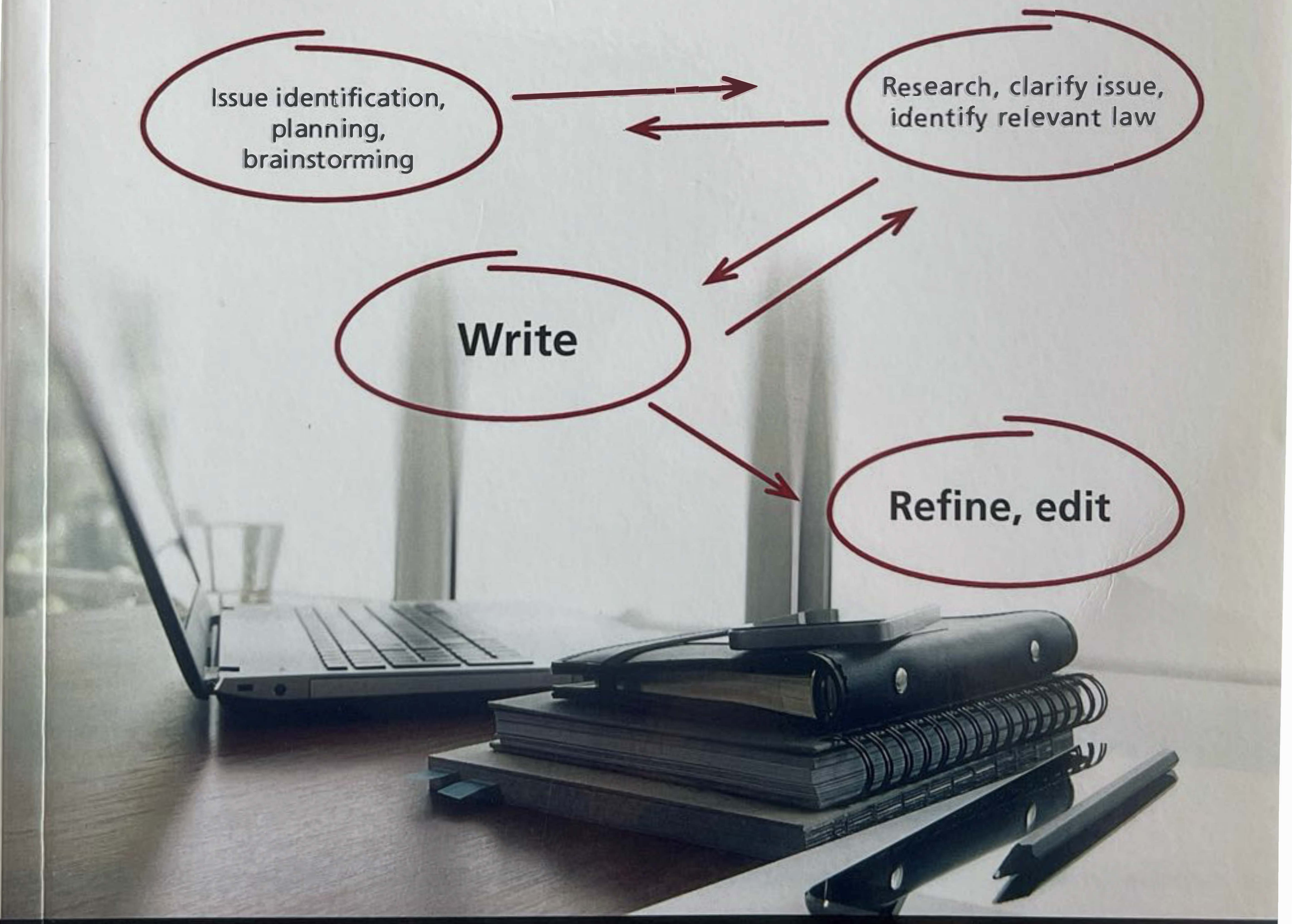
ASPEN COURSEBOOK SERIES

Charles R. Calleros • Kimberly Holst

Legal Method and Writing I

Predictive Writing

EIGHTH EDITION



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Chapter 5

I. Introduction to Stare Decisis

In the United States, previous court decisions may influence, or even dictate, the result in a dispute currently before a court. The legal effect of the previous decisions is governed by a complex set of conventions for which the Latin phrase "stare decisis" is often used as convenient shorthand.

"Stare decisis," sometimes called the rule of precedent, means standing by what has been decided. Under the doctrine of stare decisis, a court endeavors to decide each case consistently with its own previous decisions, which are called its "precedent." Moreover, the deciding court ordinarily is strictly bound by the precedent of a higher court that reviews the decisions of the deciding court, if the precedent addressed essentially the same question currently before the deciding court.

Judicial adherence to the doctrine of stare decisis serves several significant goals:

- it promotes efficiency in judicial administration by relieving judges of the burden of revisiting settled legal questions in each case;
- it facilitates private and commercial transactions by ensuring a degree of certainty and predictability in the law that regulates such transactions; and
- it satisfies the common moral belief that persons in like circumstances should be treated alike.[1]

The strength of an authority as precedent depends in part on the relationship between the court that created the precedent and the court that may subsequently apply it. Therefore, our exploration should begin with an introduction to the court system.

II. The Court System

A. Structure of State, Federal, and Tribal Courts

1. State Courts

Most state court systems include courts of limited jurisdiction, which hear disputes on limited matters such as domestic relations, traffic violations, and civil suits with small amounts in controversy. All other disputes are tried in branches of a trial court of general jurisdiction, typically named "Superior Court," "Circuit Court," or "District Court."

In most states, final decisions of this trial court may be reviewed by appellate courts at two different levels: A disappointed litigant may appeal a trial court judgment to an intermediate court of appeals; further appeals are taken to a court of last resort, known as the "Supreme Court" in nearly all states. Some court systems, however, have no intermediate appellate court. Instead, a single state court of last resort hears appeals directly from judgments of the trial courts of general jurisdiction.[2] Under either model, a disappointed litigant in state court may seek further review on questions of federal law in the United States Supreme Court.[3]

1. *See* Edgar Bodenheimer, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 425-28 (rev. ed. 1974); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595 (1987); *see also* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process").

2. In 2017, those court systems included those of the District of Columbia and the following states: Delaware, Maine, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. BNA's DIRECTORY OF STATE AND FEDERAL COURTS, JUDGES, AND CLERKS xi-xiv (2017) [hereinafter, BNA's DIRECTORY OF COURTS].

3. 28 U.S.C. § 1257 (2012).

The state court system in California is representative of those systems with two levels of appellate review:

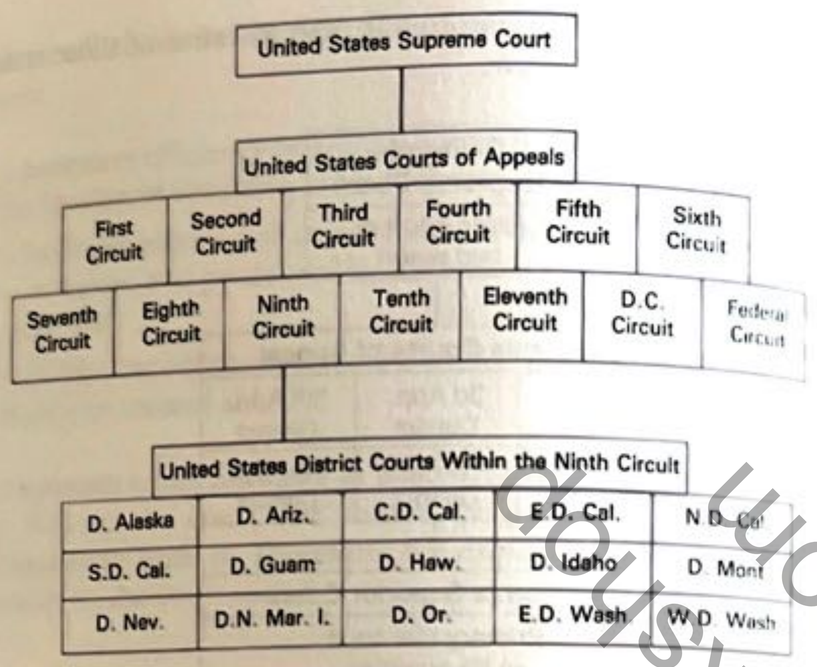
In California, two courts of limited jurisdiction, Justice Courts and Municipal Courts, hear restricted classes of cases. The trial court of general jurisdiction is the Superior Court, which serves each of 58 counties throughout the state. The Superior Court hears appeals from the courts of limited jurisdiction, and it entertains original actions in a wide variety of civil and criminal cases. Disappointed litigants in a criminal or civil case may appeal from a judgment of the Superior Court to the California Court of Appeal. This intermediate appellate court is divided into six districts, each of which hears civil and criminal appeals from departments of the Superior Court in counties assigned to that district. A disappointed litigant in the Court of Appeal may appeal to the California Supreme Court in certain kinds of cases and may petition for discretionary review in others.[4]

For example, California's Second Appellate District includes the counties of Los Angeles, San Luis Obispo, Santa Barbara, and Ventura. The California Court of Appeal for the Second Appellate District would hear appeals from the decisions of the California Superior Court in those counties. A litigant disappointed by a decision of the Court of Appeal for the Second Appellate District could appeal to the California Supreme Court or petition it for discretionary review.

2. Federal Courts

The structure of the federal court system is similar to that of the California court system:

4. BNA's DIRECTORY OF COURTS, *supra* note 2, at 90.

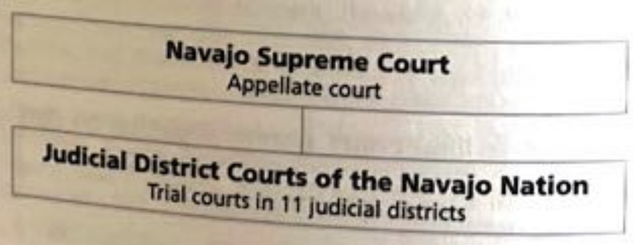


The primary federal trial courts are the United States District Courts. With few exceptions, disappointed litigants appeal from a judgment of a district court to the appropriate one of 13 "circuits" of the United States Courts of Appeals. Petitions for further review are taken to the United States Supreme Court. The chart above shows the line of review from judgments of the United States District Courts that serve the geographical area within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit encompasses a large portion of the United States. Although Congress has repeatedly considered proposals to split this circuit into two circuits, the Ninth Circuit still includes the states and territories of Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon, and Washington. Each of these states and territories has at least one district court; California and Washington have more. For example, California is divided into four district courts, the United States District Courts for the Central, Eastern, Northern, and Southern Districts of California.

3. Tribal Courts

Tribal communities in the United States typically employ a two level court system, with a trial court and a single appellate court, as illustrated by the judicial system of the Navajo Nation:



The Navajo Judicial Branch alternatively offers the opportunity to resolve disputes in the Navajo Peacemaker Court. Rooted in traditional Navajo culture, the Peacemaking Program seeks to restore harmony in disrupted relationships through engagement, healing, and consensus.[5]

Some tribes are sufficiently small that they join with other tribes to share a single court system. For example, 12 tribes in San Diego County have formed a judicial consortium, the Inter-Tribal Court of Southern California.[6]

B. Court Structure and Stare Decisis

Precedent has only limited stare decisis effect on the decision-making of the court that created the precedent: Although a court will do so only in unusual circumstances, it can depart from its own prior rulings. For lower courts within the same court system, stare decisis is less flexible: A trial court or intermediate court of appeal must consider the precedent of a higher court that acts as a court of review for the lower court.[7] Such binding precedent, like legislative acts, is *mandatory* authority for the lower courts. The California Court of Appeal, for example, is bound by decisions of the California Supreme Court. As discussed further in Section III below, the lower court must either distinguish the reviewing court's precedent or apply it as *controlling* authority, authority that dictates the outcome of the issue before it.

Stare decisis generally does not require a court to follow the precedent of coequal autonomous courts, of lower courts within the same court system, or of any courts outside that system. For example, the Florida Supreme Court is not bound by the decisions of the other Florida courts or by those of the California Supreme Court. Similarly, the United States Court of Appeals for the First Circuit is not bound by the decisions of either the

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5. For more information about this program, see http://www.navajocourts.org/index peacemaking.htm.

6. This consortium is described as part of tribal and state programs in California at http://www.courts.ca.gov/14902.htm. For more information on tribal courts, see http://www.tribal-institute.org/lists/justice.htm.

7. *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("The Court of Appeals was correct in applying [Supreme Court precedent] despite its disagreement with [it], for it is this Court's prerogative alone to overrule one of its precedents."). In limited circumstances, however, a trial court may depart from precedent of the intermediate court of appeals in its system. *E.g.*, Miller v. Gammie, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc) (federal district court could disregard precedent of court of appeals that reviews its decisions, if a decision of a yet higher authority, the U.S. Supreme Court, even though not precisely on point, has undermined the theory or reasoning underlying the court of appeals precedent); Auto Equity Sales, Inc. v. Super. Ct. of Santa Clara County, 369 P.2d 937, 940 (Cal. 1962) (if trial court is faced with conflicting decisions of two coequal panels or divisions of its reviewing court, it cannot follow them both but must choose between the two). Indeed, even United States Supreme Court precedent can lose its binding effect before being overruled. A summary dismissal of an appeal by the United States Supreme Court, although constituting a decision on the merits, will no longer bind lower courts if subsequent Supreme Court decisions undermine its reasoning, even though they do not directly overrule the earlier decision. *E.g.*, Bostic v. Schaefer, 760 F.3d 352, 373 (4th Cir.), *cert. denied*, 135 S. Ct. 308 (2014) (Supreme Court summary dismissal of constitutional marriage claim on behalf of same-sex couple was undermined by later Supreme Court authority, allowing lower courts to consider such claims without being bound by that precedent).

United States Court of Appeals for the Second Circuit or any United States District Court. Nonetheless, the deciding court will often consider such nonbinding precedent as persuasive authority and follow its reasoning as a matter of choice, provided that the *persuasive* authority does not contradict *binding* precedent.

In some courts, a judicial unit of fewer than all members of the court may create precedent for the entire court. For example, the United States Court of Appeals for the Ninth Circuit has more than two dozen judges, but most appeals in the circuit are heard by panels of three judges each. Each three-judge panel creates precedent that must be followed by all other three-judge panels in the circuit. Within the circuit, a decision of a three-judge panel can be overruled only by an "en banc" panel of 11 members of the court.[8]

III. Scope and Application of Stare Decisis

A. Building a Wall of Case Law, Brick by Brick

Courts add to existing common law or statutory interpretations incrementally, as they decide individual disputes on specific facts. Each resolution of a dispute, when published as a written opinion, adds one more "brick" of precedent to a wall of case law. When courts adhere to precedent under stare decisis, they build on the foundation created by the precedent of judges who laid "bricks" laid in previous decisions.

Some form of stare decisis is justified in any society that values efficiency, certainty, and at least those notions of fairness predicated on equal treatment for similarly situated parties. On the other hand, unquestioning adherence to precedent may inappropriately extend the rule of previous decisions beyond the rationale and policy of the original decision, or it may retain outdated or otherwise unsound precedent. A wall that rises ever higher on a flawed or outdated foundation will eventually fall.

Two limits to stare decisis help to avoid rigidity in the law while maintaining consistency:

(1) A court may *distinguish* a prior decision if it concludes that the prior decision addressed a significantly different dispute from the one now before the court. If so, even if the prior decision was issued by the same court or by a higher court within the jurisdiction, the prior decision does not control the result in the case now before the court. Of course, if the prior decision was issued by a lower court or by a court from another jurisdiction, it would never be *binding* on the current court. Moreover, if such a prior decision is distinguishable from the current case, the prior decision may lose even the persuasive value that it might otherwise have had.

(2) Alternatively, a court's own precedent may be indistinguishable from the dispute currently before the court. If so, the court normally would be bound under the doctrine of stare decisis to follow its precedent. Nonetheless, the doctrine of stare decisis is grounded in policy rather than inexorable mandate. In special circumstances, the court may depart from the normal dictates of stare decisis and reject its own precedent as authority for the present dispute.

The following sections thoroughly examine each of these limits on stare decisis. Section B explores means of determining whether a prior decision is sufficiently analogous that it creates precedent on the issue now before the court, or whether the prior decision instead is distinguishable. Section C assumes that a court's own prior decision is not distinguishable and therefore creates precedent that normally would be controlling in the current dispute. It then discusses the special circumstances in which a court may depart from such precedent.

B. Analogizing and Distinguishing Precedent

1. An Inexact Science with Ample Room for Argument

Few disputes are so similar in their facts and legal issues that resolution of the first dispute provides a clear basis for resolving the second. In those relatively rare cases, the prior decision is "controlling" precedent in the same court or a lower court within the jurisdiction. Such controlling precedent will dictate the result of the subsequent case in a lower court, or at least will control the outcome of an issue in that case. Indeed, even the court that created the precedent will normally adhere to it when the issue arises again in that court.[9]

More often, however, differences between two cases in the facts or in the nature of the legal issues are sufficiently substantial that the prior decision should not dictate the resolution of the second. Whether the differences meet this standard often is a question of degree on which reasonable lawyers may disagree.[10]

Assuming the precedent is not nearly identical to the current dispute and thus is not strictly controlling, it may still be sufficiently analogous to provide a strong basis for deciding the current dispute. Whether the prior decision is analogous or distinguishable is a matter of judgment and analysis, which provides opposing attorneys with plenty of room for argument.

8. *See, e.g.*, United States v. McLennan, 563 F.2d 943, 948 (9th Cir. 1977), 9th Cir. R. 35-3.

9. *See generally* Hutto v. Davis, 454 U.S. 370 (1982).

10. *Compare id.* at 372-75 (majority opinion), *and id.* at 375-81 (Powell, J., concurring), *with id.* at 381-88 (Brennan, J., dissenting).

In analyzing the precedential value of arguably distinguishable authority, you should pay attention to the rationale underlying the prior decision. Differences between the cases may be such that the reasons for the result in the prior decision do not apply to the current case. If so, the distinctions between the two cases justify a different result in the current case, or at least an analysis free of deference to the prior decision. Conversely, even though a prior decision does not provide a clear resolution of the current case because of differences between the two cases, many of the reasons for the legal result in the prior decision may apply equally to the current case. If so, the prior case—although not clearly controlling—is ***analogous*** to the current case in a way that may justify the same legal result in both.

Of course, this process of either restricting or extending the application of precedent in relation to a new dispute is far from an exact science. The determination whether a prior decision supports a proposed outcome in a new case may implicate the most deeply held values of those who must interpret and apply the precedent:

> Like the antebellum judges who denied relief to fugitive slaves . . . the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.[11]

Although uncertainty about the reasons for a prior decision often complicates the analysis, courts regularly engage in the processes of distinction and analogy to limit, extend, refine, and clarify the rules of prior decisions. Indeed, the precise parameters of the rule of a decision typically do not become clear until courts analyze the decision in subsequent decisions in the context of other disputes. This inquiry is largely one of defining, limiting, and extending the holdings of prior decisions; you will revisit it when you study techniques of briefing cases in Chapter 7.

2. Gaining Comfort with Legal Uncertainty

This "ample room for argument" retained in a flexible doctrine of stare decisis is illustrative of a more general characteristic of uncertainty or indeterminacy in our legal system. New law students are often eager to write down the "answer" to every legal question posed by their professors. But, as periodically pointed out in this book, the most interesting legal questions—the ones that are fully litigated and appealed—are ones to which the answer is uncertain prior to the final judicial determination. If the resolution of the legal dispute were perfectly certain, the parties likely would have settled the dispute well short of full litigation. And, if the answer were certain during litigation, why would parties and attorneys wait with great anticipation for

11. DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 212-13 (1989) (Blackmun, J., dissenting).

the jury's verdict on the evidence, and why would so many appellate decisions be decided on a split vote of learned judges or justices, who frequently disagree on the merits of the appeal?

British law professor Gary Watt describes the uncertainty in the outcome of legal disputes in a particularly colorful manner:

> There is never only one answer to a legal dispute; indeed it is a rare case that has only one right answer. As Lord Macmillan admitted: "in almost every case except the very plainest, it would be possible to decide the issue either way with reasonable legal justification." Ronald Dworkin fantasizes that there is always one right answer to every case and that a hypothetical Herculean judge could find it. Perhaps Hercules might, but then perhaps Zeus would find another answer on appeal. . . . [T]he outcome often turns in large part on the purely practical contingency of running out of courts. The nature of the law in such a system is less like a scientific experiment and more like a wheel of fortune: the nature of the legal outcome is determined at the point the wheel stops spinning, and would have [been] determined earlier if the litigants had been at any stage unwilling, or financially unable, to give it an extra push. From the judges' perspective it is a living conversation across a range of reasonable alternative possibilities, and it just happens that the conversation must stop sometime.[12]

The example in the next subsection illustrates Professor Watt's metaphor of a roulette wheel signifying the outcome of a dispute by stopping its spinning and "running out of courts." It reminds us that the main task of law students and attorneys alike is not to know or discover the "right answer" to a novel legal question. Your main task instead is to identify issues—matters that are reasonably in dispute on the facts and the existing law—and to recognize or develop the arguments that can be persuasively advanced on either side of the dispute.

3. Example: Warrantless Searches of Cars, Houses, and Mobile Homes

Supreme Court decisions interpreting and applying the Fourth Amendment to the United States Constitution[13] illustrate the techniques of analogy and distinction as well as the difficulty of predicting legal outcomes. In *Carroll v. United States*,[14] the Supreme Court held that the Fourth Amendment permitted federal officers to search an automobile without first obtaining a warrant. The Court reasoned that, although a suspect may have privacy interests in the contents of an automobile, the ready mobility of the automobile

12. Gary Watt, EQUITY STIRRING: THE STORY OF JUSTICE BEYOND LAW 12-13 (2009) (footnotes with citations are omitted from the quoted text).

13. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures by government officials:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

14. 267 U.S. 132 (1925).

In fact, no one has argued to us that *Austin*'s rule has proved impracticable.... In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis*, "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion" that "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

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. . . At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.

I would affirm the judgment of the District Court.

Chapter 6

Deductive Reasoning and IRAC—Introduction to Legal Analysis

I. Overview—Solving Legal Problems

Attorneys perform many tasks for clients that do not directly relate to litigation of legal disputes, including estate and tax planning, business counseling, and legislative lobbying. Even these tasks, however, might be inspired partly by the desire to avoid or influence future litigation. Moreover, many people consult an attorney only after they have become embroiled in a legal dispute in which litigation has commenced or is imminent. With a little luck and skill, the parties or their attorneys might still avoid formal litigation in court by using alternative dispute resolution (ADR) such as negotiation, mediation, or informal arbitration.[1] However, at least some of these

1. *See, e.g.*, Leonard L. Riskin, James E. Westbrook, Chris Guthrie, Richard C. Reuben, Jennifer K. Robbennolt, & Nancy A. Welsh, Dispute Resolution and Lawyers (5th ed. 2014); Stephen B. Goldberg, Frank E.A. Sander, Nancy H. Rogers, & Sarah Rudolph Cole, Dispute Resolution: Negotiation, Mediation and Other Processes (6th ed. 2012); Stephen J. Ware, Principles of Alternative Dispute Resolution (3d ed. 2016).

methods of ADR require the parties to evaluate or present their cases within a general legal framework.

Consequently, legal method relating to litigation of legal disputes is an important component of nearly every attorney's practice. As discussed in Chapter 1, legal writing is audience focused. Because most readers of legal writing will be trained in litigation, they will expect the writing to conform to this general legal framework.

A lawsuit is formally commenced with the filing of pleadings: The plaintiff files a complaint against the defendant, and the defendant responds by filing an answer. If you represent a party in the early stages of such litigation, you must assess the strengths and weaknesses of your client's claims or defenses to help you prepare for various stages of advocacy, from the pleadings and settlement negotiations to trial and appeal.

In a large or medium-sized law firm, you often will communicate your evaluation to other members of the firm in an office memorandum of law, discussed in detail in Part IV of this book. The principal means of persuading a judge or other adjudicatory body to accept your client's legal claims or defenses is a written brief, discussed in Volume II. To prepare either kind of document, you must apply fundamental skills of legal method and analysis that you develop in the first year of law school, as discussed in Parts II and III of this book.

This chapter examines methods of solving legal problems in the context of litigation of legal disputes. It builds on the groundwork laid in Chapters 3 through 5, and it provides an overview for more detailed discussions of legal method and analysis found throughout the remaining chapters.

II. Overview of Deductive Reasoning and IRAC

A. Deductive Reasoning in the Law—Uses and Limitations

1. The Legal Syllogism

Most essay examinations, office memoranda, and briefs require more than purely abstract legal analysis: They require you to apply legal standards to specific facts to reach a conclusion. In many cases, the analysis follows a pattern of deductive reasoning known as the "syllogism," which derives a conclusion from a major premise and a minor premise.

A common example of syllogistic reasoning addresses the issue of Socrates's mortality:

Major Premise:	All humans are mortal.
Minor Premise:	Socrates is human.
Conclusion:	Therefore, Socrates is mortal.[2]

2. *See* Irving M. Gopi, INTRODUCTION TO LOGIC §1.4, at 12-15 (12th ed. 2005).

In a legal argument, the major premise is a legal rule that helps resolve the issue raised by the parties to the dispute. It may represent the terms of a statute, the holding of a single judicial decision that acts as precedent, or a general principle derived from a series of previous decisions. The minor premise of a legal argument generally is a set of facts taken from the dispute that you are analyzing. The conclusion represents your answer to the question of whether the facts stated in the minor premise satisfy the legal standard stated in the major premise.

2. Validity and Correctness of Legal Syllogisms

A deductive argument is *valid* if its conclusion follows necessarily from its premises, but the *correctness* or *truth* of the conclusion of a valid argument depends on the truth of its premises.[3] For example, the Fourth Amendment to the United States Constitution ordinarily requires a police officer to obtain a search warrant from a judicial officer before searching an enclosed structure such as a house. Under the automobile exception, however, an officer may search an automobile without a warrant if she has probable cause to believe that it contains evidence of a crime. Suppose that a police officer searched Jack Greenberg's motor home without a warrant and found illegal drugs. In the state's criminal prosecution of Greenberg for possession of the illegal drugs, the state might advance the following valid deductive argument:

Major Premise:	The automobile exception to the Fourth Amendment's warrant requirement applies to all vehicles with mobility similar to that of an automobile on a street or highway.
Minor Premise:	Even while parked in Greenberg's backyard, Greenberg's motor home was a vehicle with mobility similar to that of an automobile on a street or highway.
Conclusion:	The automobile exception to the Fourth Amendment's warrant requirement applied to Greenberg's motor home while it was parked in Greenberg's backyard.

Although the conclusion of this valid argument follows necessarily from the premises, the conclusion is not true if either of the premises is untrue. The attorney for each party will attempt to persuade the judge to reach a certain conclusion by inviting the judge to accept some formulations of the major and minor premises and to reject others. For example, Greenberg's attorney could raise the Fourth Amendment issue by asking the judge to exclude the evidence obtained in the warrantless search of Greenberg's motor home. In response, the state prosecutor would advance the deductive argument above to demonstrate that the Fourth Amendment did not require the police to obtain a warrant to search Greenberg's motor home. Greenberg's attorney could attack this argument either by arguing as a

3. *See id.* at 13.

matter of law that the prosecutor's major premise exaggerates the scope of the automobile exception or by establishing as a matter of fact that the prosecutor's minor premise exaggerates the mobility of the motor home parked in Greenberg's backyard.

A deductive argument is not valid if its conclusion does not follow necessarily from its premises. For example, if Greenberg's attorney proved that Greenberg's motor home was significantly less mobile than an automobile on the street or highway, the judge would undoubtedly replace the prosecutor's untrue minor premise with the minor premise established by Greenberg's attorney. As reconstructed, the deductive argument would no longer be valid, because the prosecutor's conclusion would not follow from the original major premise and the new minor premise.

3. Limitations of the Legal Syllogism

Deductive reasoning provides at least a rough organizational framework for most legal analyses in office memoranda, answers to essay examinations, and briefs. The usefulness of the syllogism in legal reasoning, however, is limited by the flexibility and uncertainty inherent in legal analysis. For example, to establish the major premise of your argument, you may state your interpretation of the holding of a previous decision or your synthesis of the holdings of a series of decisions. Until a judge expresses his opinion on the matter, however, you cannot be certain whether he will agree with your interpretation of previous decisions and thus with your statement of the major premise.

Indeed, the dominant description of legal method since the twentieth century, known as "legal realism," rejects the notion that the law is external to the judges and other officials who apply and enforce it. Instead, the law is simply a prediction about what such officials will do in the face of a dispute. Moreover, their decisions will take into account the social consequences of their actions and will be based on a complex set of motivations, including personal values and judicial approaches not explicitly accounted for in the formal abstract rule of law. Thus, judges or juries can take advantage of uncertainty in law or facts by shaping them to support results that they reach on other than purely logical grounds.[4]

4. *See* J. W. Harris, LEGAL PHILOSOPHIES 98-103 (2d ed. 1997). The Critical Legal Studies movement goes beyond legal realism to broadly attack traditional legal method, scholarship, and education as a system that legitimizes and perpetuates an oppressive socioeconomic order. *See generally* Roberto M. Unger, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); Mark Kelman, A GUIDE TO CRITICAL LEGAL STUDIES (1987); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984). Scholars of Critical Race Theory and Feminist Jurisprudence more specifically charge that traditional legal reasoning is grounded in and helps to perpetuate racist and sexist institutions and attitudes. *See generally* Frances Schmid Holland, FEMINIST JURISPRUDENCE (1996); Richard Delgado & Jean Stefancic, CRITICAL RACE THEORY: AN INTRODUCTION (2001). Latino and Latina scholars have developed a new branch of Critical Race Theory, popularly known as "LatCrit" theory. *See, e.g.*, Jean Stefancic, *Latino and Latina Critical Theory: An Annotated Bibliography*, 85 CAL. L. REV. 1509 (1997); Keith Aoki & Kevin R. Johnson, *An Assessment of LatCrit Theory Ten Years After*, 83 in D. L. J. 1151 (2008). Some scholars have argued that courts are retreating from legal realism and are returning to a more traditional and mechanical legal "formalism." *See, e.g.*, John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869 (2002).

In short, legal disputes cannot be analyzed with mathematical certainty:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[5]

Nonetheless, the syllogism provides a useful starting point for discussing general techniques of presenting legal analyses.

B. IRAC—The Analytical Paradigm

The analytical paradigm is the framework for creating and communicating legal analysis—whether you are writing to predict or persuade. Most law students use the acronym "IRAC" to help them remember the elements of deductive reasoning. IRAC stands for Issue, Rule, Application, and Conclusion. Thus,

1. after identifying an Issue, you should
2. state the legal Rule that will help resolve the issue,
3. Apply the rule to the relevant facts, and
4. reach a Conclusion on the question of whether the facts satisfy the legal rule.

For example, the following excerpt from an essay examination answer discusses the availability of punitive damages in a tort action. Although the examination answer itself should not explicitly refer to IRAC, the margin notes below represent the elements that a student should keep in mind when formulating a complete response. In this example, after raising an issue about punitive damages, the student has summarized general legal rules regarding the availability of punitive damages, has applied them to the facts of the examination, and has reached a conclusion.

Punitive Damages—In addition to demanding compensation for his actual losses, Ling may request punitive damages, designed to punish the tortfeasor and to deter others from engaging in similar wrongdoing.	**Issue**
A jury has the discretion to award punitive damages if the tortfeasor acted with the malicious intent to cause harm. In most states, punitive damages are also permitted if the tortfeasor acted with	**Rules**

5. Oliver Wendell Holmes, Jr., THE COMMON LAW 1 (Dover Publ. 1991) (1881); *see also id.* at 312 ("The distinctions of the law are founded on experience, not on logic. It therefore does not make the dealings of men dependent on a mathematical accuracy."); Neil MacCormick, LEGAL REASONING AND LEGAL THEORY 65-72 (1978) (discussing "the limits of deductive justification").

reckless disregard for the risk of harm to others. Unless exceptional circumstances justify the risk, conduct, a person acts recklessly if he consciously engages in conduct that he knows or should know poses a great risk of harm to others.

Application to Facts

In this case, Con Motor Co. did not consciously intend to cause injury when it designed the Backfire sports car. In fact, the discussion at the May meeting shows that the board of directors genuinely hoped that the risky design would not cause accidents. However, Con's chief engineer informed the board of directors of her opinion that placement of the gas tank near the rear bumper of the car would create a risk of deadly explosions in even minor rear-end collisions. Yet, the board approved that design solely because it would reduce production costs of $200 per car, a trivial amount when compared to the $40,000 price of the car. In so doing, Con's directors knowingly created a great risk of death or terrible injury to consumers without any socially significant justification.

Conclusion

Con Motor Co. thus acted recklessly, permitting a jury in many jurisdictions to assess punitive damages against it. Indeed, in a jurisdiction that requires proof of malicious intent to injure, this would be a good case for a liberalization of the standards to include recklessness as a basis for the award of punitive damages.

To help you avoid the oversimplification that may result from an excessively mechanical application of IRAC, later chapters of this book explore some sophisticated techniques of analysis that build on the general framework of deductive reasoning. For example, Chapter 8, Section III D discusses problems of organization that arise when an issue or subissue presents different layers or levels of syllogisms.

In the meantime, the remainder of this chapter thoroughly explores each of the elements of IRAC. In the next four sections, you will learn about identifying Issues, formulating Rules, Applying rules to facts, and reaching Conclusions.

III. "I"—Identifying Issues for Analysis

A. Defining Issues

A legal issue is a question that a judge, jury, agency hearing officer, arbitrator, or other adjudicator must resolve to determine the outcome of a

dispute. Whenever an event creates the conditions for a legal dispute, you can identify potential legal issues immediately after the event, even though no party has yet begun to litigate a claim or has even made any demands on another.

Constitutions, statutes, agency regulations, case law, and perhaps even the private law of an agreement between the parties impose duties on some parties and correlative rights on others in the context of the event. Armed with at least a general knowledge of the law and of the facts of the event, you can address the question of whether any party is liable to another for breach of a legal duty or is guilty of a crime. If the law and its application to the facts are governed by settled law, the question of liability may be easily answered and is more likely to be addressed in a settlement between the parties than in litigation. In a surprising proportion of cases, however, uncertainty in the content of the law or in the application of the law to novel facts will block your efforts to supply a definite resolution to a legal dispute. In those cases, you can advance arguments in support of either a potentially wronged victim or a potentially liable party. If the arguments for both parties have potential merit, you have identified a legal issue that merits full discussion.

1. Issues and Subissues

A general issue may encompass discrete subissues. For example, case law establishes that a defendant generally will be liable to the plaintiff for damages caused by breach of contract if (A) the parties formed an enforceable contract and (B) the defendant failed to perform his contractual promises, thus breaching the contract. At the broadest level, the facts of a dispute might raise the general issue of whether the defendant is liable for breach of contract for failing to perform her contractual obligations by the specified date of March 1. More specifically, the facts may raise separate subissues about (A) contract formation and (B) performance and breach.

You may want to further subdivide these subissues to recognize multiple legal elements associated with each. For example, case law establishes two primary requirements for contract formation: (1) an agreement reached through a process of offer and acceptance and (2) "consideration" in the form of a mutually induced exchange. These elements are distinct, because parties could agree to a transaction that does not satisfy the consideration requirement. Thus, within the subissue of contract formation, the law and the facts may raise a second level of subissues regarding (1) offer and acceptance and (2) consideration. Similarly, within the subissue of performance and breach, the law and the facts may raise a second level of subissues regarding, for example, (1) interpretation of the defendant's contractual promises and (2) possible discharge of the defendant's obligations because unforeseen circumstances made his performance impossible. The law and facts may raise further issues regarding remedies for breach.

Without yet making the issues more specific by referring to critical facts, you can state these issues and subissues in outline form:

Is D liable to P for breach of contract by failing to perform by March 1?

I. Did D and P form a valid contract?
   A. Did P accept D's offer?
   B. If so, is the agreement between D and P supported by consideration?

II. Assuming a valid contract between D and P, is D liable to P for failing to deliver by March 1?
   A. Does the contract require D to perform by March 1?
   B. Did unforeseen circumstances for which D did not assume the risk excuse D from performing by March 1?

III. Assuming D breached a valid contract with P, to what damages or other remedies is P entitled?

2. Continuing Development of Issues

At the inception of a dispute, incomplete knowledge of the facts and vagueness or ambiguity in the arguably applicable legal rules make the eventual outcome of the dispute particularly uncertain. At that stage, you can identify the issues only tentatively. As the dispute proceeds through stages of litigation, the issues will become increasingly well defined.

For example, a demand letter or complaint may reveal which of numerous potential legal claims a claimant has decided to advance, thus raising some questions of liability and eliminating others. Under modern rules of civil procedure, each party to a civil lawsuit must disclose some kinds of information to the opposing party, and each party may use various "discovery" devices to obtain certain other kinds of information from witnesses and from the opposing party.[6] This court-supervised discovery and disclosure process or other investigation may reveal that some claims or defenses are meritless and may raise new questions about others. Moreover, as explored in Volume II, a litigant may request that the court help define the issues by ruling before trial that certain evidence will be excluded from trial or even that the litigant is entitled to judgment without trial on one or more issues. In turn, these pretrial motions may raise separate issues under applicable rules of evidence or procedure concerning the admissibility of evidence or the proper application of standards for summary disposition. Finally, if the dispute goes to trial, the nature of the disposition in the trial court and the factual record developed in the trial court will help determine which issues the losing party might reasonably raise on appeal.

As illustrated by these examples, the parties help to define the issues by making strategic decisions about what claims and defenses to assert and about which procedural vehicles should be used to assert them. With few exceptions, courts will decline to address questions that are not raised by either party to a dispute.[7]

6. *See* FED. R. CIV. P. 26-37.

7. *See, e.g.*, Yee v. Escondido, 503 U.S. 519, 533 (1992) (Supreme Court "has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below."); Amcel Corp. v. Int'l Exec. Sales, Inc., 170 F.3d 32 (1st Cir. 1999) (discussing

3. Materiality

Not every potential disagreement about the facts or the law amounts to a legal issue. Even a hotly disputed question of fact or law would not be "in issue" if it were immaterial. A disputed point is immaterial if it could not affect the outcome of the lawsuit in light of other facts and rules of law.

To take an obvious example, suppose evidence shows that the defendant drove his car through an intersection and struck the plaintiff in a pedestrian crosswalk. The defendant's liability for negligence would not be affected by even a heated disagreement over the color of the socks that the defendant wore that day. Assuming that the identity of the driver of the car is conclusively established through some means other than the color of the socks he wore, the issues of law and fact would instead include such material questions as the following:

1. Which party had the green light?
2. What injuries did the plaintiff sustain?
3. Does the law permit the jury to reduce the plaintiff's recovery if his own negligence combined with that of the defendant to cause his injuries?

Of course, many cases raise closer questions of materiality than that in the example above. As discussed in the next section, some questions of materiality may be a matter of degree requiring the exercise of judgment in selecting issues for discussion or argument in a legal document.

Exercise 6-1

Although United States jurisdictions have enacted criminal codes that largely supersede the early criminal common law, imagine a state that still applies the common law definition of burglary: the breaking and entering of a dwelling of another at night with the intent to commit a felony. As stated in Chapter 3, the law relating to this crime reflected a concern about a serious invasion of the right of habitation during hours of darkness, when the inhabitants were most vulnerable to attack and the invader most likely to escape recognition. The element of

reasons for not addressing claims or legal theories that party neglected to raise in the trial court); Hershinow v. Bonamarte, 735 F.2d 264, 266 (7th Cir. 1984) (waiver of claim presented to appellate court in perfunctory manner); State v. Santana-Lopez, 613 N.W.2d 918, 921 n.3, 922 n.4 (Wis. Ct. App. 2000) (waiver of one argument not presented on appeal and of another argument presented only in a footnote in an appellate brief). *But cf. Yee*, 503 U.S. at 534-35 (if claim was properly presented below, appellate court will entertain a new *argument* in support of that claim); Giannakos v. M/V Bravo Trader, 762 F.2d 1295, 1297 (5th Cir. 1985) (federal trial and appellate courts must address questions of federal subject matter jurisdiction on their own motions); *In re* Pizza of Haw. Inc., 761 F.2d 1374, 1377-78 (9th Cir. 1985) (appellate court must determine appellate jurisdiction on its own motion); *In re* Pac. Trencher & Equip., Inc., 735 F.2d 362, 364 (9th Cir. 1984) (discretionary appellate consideration of pure question of law not raised in the trial court).

a "breaking" does not require damage or destruction; it requires only the opening of a barrier to entry.

Armed only with this general knowledge of the law, identify the issues relating to the common law crime of burglary raised by the following facts:

In June, Leova Rosales left her San Francisco apartment and drove her VW bus down the coast for a three-week vacation near Monterey Bay. Although she occasionally ate at restaurants or stayed with friends, she mostly slept in the back of the bus and prepared simple meals in the bus with groceries that she purchased at local stores.

On the evening of June 20, Leova parked her bus in an overnight recreational-vehicle parking space at Seacliff State Beach. She prepared dinner from an ice chest in the back of the bus. At 11:00 P.M., she fell asleep in the back of her bus, leaving the driver's door closed but unlocked, with an iPod and a set of portable stereo speakers sitting on the driver's seat. A curtain separated the sleeping area of the bus from the driver's cab; other curtains blocked light from the windows in the back of the van, enabling Leova to sleep late in the morning.

At 5:15 A.M., just as the first hints of a sunrise glowed from the hilltops opposite the ocean, Robert Glass approached Leova's van. Through the closed window next to the driver's seat, Robert spied the music equipment lying on the seat. Hoping to add it permanently to his own home system, Robert opened the closed but unlocked driver's door and placed his hand on the stereo speakers. At that moment, a patrolling police officer drove up to Leova's VW bus and arrested Robert for burglary and attempted larceny. Leova awoke only when the officer knocked on her bus after the arrest.

You may assume that theft of the stereo equipment would constitute felony larceny in the jurisdiction. In the prosecution of Robert Glass on the burglary charge, what elements of the common law crime of burglary would the prosecutor and defense attorney likely dispute? What elements of burglary are not reasonably in dispute? Would further facts help define or resolve the issues? Would case law that refines the law of burglary help define or resolve the issues? If you were assigned the task of preparing an office memorandum on this problem, what facts or law would you desire to investigate further?

B. Scope of Analysis

Any dispute of at least moderate complexity presents a range of potential legal theories and arguments that you might raise in litigation. At the near end of the spectrum are persuasive and conventional legal theories or arguments that a court would almost certainly address in analyzing the dispute. At the far end are legal theories or factual analogies of such doubtful merit or applicability that a court might view them as frivolous or immaterial to the outcome of the dispute.

The extent to which you discuss topics toward the far end of the spectrum is a question of "scope of analysis" and depends partly on the nature of your document. The scope of analysis typically is quite broad in a law school essay examination answer, somewhat narrower in an office memorandum addressed to a supervising attorney, and narrower still in a good brief addressed to a judge.

1. Examination Answers

You will often touch on a broad range of issues in an examination answer because most law professors are specifically testing your ability to spot issues. Indeed, on many examinations, you will maximize your grade if you identify and briefly discuss all plausible issues, including the less obvious ones.

2. Office Memoranda

In comparison, your supervising attorney may expect a slightly narrower scope of analysis in your office memorandum. She probably will want detailed discussion of significant issues and will generally encourage creative and aggressive analysis, but she may not have time to thoroughly examine more exotic theories or approaches if they are unlikely to affect the outcome of the dispute. Unfortunately, you may be tempted to impress your supervisor with the long hours that you spent in the library by describing in detail every legal theory or authority that made its way into your library notes. Your supervisor will not be impressed. She realizes that you will regularly investigate leads that bear no useful fruit, and she expects the final draft of your memorandum to shield her from the burden of retracing your steps down paths that led only to distracting tangents.

On the other hand, the materiality of a fact or theory may be difficult to assess in the early stages of litigation and fact investigation. Accordingly, if you draft an office memorandum at the early stages of a dispute, you should consider discussing the appropriate scope of analysis with your supervising attorney before beginning to write. Absent specific direction from your supervisor, you probably should at least mention any argument of potential significance, even if only in a sentence or two. You can distinguish between a major theory and a less significant one in the depth of your analysis of each. Then, if later developments in the litigation establish the significance of an issue of previously questionable importance, you can analyze that issue in greater depth in a supplemental memorandum.

3. Briefs

As discussed in greater depth in Volume II, when drafting a brief, you often must exercise even stricter control on the scope of analysis. Although creative and novel arguments often win appeals by inspiring changes in the law, some arguments are so clearly marginal that they might detract from the cumulative persuasiveness of the entire brief. If you add a nearly frivolous argument to one with greater merit, you reduce the number of pages within the maximum page limit that you can devote to the meritorious argument. Even worse, you might lose credibility on the whole brief.