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CLOSING THE FLOODGATES: MAKING PERSUASIVE POLICY ARGUMENTS IN APPELLATE BRIEFS

Ellie Margolis*

I. INTRODUCTION¹

“For reasons of public policy, this Court should . . .”

As teachers of legal writing,² how often have we seen arguments in student briefs that start out this way and continue by making some generalized statements asserting that the desired legal rule will serve a social or economic good? Student arguments of this type rarely identify which “public policy” is being asserted or discuss specifically how the proposed rule will advance that policy. These arguments are rarely supported by authority, and are rarely persuasive unless the reader is already inclined to agree with the position taken. The arguments usually sound as if they are written off the top of the writer’s head, rather than the product of carefully researched and thought-out analysis. These are not effective policy arguments, and many legal writing teachers recognize this.³

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1. Although the focus of this article is on student writing and teaching students to make effective policy arguments, many practicing attorneys fall victim to the same errors in making vague, unsupported policy arguments or relying solely on discussions of policy in reported cases in appellate briefs. See generally Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197 (2000).

2. “Legal writing” refers to the combination of legal research, analysis, writing and advocacy that most law school programs offer. See RALPH L. BRILL ET AL., SOURCEBOOK ON LEGAL WRITING PROGRAMS 1 (ABA Section of Legal Education and Admissions to the Bar 1997) [hereinafter SOURCEBOOK].

3. The author has questioned many legal writing teachers about whether they

It is no wonder, however, that students do not make effective policy arguments since, for the most part, they are not taught to do so. For most students, the introduction to policy-based reasoning occurs in doctrinal courses such as contracts and torts.⁴ In these courses, students focus on discerning the underlying policy in a particular judicial decision or body of law. Many legal writing programs pick up on this and teach students how to identify the underlying policy of an existing rule and show how that policy applies to a particular fact pattern or client situation.⁵ This type of policy-based reasoning, however, is only a sub-part of the skill of making policy arguments which a student should learn in order to become an effective advocate.

An equally important part of the skill of policy argumentation is implicated when the advocate is urging a court to adopt a particular legal rule for a new situation, rather than simply applying an existing rule to a set of facts.⁶ This type of argument is particularly important in appellate brief-writing, where advocates frequently address novel issues of law.⁷ This kind of policy argumentation is an important skill which is generally not taught in law school legal writing programs. Although many of the legal writing and appellate advocacy textbooks mention policy arguments, none of them have any specific discussion of how to effectively make those arguments.⁸

think their students make effective policy arguments, particularly in appellate briefs. The most common response is frustration that students don't seem to fully understand what a policy argument is and how to make one effectively. The "for reasons of public policy" opening is commonly lamented as a universal problem.

4. For a more detailed discussion of how policy is discussed in law school, see James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003, 1021, 1055-60 (1985) (discussing the use of policy in teaching a torts class); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 533-35 (1986) [hereinafter Kennedy, *Freedom and Constraint*] (reviewing the "typical" policy arguments); DUNCAN KENNEDY, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW 54, 59 (David Kairys, ed., 3d ed., Basic Books 1998) [hereinafter KENNEDY, *Training for Hierarchy*] (critiquing the "formulaic, pro/con policy arguments" that first-year students learn in their doctrinal classes).

5. Most of the legal writing textbooks cover this type of policy argument. See, e.g., LINDA H. EDWARDS, *LEGAL WRITING - PROCESS, ANALYSIS, AND ORGANIZATION* 107 (2d ed., Aspen L. & Bus. 1999) [hereinafter EDWARDS, *LEGAL WRITING*]; RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING* 131 (3d ed., Aspen L. & Bus. 1998); DIANA V. PRATT, *LEGAL WRITING: A SYSTEMATIC APPROACH* 325 (3d ed., West 1999); HELENE S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* 44 (4th ed. 1999).

6. For a more detailed discussion of the difference between arguing the policy of an existing rule and arguing policy for a new rule, see Margolis, *supra* note 1, at 211-13.

7. *Id.* at 219.

8. See, e.g., RUGGERO J. ALDISERT, *WINNING ON APPEAL* (Revised 1st ed., NITA 1996) (no specific discussion of policy arguments); CAROLE C. BERRY, *EFFECTIVE*

It is time for legal writing professionals to take up the task of teaching students to make sound, persuasive policy arguments.

There are many obstacles to the teaching of effective policy argumentation. Most teachers of legal writing, like our students, had no exposure to this type of analysis in law school. Many of us probably see policy as unimportant, or so “mushy” as not to serve an important role in appellate argument. In addition, there are very few sources to which we can turn to educate ourselves about effective policy arguments. As noted above, legal writing textbooks have only a cursory treatment of this subject if they cover it at all.⁹ There is virtually no scholarly treatment of the subject.¹⁰ Likewise, there is very little discussion of policy arguments in practitioner-oriented publications that address making policy arguments.¹¹ Finally, there are very few good examples of policy arguments in appellate briefs submitted to courts.¹²

This article is an attempt to review the information that would be useful to a legal writing teacher who is interested in a more thoughtful, deliberate teaching of policy arguments. Policy argumentation is an important skill which should be taught in law school legal writing programs.¹³ Not only should we teach students that policy arguments are an important advocacy tool,

APPELLATE ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT 100 (West 1998) (general explanation of equity and policy arguments); EDWARDS, LEGAL WRITING, *supra* note 5, at 107 (discussing policy-based reasoning, but no discussion of how to make policy arguments); NEUMANN, *supra* note 5, at 271-72 (3d ed. 1998) (discussing the importance of policy arguments, but not how to support them); LAUREL CURRIE OATES ET AL., THE LEGAL WRITING HANDBOOK 61-62 (2d ed., Aspen L. & Bus. 1998) (listing policy as a “type” of argument with no explanation of what a policy argument is); DIANA V. PRATT, *supra* note 5, at 320-26 (discussing policy arguments and sources for support, but no specific explanation of how to put together); SHAPO ET AL., *supra* note 5, at 198-202 (section discusses types of policy argument, but not how to support them).

9. See *supra* note 5 and accompanying text.

10. Extensive research revealed very little on the subject of policy arguments or how to support them. The works of Critical Legal Studies scholars such as Duncan Kennedy and James Boyle, *supra* note 4, discuss the nature and types of policy argument, but do not address the practical realities of constructing these arguments. The author’s previous work, *supra* note 1, is the only article which specifically discusses how to support policy arguments.

11. Margolis, *supra* note 1, at 200-01.

12. A review of over 150 party briefs filed in the United States Supreme Court in the last 10 years revealed fewer than 20 briefs that contained identifiable policy arguments. Of these, not all were clearly supported or made effectively.

13. As indicated above, this is a skill which is best taught in the context of appellate advocacy. The author leaves open, for the moment, whether this skill is best taught in a first-year moot court program, or in an advanced writing or appellate advocacy course.

we should also teach them specifically what policy arguments are and how to construct and support these arguments in writing. Part Two of this article begins by reviewing the reasons why making policy arguments is a specific and distinct skill which should be taught. Part Three categorizes and explains the different types of policy arguments. Finally, Part Four discusses how to support policy arguments with authority to make them effective and persuasive.

II. THE IMPORTANCE OF TEACHING POLICY ARGUMENTATION AS A SKILL

A critical part of teaching students to be lawyers includes teaching them legal analysis, or “thinking like a lawyer.” To do this, students must learn specific skills.¹⁴ The goal of a legal writing program should be to teach students how to “think, write and speak ‘like a lawyer.’”¹⁵ This includes many individual skills, including legal research, clear expression and style, drafting the types of documents legal writing students are likely to write as lawyers, and, most importantly, using legal analysis, reasoning, and advocacy to solve legal problems.¹⁶ This last category can broadly be called “legal analysis” and is arguably the most important of the skills.

Inherent in legal analysis are a number of sub-skills which should be taught in a legal writing course. Specifically, students should learn how to apply a rule from a single case to a set of facts, synthesize a rule from a body of cases and apply it to facts, draw an analogy to a precedent case, apply a rule from a statute or regulation, argue that existing precedent dictates the adoption of a particular legal rule, and argue that policy considerations support the adoption of a particular legal rule.¹⁷ Most legal writing programs do an admirable job of teaching each of these skills, with the glaring exception of the last one.

There are many possible reasons for this. Most legal writing teachers learn about policy in doctrinal law courses where we are presented with “a list of balanced, formulaic, pro/con policy arguments that lawyers use in arguing that a

14. Paul Wangerin, *Skills Training in “Legal Analysis”: A Systematic Approach*, 40 U. MIAMI L. REV. 409, 429-31 (1986) (identifying six skills necessary to mastering legal analysis: the use of facts, statutes, synthesis, analogies, policy, and apparent contradiction).

15. SOURCEBOOK, *supra* note 2, at 5.

16. *Id.* at 5-7.

17. *Id.* at 18-19.

given rule should apply to a situation in spite of a gap, conflict or ambiguity or that a given case should be extended or narrowed.”¹⁸ These arguments come in “matched contrary pairs, like certainty vs. flexibility, security vs. freedom of action, property as incentive to labor vs. property as incipient monopoly, no liability without fault vs. as between two innocents he who caused the damage should pay, the supremacy clause vs. local initiative, and so on.”¹⁹ This teaches us that policy reasons can be advanced to support any side or outcome in a dispute. We get the message that policy is an amorphous concept, more useful for understanding a decision after the fact than for predicting or advocating a particular outcome.

With this view of policy argumentation, it is no wonder that law school legal writing programs provide only a cursory, general introduction to the use of policy in brief writing.²⁰ There is another approach to teaching policy, however, which is more consistent with legal writing pedagogy, and which provides a clearer understanding of how policy can be used in the real world of law practice. This approach focuses on the “use” of policy rather than its “discovery.”²¹ Instead of trying to discern how policy considerations affected a particular decision, students should be taught to understand the nature of different types of policy arguments and how an understanding of policy can affect the way a legal problem is viewed. This will allow students to make choices about “what policy argument best supports a particular side in a particular dispute.”²²

This approach is most consistent with the way lawyers actually use policy when representing clients. A person using this approach does not assume that there is an objectively correct policy which requires a particular outcome, but rather, that in a particular case, involving particular facts, there is a policy consideration that benefits one party more than the other.²³ Thus, instead of encouraging students to find the “correct” policy, this approach encourages students to find the

18. KENNEDY, *Training for Hierarchy*, *supra* note 4, at 59.

19. Kennedy, *Freedom and Constraint*, *supra* note 4, at 534.

20. The author recognizes that there are probably many individual legal writing professors who give more instruction in policy argumentation than is found in the text books. This article is not meant as a critique of legal writing programs. Rather, it is an attempt to provide some useful information for those who are interested in a more systematic way of teaching or using this skill.

21. Wangerin, *supra* note 14, at 456.

22. *Id.*

23. Kennedy, *Freedom and Constraint*, *supra* note 4, at 534-35.

policy that best advances their hypothetical client's interests. Because this approach has more of a "real-world" feel, students are more likely to be motivated to grasp this skill and learn what policy analysis is about.²⁴

This approach is similar to the way most legal writing programs teach case analysis. Rather than reading cases primarily to figure out what they mean, which is the approach taken most often in doctrinal courses, legal writing students generally read cases to determine their use in solving fact-based problems.²⁵ The latter approach focuses on cases as a tool, rather than as an end in themselves. Using this approach, legal writing professors encourage students to articulate a rule from a case, or synthesize a rule from a group of cases, in a way that benefits their hypothetical client.²⁶ For example, in some situations a narrow, fact-based statement of the rule may be beneficial to a client presenting a situation similar to that in the reported case.²⁷ In other situations, a more abstract articulation of the rule might allow the client to assert that the rule applies to a different fact scenario.²⁸ The ability to use cases in different ways is a crucial skill, particularly for persuasive writing such as is necessary in an appellate brief.²⁹ Students generally recognize that this is a valuable skill they will need in practice and, as a result, struggle to master it.

Using the same approach to teach policy argumentation, then, has a double benefit. First, it is consistent with the other skills students learn in legal writing, thus the method will be familiar and students will have an easier time grasping the often complex concepts involved in policy argumentation. Second, because the approach will help students realize the real-world implications of using policy arguments to benefit a client's position, they will respond more positively and make a greater effort to understand the nature of policy arguments.³⁰ Ideally,

24. Wangerin, *supra* note 14, at 456.

25. SOURCEBOOK, *supra* note 2, at 6.

26. See, e.g., NEUMANN, *supra* note 5, at 275-76; OATES ET AL., *supra* note 8, at 315.

27. SHAPO ET AL., *supra* note 5, at 186-87

28. *Id.*

29. This is particularly true when an appeal raises an issue of first impression for which there is no binding authority. The author uses an appellate brief problem that raises an issue of first impression for the express purpose of giving the students the experience of using cases that could arguably support a result for either party. Many other legal writing professors use similar problems, as evidenced by a review of Idea Bank submissions for the 1998 Legal Writing Institute Conference.

30. Wangerin, *supra* note 14, at 456.

this will lead to more effective use of policy both in students' work during law school and in their work as practicing attorneys.

Why is teaching students to effectively use policy important? Because policy can play an extremely important role in judicial decision-making, particularly when a court must resolve a novel issue or develop a new rule of law.³¹ The renowned judge Benjamin Cardozo recognized this in his famous book, *The Nature of the Judicial Process*,³² asserting that to address novel issues of law, judges must turn to "public policy, the good of the collective body."³³ Judges today recognize that public policy is still an important part of judicial decision-making.³⁴

Policy can play a role in almost any case, but policy plays an especially important role in three types of cases: common law cases of first impression, constitutional cases raising novel application of constitutional provisions, and cases of first-time statutory interpretation.³⁵ In these cases, there is no explicitly binding authority which directs the court to act in a particular manner. Instead, the court must create new law, assuming a "legislative" function.³⁶ When faced with these situations, judges may employ a variety of approaches, including reasoning based on precedent, principle, and policy.³⁷ When judges rely on policy-based reasoning, however, they often base their reasoning on intuition or experience, rather than on a well-researched argument.³⁸

A lawyer writing a brief should be apprehensive about

31. Margolis, *supra* note 1, at 219.

32. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

33. *Id.* at 72.

34. Ruggero J. Aldisert, *The Brennan Legacy: The Art of Judging*, 32 *LOY. L.A. L. REV.* 673, 677 (1999) (a central tenet of modern jurisprudence is that "[j]udges should consider the effect of their judicial decisions on society and social welfare, rather than adhering solely to a mechanical jurisprudence of legal conceptions); Judith S. Kaye, *State Courts and the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 *N.Y.U. L. REV.* 1, 10 (1995) (state court judges, when dealing with issues of first impression or filling in gaps, "are frequently left to choose among competing policies").

35. For a full review of these types of cases and why policy plays a critical role, see Margolis, *supra* note 1, at 219-32 (asserting that the American common law method creates gaps in the law which must be filled, even in cases involving statutes or other positive law, and that filling gaps is most often done with policy).

36. *Id.* at 197.

37. *Id.* at 211.

38. *Id.* at 221 (citing OLIVER WENDELL HOMES, JR., *THE COMMON LAW* 1 (Little Brown & Co. 1990) (1881)).

relying on a judge's intuition about public policy. A lawyer writing a brief in a case in which policy is likely to be a factor should make a sound, well-researched, and effective policy argument in the brief, just as she should make sound, well-researched and effective legal arguments.³⁹ In legal writing, we teach students to write briefs that precisely explain how a case supports a particular point. We emphasize the importance of presenting a case from the client's viewpoint, rather than letting the judge read the law and decide how it applies.⁴⁰ We should do the same with policy, encouraging students to make effective policy arguments from the client's viewpoint to back up their legal arguments in appropriate cases.

In addition to policy as an important part of legal decision-making, students should learn to make effective policy arguments because these arguments can greatly enhance the persuasive value of a brief. Policy arguments go beyond the rule or holding of a particular case, appealing to the broad interests of lay people as well as judges.⁴¹ Policy arguments are most often arguments about the way the world works, or arguments that a proposed rule will benefit society or serve a useful social function.⁴² Because policy arguments are broad in nature, they can often apply to more than one specific legal issue within the same case.⁴³ This is important because most cases on appeal involve multiple legal issues. A policy theme which unifies multiple issues in a case can make the brief as a whole much more compelling and persuasive.⁴⁴

Used in this way, a policy argument can function much like a theory of the case, a concept taught in most legal writing and appellate advocacy courses.⁴⁵ A theory of the case is the framework, or lens, through which the attorney presents the client's position to the court. A sound theory should unify all of

39. In *Beyond Brandeis*, the author suggests that an attorney may, in fact, have an ethical obligation to make such arguments and support them with all available sources of authority, both legal and non-legal. Margolis, *supra* note 1, at 206.

40. EDWARDS, *LEGAL WRITING*, *supra* note 5, at 307; NEUMANN, *supra* note 5, at 276-77.

41. Wangerin, *supra* note 14, at 457.

42. Margolis, *supra* note 1, at 211 (citing Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 *LEGAL STUD. F.* 7, 10 (1996) [hereinafter Edwards, *Convergence*]).

43. Wangerin, *supra* note 14, at 457.

44. *Id.* at 458.

45. *See, e.g.*, NEUMANN, *supra* note 5, at 257; SHAPO ET AL., *supra* note 5, at 281.

the facts and legal arguments into a cohesive whole.⁴⁶ Likewise, a sound, well thought-out policy argument can serve the same purpose and be a powerful force in demonstrating to a judge that a particular outcome is both legally correct and just.

A good example of this can be seen in the appellate brief problem the author uses in the first-year legal writing course at Temple University.⁴⁷ The problem involves whether a psychiatrist has a duty to warn potential victims of a dangerous mental patient when the patient specifically threatened these individuals and the psychiatrist has reason to believe the patient will carry out the threats.⁴⁸ The problem is set in Georgia, where this is an issue of first impression.⁴⁹ There are two main legal issues involved in the resolution of this problem: first, whether there is support in Georgia's common law for imposing such a tort law duty; and second, whether the psychiatrist-patient confidentiality statute, which is very strict in Georgia, prohibits the court from imposing such a duty. There is no precedent directly on point in Georgia, however, there is related precedent that could support an outcome in favor of either the psychiatrist or the victims.

There are several ways that policy can come into play for both parties in this dispute. For the victims, who want the court to impose a duty to warn, the obvious policy argument would be public safety, a social policy argument.⁵⁰ The victims can construct an argument that points to the high value society places on public safety. They can point to various sources, including the state constitution, which emphasize the value of public safety and the role of law in promoting it. They could also

46. NEUMANN, *supra* note 5, at 257.

47. At the James E. Beasley School of Law at Temple University, the final memorandum assignment from the fall semester is converted into an appellate brief problem in the spring semester. In the fall, the problem is set in a pre-litigation posture in which students explore the likelihood of their client's success if the case were to be filed (students are assigned to represent one or the other of the potential parties). This allows us to use a more complex problem, since students are able to get a solid grasp on the basic legal issues before they become advocates for one side or the other on appeal. See JAN M. LEVINE, *LEGAL RESEARCH & WRITING I COURSE MATERIALS 3* (1999/2000).

48. This problem originally appeared in JAN M. LEVINE, *ANALYTICAL ASSIGNMENTS FOR INTEGRATING LEGAL RESEARCH AND WRITING* (1st ed. 1991). Subsequent editions were published in 1993, 1995, and 1996. Kathryn A. Sampson co-authored the 1995 and 1996 editions.

49. For ease of discussion, the author is going to present the problem in general terms, without citation to authority.

50. For a more detailed discussion of the different types of policy arguments, see *infra* Section III.

use available psychiatric or sociological data demonstrating that having a psychiatrist issue a warning under these circumstances benefits the patient and promotes public safety. In this way, the victims can create a compelling argument that the court should resolve the case in favor of this compelling policy.

In addition, the victims can use the public safety policy to unify the legal arguments which must inevitably be a part of the court's decision.⁵¹ The victims can present the common law in light of the policy value of public safety, showing that Georgia precedent consistently recognizes this value in determining tort liability. Likewise, the victims can show that the Georgia code reflects the importance of public safety. The victims can show the legislature recognizes the value of public safety through the confidentiality statute, in conjunction with related statutes on civil commitment and disclosure of certain communicable diseases. Thus, a ruling in the victim's favor would be consistent with legislative intent. In this way, the victims can unify all of the individual arguments in the brief into a persuasive whole.

The psychiatrist has two very different policy options. The psychiatrist's goal is to have the court reject a duty to warn and maintain the status quo. One policy approach that supports this goal is an "institutional competence" argument.⁵² The psychiatrist could argue that this is an issue more properly addressed in the state legislature. To support this policy argument, the psychiatrist could cite theoretical and empirical data on the importance of confidentiality in the psychiatrist/patient relationship and the ability of psychiatrists to accurately predict dangerousness, to demonstrate the complexity of the issues and urge that the legislature is better suited to consider and balance all of the complex factors involved in adopting a duty to warn. Under this approach, the psychiatrist would avoid judging the social value of a duty to warn. Rather, the psychiatrist would be urging the court to defer to the legislature's judgment of the issue. Thus, the institutional competence policy would unify both the common law and statutory arguments.

Like the victims, the psychiatrist could use this approach to

51. While policy arguments can be very important, most courts still rely primarily on conventional legal arguments to justify their decisions. Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 41-42 (1998).

52. For a more detailed discussion of the different types of policy arguments, see *infra* Section III.

unify his legal arguments. He could use the fact that there is no common law precedent beyond a psychiatrist's duty to control a dangerous patient to argue that the court has gone as far as it can without acting "as a legislature." He could use the confidentiality statute and the detailed exceptions for things like civil commitment to argue that this issue is already in the legislative arena and should stay there.

The psychiatrist could also take a completely different approach and make a social policy argument asserting that a duty to warn would dangerously undermine the psychiatrist-patient relationship, lead to poor mental health treatment, and ultimately have a negative effect on the public health and welfare. Under this approach, the psychiatrist would make a direct attack on the duty to warn itself. To unify the legal arguments, the psychiatrist would focus on the substance of the common law and statutory provisions, showing that they have stopped where they have for sound reasons, and arguing that the court should not undermine those reasons now.

Thus, policy arguments can have a profound impact on the overall persuasive value of a brief. If, as in the example above, there is more than one available option for an effective policy argument, the advocate must make a choice. To make this choice, the advocate must consider factors such as the nature of the facts presented in the case, the temperament of the court deciding the case, and the political climate. These are similar to the considerations legal writing professors teach students to make when deciding which cases to use and which legal arguments to make when there are multiple options.⁵³

For lawyers to be able to identify the policy argument that best advances their clients' interests, or to make choices among such arguments, they must have a solid understanding of what policy arguments are and how to make them. It is our obligation as legal writing professionals to teach our students these skills. Teaching students to make effective policy arguments will serve both the idealistic goal of improving the quality of persuasive writing in the practicing bar, as well as the pragmatic goal of ensuring that lawyers make arguments on issues that affect judicial decision-making.

Teachers of legal writing should take up the task of educating students about this important aspect of advocacy. We should teach policy argumentation as a skill, and teach it

53. NEUMANN, *supra* note 5, at 121-22; SHAPO ET AL., *supra* note 5, at 280.

carefully and deliberately. To do this, we not only need to help students understand the role policy can play in important cases,⁵⁴ but we also need to teach our students about the different kinds of policy arguments which can be made and how to effectively support those arguments with authority. The next sections will address these two topics.

III. EXPLANATION OF THE NATURE AND TYPES OF POLICY ARGUMENTS⁵⁵

While there are several different types of policy arguments, all policy arguments share the common attribute of advocating that a proposed legal rule will benefit society by advancing a particular social goal or, conversely, that the proposed legal rule will cause harm and should not be adopted.⁵⁶ Because a new rule, or a new application of an existing rule, will have implications beyond the individual case,⁵⁷ the appellate court deciding the case will be concerned with how the rule will work for future litigants, as well as for society at large.⁵⁸ Thus, all policy arguments must involve an assessment of how a proposed rule will function in the real world.

In constructing a policy argument, the advocate must attempt to convince the court that the advocated goal is a desirable one for the client, as well as for society as a whole.⁵⁹ The goals underlying most policy arguments are ideals for which there is general social consensus - ideals such as fairness, justice, efficiency, and promotion of public health and welfare.⁶⁰ Identifying the goal is the simplest part of developing a sound policy argument.

Once the underlying goal is identified, the advocate must show the court how the proposed rule will help achieve that

54. See *supra* notes 30-37 and accompanying text.

55. While this discussion may be applicable to all kinds of cases, this section focuses on the use of policy arguments in cases raising a novel issue of law, requiring either a new rule or new application of an existing rule. See *supra* notes 6 - 9 and accompanying text.

56. Edwards, *Convergence*, *supra* note 42, at 10.

57. Under the common law method, issues are resolved on a case-by-case basis with the understanding that law evolves over time. Each case decided then serves as precedent to guide the court in deciding future controversies of a similar nature. For a more thorough discussion of the common law method, and the role policy plays under such a system, see Margolis, *supra* note 1, at 219-21.

58. Edwards, *Convergence*, *supra* note 42, at 10.

59. *Id.*

60. Boyle, *supra* note 4, at 1055-60 (reviewing different types of policy arguments).

goal.⁶¹ In this two-step process, it is usually in the second step that brief-writers fall short. When extracting policy from an existing source of law, the type of policy-based reasoning lawyers are generally trained to do,⁶² an advocate can generally argue for the application of that reasoning to a new situation. It is much more difficult, however, to construct this same kind of policy analysis when it cannot be found in a source of legal authority.⁶³

There are very few sources containing information about the nature of different policy arguments.⁶⁴ The work of Critical Legal Studies scholar Duncan Kennedy includes the most concrete scholarly discussion of types of policy arguments.⁶⁵ Professor James Boyle has taken Kennedy's work farther by providing examples of each type of argument.⁶⁶ Very few legal writing-oriented materials, however, have any description of different types of policy arguments.⁶⁷ It is difficult to divide policy arguments into firm categories, since there is considerable overlap between different types of policy arguments. In order to provide a concrete overview, however, the author has synthesized the various types of policy arguments into four broad categories: 1) arguments about judicial administration;⁶⁸ 2) normative arguments⁶⁹; 3) institutional competence

61. Margolis, *supra* note 1, at 211.

62. See *supra* notes 5 - 7 and accompanying text.

63. Margolis, *supra* note 1, at 212.

64. There may be information about different types of policy arguments in some doctrinal casebooks for courses such as contracts and torts. These discussions are by nature, however, limited to the particular subject they address, and are not generally accessible to an individual trying to find information on this subject.

65. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) [hereinafter Kennedy, *Form and Substance*]; Kennedy, *Freedom and Constraint*, *supra* note 4; KENNEDY, *Training for Hierarchy*, *supra* note 4.

66. Boyle, *supra* note 4, at 1055-60 (describing and providing examples for five types of policy arguments: judicial administration arguments; institutional competence arguments; moral arguments; deterrence of social utility arguments; and economic arguments).

67. The exceptions are SHAPO ET AL., *supra* note 5, at 198-202 (describing in some detail four types of policy arguments: normative arguments; economic arguments; institutional competence arguments; and judicial administration arguments) and SOURCEBOOK, *supra* note 2, at 19 (describing four types of policy arguments: economic consequences arguments; administrative efficiency arguments; institutional competence arguments; and fairness and justice arguments).

68. This category can be subdivided into sub-categories, including firm versus flexible rule arguments, "floodgates of litigation" arguments, and "slippery slope" arguments.

69. This category can be subdivided into moral arguments, social utility arguments, and corrective justice arguments.

arguments; and, 4) economic arguments. The following sections will review the most common goals identified in policy arguments and present the arguments that typically accompany each goal.

A. *Judicial Administration Arguments*

First-year law students quickly become familiar with judicial administration arguments, though they may not be identified as such. These are the arguments most frequently identified and discussed in doctrinal courses. Judicial administration arguments are arguments about how a proposed rule will affect the workings of the justice system. These are arguments about the practical administration of the rule by the courts.⁷⁰ The goal at the heart of these arguments is a fair and efficient judicial system. There is little dispute that this is a valuable goal for society.

The dual goals of fairness and efficiency are sometimes at odds, however. This tension gives rise to the first type of judicial administration argument, the “firm versus flexible rule” argument.⁷¹ Proponents of a firm rule argue that a clear, specific standard will be easy for the court to administer, and therefore promote efficiency. Further, a firm rule promotes fairness by leaving little room for judicial discretion, leading to more consistent application and making it easier for citizens to understand the rule and act accordingly. On the other hand, a flexible rule would create confusion, be more prone to judicial abuse, and undermine the rule of law.⁷² Thus, the “firm rule” argument attempts to show how both fairness and efficiency are promoted by adoption of a clear, concise rule.

The “flexible rule” argument, on the other hand, focuses more heavily on fairness. Proponents of a flexible rule argue that flexibility allows the court to adapt to changing times, and to take into account the individual circumstances of each case. A firm rule, contrarily, would be too harsh and result in unfairness both in the case before the court and in future cases. Because a flexible rule will be more responsive and fair, adopting a flexible rule will promote greater confidence in the judicial system.⁷³

70. SHAPO ET AL., *supra* note 5, at 201.

71. Boyle, *supra* note 4, at 1056.

72. *Id.* See also SHAPO ET AL., *supra* note 5, at 201.

73. Boyle, *supra* note 4, at 1056; SHAPO ET AL., *supra* note 5, at 201.

There are three other judicial administration arguments that focus primarily on efficiency. These can be made individually or combined with a firm/flexible rule argument. The first is the “floodgates of litigation” argument.⁷⁴ This argument asserts that a proposed rule, if adopted, will inundate the court with lawsuits. This may occur because the proposed rule is confusing, overly broad, or the problem it addresses is extremely common. According to this argument, the “flood” of litigation would overwhelm the courts and lead to inefficient use of the courts’ valuable time and resources.⁷⁵

The second of these arguments is the “slippery slope” argument.⁷⁶ This argument is similar to the “floodgates” argument, but speaks to fairness as well as efficiency. A slippery slope argument asserts that if the proposed rule is adopted, the court will not be able to prevent its application to an ever broadening set of cases. The rule will be stretched to one new circumstance after another and, eventually, the court will be hearing a whole range of cases it never intended to entertain. This argument may also assert that adoption of the rule will lead to a large number of frivolous claims. A slippery slope argument calls on the same efficiency themes as the “floodgates” argument, but also raises the specter of fairness by suggesting that it is unfair to open the door to a whole new type of liability, unexpected by both citizens and the courts.

The final judicial administration argument asserts that a proposed rule, even if firm, is so complex that it will be impossible to administer efficiently.⁷⁷ The complexity of the proposed rule will create unfairness by making it difficult for citizens to understand and comply with the law. The proposed rule will also undermine judicial efficiency by requiring a large number of judicial resources in order to resolve claims under the rule.

B. Normative Arguments

The next major category of policy arguments is normative

74. This argument is much overused and often used inappropriately. Over the years, the author has seen many student briefs making “floodgate” arguments because the students know they should make some kind of policy argument and this is the only one they can think of. While this argument still has value, it should be used selectively, and only where truly appropriate.

75. Boyle, *supra* note 4, at 1056; SHAPO ET AL., *supra* note 5, at 201.

76. SHAPO ET AL., *supra* note 5, at 201.

77. *Id.* at 202.

arguments. Normative arguments assert that a proposed rule either promotes or undermines shared societal values. Although there is significant overlap among different types of normative arguments, they can be roughly broken down into three categories: moral arguments, social utility arguments, and corrective justice arguments.⁷⁸ Normative arguments tend to appear more “political”⁷⁹ in nature because, in today’s complex society, there is rarely widespread consensus on issues of morality or other social good.⁸⁰ As a result, the goal of a normative policy argument is not always as obvious or easy to establish as the goal of a judicial administration argument.

Moral arguments generally assert that a particular rule should be adopted because it is consistent with generally accepted moral standards of society. The goal is a system in which the laws are consistent with, and promote, those moral values society deems important. For example, in the psychiatrist duty to warn case, a moral argument would be that a duty to warn should be adopted because it is immoral for a psychiatrist to know that his patient is going to kill certain individuals, yet do nothing to prevent their murders. The goal at the heart of a moral argument is a society in which we protect and care for one another, an altruistic view⁸¹ of the world not shared by all.

Just as judicial administration arguments raise tension between efficiency and fairness, moral arguments raise tension between individualism and altruism.⁸² Moral arguments, therefore, often come in opposing pairs such as “form versus substance” or “freedom versus security.”⁸³ A morality as form

78. *Id.* at 199. Boyle includes as two separate categories “moral” and “deterrence of social utility” arguments. Boyle, *supra* note 4, at 1056-59. The author sees these two categories as part of the broader “normative” category. Likewise, the “fairness and justice” sub-division falls into the broad “normative” category. See SOURCEBOOK, *supra* note 2, at 19.

79. By political, the author means to suggest that these arguments appear to be overtly motivated by a particular social agenda or interest group, rather than being advanced for the good of society as a whole.

80. Classic examples of this can be seen in the legal battles over abortion, gay rights, and the death penalty. There is no consensus in the United States over whether abortion should be legal, homosexuals should be given civil rights protection, or perpetrators of heinous crimes should be put to death. Because these things are not universally accepted as social goods, normative arguments may not appear as “objective” as judicial administration arguments.

81. For a more detailed discussion of the role of altruism in the creation of legal rules, see Kennedy, *Form and Substance*, *supra* note 65, at 1737-38.

82. *Id.*

83. Boyle, *supra* note 4, at 1058.

argument focuses on the “formal” classification of the dispute and reflects an individualist morality. For example, if a person of full age and mental capacity enters a contract, he should be bound by it and keep his bargain. The morality as substance response would focus on the individuals involved, and reflect an altruist morality: A large corporation should not be able to enforce a contract against a poorly educated person with unequal bargaining power.⁸⁴

In the “freedom versus security” argument, freedom of action represents the individualist morality. For example, a doctor should be free to refuse any patient, otherwise the government is forcing her into a form of servitude; likewise, the state should only require people to refrain from action, not act affirmatively. A right to security, on the other hand, reflects an altruistic morality. For example, a sick person should be confident that a doctor will treat him because, without this security, people can benefit from society without fulfilling their societal obligations.⁸⁵ There are many variations on this “individual versus altruist” theme which can make the basis of a moral policy argument. The key is to determine the world view that is most beneficial to the advocacy position and develop the argument accordingly.

The next type of normative argument is the social utility argument. The advocate of this argument asserts that a proposed rule will serve a social good and benefit society or, conversely, will undermine a social value and harm society.⁸⁶ The goal in this type of argument is a society that promotes the health and well-being of its citizens. The argument asserts that a proposed rule either deters or encourages conduct that affects the goal.⁸⁷ Social utility arguments often intersect with moral and economic arguments and focus on goals such as public health, public safety,⁸⁸ economic health, and national security.

Social utility arguments are particularly useful in tort law cases in which a court is asked to impose liability and compensate an individual for harm.⁸⁹ For example, in the

84. *Id.*

85. *Id.*

86. Boyle, *supra* note 4, at 1058; SHAPO ET AL., *supra* note 5, at 199.

87. Boyle, *supra* note 4, at 1058; SHAPO ET AL., *supra* note 5, at 199.

88. For an example of a public safety argument in the psychiatrist duty to warn case, see *supra* notes 50 - 51 and accompanying text.

89. Social utility arguments can also be made in cases of first-time statutory interpretation, in which a court uses policy norms to decide on the application of a

psychiatrist duty to warn situation, in trying to avoid liability, the psychiatrist might argue that a rule imposing a duty to warn would have a negative impact on the public health. Such a duty could undermine patient confidence in the protection of confidentiality and cause them to avoid mental health treatment, resulting in poorer mental health in society at large. The duty could also cause psychiatrists to commit patients more frequently to avoid liability, thus restricting the freedom of a larger number of citizens.

An example of an economic health argument could center around the need for a flexible standard versus a firm rule. A flexible standard would allow businesses to adjust to changing conditions and encourage competition while a firm rule would be too limiting, confine entrepreneurship, and create an obstacle to competition. The argument for a firm rule would be that a clear standard is necessary so that businesses can have predictability and act with a clear understanding of the law; a flexible standard would destroy certainty and discourage competition because businesses will be unsure of the results of their activities.⁹⁰

The final normative policy argument is the corrective justice argument.⁹¹ This argument centers on the goal of fairness and asserts that as between two innocents, the person who caused the harm should be held responsible.⁹² Corrective justice arguments are most useful in cases in which a court must determine tort liability. Because corrective justice arguments focus more directly on the particular parties before the court, they are generally less useful in cases raising novel issues. In common law cases of first impression in which the court is being asked to establish a new cause of action, however, corrective justice arguments could be very useful.⁹³ For example, if there is some precedent in support of a new cause of action, a corrective justice argument might convince a judge that imposing liability is the right thing to do.

statute to a new situation. Margolis, *supra* note 1, at 226 (citing Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 16 (1998)).

90. Boyle, *supra* note 4, at 1058.

91. SHAPO ET AL., *supra* note 5, at 199.

92. Kennedy, *Freedom and Constraint*, *supra* note 4, at 534.

93. For a more detailed explanation of the frequency with which state courts are asked to find new causes of action, see Margolis, *supra* note 1, at 223-23 (citing Kaye, *supra* note 34, at 7).

C. Institutional Competence Arguments

The third major category of policy arguments are “institutional competence” arguments.⁹⁴ These are arguments about which branch of government⁹⁵ is better suited to resolve a particular legal issue.⁹⁶ The goal at the heart of institutional competence arguments is the fair and efficient operation of the legal system, as well as the maintenance of the constitutional separation of powers.

While it is generally understood that legislatures create new law and courts apply the law and resolve disputes, there is a gray area which makes room for institutional competence arguments. The gray area is a product of the common law method used in American legal decision-making, even in cases involving positive law, such as statutes and constitutions.⁹⁷ Under the common law method, judges have the power to fill gaps in the law and formulate new rules.⁹⁸ Thus, judges have a degree of legislative power, creating the potential for arguments over whether an issue is better suited for the courts or the legislature.

Arguments that a controversy is better suited for the courts focus on the nature of courts as institutions set up to resolve individual disputes and deal with complex factual issues. These arguments emphasize the court’s ability to respond to changing circumstances, and its ability to be objective. In addition, the court has a unique ability to entertain witnesses and make objective determinations of credibility. Finally, these arguments emphasize the court’s freedom from political constraints faced by the legislature. Because courts combine all of these abilities, the legal issue is best resolved by a court.⁹⁹

Arguments that the legislature is better suited to resolve an issue focus on similar concerns. These arguments assert that courts are not competent to resolve an issue because resolution involves a change in the law, which is solely within the province of the legislature. According to this argument, the legislature is

94. Kennedy, *Form and Substance*, *supra* note 65, at 1752.

95. Most often, the debate is whether the judiciary or the legislature is the most appropriate branch of government to resolve an issue. It is possible, however, to make an institutional competence argument involving the executive branch.

96. Boyle, *supra* note 4, at 1056; SHAPO ET AL., *supra* note 5, at 200.

97. Margolis, *supra* note 1, at 219.

98. Kennedy, *Form and Substance*, *supra* note 65, at 1752; Margolis, *supra* note 1, at 197, 220 (citations omitted).

99. Boyle, *supra* note 4, at 1056-57.

better able to account for changes in public opinion. Further, the legislature can hold hearings and gather complex and varied facts that may not be relevant in the context of litigation. Accordingly, allowing the court to create law on such an important issue would threaten the separation of powers.¹⁰⁰

D. Economic Arguments

Economic policy arguments have become more important in modern legal decision-making as a result of the Law and Economics movement.¹⁰¹ Most law students and lawyers should be at least somewhat familiar with economic policy arguments. While a lawyer with a background in economics can make very complex economic policy arguments,¹⁰² there are simpler economic arguments that all law students can learn to make. Economic arguments place economics, rather than fairness or justice, at the center of judicial decision-making.¹⁰³ The goal at the heart of economic arguments is economic efficiency and promotion of a free market economy.¹⁰⁴ Economic arguments can be very persuasive because they give the appearance of scientific rigor and neutrality, though this appearance often masks the political choices inherent in the arguments.¹⁰⁵

One form of economic argument centers on the allocation of resources, asserting that a proposed rule should be adopted because it promotes the most efficient allocation. For example, a rule might be desirable because it spreads loss over a large segment of the population.¹⁰⁶ On the other hand, a defendant trying to avoid liability in a products liability suit might argue that the cost of such liability will be passed on to the public, ultimately punishing those the rule was designed to benefit.

Another form of economic argument asserts that a cost-benefit analysis dictates that a proposed rule should be adopted. Under this analysis, the proponent must show that the potential

100. *Id.*

101. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 21-22 (4th ed. 1992) (asserting that economics in the law has come to the forefront over the last thirty years).

102. For the sake of disclosure, the author wants to make clear that she has very little background in economics and is incapable of making such complex arguments herself. While a more thorough understanding of economics would be helpful for a description of economic policy arguments, it is not necessary for the simple descriptions contained here.

103. SHAPO ET AL., *supra* note 5, at 200.

104. Boyle, *supra* note 4, at 1059-60.

105. *Id.*

106. SHAPO ET AL., *supra* note 5, at 200.

economic benefits created by the rule would outweigh the costs of implementing it.¹⁰⁷ If the benefits do not outweigh the costs, the rule should not be adopted. The key to a cost-benefit analysis is determining which factors make up the cost. In addition to obvious costs, such as the monetary cost of fixing a defective part, costs such as emotional damage can be factored in. Including or excluding particular factors can greatly affect the nature of a cost-benefit policy argument.¹⁰⁸

A third type of economic policy argument is that the proposed rule will have a positive or negative effect on economic efficiency and, therefore, affect the operation of the free market economy.¹⁰⁹ The goal at the heart of this argument is to maintain a legal system that promotes competition and growth in the economy. A free market argument asserts that a proposed rule would either promote or inhibit competition, and should be adopted or rejected on that basis. This argument obviously overlaps the social utility argument described above.¹¹⁰

There are, of course, many other types of policy arguments and many nuances to the arguments categorized above. This section outlines only the major, and most common, categories of policy arguments. If legal writing teachers give their students a solid grounding in these types of arguments, and an understanding of how policy works in conjunction with legal arguments, we will be making great strides in improving our students' abilities to write persuasive briefs. The final challenge is teaching the students how to effectively support these arguments with authority.

IV. SUPPORTING POLICY ARGUMENTS WITH PERSUASIVE AUTHORITY

The biggest problem with policy arguments is that, even when they are included in legal briefs, they are not generally supported with authority.¹¹¹ Without support, policy arguments convey the mushy, "any position can be supported by some policy, so why should the policy have any impact?" message that

107. Boyle, *supra* note 4, at 1060.

108. *Id.*

109. *Id.* See also SHAPO ET AL., *supra* note 5, at 200.

110. See *supra* notes 66, 78, 86-89 and accompanying text.

111. Anecdotal information gathered through numerous conversations with legal writing professors, judicial clerks, and practicing attorneys.

causes many to be cynical about the use of policy arguments.¹¹² There can be little dispute that, to be truly persuasive, policy arguments must be substantiated.¹¹³ Policy arguments should be supported with authority just like legal arguments. We would never teach our students to make a legal argument off-the-cuff, without any reference to statutes, case law, or other sources of law that support the argument. Similarly, we should not encourage students to make policy arguments without teaching them how to effectively support those arguments.

Each part of the policy argument, the goal and the explanation of how the proposed rule serves or undermines the goal,¹¹⁴ should be supported with authority. Just as identifying the goal is usually the easiest part of constructing a policy argument, finding authority that the goal is valid is usually relatively simple. Because most of the goals are commonly identified values — judicial efficiency, public health, public safety, separation of powers, economic efficiency — they have been identified in cases, statutes and constitutions.¹¹⁵ For example, in virtually every jurisdiction, one could find a case identifying public safety as a valuable social goal and asserting that the laws should reflect that value. Statutes are also a good source for policy goals, particularly preambles in which the legislature sets forth the reasons for enacting a statute or group of statutes. Even if these statements don't exist in the statutes themselves, they can often be found in sources of legislative history.¹¹⁶

The second step in policy argumentation is showing how the proposed rule will either achieve or undermine the goal. This is a much more difficult proposition to support with traditional sources of legal authority. By definition, a policy argument is advocating for a new rule or a new application of an existing rule that has never been implemented. Therefore, it is unlikely that existing cases or statutes have addressed the effect the rule will have on the goal. The only likely source of legal authority in this situation would be cases from other jurisdictions that have

112. See *supra* notes 18-20 and accompanying text.

113. Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707, 753 (1996) (pointing out that policy arguments tend to be superficial, and to be “powerful they would require some empirical or anecdotal substantiation”).

114. See *supra* notes 55-58 and accompanying text.

115. See PRATT, *supra* note 8, at 321-24.

116. Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1130 (1983).

already adopted a similar rule or otherwise addressed a similar situation. An opinion from one of these cases might have a discussion of policy which could be cited as a source of persuasive authority.

If legal materials can't provide adequate support for policy arguments, then what can? Non-legal materials¹¹⁷ are often the best, and sometimes the only support for policy arguments.¹¹⁸ It makes sense that legal arguments, which are based on precedent, should be supported by precedent, while policy arguments, which are non-precedential,¹¹⁹ should be supported by non-precedential, non-legal sources. Policy arguments are arguments about the effect a legal rule will have, or how it will operate in the real world.¹²⁰ Therefore, facts about the real world, rather than legal principle, are most appropriate to support these arguments.

For example, take a situation in which a court is asked to adopt a proposed rule that holds parents liable when their children tease other children for being fat. Opponents of the proposed rule may make a judicial administration argument that the court will be overwhelmed with litigation on this subject. The mere assertion of this argument may not persuade a court that routinely sees the floodgates argument. Why will there be a flood of litigation? Is this kind of teasing a common problem? Is a large portion of the population affected by this problem? A citation to statistical data showing the prevalence of children teasing other children for being fat, along with citations to any studies showing the growing number of overweight children in American society, would greatly enhance the persuasive value of the argument.

Policy arguments, in predicting the effect a new rule will have, are by definition future-oriented.¹²¹ Therefore, information that aids courts in predicting how people will react to the rule can be highly persuasive. For example, if a brief

117. Non-legal materials are factual or theoretical information that is not part of the trial record of the case on appeal. This information can include scientific theory and data, sociological data, statistical information, economic theory and data, psychological theory and data, and news of current events. Margolis, *supra* note 1, at 201 n.27. For a more detailed analysis of non-legal materials and why they are appropriate to use as authority in appellate briefs, see *id.* at 202-19.

118. *Id.* at 211.

119. Boyle, *supra* note 4, at 1055.

120. Margolis, *supra* note 1, at 211-12 (citing Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111 (1988)).

121. Margolis, *supra* note 1, at 211-12.

writer is making a social utility argument that a rule should be adopted because it will encourage socially valuable behavior, psychological theory might be useful to show how individuals generally react to similar rules or information. Similarly, an economic policy argument that a business regulation should be rejected because it will inhibit competition would be greatly enhanced by economic theory establishing why a restriction of that nature would inhibit competition.

Morality arguments can also be made more persuasive by citing non-legal sources of information. Morality arguments depend on social consensus about what behavior is acceptable and what is not. If a litigant is making a morality argument that a court should establish a new cause of action because it would be immoral and unjust to let the defendant get away with the challenged behavior, information confirming a social consensus on the immorality of the defendant's behavior would greatly enhance the persuasive value of the argument. This information could come from statistical data, or even newspaper articles reporting on current trends.

Used in this way, non-legal materials play the same role as non-binding, persuasive case authority.¹²² In legal writing, we teach students to use relevant persuasive authority, particularly when there is no binding authority.¹²³ We would never tell students to make an argument without any authority when there was relevant persuasive authority to support the argument. In the same way, we should not teach students to make policy arguments without authority, as long as there is a source of information that supports the argument. The fact that support for policy arguments comes from theories or statistics, rather than cases or statutes, doesn't negate the need to cite sources to support the argument. Arguments are always stronger when supported by external sources of information. As legal writing teachers, we should teach our students that this is the case even for policy arguments.

Thus, non-legal materials are excellent sources of support for policy arguments.¹²⁴ In addition to providing persuasive

122. *Id.* at 209.

123. NEUMANN, *supra* note 5, at 121-22. *See also* SHAPO ET AL., *supra* note 5, at 280.

124. It is beyond the scope of this article to address the research issues involved in using non-legal materials in briefs. For lawyers and students who are not experts in the other fields, finding reliable information can be a challenge. The internet is obviously a valuable resource in locating some of this information. For evaluating information, the work of John Monahan and Laurens Walker is extremely helpful. *See, e.g.*, John

support, there is another important reason for using non-legal materials in policy arguments. Judges frequently turn to non-legal sources of information when faced with novel issues which require them to formulate new rules of law.¹²⁵ Studies show that in recent years, there has been a marked increase in courts' citations to non-legal materials.¹²⁶ If judges are using this information, then brief writers should make sure to include it as part of their arguments.

As legal writing teachers, we would never tell our students that if a judge is going to read a case anyway, there is no need to incorporate the case into the arguments in their briefs. Instead, we urge them to include a detailed discussion of the case so the judge sees it in the context of the entire argument and understands how it applies to the controversy before the court.¹²⁷ We should do the same with non-legal materials in support of policy arguments. Lawyers should take an active role in putting relevant information before the court, rather than letting judges rely on "common sense," or hoping that the judges are already aware of the relevant considerations. As long as courts are using non-legal materials in the creation of new legal rules, brief writers should take an active role in presenting those materials to the court in the context of effective policy arguments.¹²⁸

CONCLUSION

Policy arguments are an important, but often overlooked, part of appellate advocacy and brief writing. As teachers of legal writing and advocacy, it is time for us to take up the task of teaching our students to make clear and effective policy arguments in writing. It is no longer good enough to say "policy is important and you should support your legal arguments with policy rationales." We need to give our students clear, detailed information about the nature and types of policy arguments, as well as how to support them with persuasive authority. There are many challenges associated with teaching this subject. We

Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986).

125. Margolis, *supra* note 1, at 206.

126. *Id.* at 207 (citing Frederick Schauer & Virginia Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1108 & app. (1997)).

127. EDWARDS, *LEGAL WRITING*, *supra* note 5, at 307; *See also* NEUMANN, *supra* note 5, at 276-77.

128. Margolis, *supra* note 1, at 210.

need to learn more about policy arguments ourselves.¹²⁹ We need to think about how policy arguments should be structured, and how to effectively research non-legal materials. Much more work can be done to determine what kind of information provides the best support for different types of policy arguments. Finally, this is one more thing to teach in programs that already contain too much work for too little credit. In spite of the challenges, however, policy arguments are important, and the time has come to devote more attention to them.

129. This work is really just a beginning at understanding policy arguments and how they can be used in appellate briefs. There are many more issues to be explored as we learn more about writing and teaching these often complex arguments. *See id.* at 235-36.