# Comment

# Diagramming Interpretation

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*Sentence diagramming—a method of showing the relationship between different parts of a sentence—has long been used by judges to interpret legal texts. This Comment documents how judges employ sentence diagrams in constitutional, statutory, and contract cases. It finds that diagramming plays an important role in constitutional and statutory cases, complementing traditional canons of legal interpretation, but that diagramming is less often used in contract cases for fear of disadvantaging grammatically unsophisticated parties. In addition, this Comment defends the practice of judicial diagramming as a way of improving textualist interpretation and promoting broader values of judicial opinion writing.*



## Introduction

Sentence diagramming—a method of showing the relationship between different parts of a sentence—may now have its most influential proponent. As

† Yale Law School, J.D. Candidate, 2018. Thanks to Megan McGlynn and the editors of the *Yale Journal on Regulation* for their thoughtful feedback. Special thanks to my former English teacher, Carrie Berman, who taught a grammatically challenged sixth grader how to diagram sentences. All errors are my own.

a number of commentators have recently noted, the newest member of the Supreme Court, Justice Neil Gorsuch, is a fan of diagramming sentences.[1]

In *United States v. Rentz*, then-Judge Gorsuch used a sentence diagram to interpret 18 U.S.C. § 924(c)(1)(A).[2] The "enigmatic" provision states[3]:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—be sentenced to a term of imprisonment of not less than 5 years.[4]

The defendant in *Rentz* "use[d]" a firearm only once (he fired a single shot) but he did so "during and in relation to" two separate "crimes of violence" (he hit two individuals with that shot).[5] The appeal concerned whether the government had to prove a separate act of using a firearm for each charge or whether a single act could give rise to multiple charges.[6]

To answer this question, Judge Gorsuch included a simplified diagram of the provision in his opinion:

1. *See, e.g.*, Joe Palazzolo, *Supreme Court Nominee Takes Legal Writing to Next Level*, WALL ST. J. (Jan. 31, 2017, 8:26 PM), http://www.wsj.com/articles/supreme-court-nominee-takes-legal-writing-to-next-level-1485912410 [http://perma.cc/5994-MSE5]; Jason Steed, *Sentence Diagramming*, FORMA LEGALIS (Dec. 21, 2016), http://formalegalis.org/2016/12/21/sentence-diagramming [http://perma.cc/73G2-FSXT]; Ben Zimmer, *Gorsuch v. Prepositional Phrases*, LANGUAGE LOG (Feb. 1, 2017, 1:09 AM), http://languagelog.ldc.upenn.edu/nll/?p=30739#more-30739 [https://perma.cc/9HLR-QXZJ]. In his response to the Senate Judiciary Committee's questionnaire, Justice Gorsuch listed *United States v. Rentz* as one of "the 10 most significant cases over which [he had] presided." Alison Frankel, *Decoding Gorsuch's Picks for His 10 "Most Significant" Opinions*, REUTERS (Feb. 15, 2017), http://www.reuters.com/article/us-otc-gorsuch/decoding-gorsuchs-picks-for-his-10-most-significant-opinions-idUSKBN15U2WZ [http://perma.cc/7QXP-7MJZ] ("I suspect Judge Gorsuch spotlighted the Rentz opinion as an example of his textualist philosophy. In the decision, he literally parsed the statutory language, like a middle school teacher teaching grammar by diagramming sentences.").

2. 777 F.3d 1105 (10th Cir. 2015) (en banc).

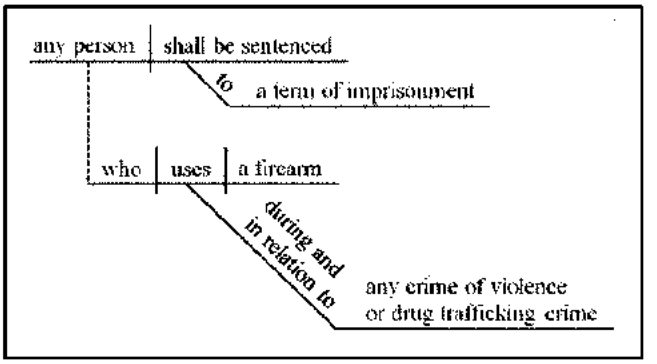
3. *Id.* at 1106.

4. 18 U.S.C. § 924(c)(1)(A) (2012).

5. *Rentz*, 777 F.3d at 1107.

6. *Id.*

Figure 1[7]




Referencing this visual aid, he concluded that "during and in relation to . . . a qualifying crime [of violence]" modified "an act of using, carrying, or possessing [a firearm]" and that, therefore, each charge required both a distinct act of using a firearm and a resulting crime of violence.[8]

Significantly, Justice Gorsuch is not alone among judges in his diagramming ways. Indeed, judges have used sentence diagrams for over a century[9] and have publically acknowledged their value in resolving cases.[10] But scholars, by contrast, have largely overlooked how courts use this simple interpretive tool.[11]

It should come as no surprise that judges diagram legal texts, as diagrams can offer important insights into the meaning of a sentence. Judges have long turned to dictionaries as an outside resource for understanding semantic meaning—the meaning of individual words or phrases.[12] And more recently,

7. *See id.* at 1109.

8. *Id.* at 1110–11.

9. *See infra* note 28 and accompanying text.

10. *See* Maura D. Corrigan, *Textualism in Action: Judicial Restraint on the Michigan Supreme Court*, 8 TEX. REV. L. & POL. 261, 266 (2004) ("For those of you who think that diagramming sentences in grade school was a waste of time, it has been used often by our Court to make sure we have the correct reading of a sentence.").

11. A few commentators have studied how lawyers use sentence diagrams. *See, e.g.*, Lisa Eichhorn, *Old Habits Sister Bernadette and the Potential Revival of Sentence Diagramming in Written Legal Advocacy*, 13 LEGAL COMM. & RHETORIC 79 (2016); Omar Ha-Redeye, *Diagramming for Statutory Interpretation*, SLAW (Aug. 24, 2014), http://www.slaw.ca/2014/08/24/diagramming-for-statutory-interpretation [http://perma.cc/5SHG-PQW8]. And more broadly, scholars have recognized that sentence diagramming can aid in legal interpretation, without considering how judges have actually used diagrams in practice. *See, e.g.*, Sean Donahue, *Limitations on Judicial Review: A Semiotic Interpretation of Statutes*, 7 UCLA ALASKA L. REV. 204, 216–34 (1978); Jeffrey P. Kaplan & Georgia M. Green, *Grammar and Inferences of Rationality in Interpreting the Child Pornography Statute*, 73 WASH. U. L.Q. 1223 (1995); Gary Monserud, *An Essay on Teaching Contracts and Commercial Law for the First Time (Even If You Have Taught These Courses Many Times Before)*, 82 N.D. L. REV. 113, 143 (2006) (noting that the author "dr[ew] grammar school-like sentence diagrams" when parsing statutes).

12. *See, e.g.*, James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013).

some courts have also begun to use new digital technologies, such as Corpus Linguistics, for the same purpose.[13] But judges have fewer outside resources for understanding syntactic meaning—the meaning of words and phrases within the broader context of a sentence.[14] And because courts lack tools for understanding syntactic meaning, they may sometimes discount the importance of this context.[15] Although the traditional grammar canons of statutory construction may address some of these questions,[16] sentence diagramming offers courts a more flexible interpretive resource for understanding syntax.

In this way, this Comment bucks the recent academic trend toward promoting new technologies in legal interpretation.[17] Instead, it argues that, when trying to understand the syntax of a sentence, courts may be well served by the old standby of grade-school English teachers.

Part I provides a brief overview on the practice and history of sentence diagramming. Part II then examines the actual and rhetorical use of sentence diagrams in judicial opinions.[18] Although rhetorical references to diagramming may not directly inform judicial interpretation, they do indicate a broader awareness of sentence diagrams among the judiciary and may also suggest some undisclosed judicial diagramming. Part II also contrasts how courts diagram statutes and constitutions with how they diagram contracts and other less formal legal documents. Finally, Part III offers a normative defense of diagramming interpretation. Like other interpretive tools, sentence diagrams may have their limitations. But, overall, sentence diagramming can help judges interpret legal texts and improve the communicative value of their opinions.

13. *See, e.g.*, James C. Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical*, 126 YALE L.J. F. 21 (2016).

14. *But see id.* at 26 (noting that some corpora can be used to identify syntactic relationships).

15. *See* Craig Hoffman, *Parse the Sentence First: Curbing the Urge To Resort to the Dictionary When Interpreting Legal Texts*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 401, 401 (2003) ("Recently, dictionaries have seemed like a good idea to judges. Acting on an instinct that determining the meaning of a sentence requires no more than defining the individual words that comprise it, judges habitually turn to dictionaries when faced with indeterminacy in interpreting statutory sentences . . . . [But] [d]ictionaries simply are not capable of explaining complex linguistic phenomena . . . .").

16. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 140-166 (2012) (describing "syntactic canons"); Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 362 (2010) (listing grammar and syntax canons).

17. *See, e.g.*, Philips et al., *supra* note 13; Alice A. Wang, *Googling for Meaning: Statutory Interpretation in the Digital Age*, 125 YALE L.J. F. 267 (2016).

18. This study examined judicial opinions discussing sentence diagrams found through the following searches on WestLaw: (sentence /s (diagram OR grammar)) and ((grammar OR syntax) /s (diagram OR graphic OR figure OR visual)).

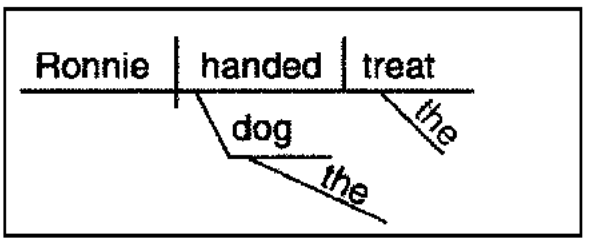
## I. A Primer on Sentence Diagramming

Sentence diagrams illustrate the grammatical relationship between different parts of a sentence. Or as one commentator put it, sentence diagrams are "a picture of what language looks like."[19]

Diagramming a sentence involves two basic steps. First, a reader must distinguish the various parts of the sentence—for example, the subject(s), verb(s), object(s), etc. And second, she must identify the relationship between the various parts of the sentence – that is, which words modify or refer to other words. The theory is that by "cutting a sentence up into its component parts," sentence diagramming "require[s] [a reader] to think about what words are and how they work together" and, therefore, makes her "more likely to use [language] correctly."[20]

To illustrate, consider the simple sentence: "Ronnie handed the dog the treat."[21] The subject of the sentence is "Ronnie," so it is placed at the beginning of the diagram. The verb is "handed," so it follows "Ronnie" but is separated by a vertical line that goes through the base of the diagram. The direct object is "treat," so it follows "handed" but is separated by a vertical line that does not cut through the base. The indirect object is "dog," so it is written on a line under the verb. Finally, both "treat" and "dog" are modified by the articles "the," which is shown by drawing a diagonal line under each term. The resulting diagram looks like the following:

Figure 2[22]




19. Juana Summers, *A Picture of Language: The Fading Art of Diagramming Sentences*, NPR (Aug. 22, 2014, 7:18 PM), http://www.npr.org/sections/ed/2014/08/22/341898975/a-picture-of-language-the-fading-art-of-diagramming-sentences [https://perma.cc/HL6S-CSTG].

20. Elizabeth Ruiz Frost, *A Worthwhile Skill: The Upside of Diagramming Sentences*, OR. ST. B. BULL. (June 2015), https://www.osbar.org/publications/bulletin/15jun/legalwriter.html [https://perma.cc/PFK9-J82Y].

21. For this example, see Deborah White Broadwater, *Diagramming Sentences*, MARK TWAIN MEDIA PUB. CO. 6 (2004), http://teachersites.schoolworld.com/webpages/lwalton/files/diagramming%20workbook.pdf. [https://perma.cc/Z4AT-9Y84].

22. *Id.*

Sentence diagramming is an American tradition.[23] It first arose in the mid-nineteenth century, but came into vogue in 1877, when Alonzo Reed and Brainerd Kellogg developed the Reed-Kellogg diagram.[24] Justice Gorsuch's diagram in *Rentz*, as well as many other diagrams included in judicial opinions and briefs, are of the Reed-Kellogg variety.[25] For decades, English teachers used the Reed-Kellogg diagram to teach grammar, but beginning in the 1960s, sentence diagramming fell out of favor among educational theorists.[26] Yet, as the next part will show, diagramming has retained adherents among the federal and state judiciary.

## II. Diagramming Judicial Interpretation

Perhaps not surprisingly, judges—like the general public[27]—have mixed feelings about sentence diagrams. Some enthusiastically support diagramming; others find it to be a tedious exercise in grade-school grammar. But beyond personal preferences, one important factor that affects whether judges use diagrams in their opinions is the type of text being interpreted. Courts appear the most open to diagramming statutes and constitutions, while they are more skeptical of diagramming contracts and other less formal legal documents.

### *A. Diagramming Statutes and Constitutions*

In both state and federal cases, courts use sentence diagrams as an aid in interpreting statutes and constitutions. In a few decisions, such as *Rentz*, judges even include the actual diagram in their written opinions.

Over 150 years ago, for example, an Ohio judge used a primitive sentence diagram to show that the phrase "whether called as a witness" modified each of the three indirect objects in a statute:

23. *See* Summers, *supra* note 19.

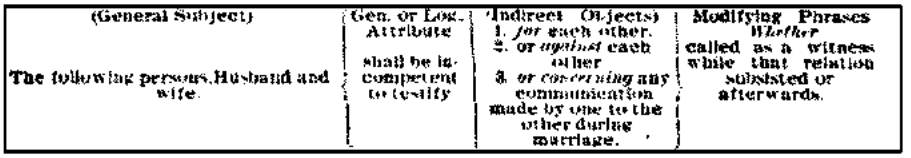
24. *See* KITTY BURNS FLOREY, SISTER BERNADETTE'S BARKING DOG 29-43 (2006).

25. *See* Eichhorn, *supra* note 11 (showing examples of Reed-Kellogg diagrams used in briefs).

26. *See* Summers, *supra* note 19. Linguists have continued to diagram sentences, but they more commonly use other types of diagrams, such as the tree diagram. *See* STEVE PINKER, THE SENSE OF STYLE 78-82 (2014). Choice of diagram is beyond the scope of this Comment. For a discussion of different types of diagrams, see Eicchorn, *supra* note 11, at 84.

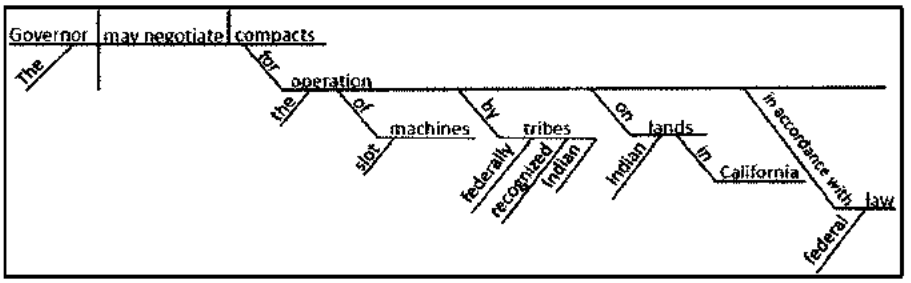
27. *See* Kitty Burns Florey, *Taming Sentences*, N.Y TIMES: OPINIONATOR BLOG (June 18, 2012, 8:39 PM), http://opinionator.blogs.nytimes.com/2012/06/18/taming-sentences [http://perma.cc/B7SK-9BDE] (describing mixed reactions to sentence diagramming).

Figure 3[28]:



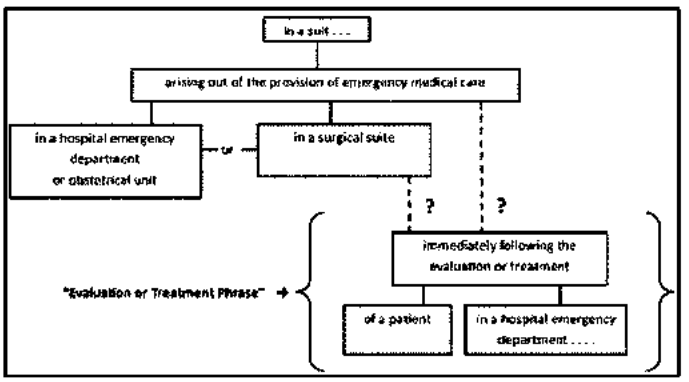

Likewise, the California Court of Appeals recently included a sentence diagram to show that the state constitution imposed numerous limitations on the governor's authority to negotiate compacts:

Figure 4[29]




And most recently, the Texas Court of Appeals used an unconventional sentence diagram "to provide a visual explanation" of a medical malpractice statute's ambiguity:

Figure 5[30]




28. *See* Neil *ex rel.* Neil v. Cherry, 2 Ohio Dec. Reprint 417, 1859 WL 4457, at *3 & n.a1 (Ohio Com. Pl. May 1, 1859). For the original diagram, see 3 REPRINT OF OHIO PUBLISHED CASES IN WESTERN LAW MONTHLY 420 (1896).

29. Stand Up for California! v. State, 211 Cal. Rptr. 3d 490, 509 (Ct. App. 2016).

30. D.A. v. Texas Health Presbyterian Hosp. of Denton, 514 S.W.3d 431, 437 & n.6 (Tex. App. 2017).

But more commonly, when judges use sentence diagrams to interpret legal texts, they simply reference the diagrams without including the actual figures in their opinions. In these cases, sentence diagrams serve a number of interpretive purposes. Courts have, for instance, used diagrams to identify words "clearly implied" by the text[31] and to understand "the meaning of the word arrangement of the statute."[32] Judges may also use diagrams to identify the various parts of a sentence.[33] In criminal cases, for example, Texas courts use the "eighth-grade grammar test" to determine which parts of a statute create an element of the offense.[34] They "diagram[] the statutory text according to the rules of grammar" to identify the criminal elements: "(1) the subject (the defendant); (2) the main verb; (3) the direct object if the main verb requires a direct object (i.e., the offense is a result-oriented crime); [(4)] the specific occasion; and [(5)] the requisite mental state."[35]

Judges most commonly reference sentence diagram when attempting to show a provision's clarity or ambiguity. In establishing the former, courts sometimes refer to what a diagram actually shows,[36] but may also simply mention sentence diagramming as a rhetorical device for dismissing a party's weak interpretive claim.[37] As one judge dramatically put it, if he accepted the party's strained interpretation of the statute, "not only were the efforts of [the judge's] past English teachers (who in that distant past forced diagramming and parsing of sentences ad infinitum, ad nauseum) wasted, but their earthly remains would take on gyroscopic manifestations."[38]

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31. Cleveland Tel. Co. v. City of Cleveland, 121 N.E. 701, 714 (Ohio 1918).

32. State Bd. of Equalization v. Cheyenne Newspapers, Inc., 611 P.2d 805, 809-10 (Wyo. 1980).

33. *See* Goyette v. Country Villa Serv. Corp., No. G039580, 2008 WL 2461433, at *4 (Cal. Ct. App. June 19, 2008) (unpublished opinion); State v. Acker, 838 A.2d 1016, 1018 (Conn. App. 2004); State v. Gates, 325 N.W.2d 166, 168 (N.D. 1982).

34. Kent v. State, 447 S.W.3d 408, 414 (Tex. App. 2014), *rev'd*, 483 S.W.3d 557 (Tex. Crim. App. 2016) (quoting Stuhler v. State, 218 S.W.3d 706, 718 (Tex. Crim. App. 2007)); *see also* Jefferson v. State, 189 S.W.3d 305, 314 (Tex. Crim. App. 2006) (Cochran, J., concurring). *But see* Chambliss v. State, 647 S.W.2d 257, 259–60 (Tex. Crim. App. 1983) (rejecting "the bygone [sic] practice of 'diagramming,' whereby sentences were broken into their component parts to see what words 'went with' what").

35. *Kent*, 447 S.W.3d at 414 (quoting Pizzo v. State, 235 S.W.3d 711, 714-15 (Tex. Crim. App. 2007)). In contrast, "adverbial phrases" are not usually elements of the offense. Jourdan v. State, 428 S.W.3d 86, 96 (Tex. Crim. App. 2014).

36. *See* People *ex rel.* Burke v. Dist. Court of Second Judicial Dist., 141 P.2d 893, 895 (Colo. 1943); *see also* Cty. of Orange v. FST Sand & Gravel, Inc., 73 Cal. Rptr. 2d 633, 635 (Cal. App. 1998) (suggesting what a diagram would prove).

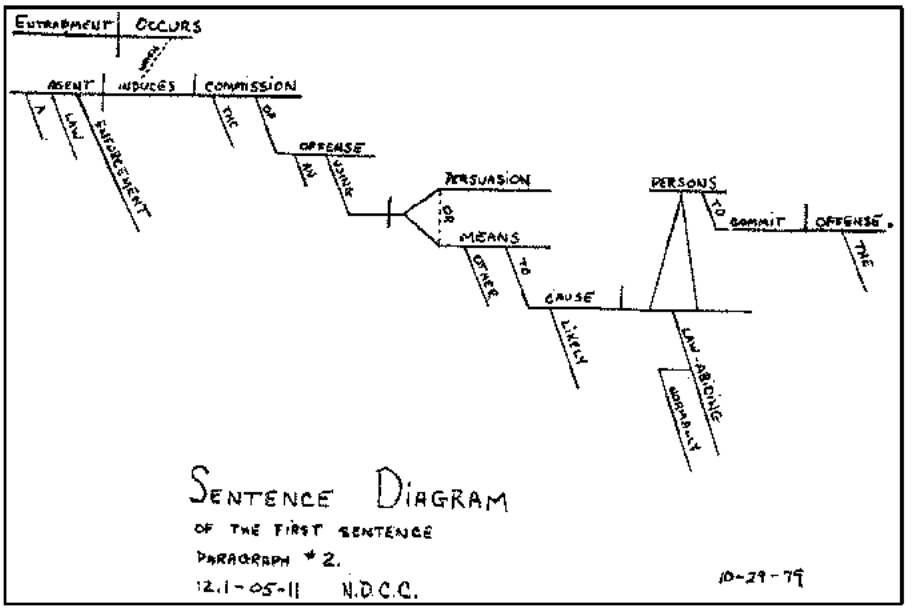
37. *See* Scardino v. Am. Int'l Ins. Co., No. CIV.A.07-282, 2007 WL 3243753, at *4 n.2 (E.D. Pa. Nov. 2, 2007) (unpublished opinion); Brownell v. Raubenheimer, 112 F. Supp. 154, 155 (S.D.N.Y. 1953), *aff'd*, 216 F.2d 751 (2d Cir. 1954); *In re* DiVall Insured Income Props. 2 Lt'd. P'ship, 445 N.W.2d 856, 860 (Minn. Ct. App. 1989); State *ex rel.* Conner v. Noctor, 140 N.E. 878, 883 (Ohio 1922); Dir. of Dep't of Agric. & Env't v. Printing Indus. Ass'n of Texas, 600 S.W.2d 264, 270 (Tex. 1980).

38. *In re* Albertson, 68 B.R. 1017, 1020 (Bankr. W.D. Mo. 1987).

Judges also use the difficulty of diagramming a sentence to suggest textual ambiguities.[39] After establishing a text's ambiguity, courts feel liberated to look beyond the statute's plain meaning to its purpose or the drafter's intent.[40] Given these various uses, it makes sense that judges have described sentence diagramming as a "trick of the trade in statutory construction"[41] and a "lost art."[42]

But diagramming also has a complicated relationship with legal interpretation. In some cases, a sentence diagram can support one of the grammatical canons of construction that courts apply in everyday cases.[43] But in others, a sentence diagram may conflict with an interpretive canon.[44] In *State v. Unterseher*, for example, the North Dakota Supreme Court included in its opinion a diagram submitted by the defendant:

Figure 6[45]




39. *See* Evoy v. Ill. State Police, 429 F. Supp. 2d 989, 995 (N.D. Ill. 2006); Casazza v. Dep't of Commerce, 350 N.W.2d 855, 859 n.6 (Mich. App. 1984).

40. Patriotic Veterans, Inc. v. Ind. *ex rel.* Zoeller, 821 F. Supp. 2d 1074, 1078-79 (S.D. Ind. 2011), *rev'd and remanded sub nom.* Patriotic Veterans, Inc. v. Indiana, 736 F.3d 1041 (7th Cir. 2013); Stiglitz Furnace Co. v. Stith's Adm'r, 27 S.W.2d 402, 404 (Ky. 1930).

41. State v. Holcomb, 886 N.W.2d 100, 102 (Wis. App. 2016).

42. *Evoy*, 429 F. Supp. 2d at 995 n.2.

43. *See* Columbia Gulf Transmission Co. v. Barr, 194 So. 2d 890, 894 (Miss. 1967); State v. Navaro, 26 P.2d 955, 959 (Utah 1933).

44. *See* Gannett Satellite Info. Network, Inc. v. Cin. City Council, 620 N.E.2d 267, 268 (Ohio Com. Pl. 1993).

45. 289 N.W.2d 201, 202 (N.D. 1980).

Although the court "intend[ed] no criticism" of the diagram "prepared by Rita A. Johnson, an English instructor at Bismarck High School," it quickly dismissed the defendant's diagrammed interpretation by citing a number of the state's codified interpretive canons.[46] Whether because of the law-like nature of interpretive canons[47] or because many judges "never really understood" sentence diagramming in the first place,[48] courts consistently preference canons over diagrams.[49]

In particular, there are a number of interpretive rules that take precedence over sentence diagrams. First and most importantly, courts follow the "plain meaning rule."[50] In short, they will prioritize a sentence's clear meaning over a diagrammatically correct (but perhaps less natural) reading.[51] Second, courts consider the broader statutory context of the sentence.[52] Then-Judge Gorsuch, for example, once noted that courts must "take account of surrounding text, structure, and context" and should not "interpret isolated statutory phrases solely according to grammatical diagrams."[53] Finally, in the face of ambiguity, courts will look to a statute's purpose.[54] In other words, courts will not allow "bad grammar . . . to defeat the operation of a statute" and will accordingly interpret the law according to its purpose[55] or the legislature's intent[56] rather than strict grammatical rules.

### *B. Diagramming Contracts*

Although judges also use sentence diagrams to interpret contracts, they generally take a more flexible approach to syntactic meaning in contract cases. Put another way, courts have often refused to allow technical rules of grammar

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46. *Id.* at 202-03. A codified canon is an interpretive rule prescribed by the legislature in a statute rather than one just announced by courts in judicial opinions. *See* Scott, *supra* note 16.

47. *See, e.g.*, William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898 (2011).

48. Collins v. Ky. Tax Comm'n, 261 S.W.2d 303, 306-07 (Ky. 1953).

49. *See, e.g.*, Berry's Chapel Util., Inc. v. Tenn. Regulatory Auth., No. M2011-02116-COAR12CV, 2012 WL 6697288, at *8 (Tenn. Ct. App. Dec. 21, 2012).

50. *See* William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 545 (2017) ("[T]he plain meaning rule uses the phrase . . . to denote obvious meaning—that is, the meaning that is clear.").

51. *See In re* Keinath Bros. Dairy Farm, 71 B.R. 993, 995 (Bankr. E.D. Mich. 1987); Columbia Gulf Transmission Co. v. Barr, 194 So. 2d 890, 894 (Miss. 1967); Peterson v. Midwest Sec. Ins. Co., 636 N.W.2d 727, 732 n.7 (Wis. 2001); Com. v. Cioppa, 6 Pa. D. & C.4th 449, 452 (Com. Pl. 1989); De Gooyer v. Nw. Trust & State Bank, 228 P. 835, 836 (Wash. 1924), *aff'd*, 232 P. 695 (Wash. 1925).

52. *See* SCALIA & GARNER, *supra* note 16, at 167-244 (describing "contextual canons").

53. United States v. Hinckley, 550 F.3d 926, 949 (10th Cir. 2008) (Gorsuch, J., concurring), *abrogated by* Reynolds v. United States, 565 U.S. 432 (2012).

54. *See* Scott, *supra* note 16, at 395-96 (discussing purpose canons).

55. Smith v. Haney, 85 P. 550, 550 (Kan. 1906) (internal quotation marks omitted).

56. *See* Tyler v. Tyler, No. CV115029427S, 2013 WL 5663287, at *7 (Conn. Super. Ct. Sept. 19, 2013).

to defeat what appears to have been the shared understanding of the parties to the contract.[57]

In some ways, judges diagram contracts just as they diagram statutes and constitutions. Courts may, for instance, diagram a contractual provision to establish a contract's plain meaning[58] or to show its ambiguity. Some unwieldy sentences just seem to "def[y] diagramming"[59]; others "require[] [such] extensive diagramming" that it is evident that they are "vague and unintelligible."[60] Also, like in statutory cases, courts may reference sentence diagrams rhetorically to dismiss "strained" interpretations of a contract.[61] In one case, for example, an appellate court specifically mentioned the lower court judge's admission "that he never understood how to diagram sentences" before reversing his interpretation of the contract.[62]

But despite these similarities between public law and private law cases, courts are in general more likely to disregard sentence diagrams when interpreting contracts. For example, in *Niven v. Smith*, the diagramming Ohio judge—mentioned already[63]—received a sentence diagram from one of the parties in a contract dispute:

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57. That courts will sometimes disregard sentence diagrams in the face of a clear contractual purpose does not settle *how* courts should identify the contract's purpose. In other words, both "textualist" and "contextualist" judges may reject diagrammed meaning. Shawn Bayern, *Contract Meta-Interpretation*, 49 U.C. DAVIS L. REV. 1097, 1099 (2016) (distinguishing "contextualists," who "favor a broad inquiry into the intent of contracting parties," from "textualists," who "favor a narrower, supposedly more predictable interpretive focus on the text of written contracts"); *see also* Ronald J. Gilson et al., *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 37-43 (2014) (contrasting justifications for textualism and contextualism). These competing theories are also called "classicalism" and "intentionalism." Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1157-67 (1998) (discussing history of "classicalism" and "intentionalism").

58. *See* Howell v. Union Producing Co., 392 F.2d 95, 101 n.7 (5th Cir. 1968); Md. Cas. Co. v. Scharlack, 31 F. Supp. 931, 934 (S.D. Tex. 1939), *aff'd*, 115 F.2d 719 (5th Cir. 1940); Hosp. Serv. Corp. of Ala. v. Eubanks, 55 So. 2d 755, 756–57 (Ala. Ct. App. 1951); Sea v. Acousti Eng'g Co. of Fla., 352 So. 2d 1250, 1252 (Fla. Dist. Ct. App. 1977); *In re* Chambers's Will, 4 N.Y.S.2d 875, 878 (Sur.), *adhered to on reargument*, 7 N.Y.S.2d 250 (Sur. 1938); *In re* Kenny's Will, 220 N.Y.S. 188, 195 (Sur. 1926), *aff'd*, 166 N.E. 337 (N.Y. 1929).

59. State Auto Ins. Co. v. Clifford, No. CIV-05-0259-F, 2005 WL 2210217, at *3 (W.D. Okla. Sept. 12, 2005), *aff'd*, 195 F. App'x 786 (10th Cir. 2006).

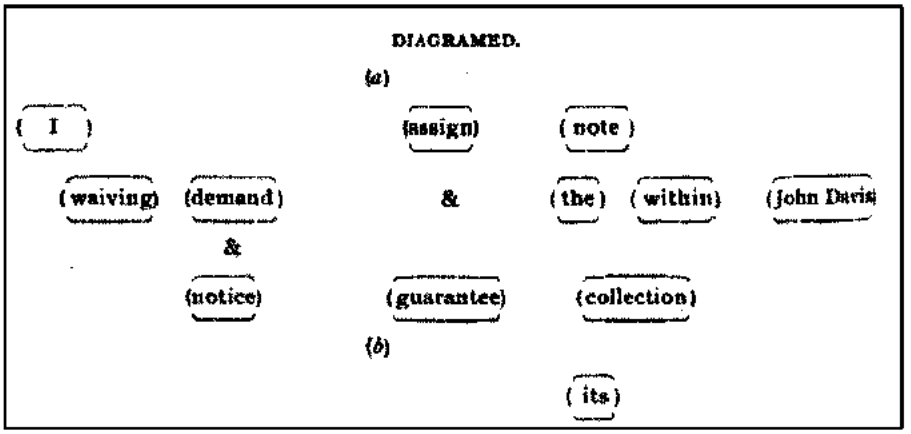
60. Compton Unified Sch. Dist. v. Universal Const. Maint. Integration Co., No. B144260, 2002 WL 849970, at *5 n.7 (Cal. Ct. App. May 3, 2002).

61. *In re* Payless Cashways, Inc., 215 B.R. 409, 415 (Bankr. W.D. Mo. 1997); *see also* Penn Cent. Corp. v. Union Pac. R. Co., No. CIV. A. 91-12453-Z, 1993 WL 370827, at *3 (D. Mass. Sept. 7, 1993); *accord In re* Pioneer Inv. Servs. Co., 21 F.3d 428 (6th Cir. 1994) (unpublished opinion) (dismissing argument based on party's "creative sentence diagramming").

62. Breakwater Cove Condo. Ass'n v. Chin, No. A-1420-09T3, 2010 WL 4878779, at *4 (N.J. Super. Ct. App. Div. Dec. 2, 2010).

63. *See supra* note 28 and accompanying text.

Figure 7[64]




But unlike in his prior ruling—decided just a year before—the judge in *Niven* concluded that "the grammatical construction" of the contract "must yield to the obvious purpose of the parties."[65]

*Niven* reflects the broader view among courts that neither "grammatical rules"[66] nor "'diagramed' meaning[s]" should defeat the "reasonably clear" purpose of a contract.[67] In other words, judges typically find that contracts "should be construed in a manner 'which makes sense to an intelligent layman familiar only with the basics of English language.'"[68] Courts reason that a private individual "should not have to resort to retaining an 'expert in sentence diagraming' in order to properly interpret his or her" contract.[69] As one judge noted, "the kind of pettifoggery and hairsplitting which would have undoubtedly delighted Miss Snow, my seventh grade English teacher, who taught us how to

64. 2 Ohio Dec. Reprint 337, 1860 WL 3940, at *3 n.a1 (Ohio Com. Pl. July 1, 1860). For the original diagram, see 2 REPRINT OF OHIO PUBLISHED CASES IN WESTERN LAW MONTHLY 340 (1896).

65. *Niven*, 1860 WL 3940, at *3 n.a1.

66. Lake Isabella Prop. Owners Ass'n/Architectural Control Comm. v. Lake Isabella Dev., Inc., No. 204954, 1998 WL 1988641, at *3 (Mich. Ct. App. Dec. 11, 1998) (unpublished opinion) (quoting Borowski v. Welch, 324 N.W.2d 144, 147 (Mich. Ct. App. 1982)).

67. Thornhill v. Sys. Fuels, Inc., 523 So. 2d 983, 1007 (Miss. 1988) (Robertson, J., concurring in denial of petition for reh'g); *see also In re* Peregrine Fin. Grp., 487 B.R. 498, 508 (Bankr. N.D. Ill. 2013) (finding that the "difficulty [of] diagram[ming] [an] ungainly sentence" should not defeat the apparent purpose of a provision).

68. Pursue Energy Corp. v. Perkins, 558 So. 2d 349, 352 (Miss. 1990) (quoting *Thornhill*, 523 So.2d at 1007 (Robertson, J., concurring in denial of petition for reh'g)); *see also* Rotenberry v. Hooker, 864 So. 2d 266, 275 (Miss. 2003) (same).

69. Artist Bldg. Partners v. Auto-Owners Mut. Ins. Co., 435 S.W.3d 202, 216 (Tenn. Ct. App. 2013).

rip sentences into unrecognizable (but diagrammable) shreds . . . is completely contrary to the way insurance contracts are supposed to be construed."[70]

In summary, although courts are willing to follow strict rules of grammar when interpreting the carefully drafted language of constitutions and statutes,[71] they take a more purposivist approach when interpreting legal documents that may have not been the product of precise drafting.[72]

## III. Diagramming as Interpretive Principle

Sentence diagramming is not simply a matter of judicial practice; it may also advance deeper normative principles of legal interpretation and judicial opinion writing. As dictionaries have done for semantic meaning, sentence diagrams may provide judges with a helpful external resource for deciphering syntactic meaning. In addition, the visual nature of sentence diagrams may make judicial opinions more accessible to the public.

Still, we should also recognize the limitations of sentence diagramming. Specifically, diagrams are less useful when the case raises an interpretive question that does not implicate syntactic meaning, when the document at issue may not have been the result of careful drafting, or when the text is already clear.

### *A. Why Diagram?*

Sentence diagramming serves at least two key purposes in legal interpretation. First, it can assist judges in determining the plain meaning of the text. And second, it can increase the communicative value of legal opinions.

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70. Lincoln Ins. Co. v. Home Emergency Servs., Inc., 812 So. 2d 433, 436 (Fla. Dist. Ct. App. 2001) (Schwartz, C.J., dissenting) (footnote omitted).

71. *See, e.g.*, FRANK P. GRAD & ROBERT F. WILLIAMS, 2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY (2006) (discussing the drafting process for state constitutions); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002) (discussing drafting process for federal statutes); Grace E. Hart, Note, *State Legislative Drafting Manuals and Statutory Interpretation*, 126 YALE L.J. 262 (2016) (discussing drafting process for state statutes).

72. Courts treat other less formal legal texts in a similar way. For example, judges often ignore diagrammed meaning of search warrants, *see* United States v. Otero, 563 F.3d 1127, 1132 (10th Cir. 2009) (noting that "[a] warrant need not necessarily survive a hyper-technical sentence diagraming and comply with the best practices of *Strunk & White*"); United States v. Burke, 633 F.3d 984, 992 (10th Cir. 2011); United States v. Alston, No. 15 CR. 435 (CM), 2016 WL 2609521, at *4 (S.D.N.Y. Apr. 29, 2016), or jury instructions. *see* United States v. McDougal, 137 F.3d 547, 558 (8th Cir. 1998); Coe v. Bell, 161 F.3d 320, 357 (6th Cir. 1998) (Moore, J., dissenting); Garrett v. Campbell, 360 F.2d 382, 386 (5th Cir. 1966); Jones v. McCully, 285 N.W. 551, 553–54 (1939). This is not to say that judges *only* diagram statutes and constitutions. *See* TiVo Inc. v. EchoStar Corp., 646 F.3d 869, 885 (Fed. Cir. 2011) (rejecting a party's claim that contempt order was unclear just because it required "detailed 'sentence diagramming' to arrive at the district court's reading"); Harris v. Quadracci, 48 F.3d 247, 254 (7th Cir. 1995) (accepting the lower court's "methodology of diagramming and parsing" defendant's allegedly defamatory statements). Rather, it simply appears that diagramming has a narrower purpose when the underlying legal text is not the product of careful drafting.

1. Diagramming as Textualism

To the extent that "we're all textualists now,"[73] judges should sometimes use sentence diagrams as a tool for improving textualist interpretation. As an initial matter, sentence diagrams immerse a reader in the text.[74] If we believe that judges should focus first and foremost on text rather than on statutory purpose or legislative intent,[75] diagrams can help ground and discipline judicial interpretation. Moreover, textualism requires that a judge do more than just look at the words in the document. We would ideally want courts to have a more rigorous interpretive methodology than the judge "who never understood how to diagram sentences" but "looked at the language several times and concluded that a reasonable person could read the sentence" in a certain way.[76] The appellate court that reversed the judge presumably agreed.[77]

In the past, judges have turned to dictionaries to improve their understanding of semantic meaning. The Supreme Court, in particular, has "invoke[d] dictionary definitions as an objective and relatively authoritative resource for discerning . . . ordinary meaning."[78] Admittedly, some scholars have criticized the Court's use of dictionaries as subjective.[79] But although it may be easy to identify examples of subjective interpretation, it is much harder to provide an affirmative account of neutral interpretation. Moreover, recent scholarship has suggested that, at least in theory, more interpretive resources need not increase judicial discretion.[80] As a result, it seems more productive to debate how—not whether—courts use outside interpretive tools.[81]

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73. Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes, at 8:28 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation [http://perma.cc/5XU2-RNNA] ("I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench."); *accord* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1090 (2001) ("[T]he proposition that statutory text . . . ought to be the primary source of statutory meaning . . . needs little defense today. We are all textualists."); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 43 (2006) ("[W]e are all textualists in an important sense."); Marjorie O. Rendell, *2003—A Year of Discovery: Cybergenics and Plain Meaning in Bankruptcy Cases*, 49 VILL. L. REV. 887, 887 (2004) ("We are all textualists now."); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998) ("In a significant sense, we are all textualists now.").

74. *See supra* note 20 and accompanying text.

75. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1829-46 (2010) (proposing that courts should always first consider whether the text has a plain meaning, even if they ultimately may turn to other resources in the face of textual ambiguity).

76. Breakwater Cove Condo. Ass'n v. Chin, No. A-1420-09T3, 2010 WL 4878779, at *4 (N.J. Super. Ct. App. Div. Dec. 2, 2010).

77. *See id.*

78. Brudney & Baum, *supra* note 12, at 486-87.

79. *See, e.g.*, *id.* at 489.

80. *See* Adam M. Samaha, *Looking Over a Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554 (2017).

81. *See, e.g.*, Antonin Scalia & Bryan Garner, *A Note on the Use of Dictionaries*, 16 GREEN BAG 2D 419, 422-23 (2013) (listing rules for using dictionaries); Phillip A. Rubin, Note, *War of*

The deeper problem with dictionaries may be that they only provide courts with one form of textual meaning. As a number of commentators have noted, legal texts "cannot be understood merely by understanding the words in [the document]."[82] Rather they "can be interpreted accurately only in a fairly comprehensive context."[83] Dictionaries can therefore be a misleading interpretive source to the extent that they "do not provide [this] context."[84]

Sentence diagrams can help courts correct this interpretive problem by providing judges with a tool for deciphering syntactic meaning.[85] In this regard, sentence diagrams are not fundamentally different from the grammar canons. But whereas the grammar canons identify a few specific syntactical rules, sentence diagramming provides an adaptable framework for dissecting sentences. Admittedly, this feature can also be a flaw as diagrams may be susceptible to judicial manipulation. As others have noted, how one diagrams a sentence may, at times, be a subjective exercise.[86] But as with dictionaries and even well-accepted canons of interpretation,[87] our debate should be about how to diagram correctly and in a more consistent way, not whether to diagram in the first place.

2. Diagramming as Legal Imagery

Sentence diagrams may also improve the communicative value of judicial opinions. In our legal system, judges do not simply answer questions; they also show their work. One purpose of written opinions is in disciplining judicial

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*the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles*, 60 DUKE L.J. 167 189-98 (2010) (same).

82. A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 71, 73 (1994); *see also* Hoffman, *supra* note 15, at 402 (criticizing the "Dictionary Method" where courts "treat sentence interpretation as a word-by-word task").

83. Randolph, *supra* note 82, at 74.

84. *Id.*; *see also* Hoffman, *supra* note 15, at 401 ("Dictionaries simply are not capable of explaining complex linguistic phenomena . . . .").

85. I say "begin" because contextual meaning may extend beyond a single sentence or even the statute. *See* Randolph, *supra* note 82, at 74-78 (arguing that courts may sometimes need to look to legislative history to understand statutory text).

86. *See* Eichhorn, *supra* note 11, at 95. At least one commentator has criticized Justice Gorsuch's diagram in *Rentz* for oversimplifying the structure of the sentence. *See* Lucy Ferriss, *Diagramming Gorsuch*, LINGUA FRANCA (Feb. 9, 2017), http://www.chronicle.com/blogs/linguafranca/2017/02/09/diagramming-gorsuch [https://perma.cc/65UD-T6Y6]. But when one considers the more complete but also more complicated diagram, *see id*, Justice Gorsuch's decision to prioritize visual accessibility over technical accuracy makes more sense. *Cf.* Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Jan. 31, 2017), http://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html [http://perma.cc/4WE3-RZK7] ("Judge Gorsuch is a lively and accessible writer.").

87. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (noting that most canons conflict with one another); *see also* Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909 (2016) (documenting use of conflicting canons in Supreme Court opinions).

reasoning,[88] and as discussed above, sentence diagrams can add rigor to judicial interpretation.[89] But written opinions also provide an important "law announcing function": they explain the court's reasoning so that future litigants and courts need not inductively determine "legal rules, principles, standards, and policies" by combing through individual cases.[90] Instead, the opinion itself offers broader legal guidance.

Sentence diagrams can help promote this communicative function. For example, a long and convoluted statutory provision, like § 924(c)(1)(A), raises many interpretive questions. In an ordinary opinion, a court would only decide the narrowest grammatical relationship in the statute, which leaves the meaning of the rest of the provision shrouded in syntactic mystery. In contrast, by diagramming even a part of the provision, the court lays out an interpretive framework for future courts and private parties. Admittedly, parts of the diagram that do not directly address the question at issue would likely be treated as non-binding diagrammatic dicta. But dicta may itself be a valuable source of information in future cases.[91]

Despite their reputation for complexity, sentence diagrams may also make some judicial opinions more accessible. Scholars have already argued that including visual images in briefs can help litigants better communicate their arguments to courts,[92] and some judges have specifically called for parties to use more visual aids.[93] In addition, courts have long used images in their opinions to communicate important facts about a case.[94] It would be a simple and logical next step for judges to include actual sentence diagrams in their opinions to help future courts and litigants understand the rationale of their decisions.

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88. *See* Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 810 (1961).

89. *See supra* notes 74 and 77 and accompanying text.

90. *Leflar*, *supra* note 88, at 810-11.

91. *See, e.g.*, Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1253 & n.17 (2006) (arguing that dicta "can help clarify a complicated subject[,] . . . can assist future courts to reach sensible, well-reasoned results[, and] . . . can help lawyers and society to predict the future course of the court's rulings."). Alternatively, we might view the structure of the entire sentence as relevant to the court's reasoning and, thus, the entire diagram as a part of its holding. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994) (arguing that a holding should include a court's rationale for its decision).

92. *See, e.g.*, Adam L. Rosman, *Visualizing the Law: Using Charts, Diagrams, and Other Images to Improve Legal Briefs*, 63 J. LEGAL. EDUC. 70 (2013).

93. *See* Eichhorn, *supra* note 11, at 86-87.

94. *See* Hampton Dellinger, *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704 (1997); Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1740-44 (2014); *see also* Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 688-709 (2012) (discussing role of images in law more broadly).

*B. When to Diagram?*

In deciding when to diagram a sentence, judges should consider three factors. First, courts should recognize that diagrams add little to debates about semantic meaning. As Lawrence Solan has noted, "battles over statutory meaning are nearly always about the 'wordlike' aspects of the statute's language rather than the syntactic, rulelike aspects of the statute,"[95] and diagrams shed little light on the meaning of the individual words in a sentence.[96]

Second, as this Comment has shown, courts are more likely to diagram texts that are the product of careful legal drafting, such as statutes or constitutions, as compared to less formal legal documents, like contracts. In these latter cases, courts seem particularly focused on protecting grammatically unsophisticated parties. Without addressing broader questions about the correct method of interpreting contracts,[97] this Comment agrees that courts should be more careful about diagramming legal texts that may not have been precisely drafted.

Finally, even in statutory and constitutional cases, courts should not allow sentence diagramming to trump a text's plain meaning or other canons of interpretation. As a result, diagrams may be most helpful for long and convoluted statutory provisions like § 924(c)(a)(A)—or what one court has called "super-sentence[s]."[98] In these cases, a diagram may simply help a judge wrap her head around the text. Unfortunately for both judges and litigants, these convoluted sentences are becoming a more and more common part of our legal system.[99] But, fortunately, sentence diagrams are ideally suited for addressing the problem of super-sentences.

## Conclusion

Whether or not Justice Gorsuch becomes the first Justice to include a sentence diagram in a Supreme Court opinion,[100] we should recognize that sentence diagrams already play an important role in our legal system. For over a century, judges have used diagrams to help them interpret legal texts, and there are good reasons for them to continue the practice. Of course, judges for whom sentence diagramming brings up traumatic grade-school memories need not

95. LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES 40 (2010).

96. *See* Eichhorn, *supra* note 11, at 103.

97. *See supra* note 57 (surveying debate between textualism and contextualism in contract interpretation).

98. *See* State v. Gates, 325 N.W.2d 166, 168 (N.D. 1982).

99. *Cf.* Cynthia R. Farina et. al., *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358 (2015) (noting increasing complexity of regulatory documents).

100. Other Justices may have used sentence diagrams without formally mentioning their use in the opinion. *See* Steed, *supra* note 1 (noting that sentence diagramming seems like "the sort of thing" Justice Antonin Scalia would have done).

engage in the exercise.[101] But for those of us who enjoy parsing sentences—or at least do not mind it—diagramming can be an important tool for understanding syntactic meaning.

101. *See supra* notes 38 and 71 and accompanying text.