HITTING THE WALL AS A LEGAL WRITER

Elizabeth Fajans*

At around twenty miles, many marathon runners hit the wall, experiencing a depletion of glycogen that manifests itself in a sudden loss of energy and progress. Similarly, many first year law students who work their way over a semester from low grades to "B" or "B+" on their written work hit the wall before reaching the elusive "A" grade. As a legal writing specialist, I often see these students. They come frustrated, disappointed, and concerned about their grades in a shrinking job market, asking what they have to do to get an "A" on a paper. As questions go, this is a hard one.

It is not hard to tell a student how to move from "C's" to "B's." Something is almost always missing that must be included: an issue, a rule, a step in reasoning, a conclusion. Something most always needs development: the court's reasoning, the factual application, the counter-arguments, or the solution. Sometimes the student must show better judgment in the selection of cases, or holdings must be stated more accurately. Sometimes the paper lacks an IRAC-type organization, or there are citation and sentence errors. There may be a lot to do, but the problems can be easily identified and clearly explained to a student.

Telling a student what is wrong with a "B+" or "A-" paper is harder. Admittedly, the student may have written a paper that is strong in some areas, but weaker in others: a variation on the problems of "C" or "B" papers.[1] But the student "may be doing

---

 Elizabeth Fajans is an Associate Professor of Legal Writing and Writing Specialist at Brooklyn Law School. She would like to thank both Brooklyn Law School for supporting this project with a summer research grant and friends and colleagues who discussed this issue with her, especially Linda Berger, Linda Edwards, Anne Enquist, Mary Falk, Kris Franklin, Ruth Ann McKinney, and Marilyn Walter. She is grateful for the secretarial assistance of Debra Richards. Most of all, she is indebted to the students who gave her permission to use their work: Gustave Ahrens, Samantha Baer, Elizabeth Brown, Joshua Card, Molly Delaney, Peter Fogarty, Steven Hasty, Andrew Kreidman, Frank Marallo, Anthony Mongone, Ari Rosmarin, and those who wished to remain anonymous.

1. One teacher expressed the sentiment of many on this. "To me, each B+ or A- paper

everything expected, and doing it pretty well,"[2] and yet the work lacks pizzazz, some value-added factor[3] that shows competence plus something more.

Not only are these value-added factors harder to identify and teach, but there are political and pedagogical considerations that make answers tricky. Different professors may be looking for different things or have different standards.[4] Different legal docu-

---

seems strong in particular areas and not as strong in others. For example, for some, the real difference might be slightly less effective use of authority, while for others it might be the level of elegance and sophistication of language." Email from Linda Edwards, E.L. Cord Found. Prof. Law, UNLV William S. Boyd Sch. L., to Elizabeth Fajans, Assoc. Prof. Leg. Writing & Writing Specialist, Brooklyn L. Sch., *A Papers* (Jan. 21, 2010, 7:52 p.m. EST) (copy on file with Author).

2. Email from Kris Franklin, Prof. Law & Dir. Academic Support, N.Y. L. Sch., to Elizabeth Fajans, Assoc. Prof. Leg. Writing & Writing Specialist, Brooklyn L. Sch., *A Papers* (July 12, 2010, 12:05 p.m. EST) (copy on file with Author); *see infra* text accompanying n. 17.

3. Email from Ruth McKinney, Clinical Prof. Law, U. N.C. Sch. L., to Elizabeth Fajans, Assoc. Prof. Leg. Writing & Writing Specialist, Brooklyn L. Sch., *A Papers* (July 7, 2010, 9:32 a.m. EST) (copy on file with Author).

The writing specialist at Seattle describes the work of a B+ student as "competent, maybe a little unimaginative, and it may be subtly off on things like emphasis." Email from Anne Enquist, Prof. Lawyering Skills & Dir. Leg. Writing Program, Seattle U. Sch. L., to Elizabeth Fajans, Assoc. Prof. Leg. Writing & Writing Specialist, Brooklyn L. Sch., *A Papers* (Oct. 2, 2009, 3:30 p.m. PST) (copy on file with Author).

4. In the exam context, Professor Kissam contrasts the answer key/score sheet method of grading, which tends to award issue spotting, identification of legal authorities, and application, with a holistic approach more responsive to "a general understanding, inferential abilities, analytic abilities, and practical judgment." Phillip C. Kissam, Law *School Examinations,* 42 Vand. L. Rev. 433, 445 (1989). Professor Fines notes that "different [professors] produce grades in different ways, taking into account different criteria, including comparison to peers, comparison to evaluative criteria, effort, growth, or behavioral compliance [with deadlines, page length, etc.]." Barbara Glesner Fines, Competition and the Curve, 65 UMKC L. Rev. 879, 880 (1997). These differences lead to the classic "stories about discrepancies among professors—the apparently inappropriate generosity or harshness of individual faculty members." Robert C. Downs & Nancy Levit, *If It Can't Be Lake WoeBegone. . . A Nationwide Survey of Law School Grading and Grade Normalization Practices* (Jan. 1997) (available at http://works.bepress.com/nancy_levit/20). Professors Clark and DeSanctis echo this concern. "When several years ago our institution proposed moving to a letter-graded . . . system . . . , one of the central concerns involved how to ensure that our . . . professors would use the same standards for assessing papers. Would it be possible for a professor to assign a B to a paper primarily because that professor "'overvalued,'" for example, the Statement of Facts in a trial brief and thus attributed more points to that section than to any other section, and more points than another professor? . . . Would a creative use of policy argument in an appellate brief stand out to one professor, but strike another as a throwaway argument?" Jessica Clark & Christy DeSanctis, *Toward a Unified Grading Vocabulary: Using Grading Rubrics to Set Student Expectations and Promote Consistency in Legal Writing Courses,* ___ J. Leg. Educ. ___ (forthcoming) (ms. at 5–6) (available at Geo. Wash. U. Leg. Stud. Research no. 574, http://ssrn.com/abstract=1890832). Although concerned, these two teachers think this problem can be overcome by rubrics that set expectations, "but accommodate both professor and student stylistic choic-

ments call for different criteria.[5] Standards change depending upon level of education and degree of experience.[6] Rubrics and grade point sheets, if used, may be insufficiently nuanced at the upper end,[7] and even if nuanced, an institution's mandatory curve or mean may skew and confound rubrics and grading criteria.[8] Nonetheless, we owe it to our students to identify some of the

---

es." *Id.* at 23.

5. For example, a teacher will look for a reasoned prediction about the probable outcome of a case in an office memorandum, a persuasive framing of the case in a brief, or the clear articulation of a problem in the law and an original, insightful, and pragmatic solution in a seminar paper.

6. Professors often modify standards or "rubrics according to the level of the course." Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics—Explicit Grading Criteria,* 2004 Mich. St. L. Rev 1, 25. As Professor McKinney said, "[T]he qualities that make an "A" paper an "A" are directly related (obviously) to the underlying assignment itself. Assignments from early in the semester may only demand insights regarding the holding in one particular case. By the end of the first year, the kinds of insights that would make me smile are those that include insights about individual cases, about how the cases (or other controlling law) weave together, and how the policy behind the laws can be expressed through wise application or modification of the law." Email from Ruth McKinney, Clinical Prof. Law, U. N.C. Sch. L., to Elizabeth Fajans, Assoc. Prof. Leg. Writing & Writing Specialist, Brooklyn L. Sch., *A Papers* (July 23, 2011, 4:23 p.m. EST) (copy on file with Author).

7. Formative assessments, that is, rubrics that "describe both what the students should learn and how they will be evaluated," Sparrow, *supra* n. 6, at 6, are more effective than summative assessments that come too late to assist in a student's development. In addition, rubrics that describe the characteristics of excellent, good, and weak student work are often more helpful than a checklist that establishes general criteria. Compare the general criteria rubric in Melissa Shafer, *Effective Assessment: Detailed Criteria, Check-Grading, and Student Samples*, 14 Second Draft 6 (1999), with level-specific criteria like those in Jessica Clark & Christy DeSanctis's article, *supra* n. 4, or Sophie Sparrow's article, *supra* n. 6. Nonetheless, even the most specific guidelines seem to stress predictive analysis rather than innovative ideas. And while many rubrics stress clarity, few stress other rhetorical techniques that can have significant impact on readers. This is why Sophie Sparrow cautions that rubrics need constant refinement to add complexities consistent with our goals for student learning. Sparrow, *supra* n. 6, at 34.

8. Whatever the merits of a required curve, it does create grading problems. As Steven Friedland notes, "The desire, even mandate, of many schools to impose grading curves exacerbates the reliability of grade distinctions. Whether called for or not, curves require instructors to distribute evaluations and make qualitative distinction between papers that are sometimes quite similar in substance. Ironically, the imposition of a grading curve necessitates a more subjective, norm-referenced grading, in which professors judge students against other students in the class, not against some objective, standardized measure." *A Critical Inquiry into the Traditional Uses of Law School Evaluation,* 23 Pace L. Rev. 147, 184–185 (2002). As one professor more cynically comments,

> [i]f a student asks a professor, "How do I earn an A in this class?" A professor operating under a policy of required means and distributions cannot simply describe the criteria of a good exam answer. For a student in such a class, fulfilling each of these criteria is neither necessary nor sufficient. The truly honest answer is, "Do more and better than 90% of your classmates . . . ."

Fines, *supra* n. 4, at 896.

qualities that might turn competent work into impressive work, even if we can provide them no guarantees that the grade will improve.

In this essay, Part I describes what some teachers say they reward with high grades. Part II then scrutinizes successful student papers in an effort to articulate and illustrate some value-added factors. These successful papers exhibit independent and often original thinking, as well as novel application. More surprisingly, perhaps, some papers are written with art and style.

I. WHAT TEACHERS SAY MERITS THE "A"

In asking colleagues how they answer the question "how can I get an 'A,'" one friend responded, "I'm always tempted to say 'evidence of independent thought'—but how do I explain what that looks like?"[9] This response reminded me of Justice Stewart's famous comment on hard-core pornography: "I shall not today attempt to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this is not that."[10] I have little doubt that law professors know "A" work when they see it. But like other categories that lack clearly defined parameters, explanations for their judgments, like those below, are often surprisingly subjective and general.

Explanation I

> My most craven desire . . . is for the beautiful, perfect exam.
>
> The exam that makes me leap out of my chair for joy. The exam that makes me want to cry. The exam that I don't think I could have written any better myself, and in fact, may be better than what I would have written, for it contains some insights and some analysis that did not oc-

9. Email from Linda Berger, Fam. Found. Prof. Law, UNLV William S. Boyd Sch. Law, to Elizabeth Fajans, Assoc. Prof. Leg. Writing & Writing Specialist, Brooklyn L. Sch., *A Papers* (Jan. 22, 2010, 9:51 a.m. EST) (copy on file with Author).

10. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

cur to me even as I carefully constructed the hypothetical.[11]

Explanation II

I do think those [papers showing evidence of independent thought] are the papers that I give the highest grades to—as long as they also do most of what I expected—and I occasionally will indicate in class that I'm always happy to see a good argument that I had not thought of—but I don't say it very loud or very often for fear they will go crazy on me.[12]

Explanation III

The problem with using a rubric [to help students achieve "A" work] is that it misses the "magic" that some "A" papers have—the value-added factor that makes the paper shine (despite a few typos or bluebooking errors throughout). It has to do with weight or insight or logic or something. The closest I can come to telling my students what I'm looking for is this it to tell them that the rubric is not an elements test. It is a factors test and a balancing test. Some of the factors definitely weigh-in heavier than others.[13] . . . The thing that is MOST important is pristine logic followed by precise communication of that logic. That's it. If you've got both, you've got an "A." (And if it's a persuasive piece rather than objective, it has to sing like a harmonic note.)[14]

Intermingled with comments about how teachers react to student work are nuggets of information about what they prize: original insight, independent thought, pristine logic and commu-

11. Ruthann Robson, *The Zen of Grading,* 36 Akron L. Rev. 303, 320 (2003).

12. Berger email, *supra* n. 9.

13. Clark and DeSanctis essentially agree with this notion. "The most critical elements of a rubric are that it is sufficiently detailed so as to announce expectations and, to some extent, circumscribe the number of points associated with each element, while at the same time providing enough flexibility to the professor to distinguish between and among papers at a level of nuance that is impossible to capture according to a purely objective methodology." Clark & DeSanctis, *supra* n. 4, at ms. 7.

14. McKinney email, *supra* n. 3.

nication. Another professor adds to this list, stating he values seminar papers because they push students beyond analysis and application and force them to deal with greater intellectual complexities like "the uncertainties, value conflicts, and concurrent intellectual frustrations that pervade the practice of law and that become critical for effective professional practice."[15] These intellectual goals comport with Benjamin Bloom's germinal work on taxonomy of educational objectives, a taxonomy that organized cognitive operations into a hierarchy of conceptual thinking (in ascending order: Remembering, Understanding, Applying, Analyzing, Evaluating, and Creating).[16] Kris Franklin, the director of academic support at New York Law School, describes how she uses Bloom's hierarchy in explaining her grading criteria to students.

Explanation IV

> In my own grading I think I intuitively and, perhaps unconsciously, draw a distinction between work that earns an "A" and work that falls unequivocally into the "A paper" category. That is, I think I give a lot more "A's" than I really see unquestionably "A" work. . . . To me, doing *everything* that is expected, and doing it all pretty well, is solid "B+" work. As far as I'm concerned, "B+" work can sometimes back into getting an "A" or "A-" grade, but it isn't quite the same thing as doing "A" work. . . . . When I'm explaining the difference I usually end up talking about "A" work as involving a complete understanding of the problem and a thorough and competent attempt to resolve it, while weaving these together in ways that show not just mastery but terrific legal judgment and often genuine creativity.
>
> The best tool I've found for making this comprehensible to students is a little flip chart describing the hierarchy of modes of thought in Bloom's Taxonomy.[17] . . . [This] flip chart is filled with examples of the kinds of

15. Phillip C. Kissam, *Seminar Papers*, 40 J. Leg. Educ. 539, 540 (1990).

16. *Taxonomy of Educational Objectives: The Classification of Educational Goals, Handbook I: Cognitive Domain* (Benjamin S. Bloom ed., David McKay Co., Inc. 1956).

17. *Quick Flip Questions for Critical Thinking* (EDUPRESS 2001).

> questions students can ask at each level of thinking that the Taxonomy envisions. (The questions themselves are useful tools, even though the chart isn't designed for law at all.) But then I group the levels and point out that the first two, Remembering and Understanding, are both expected and required in their graduate/professional training, so that working on that level gets them only to about a "C-" (students around the room groan when I ask them what levels the bulk of their outline and other review materials operate on, because it is almost always here).
>
> I then tell them that the next two of Bloom's Levels, Applying and Analyzing . . . should be the bulk of what students are doing with any problem, and are what is needed to get anywhere in the "B" range. I remind students that this is where most of their energy should go, and that how well they do this will almost always be the difference between high "B" work and low "B" work, and sometimes, can get them in the "A" range.
>
> But to draft what I think of as truly "A" work, students must fully develop their Level III/IV analysis, but then pass on at least briefly at least to Level V, "Evaluating," or occasionally, even Level VI, "Creating." Seeing it laid out in a chart this way, and sometimes critiquing their own or other students papers to determine what levels of thinking they're working on where, helps students viscerally *feel* the difference between A and B papers more concretely.[18]

Professor Franklin's observation that evaluation and creative thinking, Bloom's two highest cognitive operations, are key to excelling in law school has been echoed by others. Judith Wegner notes that

> [a]lthough faculty in many classrooms dwell on comprehension, analysis, and simple application and synthesis, that's not all that we evaluate. Most essay examinations require complicated application, complicated synthesis,

18. Franklin email, *supra* n. 2.

> and complicated evaluation, and we don't teach that nearly enough.[19]

Professor Friedland suggests law schools "adapt Bloom's pyramid of learning to [their] educational process[es]. For example, it is widely acknowledged that mere memorization of rules and principles are a lower grade of thinking and consequently less valuable than the application of those principles."[20]

One first step in helping students to scale the cognitive ladder is to explain the type of thinking that goes into creating and evaluating ideas. Evaluation, one of the cognitive operations at the top of Bloom's taxonomy, requires probing the validity of a premise or argument. Evaluation begins with recognizing assumptions behind a premise or argument. This recognition may require examining, for example, underlying fact statements; interpretations of rules, cases, and policies; and social, cultural, and legal history. It may also require evaluating inferences made on the basis of evidence already collected (like the intent of a defendant or a legislature).[21] On the basis of these observations, the next step is to assess the relevance, strength, and sufficiency of the supporting evidence before reaching a conclusion about the validity of a narrative, premise, or argument.[22]

If, as these teachers imply, sound evaluation often moves a student from the "B" range to the "A" range, original thinking is even a better predictor and more of a guarantee. Creative ideas sometimes come in a flash—in that moment when we awake in the night with the answer to a problem that has been gnawing at us. But sometimes ideas need to be puzzled out, requiring us to experiment with putting material together in innovative ways that may lead to inventive and pragmatic solutions.

One thing we can do to help students in this endeavor is to compare the work of high achieving students with work slightly less finessed in an effort to identify characteristics of superior

---

19. Judith Wegner, *Better Writing, Better Thinking: Thinking Like a Lawyer*, 10 Leg. Writing 9, 18 (2004).

20. Friedland, *supra* n. 8, at 200 (citing Michael Josephson, *Learning and Evaluation in Law School* 4 (Jan. 1984) (unpublished ms. at 58; submitted to American Association of Law School Annual Meeting)).

21. *See* Nelson P. Miller & Bradley J. Charles, *Meeting the Carnegie Report's Challenge to Make Legal Analysis Explicit—Subsidiary Skills to the IRAC Framework*, 59 J. Leg. Educ. 192, 212 (2009).

22. *Id.* at 214. This article elaborated on the cognitive skills involved in evaluation.

work that will make the differences visible and thereby attainable. We learn from this comparison, as discussed in more detail in the next section, that sound judgment and original thinking often results from careful evaluation of the sources of public policy, from probing the soundness of analogies, from re-characterizing or reversing roles, and from extending a line of reasoning beyond its original purpose.[23]

Artful writing is another important characteristic of superior work, especially in persuasive documents where the theory of the case must be visible in the way facts and law are framed (though even in objective documents legal writers want to convince their readers that the analysis correctly predicts the outcome of a case). The story upon which the legal case is based must be made sufficiently compelling for the audience to want the narrator's client to prevail. Persuasion also requires perfect pitch, so readers find a story plausible, but not coercive. This requires psychological insight and smart ears, ears that hear nuance—the difference between advocacy and aggression, respect and fawning, rational persuasion and covert manipulation. This means we should arm students with "knowledge of how people react to the disclosure of negative information . . . [to] have a better feel for the winning strategy."[24] Mastery of these, and other, skills may help student push through the writing barriers they face.

II. VALUE-ADDED FACTORS

Careful evaluation, independent and original thinking, and artful writing are three attributes that collectively help students move into the "A" range. And although it is impossible to articulate all the ways these attributes can be fulfilled, it is possible to give examples of each that will pave the way for other discoveries.

Thus, under the category of close evaluation, it might be helpful to compare a brief that evaluates and uses non-legal sources effectively in policy arguments with one that is less accomplished. Examining a brief that pays close attention to burden of proof might be educational to students because these procedural issues

---

23. For a fuller discussion of some of these attributes, see Carrie Menkel-Meadow, *Aha—Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?* 6 Harv. Negot. L. Rev. 97, 122–123 (2001).

24. Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 Rutgers L. Rev. 381, 383 (2008).

are essential to sound evaluation of a law's applicability, but are often ignored by law students. Under the category of original thinking, fresh insight can come from critiquing and comparing examples that demonstrate independent thought with those that are more mainstream. Finally, under the category of artful writing, excerpts that display strategic sequencing, sensitivity to tone, framing, and foreshadowing can help students learn how to elicit favorable audience response.

In discussing all the factors that go into a paper, it is important to remember that they are often interrelated and inextricably intertwined in practice; well-supported policy arguments can undermine adverse decisions, but an aggressive, bullying tone can render audiences resistant to the message. Nonetheless, in the discussions below, I try to focus on one analytical or rhetorical factor because by identifying each factor clearly, students have access to the menu of usable techniques.

A. Close Evaluation

1. Using Policy Effectively

Policy plays an important role in cases of first impression and in statutory cases where attorneys must advocate for the creation or a particular understanding of a rule. Policy arguments generally appeal to core interests and values and explain why a rule will or will not benefit society.[25] The identification of a desirable goal is, of course, a normative evaluation,[26] but one that can gain credibility if non-legal information convincingly demonstrates how a policy would work in reality—for good or ill. This support is important because unchallenged normative goals may unfairly advantage more powerful groups in society and result in poorly conceived law. In addition to policy arguments for or against a rule, lawyers often raise the policy underlying a rule to explain why it does or does not apply to a client's situation.[27]

For policy arguments to be effective, however, law students need to be familiar with different types of policy arguments and

---

25. Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs,* 62 Mont. L. Rev. 59, 66 (2001).

26. Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. Rev. 197, 214–215 (2000).

27. *Id.* at 212.

different types of non-legal authority that often underpin policy arguments.[28] Yet many students just run a generic Google-type search and do not know about the science and social science databases that include more reputable sources. Sometimes the students do not look beyond the data cited in decisions. Then students have even more trouble assessing the validity and the sufficiency of the evidence they are using to support a policy argument. They need to learn to search for confirmation that the findings are closely related to the issue they are examining and that the findings "are supported by a substantial body of work and . . . have survived critical appraisals by . . . professionals."[29] Since misuse of non-legal information undermines the legitimacy of a policy argument and the credibility of the advocate, the information must be carefully assessed before being incorporated.[30]

a. Policy Arguments on a Rule's Desirability

Policy arguments explaining why a rule is or is not desirable depend heavily on non-legal sources explaining the reasons for that position. One student's brief explaining why a statute prohibiting adoption by unmarried, co-habiting couples is undesirable demonstrates this use of non-legal sources with aplomb. The writer uses studies from independent, reputable professional organizations that have done comprehensive reviews of the relevant literature, organizations like the American Psychological Association or the American Journal of Orthopsychiatry. This selection shows the writer cares about the legitimacy of supporting sources, which in turn demonstrates the writer's sound judgment.

> The New Devon statute prohibiting unmarried co-habiting couples from adopting is not rationally related

28. There are four broad categories of policy arguments, although these categories sometimes become intertwined. Normative arguments are arguments about the values and goals that a law should promote and include moral arguments, social policy arguments, and corrective justice arguments. Economic arguments examine the economic consequences of a rule. Institutional competence arguments are structural arguments about the proper relationship of courts to other courts and courts to other branches of government. And judicial administration arguments look at the practical effects of a ruling on the administration of justice. *See* Helene Shapo et al., *Writing and Analysis in the Law* 264–265 (5th ed., Found. Press 2008).

29. Sharon D. Herzberger, *Social Science Contributions to the Law: Understanding and Predicting Behavior,* 25 Conn. L. Rev. 1067, 1072 (1993).

30. *See* Margolis, *supra* n. 26, at 209.

to a legitimate government interest. While providing stable homes with positive role models for adopted children is a legitimate goal, the statute prohibiting unmarried cohabiting couples from adopting does not further that goal.

According to a brief filed by the American Psychological Association for *In re Marriage Cases,* 43 Cal. 4th 757 (2008), which the court cited, a comprehensive survey of peer-reviewed scientific studies reported no differences between children raised by lesbians and those raised by heterosexuals with respect to the factors that matter: self-esteem, anxiety, depression, behavioral problems, performance in social arenas, use of psychological counseling, mother's and teacher's reports of children's hyperactivity, unsociability, emotional difficulty, or conduct difficulty. J. Stacey & T.J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?* 66 Am. Soc. Rev. at 169, 171.

State courts have also cited information provided in the APA's *Resolution on Sexual Orientation, Parents, and Children (2004),* which states that empirical research demonstrates that homosexual couples form stable, committed relationships. *In re Adoption of Doe,* 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008); *In re Marriage Cases*, 43 Cal. 4th 757. According to the APA, studies of homosexual persons "show that the vast majority . . .have been involved in committed relationships . . . that large proportions are currently involved in such a relationship (across the studies, roughly 40–70% of gay men and 45–80% of lesbians), and that a substantial number of those couples have been together ten or more years." *See* L.A. Peplau & L.R. Spalding, *The Close Relationships of Lesbians, Gay Men, and Bisexuals,* in Clyde Hendrick & Susan Hendrick, *Close Relationships: A Sourcebook* 114 (Sage Publications 2000); L.A. Kurdek, *Lesbians and Gay Couples*, in Anthony R. D'Augelli & Charlotte Patterson, *Lesbian, Gay, and Bisexual Identities over the Lifespan* 243 (1995). Also, research shows that homosexual parents do not differ substantially in their ability to parent a child. *See e.g.* Ellen C. Perrin, *Sexual Orientation in Child and Adolescent Health Care* 105, 115–116 (2002);

> C.A. Parks, *Lesbian Parenthood: A Review of the Literature,* 68 Am. J. Orthopsychiatry 376 (1998) . . . .

In contrast to the extensive research and carefully chosen sources cited in the excerpt above, an opponent's brief in this case supports the policy underlying the statute at issue, using only one article written by a law professor rather than an expert in the field and two cases. No social science research is cited.

> The legislative classification of unmarried people is rational because it is directly related to the statute's objective to provide adopted children with stable homes. The *Lofton* court recognized an "unprovable assumption" that unmarried couples are less stable than married ones as a legitimate basis for legislative action. *Lofton*, 358 F.3d at 819. Marriage holds a legally cognizable signification of willingness to work together in caring for a child. *Stanley v. Ill.*, 92 S. Ct. 1208, 1218 (1972) (Burger, J., dissenting). It provides couples with legally enforceable rights and duties to each other and their children and is symbolic of the couple's commitment to care for their child. *Id*. at 1219. Because unmarried couples lack such a commitment, there is a higher likelihood that they will separate than there is that a married couple will divorce. Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 Notre Dame L. Rev. 1435, 1456 (2001). Families in which parents are unmarried and can come and go when they please without involvement of the state are patently less stable than those in which the parents have made a legal commitment to one another. (R. 12). Placing adoptive children in the homes of such couples directly conflicts with the state's goal of providing them with a stable living environment.

The appellee's brief never went on to say that although the *Lofton* court admits that the notion that unmarried couples have less stable relations than married couples was an "unprovable assumption," the court said Florida was entitled to make this as-

sumption because the appellants had offered no "competent evidence to the contrary."[31] This is not true in the appellants' brief quoted above, however. Thus, appellee's brief would have been stronger if it provided more research supporting its position and refuting appellants' position.

b. Policy Arguments about Whether a Rule Applies

A second kind of policy argument focuses on why the underlying reasons for a rule do or do not apply to a client's situation. In the example below, the student writer explains why petitioners in the client's position should be granted an exception to the immediate custodian rule, which names the warden of a facility where the prisoner is held as the proper respondent to habeas challenges.

> Courts have held that when the government intentionally transfers immigration detainees to make filing a *habeas* petition more difficult, the detainees fall within the exceptions to the immediate custodian rule. The court in *Vazquez* recognizes an exception where the INS spirits "an alien from one site to another in an attempt to manipulate jurisdiction." 233 F.3d at 696. The *Roman* court agreed "an exception might be appropriate if the INS were to exercise its transfer power in a clear effort to evade an alien's habeas petitions," although it found the facts alleged by the Petitioner failed to meet that standard. *Roman*, 340 F.3d at 326. To justify such an exception, however, "[Petitioner] must articulate specific allegations of bad faith and, if necessary, produce reasonably particularized evidence in support of those allegations." *Costa v. INS*, 233 F.3d 31, 37 (1st Cir. 2000), (quoting *U.S. v. Gertner*, 65 F.3d 963 (1st Cir. 1995).
>
> The Government acted in bad faith under the framework in *Costa v. INS* by twice transferring Lima without notice immediately after counsel promised to file a habeas petition on his behalf. In these situations, it is logical to extend to immigration detainees the exception

31. *Lofton v. Sec. of Dept. of Children & Family Servs.*, 358 F.3d 804, 829 (11th Cir. 2004).

> the *Padilla* court articulated for federal prisoners, namely that "if there is an indication that the Government's purpose in removing a prisoner were to make it difficult for his lawyer to know where the habeas petition should be filed . . . habeas jurisdiction would be in the district court from whose territory the petitioner had been removed." *Padilla*, 542 U.S. at 454 (Kennedy, J., concurring).

Here evidence of the government's attempt to manipulate jurisdiction justify applying an exception that makes this conduct impermissible.

2. Using Burden of Proof and Standards of Review in Evaluating Facts

Law students learn fairly early that rules, holdings, and facts, while not infinitely manipulable, are pliable. As many legal writing textbooks note, rules can be articulated or interpreted differently in different decisions, holdings can be framed broadly or narrowly, and precedent facts can be detailed or general depending on the conclusion the writer wishes to draw.[32] Indeed, the ability to frame law and use cases persuasively is an expected part of standard legal analysis. But students are less sensitive to burden of proof or standard of review issues, and rarely factor them into the analysis of a case. It is a measure of discrimination to do so, and an even greater measure when students realize these procedural rules can also be framed advantageously and woven into their analysis. For example, standards of proof can be variously described to minimize or maximize the burden of proof, and standards of review can be described to give courts greater or lesser discretion. The first-semester memo below—on whether a plaintiff's mental health is sufficiently in controversy for a court to grant an order for a psychiatric exam—is unique in the way

32. *See e.g.* Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* 250–256, 327–329 (4th ed., Aspen Publishers 2006); Richard Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 18–19, 194–201, 153–154 (6th ed., Aspen Publishers 2009); Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook: Analysis, Research, and Writing* 466–475, 489–490 (4th ed., Aspen Publishers 2006); Shapo et al, *supra* n. 28, at 19–20, 101–112, 414–419.

this novice law student uses the burden and standard of proof in analyzing and evaluating the facts.

> The plaintiff's nine year history of depression and periodic use of antidepressants while under the care of a psychiatrist may place her mental health in controversy. If there is an alternate cause for the alleged harm related to the mental health of the party, the party's mental health may be in controversy. *Vilkhu*.[33] In *Vilkhu*, the complainant suffered from an ongoing hernia that provided a possible alternate cause of the physical harm allegedly caused by the claimed assault. *Id.* Because the hernia could have contributed to the alleged physical harm, the court ordered an exam to determine causation issues. *Id.* Similarly, in *Hodges*, there was evidence that the complainant suffered from ongoing paranoid schizophrenia, a mental illness that might have affected his perception of the events underlying his claims of harassment. This condition led the court to rule that the illness could be an alternate cause of the alleged harm, thus placing his mental health in controversy. Although mere allegations of such an illness do not show an individual's health is "genuinely in controversy" without a "requisite affirmative showing of proof," *Schlagenhauf,* the movant need not prove the merits of his or her case in order to show more than "mere relevance." *Id.* An indication that the exam would "shed light" on remaining claims would likely suffice.
>
> In the instant case, although the plaintiff's doctor has asserted that Brown is mentally healthy aside from periodic spells of depression, this assertion is less forceful in light of Brown's nine years of ongoing psychiatric care and repeated use of antidepressants. Like the hernia in *Vilkhu* and the paranoid schizophrenia in *Hodges*, Brown's prior counseling and use of antidepressants offer sufficient evidence of ongoing depression that could serve as alternate cause for the alleged mental distress Brown suffered during the period of harassment and her recov-

[33] Full citations omitted.

> ery. The defendant need not prove causation; it need only demonstrate that Brown's depression presents an alternate potential cause of the alleged harm such that it should be permitted to determine the nature and extent of such a cause. A court could conclude that the source and pervasiveness of Brown's depression are factual questions relevant not only to her claim of mental harm, but also to her claim of harassment.

The thesis sentence clearly foreshadows the writer's conclusion that the plaintiff may fall under an exception to the rule that the mental health of a party is not generally in controversy if the harm occurred in the past and is not ongoing. The burden of proof is phrased to fit that outcome. Even more impressive is the way the student analyzes the facts in light of the burden of proof, carefully evaluating whether the evidence of prolonged depression places the plaintiff's health in controversy and justifies a psychological exam because it could "shed light" on the claim. This kind of attention to procedural issues demonstrates careful evaluation and solid legal judgment.

B. Independent and Original Thinking

1. Effective Analogies

New ideas often come from seeing analogies, but for the analogy to work, there must be true similarities between the things being compared. Those similarities must be easily inferable or explicitly developed—otherwise, the analogy is unhelpful. Contrast the following two briefs on the constitutionality of advanced imaging technology [AIT] used at airports. Both open by analogizing full body scans with strip searches, but only the second develops the analogy enough for it to provide legal insight. Here is the first.

> [T]he full body scan machine is also unreasonably invasive and extensive. Both backscatter and millimeter wave machines create a chalk-like image of the entire body, likened to a "virtual strip search." American Civil Liberties Union, *ACLU Backgrounder on Body Scanners and "Virtual Strip Searches"*, http://www.aclu.org/technology-and-liberty/aclu-backgrounder-body-scanners-

> and-virtual-strip-searches (Jan. 8, 2011). They can even capture a detailed portrait of one's face, although the Transportation and Security Administration [TSA] ordered backscatters which are equipped with an algorithm that blurs images to make faces unidentifiable, and it ordered millimeter wave machines to include technology to blur facial features. TSA, *Privacy: Advanced Imaging Technology,* http://www. tsa.gov/approachtech/aitprivacy.shtm.

This brief likens a scan's chalk-like image of the body to a strip search, but the analogy stops there. The writer never clarifies how a chalk outline is like the indignity of baring one's nude body to a stranger or having one's bodily cavities probed. Indeed, the analogy is rendered less convincing by the writer's subsequent admissions that the individual's face is blurred and the image is witnessed by an officer staring at a screen in a distant room. Perhaps even more damaging, the writer never clarifies what is gained if the court accepts the analogy.

Contrast these weaknesses with the analogy's development in the second brief.

> Because they reveal true-to-life contours of a passenger's nude body, including his or her genitals, AIT body scans amount to virtual strip searches and are thus overly intrusive absent individualized suspicion. Strip searches are maximally invasive and require individualized suspicion even in the administrative context. *Redding*, 129 S.C. at 2641–43 (school's search of a thirteen-year–old student, involving "pulling out her bra and underwear, was unreasonable absent reasonable suspicion that the search would yield drugs."). Except in rare circumstances supported by objectively reasonable individualized suspicion, warrantless strip searches are almost always unconstitutional. *Sec. & Law Enforcement Empl. v. Casey*, 737 F.2d 187, 203–204 (2d Cir. 1984) (individually suspected corrections officer could be strip-searched for limited purpose of controlling flow of contraband into the prison). . . . Thus characterized, without individualized suspicion, AIT body scans of domestic air passengers as a first-line screening method are overly intrusive.

Here an arguable analogy between a body scan and actual strip search is strengthened by visual details: the writer makes it clear that the contour is of a "nude body" and specifically refers to the visibility of female and male genitalia. These few details suggest that what is seen in an AIT scan is similar to what is seen when a search involves peering under a bra and into underwear. More importantly, the consequences of accepting the analogy are clear, namely, that even in the administrative search context, virtual strip searches are impermissible unless other less intrusive screenings have created individualized suspicion. The analogy allows the writer to introduce a whole new line of cases.

2. Arguments Stemming from Role Reversal

One common way to explore a problem is to engage in role reversal. Often this means adopting the perspective of the opposing party in order to better understand and mediate a conflict. The technique can also be used to counter opposing perspectives, by usurping, for example, the opposing party's argument. This happens in the following example, which puts an innovative and different spin on the government's contention that an exception to the immediate custodian rule would allow forum shopping by immigrant detainee *habeas* petitioners. The government's underlying policy concern is acknowledged, but the danger is attributed to the opposing party.

> Although the government argues the immediate custodian rule is a strategy for minimizing forum-shopping by alien habeas petitioners, the rule enables such forum-shopping by the Government. In *Farah,* the practical effect of transferring the Petitioner out of state "was to prevent him from filing his Petition while he was present in this state. To now hold that Farah may only file his Petition in the state that the INS determines to send him would be to allow the INS to forum shop, intentionally or not." *Farah*, 2002 WL 31828309 at *3. As in *Farah*, the practical effect of Lima's transfer from Varick to Hudson was to prevent him from filing in the District of Brooklyniana by moving him out of state and beyond the reach of his attorney. His transfer from Hudson to Oakdale similarly prevented his filing a *habeas* petition in New

> Jersey and moved him far beyond the reach of his replacement counsel to a forum chosen by Immigration and Customs Enforcement. Whether intentionally or not, by repeatedly transferring Lima just prior to his filing his *habeas* petition and without informing him or his counsel, the government was able to exercise complete discretion as to where Lima could—and could not—file his petition for relief. Thus, even if the government did not act in bad faith, the "practical effects" of the government's conduct is the same as if it acted in bad faith. Lima therefore falls within the exception to the immediate custodian rule.

By switching roles, writers can sometimes steal the opponent's thunder.

3. Re-characterization

Creative arguments also emerge by re-characterizing facts to fit other causes of action or new defenses. In the passage below, the writer argues that overly intrusive airport searches violate not only an individual's right to privacy, but also give rise to a constitutional violation of an individual's right to travel freely, noting that "the constitutional right to travel may not be conditioned upon the relinquishment of another constitutional right. . . . "[34]

> Mr. Hanson has the right to travel in interstate commerce. *Edwards v. Cal.*, 314 U.S. 160, 172–73 (1941). Passenger screenings that are more intrusive than necessary run the risk of discouraging interstate commerce, however. Although older cases like *Davis* and its progeny said that as long as passengers had the choice to "opt-out" of flying and travel by other means, there was no interference with the right to travel, 482 F.2d at 910–11, abrogated by *Aukai*, 497 F.3d at 960–62, those cases were decided when air travel was prohibitively expensive for a large segment of the population and passengers had other viable and common travel options. Since airlines were

34. *U.S. v. Davis*, 482 F.2d 843, 912–913 (9th Cir. 1973).

> deregulated thirty-five years ago, fares have dropped dramatically, opening access to air travel to ever greater percentages of Americans. Stephen Breyer, *Airline Deregulation, Revisited*, Bloomberg Businessweek, http://www.businessweek.com/bwdaily/dnflash/content/jan2011/jan2011/db20110120-138711.htm (Jan. 20, 2011). Moreover, given its history of frequent airline bailouts, the federal government clearly recognizes the centrality of air travel. Coupled with federal and state neglect of intercity passenger rail, domestic interstate air travel has become the *sine qua non* of travel and interstate commerce. Providing a passenger with the choice between flying and enjoying Fourth Amendment protection forces their consent at the sacrifice of constitutional rights, resulting in "considerable hardship." *U.S. v. Albarado*, 495 F.2d 799, 806–807 (2d Cir. 1974). Thus, the government should not place unreasonable restrictions on the right to travel freely.

Here, one student categorized intrusive airport searches as a Fourth Amendment violation and a violation of the right to travel, the latter argument functioning as an argument for why it is disingenuous to say that air travel is a luxury, not a necessity. Given this necessity, "consent" to a search is coerced, not voluntary.

4. Extension & Transfer

New ideas can come from transferring legal concepts from one domain to another or from extending a line of reasoning to new situations. As one professor notes, sometimes "a body of law designed to remedy particular harms or wrongs . . . may be extended as we recognize appropriate new members of a category."[35] Examples of exporting include using public trust doctrine in environmental law or applying traditional property principles to new forms of property like welfare and other government entitlements.[36] In the example below, the right of an owner or lessee to challenge the constitutionality of a search is extended to an unau-

35. Menkel-Meadows, *supra* n. 23, at 130.
36. *Id.*

thorized driver of a rental car who has the lessee's permission to use it because the expectation of privacy is similar.

> Supreme Court precedent makes it clear that a reasonable expectation of privacy may be shown "either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Ill.*, 439 U.S. 128, 144 n. 12 (1978). The Court has made it painstakingly clear, however, that "arcane distinctions" governing property law ought not to control. *Id.* at 149 n. 17.
>
> With respect to the first prong, the Court has admitted that "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude." *Id.* Indeed, the *Rakas* Court explained the holding of two leading Supreme Court cases largely in these terms. *See e.g. Rakas*, 49 U.S. at 149 (concluding that the defendant in *Jones v. U.S.*, 362 U.S. 257 (1960), had a legitimate expectation of privacy because he "had complete dominion and control over the [property] and could exclude others from it," and emphasizing the fact that the defendant in *Katz v. U.S.*, 389 U.S. 347 (1967), had "shut the door behind him to exclude all others"). Not surprisingly, courts have applied the reasoning of *Rakas* by adopting a modified bright-line rule toward unauthorized drivers. For example, the Ninth Circuit grants standing to unauthorized drivers "upon a showing of 'joint control' or 'common authority' over the property searched." *U.S. v. Thomas*, 447 F.3d 1191, 1198 (9th Cir. 2006). Similarly, the Second Circuit has noted that an unauthorized driver of a rental car "may legitimately conclude that the car is his during the time he has permission to use it" and that his exercise of "dominion and control" over the vehicles gives him a legitimate expectation of privacy. *U.S. v. Little,* 945 F. Supp. 79, 83 (S.D.N.Y. 1996), *aff'd*, 133 F.3d 908 (2d Cir. 1998).

In a progression from an owner's, tenant's, or guest's recognized privacy rights in a home to the rights of a person in a phone booth, the author shows that the steady extension of privacy

rights justifies recognizing the privacy rights of an unauthorized driver of a rental car who was given permission to use it by a lessee.

5. Detailed Application of Law to Fact

A detailed application of law to fact can lead to a more nuanced understanding of both the law and the narrative. In the first example below, the discussion of repercussions stemming from a city employee's demotion for the exercise of her free speech rights rounds out the meaning of irreparable harm and shows why monetary damages do not sufficiently redress her injuries.

> The unique interplay of the circumstances surrounding Ms. Rodriguez's demotion also establishes irreparable harm. The Third Circuit does not usually grant injunctive relief for lost wages and other monetary damages that can be redressed at trial. *See Singh v. School Dist. of Phila.*, No. 10-2028, 2010 WL 3220336, at *6 (E.D. Pa. Aug. 11, 2010). However, a denial of Ms. Rodriguez's motion for reinstatement and the resulting monetary losses implicate a complex web of issues that stretch beyond mere monetary damage. If Ms. Rodriguez were to remain in her inferior, new job to pay her education loans, she will be abandoning the career aspirations that initially inspired her to earn the education that caused her debt. On the other hand, if Ms. Rodriguez were to leave her inferior administrative position to pursue her career aspirations, she may suffer the stress that comes from debt, potential eviction, and harassment of creditors. Aside from these considerations, the demotion itself will severely impede the progress of Ms. Rodriguez's career in civil service. *See Iles v. De Jongh*, Civil. Nos. 2007/0094, 2007/0053, 2007/0019, 2009 WL 44349475, at *7 (D.V.I. Nov. 24, 2009) (concluding two government employees suffered irreparable harm as a result of loss in job title and reputation). The repercussions of these options show that regardless of Ms. Rodriguez's course of action, the end result will be irreparable harm to her career and emotional stability. This consideration, in conjunction with the chilling effect that the defendant's retaliation

> has levied on her freedom of expressive association, indicate that immediate reinstatement to her previous position of Assistant to the Director of Communications in the Office of the Mayor is the only remedy that will prevent Ms. Rodriguez from suffering irreparable harm. *See Firetree v. Creedon*, No. 1:08-CV-0245, 2008 WL 2078152, at *6.

Damage to her career and the stress that results from that, as well as from potential harassment from creditors, are all harms that cannot be redressed by a monetary award. In contrast, in the next example, the writer mostly ignores the nontangible harms the plaintiff faces and tries with lesser effect to prove that her monetary harms constitute such extraordinary hardship that it is irreparable harm.

> While monetary harm does not constitute irreparable injury, Ms. Rodriguez's injuries represent extraordinary hardship remediable only by a preliminary injunction. Ms. Rodriguez's demotion reduced her salary, and she now faces the bleak prospect of being evicted from her apartment and defaulting on her student loans. Rodriguez Decl. ¶ 16. Defaulting on her loans will result in adverse action by the government and severely damage her credit score. Reinstating Ms. Rodriguez will delay these harms until the end of the trial and prevent her from being thrown into a spiral of debt and financial distress. Thus, injunctive relief is necessary to prevent Ms. Rodriguez from suffering irreparable harm to her financial situation.

This may be a legitimate secondary argument, but because the author misses the chance to marshal facts that speak more directly to the standard, this is a "B+" rather than an "A" argument.

C. Artful Writing

1. Persuasive Sequencing and Perfect Pitch

Studies of human decision-making suggest that the order in which persuasive messages are presented influences their suc-

cess.[37] Those organizations that "'prime' the reader by leading her, step-by-step, toward acceptance of the final thesis"[38] are the most successful. This "priming" involves constructing a chain of overlapping propositions "so the acceptance of one proposition leads inexorably to the next."[39]

One frequently successful chain—the foot-in-the-door strategy—opens with an attractive, fairly uncontroversial premise, "on the theory that if the reader agrees with the first few premises, she is more likely to accept the ultimate thesis."[40] This strategy also "has the advantage of subtlety" since research shows that argument "is more persuasive if the intent to persuade is not obvious."[41] Readers like to believe they have "independently arrived at the decision. . . . Preserving the appearance of audience autonomy lessens the likelihood that the audience will feel coerced and angry, feelings which can lead to the so-called 'boomerang effect' in which the message recipient responds to the persuasive message by rejecting it."[42]

The appearance of autonomy is not the only thing that writers should strive for, however. They need to actually give readers space to make their own decisions, especially because overt pressure and confrontational demands may be perceived as offensive, threatening, and therefore counter-productive. Thus, writers need to reconcile advocacy with respect and "calibrate the force of a plea, assertion, demand, request, or refusal,"[43] finding the perfect pitch.

A second organizational strategy—the door-in-the-face strategy—opens with a more controversial premise that the reader

---

37. Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration,* 2006 Mich. St. L. Rev. 411, 415.

38. *Id.*

39. *Id.*

40. *Id.* at 417.

41. Michael J. Higdon, *Something Judicious This Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative,* 44 U. Rich. L. Rev. 1213, 1224 (2010) (citing Frank R. Kardes, *Spontaneous Inference Processes in Advertising: The Effects of Conclusion, Omission, and Involvement on Persuasion*, 15 J. Consumer Res. 225, 225 (1988) (citing Elaine Walster & Leon Festinger, *The Effectiveness of "Overheard" Persuasive Communications*, 65 J. Abnormal & Soc. Psychol. 395, 401 (1962))).

42. Stanchi, *supra* n. 37, at 422 (citing Michael Burgoon et al., *Revisiting the Theory of Psychological Resistance: Communicating Threat to Attitudinal Freedom*, in *The Persuasion Handbook: Developments in Theory and Practice* 213, 215–216 (James Price Dillard & Michael Pfau eds., Sage Publications 2002)).

43. Elizabeth Fajans & Mary R. Falk, *The Art of Indirection*, 14 Persps. 21, 22 (2005).

may likely reject. This strategy operates on the theory that the reader, "having rejected the first larger request, is thereafter somewhat more inclined to acquiesce to a second, smaller request."[44] When this strategy works, it is because the sequence of requests operates like a negotiation, where one party's concession is reciprocated by the other party.[45] "Door-in-the-face is not as consistently successful as foot-in-the-door, however, and can depend on context."[46]

In the introductions of the following two trial briefs, students make similar points but employ different strategies. The first has good pitch and is artfully framed and sequenced, while the other struggles with sequence, emphasis, and tone.

(I)

> The writ of habeas corpus is an indispensable foundation to the integrity of our system of justice. For centuries this basic right has proved a bulwark against insidious government overreach and has served as a last refuge for those whose most basic liberty has been wrongfully taken from them. Granting Jose Lima's petition for habeas relief is appropriate here because Lima properly named the Attorney General ("AG") as the respondent to his petition for immigration habeas relief since Congress granted the AG authority in matters of immigration detention and removal. If Lima's immediate custodian is the respondent, the warden of Lima's detention center in Louisiana, his access to justice is impaired. It is to avoid this kind of scenario that the writ of habeas corpus was enshrined in our Constitution.
>
> Recognizing the AG's authority is essential because the stakes are high when it comes to answering the proper respondent question. This court has already noted that Petitioner has a meritorious claim in his habeas petition and that Petitioner's ability to participate in his parallel Immigration Court proceedings depend on his release

44. Stanchi, *supra* n. 37, at 427.

45. *Id.* at 427–428. Stanchi says this strategy is a bit like arguing in the alternative. *Id.* at 431.

46. *Id.* at 427.

from detention a distant and overcrowded center in Louisiana and his return to Brooklyn. In addition, there is substantial evidence of Immigration and Customs Enforcement misconduct in this case. If the court accepts the Government's arguments that the proper respondent in alien habeas petitions such as this one falls within the immediate custodian rule, the Government's ability to willfully transfer a detainee far from counsel and his dependent family and counsel—and away from his ongoing challenge to his removal from the United States—will be unchecked and the interests of justice preserved in the writ of habeas corpus will not be served. As such, the motion to dismiss should be denied.

(II)

In this classic example of bullying by the United States government, the Petitioner Jose Lima is simply asking for the opportunity to be heard in court and be reunited with his wife and young son. Mr. Lima's petition for a writ of habeas corpus arises out of an arrest not for committing a crime, but for being in the wrong place at the wrong time after supporting a piece of legislation which would allow him to remain in the country he has known to come and love since he was brought here at the age of three. But, as a result of his unfortunate arrest and cruel transfer to Western Louisiana, where he is deprived of adequate counsel and more importantly contact with his loved ones, Petitioner Lima now requests that this Court find that the Attorney General is the proper respondent and deny the motion to dismiss.

The petitioner is asking that the immediate custodian rule, which applies to normal federal prisoners, be ignored in favor of a rule which would provide more equal justice to all immigration detainees. In being allowed to name the Attorney General as respondent to his petition, Petitioner Lima would be recognizing the Attorney General's unique role in immigration that gives him widespread control. The government is hoping to maintain the immediate custodian rule so it can continue its mistreatment of hard working American residents, just try-

> ing to support their families home and abroad, by isolating them in distant and overcrowded detention centers, thereby making it nearly impossible to have a petition granted.

The first example follows the foot-in-the-door strategy. The student's brief opens by reminding the reader that the writ of habeas corpus is a cornerstone of the American system of justice. Counting on the readers' comfort with this foundational principle, the writer hopes it will lead her to accept the next thesis, namely, that the ICR wrongly deprives illegal aliens like Lima of habeas relief, and thus the court should recognize an exception to the rule.

Buttressing this structure is the writer's effort to pitch the petitioner's dilemma to the audience's core values and beliefs,[47] namely, the fundamental right to judicial access. Arguments that are highly relevant to personal experiences, values, or beliefs have been shown to actively engage the reader in close examination of the merits.[48] Thus the second paragraph sympathetically frames what is at stake for Lima, while secondarily hinting at evidence of nefarious government dealing, a situation that invites the reader's serious consideration. The paragraph ends tying the issues back to the underlying reasons for the writ of habeas corpus, powerfully framing the argument.

The second example makes essentially the same points, but uses the more contentious door-in-the-face strategy[49] in the hope that the recipient will concede to a second, smaller request in reciprocation for rejecting the first. Here, the opening two contentions will likely be rejected because the tone is so aggressive and heavy handed, as in, "this is a classic example of bullying by the United States government," and the government supports the immediate custodian rule only "so it can continue its mistreatment of hardworking American residents." These statements are so unequivocal that they rob the reader of the right to make autonomous decisions about the government's tactics and motivations. They may also collide with some readers' more positive attitude toward government, causing them to generate counter-

47. *Id.* at 445.
48. *Id.* at 434–441
49. *Id.* at 426–427.

arguments. Moreover, the reader may decide that instead of establishing a bargaining dialogue, which depends on the first premise being sufficiently reasonable so as not to generate a hostile response,[50] the first premise is so farfetched that there is no obligation to reciprocate by conceding to the second request, which asks the Attorney General to be recognized as Lima's immediate custodian, and the respondent to Lima's petition. The strategy here could well have a boomerang effect.

Equally problematic, the door-in-the-face strategy here has some undesirable substantive repercussions. By characterizing the government's conduct as "bullying" and "mistreatment," the advocate appears to concede the need to show bad faith, instead of inadvertent or inefficient bureaucratic confusion that has the same practical effect on Lima's right to access but a lower burden of proof.[51] A similar—if less serious—thing happens when the advocate says "as a result of his unfortunate arrest and cruel transfer to Western Louisiana, . . . [Lima was] deprived of adequate counsel and, more importantly, contact with his loved ones." While we recognize the student's desire to humanize the petitioner, in the context of this litigation, "contact with loved ones" is less important than deprivation of counsel. Here, a carelessly used intensifier inverts the relative importance of the arguments, demonstrating how inartful writing can interfere with the weight of the arguments.

Finally, there are other ill-considered word choices. The prose is sometimes clichéd, "the country he has known to come [sic] and love," or "just trying to support their families home and abroad." However well intended composition teachers call such phrases "instant prose," clichéd expressions that spill out "without thought or commitment and almost without effort."[52] Without effort, the prose may make the point but be too insipid to spark interest or empathy. In addition, the prose in the second example is at times inopportune: "The petitioner is asking the immediate custodian rule, which applies to normal federal prisoners, *be ignored* in favor of a rule which would provide more equal justice to

---

50. *Id.* at 432.

51. The "bad faith" argument should be the fallback argument in case the "practical effects" argument fails.

52. Sylvan Barnet & Marcia Stubbs, *Barnet & Stubb's Practical Guide to Writing* 177 (Little, Brown & Co. 1975).

all immigration detainees." "Ignores" suggests that the court should willfully disregard the law rather than contend with it, a suggestion courts are unlikely to find palatable. It would be more diplomatic and more accurate to say instead that "the immediate custodian rule, which applies to normal federal prisoners, does not now and should not extend to immigration detainees." This sentence also has some obfuscating adjectives: should we infer from the wording that there is a different rule for "abnormal federal prisoners" than for "normal" prisoners"? Here, poor strategic choices and writing that veers between banal, overzealous, and imprecise damage the advocate's credibility and weaken otherwise sound substantive arguments.

2. Foreshadowing and Framing

In most legal documents, both persuasive and objective, a key decision is how to "prime" the audience to lead the reader step-by-step to a final thesis. One technique involves foreshadowing. Foreshadowing works by projecting a "backwards causality,"[53] where an "early scene simultaneously predicts and confirms a future that then appears as an inevitability, the only course this story could have taken."[54] It works "by unobtrusively planting clues early on, [which] can help control the creation of . . . hypotheses, leading the viewer—seemingly on her own—to the conclusion the writer will ultimately be advocating."[55]

a. Using Facts to Foreshadow Thesis

Because there are almost always rival interpretations of stories, using facts to foreshadow a thesis must be done artfully.

> The historical reconstruction that makes up much of storytelling is considered more trustworthy if it simply presents the facts without any instrumental or predetermined direction . . . . Despite occasional reminders that this convention embraces a cognitive impossibility and open acknowledgment that it is often at odds with

53. Higdon, *supra* n. 41, at 1226 (citing Gary Saul Morson, *Narrative and Freedom: The Shadows of Time* 11 (1994)).

54. *Id.* at 1227 (quoting Nancy Welch, *Sideshadowing Teacher Response*, 60 College English 374, 378 (1998)).

55. *Id.* at 1244.

> the instrumental nature of remedying-seeking stories, most cultures abide by and even exalt the pretense that what happened can be found and reported without bias.[56]

To be credible, a historical reconstruction must be consistent with the evidence. But within these confines, legal writers must try to make one outcome seem more legitimate than another without being too obvious. Often this is done by briefly foreshadowing the client's story in order to frame and diminish negative information, using affective or cognitive priming. Affective priming establishes a mood, setting, or characterization that will elicit the affective response desired—compassion, indignation, or fear. Cognitive priming involves planting schemas, news flashes, or ideas that readers can quickly retrieve to help evaluate arguments.[57]

In the example that follows, a seemingly unbiased historical reconstruction of the petitioner's biography makes the opening paragraph in the first statement of facts seem credible. It details facts favorable to Lima, but does so without embellishments, indeed without adjectives. Thus it directs the reader's attention to the petitioner's hard work and worthy activities, but leaves it to the reader to infer Lima's good character. This positive impression of him makes the reader sensitive to Lima's fright and fate when ICE agents swarm the building, slam on the apartment door, and storm in. These Gestapo tactics, conveyed with effective verbs only, makes Lima's later contentions of government bad faith seem possible.

(I)

> Jose Lima arrived in the United States in 1987 from Guatemala at the age of three and has spent the last twenty-three years—nearly all of his life—residing in Brooklyn, New York. He attended New York City public schools, where he participated in athletics and graduated with academic honors. He is married to Carmela Martinez, a lawful permanent resident, and is a parent with

56. Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. Rev. 1, 32 (1984).
57. Higdon, *supra* n. 41, at 1230–1231.

> Martinez to an eighteen-month-old son, Ernesto Lima, a United States citizen. Lima works over forty hours a week at the electronics store in Brooklyn to provide for his wife and child and has never been convicted of any crime in the United States.
>
> Lima's Arrest
>
> On October 16, 2010, Lima participated in a peaceful rally in support of immigrant's rights in Huntingdon, New York, and stayed overnight at a friend's house. As he slept quietly, armed Immigration and Customs Enforcement agents swarmed around the apartment building and slammed on the door. They then stormed through the apartment, waking Lima with a flashlight in his face, while demanding to see his papers. Discovering he was from Guatemala, the agents handcuffed Lima and marched him into a van.

The effective use of facts is as important in the argument as they are in the statement. Opening the argument section with key underlying facts is one good way of getting the reader's attention, as in this introduction arguing that full body scans and enhanced pat-downs at airports are reasonable at inception. The thesis paragraph opens with a litany of facts that persuasively foreshadow the conclusion.

> The courts have emphasized the grave and urgent nature of the special need of battling airborne terrorism. *See Davis,* 482 F.3d at 270 and *City of Indianapolis v. Edmund,* 531 U.S. 32 (2000). In the post-9/11 United States, "[the] government…has the most compelling reasons—the safety of hundreds of lives and millions of dollars' worth of private property—for subjecting airline passengers to a search for weapons or explosives that could be used to hijack an airplane." *See Singleton v. Commr. of Internal Revenue*, 606 F.2d 50, 52 (3d Cir. 1979). . . . Modern-day terrorists now employ previously inconceivable tactics in the mission to destroy American lives and property. Their arsenal is no longer "confined to the cumbersome gun or knife . . . for modern technology

> has made it possible . . . that enough plastic explosives to blow up an airplane can be concealed in a toothpaste tube." *Moreno.* Recent terrorist activity has proven this all too terrifying reality. In 2006, British authorities uncovered an Al-Qaeda plot to "blow up United States-bound airliners" by mixing household liquids "into an explosive cocktail." Alan Cowell, *Britain Charges 11 in Plane Case; Bomb Gear Cited*, N.Y. Times (Aug. 22, 2006). Nigerian terrorist Abdul Farouk Abdulmutallab went to similarly unimaginable lengths on Christmas Day 2009, immediately preceding the government's deployment of AIT and pat-down procedures at airports across the nation, by attempting to detonate a mixture of nonmetallic powders and liquid he had concealed in his underwear. Anahad O'Connor & Eric Schmitt, *Terror Attempt Seen as Man Tries to Ignite Device on Jet*, N.Y. Times (Dec. 25, 2009). These alarming attempts emphasize the government's absolute need to adapt the way in which it "approached the task of ensuring the safety and security of the" nation's air transportation. *See United States v. Aukai* and *Cassidy v. Chertoff* (holding that prevention of terrorist attacks on large vessels engaged in mass transportation and determined by the Coast Guard to be at heightened risk of attack constitutes a special need.)
>
> Unlike magnetometers, both advanced imaging technology and enhanced pat-down procedures can detect the kinds of nonmetallic weapons and explosives that stocked the liquid bombers' and underwear bomber's arsenals. . . . Because these procedures discover hidden dangers and prevent their development "before the lives of an airplane's passengers and crew are endangered," they are classic administrative searches. Therefore both AIT and pat-down screening procedures are reasonable at inception.

The magnitude of the terrorist threat, conveyed in a crescendo of cases and newspaper articles reporting different terrorist weapons and attempts, plays on the audience's fears and makes it responsive to the conclusion that the need to thwart terrorism outweighs the reasonably circumscribed intrusions on individual

privacy. The writer effectively uses both affective and cognitive priming.

b. Inoculating against Adverse Information

Many advocates "minimize the 'airtime' given to negative information because of the worry that space devoted to adverse points will inflate their importance or unduly highlight them."[58] Others think a preemptive strike is more effective, especially when a different spin on the negative information neutralizes its harm. One way to undermine opposing arguments is to foreshadow them, inoculating readers against them.[59] Research has shown that the key to inoculation is to warn of an "impending attack or threat" and then to provide "antibodies" that resist the attack.[60] When the threat is sufficiently scary, the recipient is likely to be open to the advocate's refutation.[61]

An adverse decision comes under a two-fold attack in the following student brief on a state statute prohibiting unmarried couples from adopting.

> This Court should not follow the *Lofton* court's decision to ban homosexuals from adopting due to a lack of well-established evidence. *Lofton v. Sec. of Dept. of Children & Family Servs.*, 358 F.3d 804 (Fla. 2004). First, when research is inclusive, it is especially dangerous to base law on assumptions; this is precarious territory that the court should not cross. *Craig v. Boren*, 429 U.S. 190, 204 (1976). Second, individualized determination is a superior method of evaluating parental fitness. In *Stanley v. Illinois*, Justice White called procedures based on presumption "cheap" in comparison to individualized determination. 405 U.S. at 656. It disregards the real interests of children and defers to outdated formalities instead of present realities. *Id.* at 657. The adoption process is already an intense public procedure where the adopters' lives must go under the microscope of the state. *Lindley*

58. Stanchi, *supra* n. 37, at 390.
59. *Id.* at 399–400.
60. *Id.* at 401.
61. The thesis paragraph in section II(C)(2)(a) on airborne terrorism turns on this dynamic.

> *v. Sullivan*, 889 F.2d 124 (7th Cir. 1989). There is no need to limit the application pool even further when each couple will be individually evaluated. To take the easy way out by barring unmarried couples on the assumption that they are unfit does not serve in the best interests of the child and weighs heavily on the matter of equal protection.

Attacking the opposing argument using Supreme Court precedent and a core appeal to the best interest of children, the student here swiftly combats the *Lofton* decision.

III. CONCLUSION

Because grades depend on balancing a variety of factors, institutional and individual, it is impossible to assure students that the value-added factors discussed above will result in an "A" grade. But it also seems true that an "A" might require more than clear organization, competent analysis, and reasonably professional presentation. A paper with all those qualities might, as Professor Franklin has said, back into an "A," especially in schools with a mandatory curve, but true "A" work is not simply about perfecting the first four levels of Bloom's hierarchy of cognitive development. It is also about nuanced evaluation, independent thought, and finesse in execution. These finer details require attentiveness to the validity of evidence, malleability of law, and impact of language. These are the factors that make a paper "sing." They are rarely achieved easily because they require conscious thought and frequent refining. But they can be explained and discussed and that discussion may edge students closer to the finish line.