize the actor or subject, if the object of the

sentence is more important than the actor, or if the actor is obvious, as in "a new mayor was elected." Finally, passive voice sentences are appropriate when they promote paragraph coherence. Beginning a new sentence with the object of the prior sentence is one way of overlapping and connecting sentences.

a. **Unclear Use of Passive Voice**

Example: In balancing the interests, full factual development is needed in order to ensure the fair administration of justice. (Who needs full factual development? Who is balancing?)

Rewrite: To balance the interests, the court needs full factual development in order to ensure the fair administration of justice.

Or

Rewrite: In order for the courts to balance the interests, the parties should fully develop the facts.

b. **Wordy Passive Voice**

Example: A duty of care to the plaintiff was breached by the defendant when the slippery floor was left unmopped by the defendant.

Rewrite: When the defendant failed to mop the slippery floor, she breached her duty of care to the plaintiff.

c. **Appropriate Use of Passive Voice**

Example: Under Rule 11 of the Federal Rules of Procedure, factual errors alone are not enough to justify sanctions. Sanctions would be granted, however, if the attorney knew there was no factual basis for the complaint. (Here, passive voice promotes paragraph coherence in that the second sentence picks up where the first left off and focuses the reader on what is really at issue: grounds for sanctions.)

4. To Promote the Main Idea of the Sentence, Do Not Separate the Subject from the Verb with Intruding Phrases and Clauses

A sentence does not begin to become an intelligible thought until the reader knows its subject and verb. When you separate the subject and the verb with a series of interrupting phrases and clauses, you leave the reader in limbo. To be reader-friendly, keep the subject of the sentence near the verb and the verb near the object. You can move interrupting phrases and clauses either to the beginning or the end of a sentence. You can also break the sentence in two.

Example: In 1987, the patients of Kent Family Planning Center, 50,000 in number, 35% of whom were adolescents, 50% of whom were at or below the poverty level, received in the mail a sex education manual published by the Center.

Rewrite: In 1987, Kent Family Planning Center published and mailed a sex education manual to its 50,000 patients, 35% of whom were adolescents, 50% of whom were at or below the poverty level.

Or

In 1987, Kent Family Planning Center published and mailed a sex education manual to its 50,000 patients. Thirty-five percent of these patients were adolescents, and fifty percent were at or below the poverty level.

Example: Officer Miller, who at the preliminary hearing on August 8 had said the car did not look like it had been in an accident, fell ill just before the trial was due to begin and never testified.

Rewrite: Although Officer Miller had said at the preliminary hearing on August 8 that the car did not look like it had been in an accident, he fell ill just before the trial was due to begin and never testified.

5. Keep Your Sentences Relatively Short (under 25 words)

Although varying the length of your sentences makes your writing less monotonous and more interesting, it is not a good idea to pack

several ideas into one unreadably long sentence. If you have written a long and involved sentence, consider dividing it into shorter ones.

It is easy to split apart a compound sentence (two independent sentences joined by a coordinating conjunction). Instead of joining those sentences with a coordinating conjunction (and, but, or, nor, for, so, yet), put a period between them. You can also divide a long complex sentence (a sentence that has a dependent and independent clause). To do so, you must make the dependent clause independent by deleting the word that makes the clause dependent. These words are called subordinating conjunctions and include, among others, such often used words as *because*, *since*, *while*, *when*, and *although*. You can also shorten a sentence that ends with a long modifier tacked on to the end by converting that modifier into an independent sentence.

When you break long sentences into shorter ones, link your ideas with transition words that carry a preceding idea into the next sentence. Put these transition words early in the sentence so that the specific relation between the sentences is quickly apparent.

Example: Although the Kent statute authorizes a court to sentence a defendant for criminal contempt, the statute does not define contempt, and the Kent courts have been left with the task of defining contempt, which they have interpreted as requiring intent to disobey the orders of a court, a requirement similar to those in other jurisdictions.

Rewrite: Although the Kent statute authorizes a court to sentence a defendant for criminal contempt, the statute does not define contempt. The Kent courts, therefore, have been left with the task of defining contempt, which they have interpreted as requiring an intent to disobey the order of a court. This requirement is similar to those in other jurisdictions.

6. Maintain Parallel Sentence Structure (Parallelism)

Repeating a grammatical pattern is a good way of coordinating ideas in a sentence and maintaining control over complicated sentences. By making phrases or clauses syntactically similar, you are emphasizing that each element in a series is expressing a relation

similar to that of the other elements in the series. Such coordination promotes clarity and continuity.

To maintain parallelism, nouns should be paired with nouns, infinitives with infinitives, noun clauses with noun clauses, etc. Faulty parallelism results when the second or third element breaks the anticipated pattern. "Hypocritical and a fraud" shows faulty parallelism, for instance, because an adjective is paired with a noun. Parallelism can be restored either by changing "hypocritical" to the noun "hypocrite" or "fraud" to the adjective "fraudulent."

Example: She also served on the Board of the Fresh Air Fund, as a participant in the YMCA programs, and she worked for Planned Parenthood.

Rewrite: She also served on the Board of the Fresh Air Fund, participated in the YMCA programs, and worked for Planned Parenthood.

Example: An agency defense depends upon whether the agent was acting as an extension of the buyer and not for himself, if the agent was motivated by compensation, and finally, was salesman-like behavior exhibited.

Rewrite: An agency defense depends upon whether the agent was acting as an extension of the buyer and not for himself, whether the agent was motivated by compensation, and finally, whether the agent acted like a salesman.

When you are coordinating ideas in a sentence, you normally begin your coordination after the subject, that is, with the verb (as in the first example above) or with the complement (as in the second example). A complement is that part of the sentence which completes the meaning of the subject and predicate. For example, if you said only, "They made," your thought is unfinished. You must add a complement to complete the idea: "They made a last effort to settle out of court." If you have a series of parallel complements or verbs and complements, a good idea is to build your sentences so that the shortest unit of the series comes first and the longest comes last, unless logical order dictates otherwise.

Example: Some of the factors a court considers in determining the reasonableness of enforcing a forum selection clause are the

residence and citizenship of the parties, the proximity of the contractual forum to probable witnesses, and the comparative convenience for the parties of litigating in each forum.

Here, the parallelism begins with the complements and the complements are arranged in order of length.

7. Avoid Misplaced and Dangling Modifiers

Aside from the primary parts of a sentence (the subject, predicate, and complement), sentences have secondary parts called modifiers. Modifiers are words, phrases, or clauses that describe or define one of the primary parts or that further describe or qualify one of the modifiers (as in, "a court may impose sanctions upon an attorney who solicits clients that are still hospitalized").

Modifiers must be placed so that there is no uncertainty about the word or phrase they modify. A modifier should, in general, stand as close as possible to the word it modifies.

a. A modifier is *misplaced* if it modifies or refers to the wrong word or phrase. You can correct this situation by shifting the modifier closer to the word being modified. If this is not possible, rewrite the whole sentence.

Example: The court reached these conclusions by applying the "general acceptance" test for the admission of evidence resulting from the use of novel scientific procedures first articulated over sixty years ago. (The test was first articulated over sixty years ago, not the use of novel scientific procedures.)

Rewrite: The court reached these conclusions by applying the general acceptance test, which was first articulated over sixty years ago, for the admission of evidence resulting from the use of novel scientific procedures.

Or

The court reached these conclusions by applying the general acceptance test for the admission of evidence resulting from the use of novel scientific procedures. The test was first articulated over sixty years ago.

Example: Undercover agent Jones walked up to a group of teenagers standing in front of a store with the intention of buying some cocaine. (Did Jones intend to buy cocaine or did the teenagers?)

Rewrite: Intending to buy cocaine, undercover agent Jones walked up to a group of teenagers standing in front of a store.

b. A *dangling modifier* points to a word that is not in the sentence. Revise by inserting the word which is being modified.

Example: In Kent, a plaintiff whose spouse has been wrongfully killed has no cause of action for loss of consortium, denying, in effect, recovery for the destruction of the marital relationship.

Rewrite: In Kent, a plaintiff whose spouse has been wrongfully killed has no cause of action for loss of consortium. This ruling denies, in effect, recovery for the destruction of the marital relationship.

Example: After dismissing the claim, the attorney was chastised.

Rewrite: After dismissing the claim, the court chastised the attorney.

8. Identify and Punctuate Restrictive and Nonrestrictive Modifiers Correctly

There are two kinds of modifiers, restrictive and nonrestrictive. Restrictive modifiers are those that narrow the denotation of a word, that is, they narrow the class of things or persons covered.

Example: Courts that recognize loss of parental consortium as a cause of action emphasize the child's best interest.

Here, the modifier—"that recognize loss of parental consortium as a cause of action"—is restrictive because it limits the number of courts under discussion.

A nonrestrictive modifier adds information about a primary element in the sentence but does not define that element.

Example: Trial courts, unless faced with a case of first impression, tend not to make policy decisions but rather follow precedent.

In punctuating your modifiers, notice that nonrestrictive modifiers are surrounded by commas while restrictive modifiers are not. It is important to recognize the difference between restrictive and nonrestrictive modifiers, and to punctuate accordingly, because of the impact they have on the meaning of a sentence. If you write, "the court is opposed to loss of consortium damages that are speculative," you have limited the number of consortium damages to which the court is opposed. If you write, "the court is opposed to loss of consortium damages, which are speculative," you imply the court opposes all consortium damages because they are speculative in nature. Far too often litigation arises because of disputes over whether a modifier is restrictive or nonrestrictive, as in "the employee will not disclose to a competitor the names on the customer list which are not publicly known." Is the employee prohibited from revealing all names or only those names not publicly known?

Besides using commas to indicate restrictive and nonrestrictive meaning, you should be aware that the relative pronoun "that" is properly used when it introduces restrictive modifiers. "Who" and "which," however, are used to introduce both restrictive or nonrestrictive modifiers. Conventional usage also requires you to use "who" or "that" when referring to specific individuals, "that" when referring to a class composed of persons, and "which" or "that" when referring to things or ideas.

9. Eliminate Unnecessary Words

Aim for economy and simplicity of phrasing.

a. Substitute Simple Words for Cumbersome Words.

Example: By reason of the fact that the witness was out of the country, the trial was postponed.

Rewrite: The trial was postponed because the witness was out of the country.

b. Avoid "Throat–Clearing" Introductions to Sentences

Start right away with an argument. If you make the argument well, you do not have to tell the reader that you are about to do so. Most "throat-clearing" introductions are padding. They can usually be replaced with a word or omitted entirely.

Example: After discussing this question, it is important to consider the possibility that Michael's "acceptance" may have been a counter-offer.

Rewrite: A second question is whether Michael accepted the offer or, instead, counter-offered.

10. Use Quotations Sparingly

In using quotations, be selective, grammatical, and accurate. Quotations should be used selectively for two main reasons. First, a heavy reliance on quotations is frequently a signal of adequate research but inadequate analysis. Second, a paper littered with quotations is often disjointed; differences in style may jar your reader. Before you use a quotation then, think about whether the quote is necessary or whether it can be eliminated from your paper. You may be able to put the idea into your own words more efficiently and effectively. Whether you quote or you paraphrase, make sure that you then cite to the source of the idea.

It is sometimes appropriate to quote the holding of a case, and you should quote language that supplies the controlling standard for a particular area of the law. When you quote the controlling language of a statute, it is important to repeat the exact wording of the statute as you apply it to your problem. Besides using necessary quotes from the language of precedents, you might want to quote some judges for their particularly eloquent or apt language.

Generally, you should not quote a court's description of the facts. However, you should quote, rather than paraphrase, the words of a party or a witness if they are important to your case.

Example: The witness said, "I killed him and I'm glad."

Not

The witness dramatically confessed.

A quotation that is embedded in a longer sentence must fit into that sentence grammatically and logically. This sometimes takes some juggling. It is frequently easier to recast that part of the sentence which is not a quotation than to alter the quotation. The following sentence needs to be revised because the possessive pronoun "its" in the quotation wrongly refers to the parent company. "Its" is meant to refer to subsidiaries.

Example: The court found it decisive that the parent company, through its American subsidiaries, had "continued to engage in the market penetration and expansion that are its raison d'etre...."

Rewrite: The court found it decisive that the American subsidiaries of the parent company had "continued to engage in the market penetration and expansion that are its raison d'etre...."

Keep quotes short. But if you do use a long passage of fifty words or more, you must set out the quote in block form, that is, indented and single spaced. You do not use quotation marks when you set out a quote in block form. Put the citation as the first nonindented text after the quotation.

11. Use the Appropriate Tense

English is a language that has many verb tenses; this characteristic is a sign of the importance we place on accurately reporting the sequence of events and conveying the relation of one event to another. In legal writing, it is particularly important to pay attention to tenses when narrating facts and discussing case law. You should use the past tense to state all facts that have already occurred. Thus, you should use the past tense to discuss precedents. However, use the present tense to state a proposition of law.

Example: The court held [past tense] that due process requires [present tense] court-appointed counsel.

When discussing two events both of which occurred in the past, use the past perfect tense ("had" plus the past participle) to describe the earlier of two past actions.

Example: The defense objected, arguing that the court had already overruled that line of questioning.

12. Make Your Comparisons Complete and Logical

A comparative sentence must have two terms. Do not say "Jones has a stronger case." Finish the comparison by adding the second term: "Jones has a stronger case than you." In addition, make sure you are comparing like or comparable things. Do not compare, for example, your facts to a case. Compare your facts to the facts in a case. Do not say "Smith's fraudulent statements are like *John v. Doe.*" The proper comparison is "Smith's fraudulent statements are similar to those of the defendant in *John v. Doe.*"

13. Check That the Words in Your Sentence Have a Rational Relationship

The subject of your sentence should be able to perform the action expressed by the verb; if the subject cannot, your sentence lacks coherence. A court, for example, does not *contend* or *argue* that a defendant is negligent. It "holds" the defendant negligent. A court is not an advocate in the litigation; the attorneys are the advocates. Nor do courts *feel* or *believe;* their decisions are presumably based on reasons, not emotions or beliefs. What then might a court do? The court may have said something, or decided, stated, concluded, held (for propositions of law), found [that] (for facts), weighed, reasoned, indicated, implied, considered, stressed, noted, compared, added, analyzed.

A court, for example, might "apply" a balancing test or might "balance" the state's interest against a private interest. It would be incorrect, however, to write that a "test" balances those interests. A "requirement" does not "show" a "foreseeable injury," although a test might "require" a plaintiff to "show" the defendant could have foreseen injury. In other words, make sure the subject, predicate, and object of a sentence rationally relate to each other.

14. Select Concrete, Familiar, and Specific Words: Avoid Vagueness and Imprecision

We have already recommended that you use concrete words as subjects instead of abstract nouns. You should also use concrete facts in your descriptions rather than words that characterize. Instead of saying, "The defendant drove several miles over the speed limit," report that the defendant drove sixty miles per hour in a fifty mile zone. If you say, "After a period of time, Roche purchased the drugs," we do not know whether minutes elapsed or years.

Do not be afraid to use a familiar vocabulary, one you feel comfortable with. To sound professional, you do not need to inflate or strain your diction. You need not say, "The car accident victim expired." Simply tell us that he died. You run far more risk using a word the meaning of which you are uncertain than you do using a familiar vocabulary.

15. Avoid Jargon, Informal, and Esoteric Language

As an attorney, you will be writing mostly formal documents. Informal expressions in these documents jar the reader because of their inappropriate tone. Do not say, "the car's rear end abutted the public road." Say, "the rear of the car abutted the public road."

You need not be a slave to jargon or legalese, however. Delete expressions like "hereinafter" and "cease and desist" (unless the phrase describes the remedy that is being asked for). Moreover, although courts sometimes employ an esoteric vocabulary, you need not parrot that language. If a court says, "the statute does not pass constitutional muster," you can paraphrase that statement in a more contemporary idiom. For example, you could simply say that "the statute is unconstitutional."

On the other hand, you should use the wording of a court when applying a particular test that a court uses to evaluate claims and use the exact statutory language that you are applying.

16. Avoid Qualifiers and Intensifiers; Do Not Overuse Adjectives and Adverbs

It is better to demonstrate the clarity of an idea by supplying supporting arguments than to insist on it with adverbs like "clearly" or

"certainly." Do not overuse adjectives and adverbs. One apt adverb is more effective than many.

17. Avoid Sexist Language[2]

The legal profession has become increasingly sensitive to the use of sexist language. To avoid antagonizing colleagues and clients, it is important to use gender neutral language when you write.

a. The generic use of the pronoun "he" should be avoided.

– Use plural nouns and plural pronouns.

Example: The attorney must represent his client to the best of his ability.

Rewrite: Attorneys must use their best abilities in representing their clients.

– Substitute articles for pronouns or use "who" instead of he.

Example: The judge handed down his opinion on June 1st.

Rewrite: The judge handed down the opinion on June 1st.

or

Example: If an attorney solicits a client, he may be disciplined.

Rewrite: An attorney who solicits a client may be disciplined.

[2] The recommendations made in this section are adapted from the "Guidelines for the Nonsexist Use of Language" written for the American Philosophical Association by Virginia L. Warren. They were published in PROCEEDINGS AND ADDRESSES OF AMERICAN PHILOSOPHICAL ASSOCIATION, vol. 59, no. 3 (Feb. 1988), at 471–84.

– Substitute one, you or we for "he" or delete pronouns altogether.

Example: The litigator must exercise his judgment in selecting issues.

Rewrite: The litigator must exercise judgment in selecting issues.

– When all else fails, try the passive voice.

Example: The judge handed down his opinion on June 1st.

Rewrite: The opinion was handed down on June 1st.

– If you know that the judge is a man or a woman, use the correct pronoun.

b. The generic use of "man" and other gender specific nouns should be avoided.

– Use person, individual, human, people.

– Use spouse instead of wife or husband, sibling instead of sister or brother.

c. Address people by their titles whenever possible.

– Use Dr., Prof., Ms., Editor, Colleague, Chair or Chairperson.

Exercise 10–A: Sentence Structure

Diagnose error and correct.

1. In calculating damages, the salary of a full-time companion was considered to be the greatest expense.
2. The drug companies can either insure themselves against liability, absorb the damage awards, or the costs can be passed along to the consumer.
3. Canon 9, which prohibits both impropriety and the mere appearance of impropriety, and which alone is a basis for a disqualifica-

tion motion, reflects the Bar's concern with protecting the integrity of the legal system.

4. Heated arguments had often occurred over technicalities in the middle of negotiation.
5. A trial by jury was requested by defendant.
6. Keith Johnson's case is more factually similar to *Ziady v. Curley.*
7. The court admitted into evidence the decedent's letter charging her husband with cruelty, indifference, and failure to support, emphasizing that admitting the letter did not violate the statute.
8. A determination of the awarding of consequential damages is done largely on a case-by-case basis.
9. The state interest in setting a filing fee relates to revenue raising and arguably to act as a deterrent to unmeritorious use of judicial time.
10. Unlike *Elliot,* Keith's mother had never relinquished her custody.
11. In order for the plaintiff to state a claim, it must be shown that he suffered severe emotional distress.
12. Any instrument, article, or substance which, under the circumstances in which it was used, is capable of causing death or serious injury is a dangerous instrument.
13. The jury, knowing the prosecutor has the authority of the government behind her, and aware of her access to the files, gave her words great weight.
14. The proscription against a prosecutor expressing his personal opinion goes to the heart of a fair trial.
15. The McCaren–Ferguson Act makes an exemption for the business of insurance.
16. Breach of the implied warranty of habitability can occur even without a landlord's violation of city building and housing codes.
17. Turn the material below into a sentence with parallel structure.

The landlord agrees to

- Provide heat
- All utilities will be paid for
- Premises to be in good order
- He will keep the air-conditioning system maintained

Exercise 10–B: Sentence Structure

Diagnose error and correct.

1. A social host may be liable for the consequences of a guest's drunken driving if the host directly serves the alcohol, continues serving after the guest is visibly drunk, and knowing that the guest will soon be driving home.
2. Her innovative programming drastically increased attendance at the youth programs.
3. The firm entered into a two year contract with Ms. Taylor, who introduced several new products which increased sales and earned her an "employee of the year" award.
4. By silencing you, I believe your teacher violated your First Amendment rights.
5. The trial court, in dismissing Mann's complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, stated that it was not necessary to decide the merits of defendant's argument.
6. The defendant's acting with deliberate indifference is the second requirement.
7. Robertson granted visitation rights to Ms. Cavallo after she had abandoned Julia, abused another child, and she had committed heinous acts of abuse against Julia.
8. Although settlement will probably not result in the compensation of your damages to the same extent as that which would occur if you prevail at a formal hearing, it is a much quicker and more flexible process.
9. Only when the court would be interfering in inherently ecclesiastical matters and the court would be excessively entangled in Church matters will a church be able to avoid state laws.
10. By firing you, your contract was violated.
11. Such neutrality on the part of Utopia's School District cannot be compared to cases such as *Lee, Engel,* and *Abington.*
12. Julia was born prematurely and shortly thereafter began suffering withdrawal symptoms associated with drug addiction on August 3.
13. Should these matters go to trial, the Board will be exposed to the possibility of having to pay compensatory and punitive damages.

11

Types of Legal Arguments in Resolving Questions of Law

I. Introduction

THE FIRST HALF OF THIS BOOK FOCUSES on the relatively straightforward application of settled legal rules to the facts of a case. Not all legal disputes stem from disagreement about the appropriate application of a rule, however. Some disputes concern the rule itself. Disputes about rules, called doctrinal questions or "questions of law," arise when (1) it is unclear what a rule means; (2) there is a gap in the rules, perhaps because an issue has not been litigated in your jurisdiction; (3) there are conflicting rules because of a split among the courts; or (4) changes in law and society suggest a rule is no longer practical or equitable. In these situations, lawyers must either (1) interpret the rule before applying it, (2) extend a rule or create a new rule to fill the gap, (3) explain why one rule is better than another, or (4) explain why a rule needs to be refined or overruled. Only after the law has been thus clarified, can it be applied. Many disputes require both a decision about the law and its application to the facts.

The types of arguments lawyers make about questions of law can be helpfully, if not exhaustively, catalogued, for many legal arguments are standard and therefore predictable. Indeed, not only are legal arguments often predictable, but so are their counter-arguments: legal reasoning tends to fall into dualistic patterns that reflect law's adversarial nature.[1] If there is a sound analogy, there is likely a sound distinction. If a flexible rule ensures equity, a fixed rule provides notice and stability. Thus, up to a point, arguments and responses can

[1] For more detailed discussions, *see* James Boyle, "The Anatomy of a Torts Class," 34 Am. U. L. Rev. 1003 (1985); Duncan Kennedy, "A Semiotics of Legal Argument," 42 Syracuse L. Rev. 75 (1991).

be matched. Finally, lawyers tend to support their conclusions with multiple arguments (including arguments in the alternative), and these arguments often appear in predictable sequences: arguments based on authority generally precede arguments based on policy; plain meaning analyses precede legislative history. Nonetheless, not all arguments are equally relevant or equally strong. The choice and order of legal arguments are strategic decisions, especially in briefs, and require thought.

This chapter looks first at the types of arguments lawyers make about legal authority—precedents and statutes. It then describes the kinds of policy arguments that are prominent in legal discourse.

II. Authority Arguments Based on Precedent

STARE DECISIS MAKES precedent binding authority within a jurisdiction. Precedent functions in two ways: courts create common law rules and they also create binding interpretations of enacted law. Yet, under either of these two situations, *stare decisis* does not necessarily result in a rigid and mechanical application of law because there are often debates about what the precedent means. These debates tend to fall within four categories mentioned above and discussed in more detail here.

A. Broad and Narrow Interpretation

Arguments founded in precedent state, in effect, that prior decisions compel a particular outcome because the precedents and the instant case are analogous or distinguishable. Yet courts and practitioners rarely find the matter so simple. First, it can be difficult to determine exactly what the precedents require. Then, for courts, fairness to the parties and social goals also influence their formulation of holdings, requiring them to frame holdings either broadly or narrowly depending on the results they seek.

Assume a rent control law fails to define "family," and a court needs to decide if unmarried domestic partners are included in that term. One court might conclude that a domestic partner is not included in the term "family" because he or she is not a legal spouse by virtue of marriage, an institution supported by the state. In addition, this court might fear the difficult problem of defining unmarried domestic partners or of predicting the economic and social consequences of a broad

definition. In contrast, another court might define the term "family" in a noneviction provision to include adult partners unrelated by blood or law whose relationship is long-term and characterized by emotional and financial commitment and interdependence. The court might define family this way both because of the changing configuration of domestic nuclear units and to avoid the health and welfare catastrophes that could result from evicting large numbers of people from their homes upon the death of the tenant-of-record.[2]

A good practitioner will similarly manipulate the scope of a holding to serve a client's interests. The decision to interpret law broadly or narrowly is shaped by an attorney's persuasive purposes. If a precedent is favorable, it may have to be interpreted broadly and analogized as similar to the instant case. A broad interpretation is one that characterizes facts, reasoning, and holding in general or abstract terms. Thus a lesbian ex-partner might argue that the changing notions of family that prompted one court to define that term broadly in the rent control case are equally applicable in a child visitation case and support her visitation rights as the non-biological parent of a child jointly reared.

Conversely, if the precedent is unfavorable, it is often easier to argue that it is inapplicable to your case than it is to convince a court to overrule it. To convince a court to overrule, you must convince the judges that the court's own precedent is wrong. Thus, the first tactic where unfavorable precedent is involved is usually to distinguish the cases by interpreting the decision narrowly. Thus the biological mother fighting visitation by her ex-partner might argue that the health and welfare concerns that justify a broad definition of family in an eviction situation do not apply in a visitation situation, and that visitation should be awarded to biological or adoptive parents only.

B. Extending Precedents to Cover a Gap

Sometimes the facts of a precedent are significantly different from the facts in a case on which you are engaged, but the underlying rationale of the precedent seems applicable to your case. In this situation, you might want to argue that the precedent is sufficiently analogous that it should be extended to the new situation.

[2] As the court did in *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989).

Assume, for example, that the courts in your jurisdiction recognize a discovery rule exception to the statute of limitations for negligence suits. The statute requires the plaintiff to file an action within two years of the accrual of the claim, unless it is unclear when a claim begins to accrue. Generally, claims have been held to accrue at the time of injury. However, where the plaintiff learns of his or her injury only after the two-year limit has expired—as is often in the case in toxic torts, for instance—the claim accrues not at the time of injury, but at the time the injury is discovered. The courts recognized this discovery rule exception because of the unfairness to plaintiffs who, through no fault of their own, would be denied an opportunity to litigate if the claim began to accrue at the time of injury, instead of at the time the injury was discovered.

Your case is somewhat different. Your client knew about her injury before the statute expired, but she did not know its cause. She had undergone radiation therapy for breast cancer. Her reaction to this course of therapy was poor. She suffered burns, nausea and pain. Within two years of the radiation therapy, necrotic ulcers appeared, requiring surgery. During a follow-up visit six months after the surgery, your client overheard her surgeon saying to colleagues, "And there you see, my friends, what happens when the radiologist puts a patient on the table, and goes out and has a cup of coffee."[3] Here the patient knew of radiation burns and ulcers within the two year limitations period, but she did not know that the injury was caused by her radiologist's negligence until after the limitations period had expired.

As plaintiff's attorney, you would argue that the situation is analogous to hidden injury, and as with hidden injury, so here justice demands the client be afforded a day in court. The discovery rule is a rule of equity, developed to mitigate the harsh and unjust results that flow from a rigid adherence to a strict rule of law. In this case, the strict rule should not apply because the passage of time does not make it unduly difficult to present a defense and the claim is not false, frivolous or speculative. Thus you would argue that the discovery rule should be extended to include the delayed discovery of negligence as well as the delayed discovery of injury because the rationale for each exception is the same.

[3] Based on *Lopez v. Swyer*, 300 A.2d 563 (N.J. 1973).

C. Conflicting Lines of Authority

Sometimes there are two equally valid lines of authority that point in opposite directions. In cases of first impression, for example, a court may look to other jurisdictions for guidance and find that there are two or more dominant trends. These alternatives require courts and counsel to explain why one line of authority is preferable to another. Among the reasons an attorney might offer is that one line of authority is easier to apply than the other or that one trend reflects a sounder social policy. Often advocates make a "weight of authority" argument to support their positions, arguing that more courts have adopted one position than another. But numbers do not always prevail, and this type of argument must be supported by other reasons.

For instance, until resolved by the Supreme Court, there was a split among the federal courts about what "use" meant in a federal statute that enhanced the prison sentence for anyone who "uses" or "carries" a firearm during a drug transaction. One line of cases distinguished "active" from "passive or potential" employment of a firearm and held that active employment is required because such an interpretation is consistent with the ordinary meaning of "use." The other line of cases suggests that if a firearm in any way facilitates a drug transaction, it has been "used." Under this definition, a gun left on a table that is visible through a doorway may be "use" of a firearm. The Supreme Court eventually settled this split by adopting the narrow definition of use, requiring "active employment" of a weapon.[4]

D. Overruling Precedent

Sometimes precedents need to be overruled because they are outdated and no longer reflect good policy. An increase in teenage drunk driving, for example, has led a number of courts to overturn precedents prohibiting "social host" liability; the new rule renders hosts negligent when they serve liquor to teenage guests who then drive and injure a person. The old rule of nonliability simply did not work well under modern conditions.

Even if a rule is not an old one, another reason to overrule a precedent is that important new decisions in other jurisdictions have held the other way based on better reasoning. For example, many state

[4] *Bailey v. United States*, 516 U.S. 137 (1995).

courts have held that a defendant who raises an entrapment defense cannot also deny the crime by pleading not guilty.[5] Entrapment presupposes the defendant committed the crime. Thus many states do not permit a defendant who pleads not guilty to use an entrapment defense because the defenses of not guilty and entrapment are thought to be inconsistent.

The Supreme Court has held, however, that a criminal defendant could plead not guilty and still enter an entrapment defense if the defendant denies an element of the crime.[6] The *Mathews* defendant had pleaded not guilty because he denied the intent element of the crime. The Court acknowledged that inconsistent defenses ("I didn't do it; I did it but was entrapped") could be seen as encouraging perjury. Nonetheless, the Supreme Court said other more beneficial consequences outweighed the perjury concern. The legitimate purpose of entrapment in a sting operation is to take a dangerous criminal out of circulation: this purpose is thwarted if entrapment leads an otherwise law-abiding citizen into unintentionally committing a crime. Permitting the defense in this situation is a way to discourage the abusive use of sting operations. Moreover, the Court stated that the risk of perjury is actually minimal because a defendant who offered conflicting testimony would significantly reduce his credibility before the judge and jury, and thus reduce the chance of acquittal.

The *Mathews* case does not bind the states because it is based on federal criminal law, not on a state criminal statute. Thus, to state courts, it is only persuasive authority. Nonetheless, in a state criminal trial, defense counsel could argue that the superior reasoning in *Mathews* should persuade a state court to overrule precedents that held the defenses of not guilty and entrapment inconsistent.

III. Authority Arguments Based on Statutes

ADDITIONAL LAYERS OF COMPLEXITY are added with statutory interpretation. As we mentioned in Chapter 3, statutory interpretation

[5] Entrapment is a defense based on the claim that the government "set up" the defendant. In the Supreme Court case cited most often as authority for this defense, the Court explained that entrapment occurs "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense." *Sorrells v. United States,* 287 U.S. 435, 442 (1932). Entrapment is thus interpreted as a two-part test: The criminal design must originate with the government and the defendant must not be predisposed to commit the crime.

[6] *Mathews v. United States,* 485 U.S. 58 (1988).

begins with the "plain meaning" rule. To determine legislative intent, you look first at the statutory language to determine whether the words have a commonly accepted meaning that render the statute unambiguous. If not (and many times, even if so), you then analyze what the legislature intended the statute to mean by using the materials that were generated during the legislative process leading to enactment of that particular statute. You might also look at the larger legislative history—at predecessor statutes, amendments, and even similar statutes in other jurisdictions. Another technique of statutory interpretation explained in Chapter 3 is the use of canons of construction, which interpret statutory language according to types of statutes or general principles of grammar and usage.

Both courts and advocates use these interpretative techniques to explain and justify their positions. Advocates are, of course, bound by the interpretative analyses of the courts in their jurisdiction. However, since these techniques do not always yield clear answers, arguments about interpretation are the basis of many briefs. And there, as with a case law analysis, you must marshal as many arguments as are relevant to support your conclusion about the statute's meaning.

A. Plain Meaning Analysis

The plain meaning rule dictates that where the language of a statute is clear, other evidence of legislative intent is unnecessary. Only when the meaning is ambiguous should extrinsic sources be consulted. Frequently, the plain meaning of a rule can be inferred because language is rule-governed and therefore predictable. The rules of grammar govern the structure of a sentence, that is, the order and relationship of words within a sentence. Thus, for example, when Section 12102(2) of the Americans with Disabilities Act [ADA] defines disability as "*a physical or mental impairment that substantially limits one or more of the major life activities*," we know from the rules governing adverb and adjective placement that "physical" and "mental" modify impairment, not activities, and "substantially" modifies "limits." Dictionaries, stipulative definitions,[7] and common and technical usage also govern the meanings of words. Thus, for example, when Congress defines "public entity" in the ADA as "any department, agency, ...or other instrumentality of a state ... or local government,"

[7] Stipulative definitions are definitions created for use in just that one regulation.

an entity like a state department of welfare falls squarely within the plain meaning of the statutory definition.

Nonetheless, plain meaning analyses are often less definitive than they might first appear. The plain meaning of a statute is often threatened by syntactic ambiguity (uncertainty that results from the arrangement and relationship of words in a sentence) and semantic uncertainty (uncertainty that results from confusion about a word's meaning or its range of meanings).

1. *Syntactic Ambiguity*

Syntactic ambiguity is the ambiguity that results from confusion about how the parts of a sentence fit together. One of the most common syntactic problem results from the careless use of conjunctions and disjunctives: "It is a crime to solicit funds and to loiter while on public transit." Must a person both solicit and loiter to be guilty of a crime? Although the drafter probably wanted to forbid each activity independently, the use of "and" instead of "or" undermines this intention.

Another common problem is caused by the unclear placement of modifiers, especially modifiers that are positioned at the beginning or end of a series. Consider the provision, "No one may transport wholesale or retail vegetables, dairy, fruit, or other perishable products without a certificate of conveyance." It is syntactically unclear whether the modifier "without a certificate of conveyance" is confined to "other perishable products" or whether it also applies to "vegetables, dairy, and fruit" since end modifiers can describe all the items in a list or only the item closest to it. Moreover, an adjective or adverb preceding a series can be interpreted to modify the first or all the elements of the series. Thus it is ambiguous whether the adjectives "wholesale and retail" modify only vegetables or all the items in the list.

Dangling modifiers also create confusion. Justice Scalia criticized this provision in a statute controlling the National Endowment for the Arts: "Artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards for decency and respect for the diverse beliefs and values of the American public." There is no subject to which the modifier "taking into consideration" is attached. When syntax is ambiguous, context should direct our interpretation.

Yet another ambiguity that bedevils legal prose is the common failure to distinguish between restrictive and nonrestrictive modifiers. If a provision requires "two day delivery of all produce which is quickly perishable," it is unclear whether all produce is being regulated or only that which is quickly perishable. If the clause had used "that," the modifier would be restrictive. It would limit the kind of produce regulated to that which perishes quickly. If the drafter had preceded the "which" with a comma, the modifier would be nonrestrictive and mean that all produce is regulated because all produce perishes quickly. Without the comma, however, it is unclear whether the modifier is restrictive or nonrestrictive, and thus the scope of the provision is ambiguous. (See Chapter 10, Section 8.)

Finally ambiguous pronoun reference causes syntactic ambiguity: "After a plaintiff makes a prima facie case and the defendant articulates a legitimate reason for the discharge, he resumes that burden of proof." It is unclear whether "he" refers to the plaintiff or the defendant. When syntactic ambiguity exists, you must seek clarification from other sources.

2. Semantic Uncertainty

One common semantic problem is atypical usage. Words have a range of meanings—some of which are more typical than others. When the Supreme Court in *Smith v. United States*[8] held that trading a machine gun for drugs is active employment of a firearm and thus one way of "using" a firearm in violation of a statute, it was not wrong. Nonetheless, it was not employing the ordinary meaning of "use" of a firearm either. When most people think about using firearms, they think about using them as weapons, not as commodities of exchange. Thus practitioners and courts sometimes stretch words in ways that generate heated debate about their meanings and that require looking at other sources to determine intent.

There are two other frequent causes of semantic uncertainty: ambiguity and vagueness. Semantic ambiguity exists when words have two or more meanings. The meaning of "no drinking in the pool room" is ambiguous because we cannot determine on the basis of the word alone whether a "pool room" is a room with billiard tables

[8] 508 U.S. 223 (1993).

or a room with a swimming pool, or whether "drinking" refers to the consumption of any beverage or only alcoholic beverages. Although context could possibly remove some of our uncertainty, language alone cannot.

Vagueness is uncertainty that results when the boundaries of a word are fluid. Consider the ordinance "No Parking Near Hydrant." It is unclear whether "near" means 5 inches, 3 feet, or fifteen feet. Or, to take a more complicated example, consider the Americans with Disabilities Act's definition of disability as an impairment that "substantially limits one or more of the major life activities." The federal agency charged with enforcing Title III of the ADA recognized that "substantially limits" is a vague term and thus defined it further, explaining that a person is "substantially limited" if he or she is "unable to perform" a major life activity or is "significantly restricted" in performing an activity. But this clarification is itself vague: what is the difference between being restricted in performance and being significantly restricted? The uncertainty remains and recourse to other interpretative techniques is required.

To cover unanticipated situations, legislatures sometimes purposely use vague or general language, as in "unfair competition." In these situations, the legislatures expect courts to decide on a case-by-case basis what conduct falls within the category and what falls outside it. On the other hand, some statutes are so hopelessly vague that courts hold them "void for vagueness."

In deciding that a person who has asymptomatic HIV infection is protected by § 12102(2)(A) of the Americans with Disabilities Act,[9] the Supreme Court began its opinion with a plain meaning analysis of whether asymptomatic HIV infection met the definition of disability, that is, whether it is a "physical ... impairment that substantially limits one or more of the major life activities of such individual." The lower courts had split on two issues: first, whether asymptomatic HIV was a physical impairment, and second, whether it substantially limited a major life activity, reproduction.

[9] *Bragdon v. Abbott*, 524 U.S. 624 (1998).

Major life activities are defined in the regulation as activities like "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[10] Many people with HIV refrain from a major life activity, namely, reproduction. Yet some courts said reproduction is not as fundamental as the listed activities of breathing and speaking, nor is an HIV-positive person unable to perform these activities, though he might chose not to engage in them. Other courts said procreation is as fundamental as "working" and "learning."

The Supreme Court held that reproduction falls within the phrase "major life activities," agreeing with the court below that "[t]he plain meaning of the word 'major' denotes comparative importance" and "suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance."[11]

The Supreme Court also decided that asymptomatic HIV infection is a physical impairment, but not primarily on plain meaning grounds. Some of the lower courts had decided that the dictionary definition of "impairment" as "lessening" and "weakening" suggests a person who is asymptomatic is not impaired under a plain meaning analysis since there is no weakening. Others said asymptomatic HIV is a physical impairment because it attacks the immune, the hemic, and the lymphatic systems immediately. These courts were influenced by the Justice Department's definition of "physical impairment" as a disorder that detrimentally affects the hemic and lymphatic systems, among others.[12] Although the Supreme Court gave weight to the regulatory definitions of physical impairment, the Court focused on medical journals and reports when it determined that asymptomatic HIV infection is a disability.

B. Other Sources of Legislative Intent

When there is no commonly accepted judicial interpretation of statutory language, as in the lower courts' split over the meaning of physical impairment, it is necessary to consider other evidence of legislative

[10] 28 C.F.R. § 41.31(b)(2).

[11] *Bragdon*, 524 U.S. at 628, citing 107 F.3d at 939–940.

[12] 28 C.F.R. 41.31(a)(1). The Justice Department was charged with enforcing Titles II and III under the ADA.

intent. Sometimes an ambiguous term or provision can be clarified by examining the statutory context, since the language in one part of a statute may help in determining the meaning of ambiguous language in a different part of the same statute. Preambles or Statements of Purpose are another important source. Evidence of legislative intent also comes from extrinsic evidence, especially from a bill's legislative history. Intent is often inferred from the paper trail that tracks a statute's process through the legislature—from its introduction as a bill, to its deliberation in committee, to the vote on the floor. Each stage produces documentation that provides evidence of intent. Committee reports are important sources of legislative intent. Legislative activity and inactivity is yet another useful type of analysis: a statute's relation to predecessor statutes as well as its history of amendment, whether the amendments are rejected or adopted, all provide clues to legislative intent. Sometimes lawyers go even further afield to determine intent: they examine similar statutes in other jurisdictions to see what light they may shed on the statute in question.

1. Statutory Context

Sometimes statutory context can resolve questions about the meaning of terms within that statute. Statutes should be interpreted to promote coherence among the parts of the statute itself. If the exact language of one provision is used elsewhere in the statute, that initial use may give clues to the intended meaning of the words when they are used later. If similar but not identical language is used elsewhere in the statute, the difference in the wording may help you interpret the different meanings. Thus, the context of the statute as a whole and the language in other parts of the statute may help you interpret the scope of the disputed language. It also follows that language should be interpreted in the spirit of a statute's preamble or statement of purpose.

The introductory language of the ADA could also be interpreted to indicate its broad remedial purpose. The introduction states "the nation's proper goals regarding individuals with disabilities are to assume equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals" 42 U.S.C. § 12101(a)(8). The Act aspires to give "people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our society is justifiably famous." 42 U.S.C.

§ 12101(a)(9). A plaintiff may argue that this broad statement of purpose supports an inclusive rather than exclusive interpretation of disability: it weakens the argument that asymptomatic HIV is not a disability. A defendant, however, would interpret that language to mean only that the ADA should be interpreted to end discrimination toward disabled people, not to interpret the term "disability."

Some might interpret the broad remedial purpose of the ADA to also be embodied in the third prong of the disability definition,[13] which includes those persons who are not in fact disabled, but who are "regarded as" disabled, 42 U.S.C. § 121202(2)(c). Here Congress was implementing a policy of broad protection by recognizing that a discriminator's actions and beliefs toward an individual are as handicapping as the physical limitations of the impairment itself.

2. *Legislative History*

When Congress enacted the Americans with Disabilities Act in 1990, it left a well documented record of its deliberations. The ADA is therefore a good illustration of the uses of legislative documents. Indeed, the United States Congress often produces a voluminous legislative history, whereas state legislatures tend to have insubstantial records. Where the record is insubstantial or where it reveals ambivalence and conflict, courts have to extrapolate purposes from evidence other than legislative documents.

In the case of the ADA, both House and Senate Committee Reports as well as statements from the Congressional Record demonstrate the consensus within Congress that AIDS, as well as asymptomatic HIV, was intended to be a protected disability. The Supreme Court relied on these reports in *Bragdon.*

> All indications are that Congress was well aware of the position taken by the Office of Legal Counsel [of the Justice Department] when enacting the ADA and intended to give that position [asymptomatic HIV infection is a disability] its active endorsement. H.R. Rep. No. 101–485, pt. 2, p. 52 (1990) (endorsing the analysis and conclusion of the OLC Opinion); id., pt. 3, at 28, n. 18 (same); S. Rep. No. 101–116, pp. 21,22 (1989) (same).... Again the legislative record indicates that Congress intended to ratify HUD's interpretation [disability includes

[13] This was not an issue in the Bragdon decision.

infection with HIV] when it reiterated the same definition in the ADA. H.R. Rep. No. 101–485, pt. 2, at 50; id., pt. 3, at 27; id., pt. 4, at 36; S. Rep. No. 101–116, at 21.

3. Predecessor and Similar Statutes

It is often helpful to look at predecessor statutes when interpreting a current statute, since continuity and change are both equally significant.

The Supreme Court in *Bragdon* relied especially on the fact that the ADA incorporated almost verbatim the definition of disability used in the Rehabilitation Act of 1973,[14] and that Congress included a provision directing the courts to construe the ADA as granting at least as much protection as that provided by the regulations implementing the Rehabilitation Act. Thus the precedents that arose under the Rehabilitation Act apply to the ADA. The Rehabilitation Act cases have consistently held that both AIDS and asymptomatic HIV infection constitute disabilities, and the Supreme Court took account of those cases.

Statutes that adopt rather than reject provisions of predecessor statutes should be interpreted consistently, as should other statutes relevant to the same area of law, in order to keep the body of the law coherent. This is the policy behind the in *pari materia* canon discussed in Chapter 3.

4. Regulatory Agencies

If the administrative agency charged with enforcing a statute offers a construction that is reasonable and that does not conflict with the statute, courts defer to that agency's construction. In the context of the ADA, the Justice Department is the agency charged with enforcing Title III of the ADA. Its regulations specifically define the phrase "physical impairment" by a list of diseases that includes HIV disease, whether symptomatic or asymptomatic.[15] Although a court is the final arbiter of statutory construction, it will not substitute a different reading for that of a reasonable agency interpretation unless that interpretation is capricious or manifestly contrary to the statute.

[14] The Rehabilitation Act applied to government employers and employees. The ADA extended the scope of the Rehab Act.

[15] 28 C.F.R. § 36–104(1)(iii).

5. Legislative Activity

A sometimes useful, but often inconclusive, type of analysis is one that examines related legislative action or inaction. If language was changed by amendment or changed in a related statute, the change may clarify and make explicit the legislature's intent. If it remains the same, the continuity may be an indication that the language as currently interpreted comports with legislative intent.

The 1990 ADA broadened the protection against discrimination that disabled persons received under the Rehabilitation Act of 1973 and the National Fair Housing Act Amendments of 1988. The Rehab Act protected disabled government employees from discrimination. The Fair Housing amendments barred housing discrimination. The ADA extends that protection in employment and places of accommodation. In adopting the same definition of disability in each of these statutes, one that encompasses HIV infection, Congress indicates no change in interpretation is intended.

It is also important to note regulatory action and inaction. For example, the Justice Department originally took the position that decisions about whether asymptomatic HIV-positive persons were disabled should be made on a case-by-case basis rather than by a *per se* rule. It later reversed its position on the physiological impact of HIV infection, reasoning that the overwhelming majority of infected persons exhibit abnormalities of the immune system and are therefore disabled as a matter of law. Its new provision eliminates one of the previous possible outcomes. Such changes need to be tracked for your analysis to be complete and accurate.

C. Canons of Construction

As discussed in Chapter 3, the canons of construction provide guidelines for interpreting statutes when meaning is ambiguous. To the discussion in Chapter 3, we add here a word of warning: just as there are arguments and counter-arguments, so are there canons and, so to speak, "counter-canons."[16] Thus, if one canon says courts must give effect to unambiguous statutory language, another says plain language need not be given effect when doing so would defeat legislative intent or have absurd or unjust results.

[16] For a more complete listing of opposing canons, *see* Carl Llewellyn, "Remarks on the Theory of Appellate Decisions and the Rules or Canons about How Statutes are to be Construed," 3 Vand. L. Rev. 395, 401–06 (1950).

The dissent in *Bragdon v. Abbott* conceded an *expressio unius, exclusio unius* argument (the expression of one thing excludes another) when it agreed that the list of activities that follows "major life activities" in the ADA is illustrative, not exhaustive. The list does not include reproduction. Nonetheless, Chief Justice Rehnquist's dissent argued that reproduction is not "major" in the sense that it is not performed as often or to the same extent as the listed activities of "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Thus the Chief Justice made an *ejusdem generis* argument (of the same genus or class) that reproduction does not fall into the same class as the activities mentioned. The majority disagreed, interpreting "major" as meaning important.

IV. Policy Arguments

POLICY ARGUMENTS WILL OFTEN DECIDE A CASE, especially when each party offers plausible interpretations of the law. In this situation, the judge may then decide the case on the basis of the social goals that the decision will promote, and the purposes behind the particular rules.

Policy arguments can be categorized in many ways, but one useful system is to divide them into four basic groups: normative arguments, that is, arguments about shared values and goals that a law should promote; economic arguments, which look at the economic consequences of a rule; institutional competence arguments, that is, structural arguments about the proper relationship of courts to other courts and courts to other branches of government; and judicial administration arguments, arguments about the practical effects of a ruling on the administration of justice. These categories are not, of course, mutually exclusive.

A. Normative Arguments

Normative arguments fall into at least three types. There are moral arguments, which are arguments about whether a rule advances or offends moral principles; there are social policy arguments, which involve a discussion of whether a rule advances or harms a social goal; and there are corrective justice arguments, which revolve around whether the application of a rule is just in a particular case. Moral and social policy arguments are not always easily separable because

they both debate the greater good, but the following example illustrates the difference: draft evasion should not be a crime because the taking of life is morally reprehensible, or draft evasion should be a crime because it is a threat to national security. Some rules of equity are derived from moral principles and social policy, for example, a person may not profit from his own wrong, and a plaintiff must come into equity with "clean hands." Corrective justice arguments focus on the actual parties before the court and are traditionally, but arguably, both the basis of our legal system and the province, in particular, of every trial court.

Assume you are involved in a case that asks the court to recognize for the first time a claim for damages for loss of parental consortium. Your clients are children whose mother suffered injuries when an intoxicated driver went through a red light and struck her. The mother now suffers from permanent spinal paralysis, brain damage, and impaired speech. She is confined to bed and requires constant custodial care. She no longer recognizes her children.

Plaintiffs here can make corrective justice and social policy arguments. They can argue that a small but steadily increasing number of jurisdictions permit loss of parental consortium claims because compensation comports with notions of public policy and fairness. Between the two parties, corrective justice demands that the tortfeasor compensates the children for their tragic loss of parental guidance, services, love, and companionship. Providing them with the resources to obtain live-in help or to receive psychiatric assistance can help the children make a permanent adjustment to their loss. Recognition of the claim also serves two important social policies: it preserves the deterrent function of tort law and compensates for real losses.

Some normative arguments are vulnerable to the accusation that they are political. Judges may be therefore reluctant to base, or to admit basing, decisions upon their moral and political views. Yet, as one judge has written, cases that break new ground[17] are often decided on "moral, social, or economic, *i.e.*, political reasons."[18]

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[17] Consider, for example, *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Roe v. Wade*, 410 U.S. 113 (1973); *Meritor v. Vinson*, 477 U.S. 57 (1986).

[18] Robert A. Leflar, "Honest Judicial Opinions" 74 Nw. U. L. Rev. 721, 741 (1979). *See also* Judith S. Kaye, "[A] court must resolve every dispute before it. The court has to go one way or another, and either result necessarily involves a judge's choice, sometimes a judge's social policy choice. "Things Judges Do: State Statutory Interpretation," 13 Touro L. Rev. 595, 610–11 (1997).

B. Economic Arguments

Economic arguments have assumed an increasingly important role in legal decisionmaking. Economic arguments are concerned with efficient allocation of resources. One economic approach to the law asks, for example, whether a particular decision is preferable because it spreads the losses among larger segments of the population. Other economic arguments focus on whether a rule ensures optimal efficiency.[19] For those who subscribe to this approach, an efficient outcome is the preferred outcome regardless of fairness between the parties.

The defendant in the loss of parental consortium problem may have trouble countering the plaintiffs' normative arguments, but he has some reasonable economic ones. First, he may argue that permitting these claims could effectively result in a double recovery since a jury may, as a practical matter, compensate a child by means of an award to the surviving parent, if there is one. Moreover, double recovery costs will ultimately be borne by the public generally through increased insurance costs.

C. Institutional Competence Arguments

Institutional competence involves an examination of the proper role of each branch of government. For example, courts may defer to the legislature to create or to repeal a cause of action if they believe that the legislature, as the popularly elected branch of government, is the more appropriate forum to change the law. Lower courts will defer to the binding power of higher appellate courts' rules. Another aspect of institutional competence that courts consider is whether a particular decision will interfere with the work of administrative agencies.

Both parties in the loss of parental consortium hypothetical have strong institutional competence arguments. The defendant will argue that any change in the law on an issue of public policy should be made by the elected members of the legislature and not the courts. As an institution, the legislature, unlike a court, can gather information on a number of relevant questions, such as:

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[19] For an explanation of the application of basic economic analysis to law, see Helene Shapo and Marshall Shapo, *Law School without Fear* (1996).

1. whether there is any practical necessity for creating a separate cause of action for a child whose parent has been negligently injured;
2. what limiting principles—for example, the age of the child—should circumscribe such a cause of action;
3. what impact such a cause of action would have on insurance rates and other costs to the general public;
4. what, if any, limit on allowable damages should be imposed as a matter of social policy.

Accordingly, the defendant will contend it is for the members of the legislature to debate and decide this issue.

Plaintiffs will respond that loss of consortium is an item of damages that was initially created by the courts. Changes in the law of consortium have been made by the courts, for example, in permitting wives as well as husbands damages for loss of consortium. Moreover, it is not a highly complex doctrine. Therefore, it is wholly appropriate for the courts to decide this issue and not defer to the legislature. In fact, the plaintiff will argue the courts would be abdicating their responsibility if they did not reform the common law to meet the evolving standards of justice.

D. Judicial Administration Arguments

Judicial administration arguments are arguments about the practicality or impracticality of applying a rule. One typical administration of justice argument analyzes the merit of a "bright line" rule versus a flexible rule. Precise, narrow rules provide clear notice and consistency and are easy to administer. They leave little to judicial discretion. In contrast, flexible rules are more responsive to individual circumstances and more likely to promote fairness to the parties. Because flexible rules involve judicial discretion, however, they are less predictable and relatively prone to judicial abuse. Other judicial administration arguments include "slippery slope" and "floodgate" arguments respectively, that the rule is so broad it will be applied in inappropriate circumstances or inundate the courts with suits. Such suits waste judicial resources, as do rules that open the door to speculative, frivolous, or false claims. Finally, if a rule is so complex that it will be difficult to administer, practitioners might make arguments about conserving judicial resources.

The defendant in the loss of parental consortium suit will argue that since each injury would lead to an increased number of law suits, the liability of an individual tortfeasor to a single family based on a single event would become unreasonable and oppressive. Moreover, recognition of the claim will create a slippery slope. It could become unclear how to measure damages and whether to draw the line at children or to include grandparents, or aunts and uncles. Plaintiffs will counter that where children's welfare is at stake, administrative concerns, like the possibility of increased litigation, should be secondary. Moreover, damages are no more uncertain in this type of claim than they are for pain and suffering in personal injury and wrongful death actions, or in the spouse's claim for loss of consortium. Thus this claim is no harder to handle than those, especially since the possibility of double recovery can be avoided by careful jury instructions.

As the issue of loss of parental consortium illustrates, policy arguments often compete against each other. Sometimes one party will directly refute the logic of another's argument: although children whose parents have suffered a severe injury have themselves suffered a severe loss, an action for loss of parental consortium is simply unnecessary since compensation for emotional loss and lost economic support can be factored into an uninjured parent's award. Sometimes, one policy argument is countered by shifting the context. If one party argues fairness to the individual, the other stresses the needs of the community or efficiency. If one party focuses on freedom of action (the right to drive), the other focuses on the right to be secure (the right to be protected from drunk drivers). In the consortium case, competing policies need to be balanced: the negative effects of an increased burden on judicial resources and increased insurance costs must be weighed against fair compensation for children and society's interest in deterring negligent conduct. A court might decide, for example, that, in the context of single-parent families, the possibility of parental injury compels recognition of the cause of action because a child of a single parent cannot receive compensation through an uninjured parent's cause of action. This interest outweighs concerns over economic and judicial resources. Thus you must assess competing policies by testing their logic or by deciding that although

a number of policies have merit, some policy interests are weightier than others.

V. Organizing Levels of Argument in Questions of Law

WHEN YOU WRITE ABOUT QUESTIONS OF LAW, there are four primary analytic strategies.

- Statutory interpretation focusing on the language of a statute.
- Statutory interpretation focusing on the legislative history of a statute.
- Case law analysis focusing on which common law rule applies, how to frame a common law rule, or how courts have interpreted statutory language.
- Policy analysis focusing on the underlying reasons why a statute or common law rule should or should not control or be interpreted in a particular way.

The extent of these analyses depends on the strength of the arguments you want to make, although in statutory analysis you would always start with plain meaning, even if you can only say there is none or that it is ambiguous. Then go to legislative history. In the asymptomatic HIV problem, plaintiffs would start with a plain meaning analysis and move on to legislative history, since those arguments favored them. The defendants might open by arguing that the statutory language requires individualized inquiry, and then go to the cases that have adopted that statutory interpretation. Thus you must assess what types of argument you can make and their authority and strength.

In addition to making a variety of arguments in support of a contention, you will often need to make alternative arguments also. Alternative arguments are a staple of legal analysis. To argue in the alternative, you must concede your first theory in order to raise additional ones. In an entrapment case, for example, you might be defending a client who denied the intent element of a state charge of drug possession: he did not know that the pipe an undercover government agent handed him contained cocaine, although he admitted committing the act itself, that is, admitted smoking the pipe. As defense counsel, you would interpret the state precedents narrowly and try to distinguish them. Unlike your client, the defendants in

the precedents had not denied intent; they denied committing the crime altogether. If the state court is not persuaded by this distinction, your alternative argument is that those precedents should be overruled. You would justify this argument by pointing to the important policy argument in Mathews that the government must be prevented from enticing innocents into a criminal act.

As the above example suggests, authority arguments often depend on or are supported by policy arguments. In assessing the merits of a broad versus a narrow interpretation of precedent or of one line of cases over another, policy plays a role. In deciding whether to extend a precedent or to overrule it, policy plays a role. Thus policy arguments are often raised in context, interwoven into the discussion of other points, rather than separated out. Sometimes, however, policy concerns are raised in a separate section. Here you could organize either around the types of policy arguments being made, describing and evaluating each party's argument on one policy concern. After discussing all the relevant policy issues, you would assess which party had the stronger overall position. Alternatively, you could organize around parties—making all the arguments of one party before moving to the next. Here too, you would need to conclude by weighing the overall merits of each position.

Thus, complex legal analysis often involves strategic thinking and several levels of argument. You will need to examine a variety of sources and their interrelationships, and to develop analytic strategies that will enable you to resolve a question in a logical and persuasive manner. Persuasion is especially important when you write a brief, but even in a memorandum you want to persuade your reader that your analysis is correct and complete.

Exercise 11–A

The defendant Smith was charged with burglary, which under the New York Penal Law § 140.20 requires the defendant to "enter ... unlawfully in a building with intent to commit a crime." Smith had climbed on the roof of a one-story structure in order to pour oil on the building to set it on fire.

1. Which statutory language is at issue in this prosecution?
2. Below are two columns of arguments that can be made in this case. The left column lists arguments the defendant can make; the right

column lists the state's answering arguments. The arguments are not listed in matching order.

Match the defendant's and the state's arguments and characterize them as to the type of argument each is. Then write an outline of the order in which you would analyze this issue.

3. How would you decide this case if this were before you on the defendant's motion to dismiss the indictment?

Smith	State
a. The statute does not define "enter ... in a building" and the plain meaning of the words requires some opening to the building large enough for the defendant's body to pass through.	a. The scope of the common law of burglary and its purpose was expanded by the concept of the curtilage, which is the area in close proximity to the dwelling house. Unlawful entry of an out-building within the curtilage is burglary. The crime is not restricted to maintaining security within the four walls.
b. In a recent case from the N.Y. Court of Appeals, *People v. King*, the court held that the defendant violated § 140.20 when he cut a small hole in a part of a metal security gate. Defendant attempted to get into a store on the ground floor of a building. The metal gate covered the display windows and the vestibule area that led past the display windows into the interior of the store. Defendant cut the hole in the gate directly in front of the vestibule. The court held that the vestibule was functionally indistinguishable from the display window and store because it could be closed off from the public by the security gate. *King* requires that a defendant must intrude into an enclosed space in or connected to a building.	b. Because the Penal Law does not define enter, the word retains its common law meaning which is that entry is accomplished when a person intrudes within a building no matter how slightly.

Smith	State
c. The purpose of burglary statutes is to preserve the internal security of a dwelling and the crime requires some breaking of the planes created by the threshold and walls of the structure.	c. *King* means that the element of entering is satisfied if the defendant goes into an area of a building or an area related to a building to which the public can be denied access.

Exercise 11–B

When John Trent was arrested for possession of a controlled substance, he was in Illinois and with his friend Timothy Lot, who had given him the cocaine-filled pipe. Suppose that Lot was not a police informer, and indeed did not know that it was an undercover police officer who supplied him with cocaine. Suppose also that the undercover officer urged Lot to provide the drugs to his "special friends in government positions," and Trent was a local government official.

An Illinois statute, § 7–12, provides the entrapment defense for a person whose conduct "is incited or induced by a public officer or employee, or agent of either." The statute does not define "agent."

The trial court denied Trent's request for an instruction on the ground that Lot was not an agent of a public officer because he did not knowingly act on the officer's behalf.

1. List the types of materials you would research to analyze whether an agent must be a knowing agent under the Illinois statute.

2. Which types of arguments would you want to use? How would you organize your analysis?

3. Read the arguments set out below. Which kinds of strategies are each of these writers using? Evaluate the strength of each. Which ones would you prefer to use? Which ones would you avoid? Organize the strategies you would use in a memorandum analysis as they pertain to 1) statutory arguments, 2) case analysis, and 3) policy analysis.

Arguments:

a. Section 7–12 does not define the term "agent." However, the Committee Comment suggests that the legislature did not intend to require a knowing agent. The Comment provides:

The defense has been recognized as proper not only when the person alleged to have incited the offense was a government officer or agent, but also when he was an investigator privately hired and acting without contact with law enforcement authorities. One case sometimes cited as an entrapment case involved a burglary of a private office, planned and executed by a detective with the knowledge of the owner of the office, to cause the arrest and prosecution of several men who were suspected of having perpetrated a series of burglaries. Although the Illinois Supreme Court referred to the entrapment situation, the basis for the reversal of the judgment was that the "victim" consented to the conduct, and since lack of consent is an element of the offense, no burglary was committed.

b. If the legislature intended to require a knowing agent, it would have said so. For example, § 4–3 of the Criminal code generally defines the mental state element for the entire Criminal code and says that "knowledge is not an element of an offense unless the statute clearly defines it as such."

c. Two Illinois appellate courts have reached opposite conclusions as to whether a defendant is entitled to an entrapment instruction where a private person unknowingly worked with an undercover policeman to buy drugs from the defendant.

In one case, in which the appellate court held that the trial court correctly rejected the instruction, the private party had initiated the contact with the police officer. He also had initiated the contacts with the defendant, and urged the defendant to sell the drugs. In the other case, the private party's only role was to communicate the government's inducements to the defendant directly. The appellate court held that the trial court should have instructed the jury on entrapment.

d. The lower federal courts are split as to whether the middleman must know he is acting for the government.

e. Recognition of entrapment where the police use an unknowing middleman is necessary to prevent the police from engaging in unchecked abuses. Otherwise, police will avail themselves of this technique and unfairly induce people to commit crimes.

f. When the police instruct a middleman to target a particular person, all courts permit that person to raise the entrapment defense. In

this case, the police did not name Trent as the target but described the target in a way that logically led Lot to Trent.

g. If the legislature were opposed to police using middlemen, it would have legislated against it.

h. Law enforcement agencies can best control abuses administratively by issuing clear guidelines to their personnel.

i. Section 7–12 defines the terms "public officer" and "public employee" as well as several other terms. In light of this specificity, the fact that the section does not define "agent" implies that the legislature intended not to restrict its meaning.

j. Black's Law Dictionary defines agent as "one who represents and acts for another under the contract or relation of agency."

k. If a police officer is not present during the transaction between a defendant and a middleman, an entrapment defense would present the danger of collusion between the defendant and middleman and would encourage false statements at trial.

Exercise 11–C

1. Title 18 U.S.C. § 2511(1)(a) of the Omnibus Crime Control and Safe Streets Act makes it unlawful for "any person ... [to] intentionally intercept ... any wire ... communication" without a court order. Edna Mack was charged with a violation of this section for installing a tape recording device on her home telephone and taping her husband John's conversations with a woman with whom he was having an extra-marital affair. Her husband had not consented to the wiretap and Ms. Mack had not gotten a court order. John Mack sued his wife (from whom he then separated) under the statute, which permits civil damages suits for violation of the statute. This suit raised two issues: Does the statute apply to Ms. Mack, and if so, was her husband entitled to damages.

For the first issue, organize the following into arguments for each party, and explain what type of argument each is.

a. The statute apples to "any person." Section 2510 defines "person" to include "any individual." Therefore, Ms. Mack is a person within the meaning of the statute.