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## Reflecting a King's Wisdom: Bridge-Building and Legal Analysis

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# Reflecting a King's Wisdom: Bridge-Building and Legal Analysis

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## I. Introduction

Over the years, the Issue—Rule—Analysis—Conclusion (IRAC) writing structure has become a rage on law school campuses. Consequently, the sound of those four initials, I-R-A-C, even reverberates in the halls of law firms throughout the land. As this Commentary indicates,<sup>1</sup> the IRAC structure has a long, historic tradition. Furthermore, it provides a clear road map to those who are naturally well-equipped to write in legal contexts. To the mass of mere mortal legal writers, however, IRAC grows hazy as the challenges of legal writing become clear. These writers are certain that they must “analyze” after they “rule” and before they “conclude,” but what they are not so certain of, at least not as they begin their careers as legal writers, is what the “analyze” portion requires.

This Commentary sheds light on the bridge called “analysis” that runs from the rule to the conclusion. First, it discusses how, in the “analysis” process, rules are interpreted to account for facts both given and generated, and how these interpretations are supported. Finally, this Commentary addresses how these interpretations are methodically

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1. See *infra* text accompanying notes 2-18.

applied to the facts that the interpretations were created to address.

Hopefully, this discussion will offer something for the entire legal audience. For the novice, it may demystify the mystical process of legal analysis, and for the instinctively good writer, it may clarify the process behind the instinct and allow the good writing practitioner to become a better writing teacher.

## II. The Origins: Before IRAC

Family law provides one of the earliest examples of the use of IRAC to resolve a legal problem. Although he did not call it IRAC then, a few thousand years ago, a king of Israel named Solomon used the structure to decide a tricky custody case. King Solomon said:

The one says, 'This is my son that is alive, and your son is dead'; and the other says, 'No; but your son is dead, and my son is the living one.' And the King said, "Bring me a sword." So a sword was brought before the king. And the king said, "Divide the living child in two, and give half to the one, and half to the other." Then the woman whose son was alive said to the king, because her heart yearned for her son, "Oh, my lord, give her the living child, and by no means slay it." But the other said, "It shall be neither mine nor yours; divide it." Then the king answered and said, "Give the living child to the first woman, and by no means slay it; she is its mother." And all Israel heard of the judgment which the king had rendered; and they stood in awe of the king, because they perceived that the wisdom of God was in him, to render justice.<sup>2</sup>

Here, King Solomon demonstrates the "wisdom . . . to render justice"<sup>3</sup> not by simply concluding one woman or an-

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2. I Kings 3:23-28.

3. *Id.* at 3:28.

other should have the baby, but by (1) identifying the issue, (2) recognizing an appropriate rule, (3) analyzing the issue in the context of the rule, and (4) concluding which woman should have the baby. Breaking his process down even further, one can see that under the mystical third step (analyzing the issue in the context of the rule) King Solomon had to (1) interpret the rule, (2) generate facts to apply to the rule as interpreted, and (3) apply the facts to the rule as interpreted.

King Solomon began by identifying the issue before him: "The one says, 'This is my son that is alive, and your son is dead'; and the other says, 'No; but your son is dead, and my son is the living one.'"<sup>4</sup> Simply stated, King Solomon had to determine which woman got to keep the living child.<sup>5</sup>

To resolve this issue, King Solomon had to recognize an appropriate rule to apply to it. For purposes of this discussion, a rule is a principle recognized by the members of a group for conducting the group.<sup>6</sup> Here, the people of the kingdom were the group. The rule that King Solomon recognized was that the child's mother should keep the child.<sup>7</sup> However, as is often the case, the rule was not particularly helpful in resolving the issue. The problem was that, uninterpreted, the term "child's mother" provided no direction for the king. Thus, King Solomon had to begin to build an analytical bridge from his rule to his ultimate conclusion.

The first step on this analytical bridge was for King Solomon to interpret the rule. To do so, he had to expand the rule with assumptions that he had formed about the world. The first of these was that only a child's mother would have

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4. *Id.* at 3:23.

5. Determining the issue was no easy task, as readers of I Kings 3:16-22 know. Like all laymen, the parties here were quick to cloud the matter with interesting, although not legally relevant, facts.

6. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1134 (New College ed. 1976).

7. I Kings 3:27.

a heart that “yearned for her son.”<sup>8</sup> King Solomon used this assumption to interpret “child’s mother.” As interpreted, the rule became that the one whose heart yearns for her son should keep the child.

Even a wise king has problems determining yearning hearts, so King Solomon had to interpret “the one whose heart yearns for her son” in an appropriate way. To do so, he introduced another assumption, that a heart which truly yearns for a child would let the child go rather than allow it to die.<sup>9</sup> Replacing the old interpreted phrase with the new assumption about what the phrase meant, King Solomon now could proceed with a rule that the woman who was willing to let the child go rather than allow its death should be the one to keep the child.

After these preliminary determinations, King Solomon advanced to the next function on the analytical bridge: He generated and identified facts to apply to the rule.<sup>10</sup> In order to do this, he ordered the guard to “[d]ivide the living child in two, and give half to the one, and half to the other.”<sup>11</sup> To this, one woman responded “‘Oh, my lord, give her the living child, and by no means slay it,’” while the other responded, “‘It shall be neither mine nor yours; divide it.’”<sup>12</sup> These responses gave the king the facts he needed.

King Solomon was now ready to apply the facts to the rule as he had interpreted the rule. Being a wise king, Solomon must have known not to make blanket applications.

8. *Id.* at 3:26.

9. *Id.* at 3:26-27. The sentence, “If you love something, let it go. If it returns, know it loves you freely. If it does not, hunt it down and kill it,” is an example of an alternative assumption that might have been used less wisely. For a discussion on choosing between conflicting assumptions, see text accompanying *infra* notes 25-36.

10. In law school, students seldom work through this step because the facts are always given to them. Needless to say, in practice, attorneys must be good fact-finders.

11. I Kings 3:25.

12. *Id.* at 3:26.

Rather, he knew to show, patiently taking the elements one at a time, how the facts met each element. King Solomon first checked the facts against the first requirement of the rule to see if one of the women “would let the child go.” Because the first said “‘give her the living child,’ ”<sup>13</sup> Solomon knew the first would let the child go. Because the second said “‘divide the child,’ ”<sup>14</sup> or kill it, Solomon might also have thought this woman would let the child go.

He then checked the facts against the second requirement of the rule, that the person’s reason for letting the child go must be that the person did not want the child to die. Since the first woman offered to let the child go only in the context of demanding that the King’s servant should “‘by no means slay it,’ ”<sup>15</sup> King Solomon could tell that she met the rule’s requirement. The second woman, however, was letting the child go not to life, but to death. Thus, King Solomon could tell that only the first woman met both requirements of his interpreted rule. This completed his analysis.

King Solomon was ready to conclude. He had (1) interpreted the rule, (2) generated facts to apply to the rule, and (3) applied the facts to each requirement of the rule. With this thoughtful structure behind him, King Solomon ended the process by concluding, “‘Give the living child to the first woman, and by no means slay it; she is its mother.’ ”<sup>16</sup>

One might well argue at this point that after this decision, people “stood in awe of the king”<sup>17</sup> not because he could mechanically think through a process called IRAC but “because [his subjects] perceived that the wisdom of God was in him, to render justice.”<sup>18</sup> Certainly, wisdom rather than methodology made the King’s decision memorable, but

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13. *Id.*

14. *Id.*

15. *Id.*

16. I Kings 3:27.

17. *Id.* at 3:28.

18. *Id.*

without methodology, most people would not recognize wisdom. One's view of King Solomon would be very different if the story reflected none of his methodology but read simply that two women brought a baby to King Solomon and he picked which one should keep it. Even worse, the reader would be misled if the story reflected only some of the methodology and reported that Solomon decided that the baby should be given to the woman who said the baby should go to the other woman. No doubt a legal writer must begin with the wisdom to render justice. However, unless he has the writing methodology to demonstrate that wisdom to his audience, as a lawyer he will never convince a court to accept his wisdom, and as a judge he will spend his career being reversed.

Although the example of King Solomon is a good start in understanding the method of expressing legal analysis, the process has advanced since his time. Consideration should now be given to how the process reflects these advances, and, in particular, how those who are not kings must support their interpretations.

### **III. The Lawyer as Engineer: Analytical Bridge-Building**

The preceding section reconstructs a bridge that King Solomon built thousands of years ago. At one end of the bridge, there is a rule that King Solomon had assumed or accepted from his culture, a rule that a child's mother should keep her child. At the other end of the bridge, there is King Solomon's conclusion that the first woman was the child's mother. In between this assumed or accepted rule and conclusion, there is a bridge made up of three steps:<sup>19</sup> (1) The child's mother would have a heart that yearned for

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19. The idea for perceiving legal analysis as bridge-building came to this author while watching Professor Richard Parker of the Harvard Law School build analytical pyramids during his Constitutional Law course.

her son; (2) a heart that yearned for her son would let the child go rather than be the reason it died; and (3) the one who would let the child go rather than be the reason it died is the first woman because she said, "Give her the living child, and by no means slay it."<sup>20</sup>

Each step on the bridge defines or clarifies the step before it. For example, the first step defines "the child's mother" from the rule. The second step defines "a heart that yearns for her son," which the first step used to define "the child's mother." Finally, the third step clarifies this definition in terms of the facts presented in the case. Because each step on the bridge simply clarifies the preceding definitions of the original rule, by the time one has taken all the steps necessary to reach the conclusion, he can conclude that the requirement of the original rule is met by the facts: here, that the child's mother was the first woman.

When lawyers today build similar analytical bridges, they do not enjoy the luxury of being a king. Nor are their steps so self-evident that everyone can see the "wisdom of God"<sup>21</sup> without support. Thus, unlike King Solomon, lawyers today must support each step on their analytical bridge; they cannot define a term without explaining why the definition is appropriate.

To highlight the necessity of this process of support, one should look at a fundamental truth in the Declaration of Independence: "[A]ll men are created equal." Every word in this clause is ambiguous. While one might think "all" means "every," the United States Supreme Court has indicated that sometimes "all" means "some" rather than "every."<sup>22</sup>

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20. I Kings 3:26.

21. *Id.* at 3:28.

22. In *H.L. v. Matheson*, 450 U.S. 398, 101 S. Ct. 1165, 67 L. Ed. 388 (1981), the Supreme Court reviewed Utah Code section 76-7-304 (1978), which required that a physician "shall . . . [n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed if she is a minor." 450 U.S. at 406. Although the statute indicated no limit regarding the minors to which a court

"Men" can mean males over eighteen. However, it also has been known to mean people; people over eighteen; people over twenty-one; white, male people over a certain age; white, male people who are not "differently-abled" and are over a certain age; white, male, Anglo-Saxon Protestant people who own land, are not differently-abled, and are over a certain age; and a whole host of other meanings.

Similarly one might propose a myriad of meanings for "created" and "equal." Does "equal" mean that things are the same or need they only be similar? Also, in what contexts must they be the same: physically, economically, legally, politically? "Created" probably requires formation in some senses, but which ones: biological, spiritual, developmental? At some point, does the creation process and the need for equality end? Everyone can answer these questions, but everyone does not share a single set of answers. Therefore, to guarantee that others will accept his set of answers, one must be prepared to argue.<sup>23</sup>

In the bridge-building process, arguments used to support the definitions of words are the vertical supports for the horizontal steps. It is best to examine those supports from the foundation up. If one wants to keep a bridge standing, he cannot rest the supports on a foundation of quicksand. To keep a bridge standing, the supports must rest in a founda-

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could apply the statute, the Supreme Court chose to review the statute as it applied only to immature minors. The Court stated, "We cannot assume that the statute, when challenged in a proper case will not be construed also to exempt demonstrably mature minors." *Id.*

As Justice Stevens pointed out in his concurrence, however, such an assumption would have been consistent with the reading of the statute by the Utah Supreme Court, which held that the statute could be applied to "all" minor women. 450 U.S. at 421. In fact, the Utah Supreme Court discussed at length the implications of that holding of "all." *Matheson*, 604 P.2d 907, 911-12 (1979), *aff'd*, 450 U.S. 398 (1981).

23. At the risk of belaboring the point, even "are" is ambiguous in the clause. If the sentence were in active voice, it would read "\_\_\_\_\_ created all men equal," and the creator would need to be identified. However, because the clause is of passive construction and "are" is the verb, then the issue of who or what did the creating is still open for discussion.

tion of rock so the supports will stand fast. Similarly, if one wants a step on his analytical bridge to stand, he needs to support it with an argument built on a solid foundation. Solid foundations come in two forms.

The first form is legal authority. Lawyers are expected to follow legal authority, so if one shows the step on his bridge is consistent with legal authority, people will take the step. If a lawyer today wants to claim that "mother" means "one whose heart yearns for her son," he should first try to find some case, statute, or regulation that says that that is what "mother" means. Short of that, he might at least build an argument on some legal authority from which he can argue that that is what mother should mean: Perhaps a case that says a "father" is one whose heart yearns for his son and, thus, invites the argument by analogy that fathers and mothers may be defined similarly.

A problem arises when one has to argue by analogy. Although it may be obvious to the lawyer that "mother" and "father" should be defined similarly, it may not be obvious to the judge. This is particularly true when an opposing lawyer is arguing that not only is it not obvious that the two should be defined similarly, but it is in fact inappropriate to define them similarly. Thus, the analogy itself must be supported. To do this, hopefully the lawyer can find language in his authority to justify the analogy. If he cannot, the lawyer needs to justify the analogy in another way. This need brings us to the next foundation.

The second solid foundation is the family of value-based arguments. When the law has not spoken about the appropriateness of a step, the lawyer must prove that had the law spoken, the law would have said to take the step. To show this, one must find some value that people believe the law must reflect. He must then set that value as his foundation and build an argument on it that shows his step is consistent with that value.

For example, in order to support the "mother" step on the bridge, one must make an argument from a value foundation to support the definition of "mother." People might well believe that the law reflects a value that society seeks to place children where they will receive the greatest love and attention. This value then becomes our foundation. Since the King Solomon example showed that the "rule" requires the child be placed with its mother, one can deduce from the rule and the value that the law wants "mother" to be defined in a way that guarantees the child will receive the greatest love and attention. The person most apt to provide the child with the greatest love and attention is the person whose heart yearns for the child.<sup>24</sup> Therefore, the value requires that "mother" be defined as the person whose heart yearns for the child. Because the definition the value requires is the step one wants people to take, the value supports that step in the analytical bridge.

Different people often see different values reflected in the law, however.<sup>25</sup> This is seen in the use of opposing values such as "no liability without fault"<sup>26</sup> and "between two innocents, the one who causes the injury must pay."<sup>27</sup> Simi-

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24. If someone is not comfortable with the saying that the person most apt to provide the child with the greatest love and attention is the one whose heart yearns for the child, then the lawyer would need to buttress that step too. "Buttress" here is just a support for a support, and it simply means that sometimes one must support a step in the support in the same way that one must support a step in the analytical bridge.

25. Just as people vary in the content of their values, they also vary in what they believe without support and what they believe because they can support it. For example, one person may believe instinctively that all lawyers are filled with compassion, while another may believe the same thing because he can support that belief with all the wonderful things he has seen lawyers do.

Furthermore, although two people may share a belief and both may be able to support it, they may not share supports. Just as the number seven may be generated by an infinite number of mathematical equations, any belief may be supported in hundreds of ways. Given a number of options, different people will probably select different supports. Disagreeing in their supports does not mean two people do not share the same belief, though. Still, it may affect how secure they feel in their agreement.

26. See *McGuire v. Almy*, 297 Mass. 323, 327, 8 N.E.2d 760, 762 (1937).

27. See *McGuire*, 8 N.E.2d at 762-63.

larly, although two individuals may share a value, they may have opposing views about what will further the value. The opposing opinions of Justices Black and Brennan in *Goldberg v. Kelly*<sup>28</sup> reveal that even if the justices agreed that the law must reflect a value that poor people were entitled to special protection, the justices would disagree on how "due process" should be defined in order to guarantee that protection.<sup>29</sup>

To support horizontal steps effectively through value-based arguments, the legal writer must familiarize himself with the particular values which his audience believes the law must reflect. He may do this by reviewing things his audience has said or written or by discussing the audience with other lawyers who have worked with the audience. Then the legal writer must construct his value-based support on a value he knows his audience accepts and in a form with which he knows they will agree.

Legal writers always seek to convince their audience, but the audience cannot be convinced if the writer does not speak the audience's language. Speaking its language includes speaking to it not only in familiar words, but also in values, implications, and structures with which it is familiar. Even the apprentice can construct a logical, value-based support, but it is the craftsman who knows to construct, and does construct, the value-based support best suited to the audience.

Value-based arguments can be divided into six families: social utility, morality-fairness, rights, reasonable expectations of the parties, institutional competence, and adminis-

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28. 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

29. Justice Black characterized the position of Justice Brennan as one that needy people will benefit if "due process" is interpreted to require more procedural protection for those receiving welfare, because that will keep needy people on the welfare rolls longer. Black argued that in fact increased procedural protection will hurt needy people by making states more reluctant initially to add needy people to the welfare rolls. *Goldberg*, 397 U.S. at 278-79.

trability.<sup>30</sup> Each family contains a set of related values from which arguments may be built. Under social utility, the values indicate social goals that the law may seek to further. An example might be a goal of guaranteeing greater supervision for people with mental disorders.<sup>31</sup> Under morality-fairness, the values reflect principles by which people should behave or be treated. Examples here include: people must care for others, people must care for themselves, similar injuries must be treated similarly, no liability without fault, and between two innocents the one who caused the injury must pay. Under rights, the values take the form of rights and duties, perhaps reflecting views of natural law. Not surprisingly, under reasonable expectations of the parties, the principal value is that the parties should be treated according to their reasonable expectations.<sup>32</sup> Under institutional competence, one finds values reflecting the roles of different law-making bodies and their relationships to one another. These include values of judicial activism and pacifism, values which reflect what kinds of values courts<sup>33</sup> or other governing bodies<sup>34</sup> should consider, and how much deference law-making bodies must show one another. Finally, under administrability, one finds values related to the ability of a particular institution to administer a given rule regardless of

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30. Professor Duncan Kennedy of the Harvard Law School introduced this author to these categories. Although he has never published them, he does discuss them regularly in various forms in his teaching materials.

31. *McGuire v. Almy*, 297 Mass. 323, 8 N.E.2d 760 (1937).

32. To this, one could raise a counter-argument that under some principle of fairness or social policy, something in the relationship demands that the court upset the reasonable expectations of the parties or that the court determine the parties' expectations were not reasonable. Unequal bargaining power is one example of something that could spur such an argument.

33. For example, in response to a fairness or social policy argument, one can argue under institutional competence that courts cannot consider fairness or social policy arguments because such values are best left to the consideration of the legislature.

34. In the debate over abortion, for example, some legislators wrestle with the appropriateness of considering their own moral views or those of their constituents in casting votes.

its apparent desirability.<sup>35</sup> For example, in the judicial context, one might argue that a given rule cannot be applied consistently or precisely and, thus, it should be rejected because its acceptance would lead to uncertainty and a flood of litigation. In a related vein, one might argue that courts may not be able to obtain the facts necessary to devise rules in a given area so they should refrain from doing so.<sup>36</sup>

Once a lawyer has selected a value foundation for his support, he can build an argument to support his definition of a word that serves as a step in the bridge. The lawyer builds his support from that foundation by answering the same four questions, regardless of the family from which he has chosen his value:

1. From what specific value is he building?
2. How can he define the word in his rule to further that value?
3. Why will defining the rule in that way further the value?
4. Why is that the best way to define the rule to further the value?

The first three questions were answered in an earlier argument supporting the definition of "mother."<sup>37</sup> First, one builds from the specific social value that society seeks to place children where they will receive the greatest love and attention. Second, to further that value, one must define "mother" to mean the person whose heart yearns for the

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35. In addition to the administrability label, Professor Kennedy has also placed on these the "formal realizability" label. He indicates that one may always respond to these by arguing under fairness or social policy that the simple and easy rule ignores relevant factors and that courts consider difficult, but relevant, factors as part of their job.

36. Professor Kennedy places this fact-finding problem under institutional competence. I have placed it under administrability because I find it clearer to conceive of administrability as an argument that although one might like a court to do something, he finds it is unable to do so. Institutional competence argues that one does not like the court to do something because he feels it is not the court's role to do so.

37. See *supra* text accompanying note 24.

child. Third, defining the rule in this way will further the value because the person whose heart yearns for the child is the person most apt to provide the child with the greatest love and attention.

In answering the third question, the lawyer is guided by the same process of sequential definition and clarification which the lawyer used to build the horizontal bridge.<sup>38</sup> To see this, one may look at a fairness argument advocating use of a reasonable, prudent deaf person standard, rather than a reasonable, prudent person standard, in negligence cases involving people who are deaf.

To dispense with the first two questions, one must begin by identifying (1) the value from which one will build, "no liability without fault," and (2) the definition of the standard of care that one will use to further the value. Here, that definition would be "reasonable, prudent deaf person." Now the lawyer is ready to tackle the third question with a series of definitions that will link "no liability without fault" to "reasonable prudent deaf person." First, the lawyer will define "fault" as failing to do so when one has an opportunity to avoid the accident. Next he will clarify "opportunity to avoid the accident" by saying that the phrase requires the ability to avoid the accident. Then, the lawyer will clarify "ability to avoid the accident" by saying that a deaf person does not have the "ability to avoid an accident" when a person must be able to hear to avoid the accident. Thus, deaf people only have the ability to avoid those accidents for which avoidance does not require hearing. Having established that, we can wind our way back up through the clarifications:

- (1) If deaf people only "have the ability to avoid" those accidents for which avoidance does not require hearing, then deaf people only have "the opportunity to

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38. See *supra* text accompanying notes 19-21

avoid" those accidents for which avoidance does not require hearing;<sup>39</sup>

(2) If deaf people only have the opportunity to avoid "those accidents for which avoidance does not require hearing, then deaf people can only be at fault for those accidents for which avoidance does not require hearing;<sup>40</sup> and

(3) If deaf people can only be at fault for those accidents for which avoidance does not require hearing, then deaf people can only be liable for those accidents;<sup>41</sup> and the standard that holds deaf people liable only for those accidents is the reasonable, prudent deaf person standard.<sup>42</sup>

To keep it simple, neither of the previous supports addressed the fourth question, but we should acknowledge two of the kinds of responses one can have to that question. First, the fourth question requires a rebuttal to opposing arguments that the value will not be furthered by accepting the definition advocated. For example, in support of the definition of "mother" it was argued that "mother" should be defined to further the social value of placing children where they will receive the greatest love and attention. Someone might argue against this, however, that even accepting this value as appropriate, there is no guarantee that the "person whose heart yearns for the child" would provide the child with the greatest love and attention. The road to Hell is paved with good intentions, and although someone's heart yearns for a child, the person's head may lead her to everything but the care of the child. The fourth question requires

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39. This is true because it has already been established that "opportunity to avoid" requires "ability to avoid."

40. This is true because it has already been established that "fault" requires "opportunity to avoid."

41. This is true because it has already been established that "liability" requires "fault."

42. This is true because a reasonable, prudent person standard, which ignores the deafness of the defendant, would hold the defendant liable for accidents that one should have used hearing to avoid.

acknowledgement and response to such opposing arguments, which challenge the link between value and definition. Here one might respond that, although a yearning heart does not guarantee love and attention, lack of a yearning heart guarantees an absence of love and attention, and, thus, while the definition does not guarantee the goal, it does increase the likelihood the goal will be furthered.

Second, the fourth question requires arguments to challenge opposing definitions of the words that are designed to further the same value.<sup>43</sup> Here, for example, one would respond to an opposing claim that while a yearning heart may increase the likelihood that a child will receive the greatest love and attention, one can increase that likelihood even more by defining "mother" as the person with the most material wealth available to give the child. To rebut this opposing claim under the fourth question, the lawyer could argue that "love and attention" cannot be equated to "material wealth."<sup>44</sup>

Before leaving the discussion of supports, one should look at how all of these considerations can come together as two opposing lawyers consider one step on the horizontal bridge. Restatement (Second) of Torts section 46(2) indicates that

43. To distinguish the first kind of response from the second, the lawyer should note that in the first kind he is responding to a claim that his definition does not support his value, while in the second the lawyer responds to a claim that while his definition supports his value, another definition supports the value better.

44. Although the focus of this Commentary is on making rather than rebutting supporting arguments, it is worth summarizing here what has been covered on the latter topic. Generally, one can attack any supporting argument at four levels:

1) argue under institutional competence that that kind of support is inappropriate for the institution to consider (courts should not consider social policy);

2) argue that even if the kind of support were appropriate, the value espoused by the support is inappropriate (courts may consider social policy, but society has no interest in placing children where they will receive the greatest love and attention);

3) argue that even if the kind of support and the value espoused were appropriate, the protagonist's definition of the rule does not further the value (see *supra* text accompanying notes 42-43); and

4) argue that even if the kind of support and the value espoused were appropriate and even if the protagonist's definition furthered the value, another definition furthers the value more (see *supra* text accompanying note 44).

a victim may meet the intent requirement for intentional infliction of emotional distress by showing that the defendant intended to cause distress in another victim, if the first victim is a member of the second's "immediate family." The defendant's lawyer wants to define "immediate family" to *exclude* a live-in girlfriend, while the plaintiff's lawyer wants to define the term to *include* a live-in girlfriend. The argument might proceed as follows:

Defendant's attorney: We need to define "immediate family" in a simple way that will be easy to apply and will guarantee predictable results. That way everyone will know what they must do and what will happen if they do not do it. Here, if we define "immediate family" to include only legally documented children and spouses, we will have an easy rule to apply. Either the plaintiff produces a birth certificate or a marriage license and meets the requirement or she does not. Nothing could be easier. Any other definition would draw the court into arbitrary weighing of various kinds of relationships. Such weighing would lead to inconsistent results.<sup>45</sup>

Plaintiff's attorney: Although simple rules have advantages, one cannot use a simple rule if it ignores a relevant factor.<sup>46</sup> Here, one cannot use the defendant's simple rule because it ignores the relevant factor that the law has a concern that similar injuries be treated similarly. Although a live-in girlfriend may lack the paper credentials, the nature and duration of her relationship may indicate an emotional attachment at least as great as that held by some wives. Since her emotional attachment is similar, one would expect emotional injury to be similar. Since similar injuries must be treated similarly and since wives and live-in girlfriends can suf-

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45. Defendant's attorney leads with an administrability argument that answers all four of the questions.

46. Plaintiff's attorney rebuts the defendant's argument by limiting the value from which defendant's attorney argued.

fer similar emotional injuries, the law must define "immediate family" to allow wives and live-in girlfriends to be treated similarly. To define the term to exclude live-in girlfriend, but include wives would prevent live-in girlfriends from recovering for injuries similar to those for which wives recover. Thus, we must define "immediate family" so that it includes both wives and live-in girlfriends.<sup>47</sup>

Defendant's attorney: Even if we wanted to apply plaintiff's principle that similar injuries must be treated similarly, we cannot. This is so because the plaintiff's principle draws the court into the very kind of arbitrary weighing of various kinds of relationships of which the defendant has already warned. To decide whether a live-in girlfriend can have the same level of emotional attachments as a wife, one must rely on subjective values and social policy, considerations best reserved for the legislature. The relationships are different: one requires a legal commitment and guarantee to the community that is absent from the other. To decide whether this difference matters, one invariably would be drawn into considerations of one's own up-bringing and views on the types of relationships society should encourage or condone. These may well be important considerations, but courts should allow legislatures to do the considering. Thus, the court must follow an objective standard, and that necessity points toward the legally documented relationship standard which the defendant advocates.<sup>48</sup>

Plaintiff's attorney: It is unrealistic to suggest that the court could select any definition of "immediate family" without the selection reflecting social policy. Were the court to accept the defendant's legally documented relationship standard, it would communicate a social

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47. Plaintiff's attorney follows with a fairness argument founded on the value that "similar injuries must be treated similarly."

48. Defendant's attorney rebuts plaintiff's argument with the institutional competence claim that plaintiff's definition would draw courts into considerations outside their realm.

policy that supports marriage but completely discredits living together. Whether the court would mean to or not, the court would be making a social policy statement to which members of society would respond. If any decision will communicate a social policy message, and if such messages do affect society, then courts have an obligation to make sure that the messages are appropriate.<sup>49</sup> The law seeks to treat similar injuries similarly. The plaintiff has shown that wives and live-in girlfriends can suffer similar injuries. Therefore, the court should adopt a standard that allows the two groups to recover in a similar fashion.

At this point, a judge could decide for either side. He could say that either the plaintiff or the defendant had the correct view of the role of courts; similarly, he could say either that the simple rule is needed here or that the plaintiff's relevant factor should be considered. Both sides could introduce arguments beyond these, and in fact, this exchange could go on indefinitely with all sorts of values being argued. Despite all those arguments, however, a clear answer might not emerge from the debate. Ultimately, the judge must pick the argument he finds more persuasive, and it is in large part because of that necessity that law suits and judges are continually needed.<sup>50</sup>

As the above comments demonstrate, the legal writer must be able to build a bridge of definitions horizontally from a rule to a factual result and then build a series of vertical supports for these definitions. These supports are founded either in legal precedent or in some legal value accepted by the audience, and these supports need to address four questions.

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49. Plaintiff's attorney responds with the ultimate institutional competence argument: that the defendant's institutional competence argument is inappropriate for the court to consider.

50. One must realize that although there may not be a clear answer, there is always a just and right answer, and hopefully there is a continued need for lawyers to flush out such answers.

As this Commentary comes to a close, the author asks the reader to reflect on the dark and light sides of this process.

#### **IV. Conclusion: Discerning Between Light and Darkness**

Analytical bridge-building leads to three skills, which may be used to create either understanding or confusion. First, a legal writer can build bridges to understand his own beliefs. At some point, support for any conclusion must rest on a value that is maintained only by "that's something I just believe." Yet, in spite of this, a legal writer always can work to build bridges to explain a little more deeply those things "he just believes." In addition he can work to understand the internal consistency of all his beliefs and supporting bridges. Alternatively, the legal writer can build bridges to rationalize away unpleasanties and deceive himself.

Second, the legal writer can help others who are not so well-versed in bridge-building to build bridges of their own and, thus, to better understand their own beliefs. Alternatively, the legal writer can spot the vulnerability in these people and the weaknesses in their bridges and work to turn minor flaws in those bridges into major confusion.

Third, a legal writer can be given a conclusion by a client, and then work backward to support that conclusion with an analytical bridge that has nothing to do with the beliefs of either the lawyer or the client, but which still might convince a judge. On the one hand, this skill may allow an attorney to convince a judge of a truth that the judge otherwise would miss because the judge did not function in a language that recognized the values of the attorney or his client. On the other hand, this skill may demand so many chameleon-like value changes of the attorney that at some point he forgets what his own truth really is.

In this land, people bring the most serious problems in their lives to attorneys, who in turn must lead those people

across the bridge from problem to resolution. It is an awesome responsibility to build, to explain, and to use these bridges; a responsibility which the legal writer may find exhilarating and humbling. As one faces this responsibility, he should always reflect on the words of the bridge-builder King Solomon, spoken as he faced a similar responsibility in a not-so-different time:

[T]hou hast made thy servant king . . . , although I am but a little child; I do not know how to go out or come in. And Thy servant is in the midst of a people . . . that cannot be numbered or counted for multitude. Give Thy servant therefore an understanding mind to govern Thy people, that I may discern between good and evil.<sup>51</sup>

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51. I Kings 3:7-9.