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## LRW's The Real World: Using Real Cases to Teach Persuasive Writing

Elizabeth A. Shaver\*

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## LRW'S *THE REAL WORLD*: USING REAL CASES TO TEACH PERSUASIVE WRITING

ELIZABETH A. SHAVER\*

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\* Assistant Professor of Legal Writing, The University of Akron School of Law. My thanks to all who commented on earlier drafts of this article, with particular thanks to Sarah Morath, Richard Strong, Bernadette Bollas-Genetin, Michelle Goldstein-Roman, Mark Herrmann, and Phil Carino for their valuable comments and insight.

## INTRODUCTION

Over the past two decades, reality television programming has fed the American audience's increasing interest in how people behave in *The Real World*.<sup>1</sup> Today's law students approach their legal education with a similar focus. With a drive to acquire skills needed to succeed in the real world of lawyering, students highly value work done by real lawyers<sup>2</sup> on behalf of real clients.<sup>3</sup>

Law professors who teach persuasive writing can leverage this interest in the real world by using materials from real cases to teach important persuasive writing techniques. Happily, using real cases does more than simply pique students' interest in learning. Materials from real cases, when used in an active learning environment,<sup>4</sup> are exemplary tools to teach the most critical components of persuasive writing. Among those critical components are development of a theme, organization of legal arguments, and effective use of case authority.

This article describes a comprehensive case-study exercise that uses practitioners' briefs and judicial opinions to teach these critical components of persuasive writing. This exercise does more than require students to read an excerpt of a brief or judicial opinion that might illustrate a single persuasive writing technique. Rather, students assess the strength of real pieces of advocacy only after they have learned the applicable law. Students then step into the role of the practitioner and construct arguments by applying the law to facts taken from a real case. Students compare the quality of their arguments to the arguments made in a real brief—a poorly written brief—and assess how the brief failed to meet their expectations about how best to persuade. Finally, students read the decision rendered in the real case and analyze whether the quality of persuasive writing affected the outcome of the case.

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1. See *The Real World: New York—Main*, MTV, <http://www.mtv.com/shows/realworld-season1/series.jhtml#moreinfo> (last visited Feb. 16, 2013). MTV's *The Real World: New York* debuted in 1992. *Id.* *The Real World* has been cited as the show that “set the template for contemporary reality TV.” Michael Hirschorn, *The Case for Reality TV*, ATLANTIC (May 1, 2007, 12:00 PM), <http://www.theatlantic.com/magazine/archive/2007/05/the-case-for-reality-tv/305791/>.

2. Law professors apparently are not *real* lawyers. A student once noted on my course evaluation that it was clear that I “used to be a lawyer.”

3. Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 CAL. W. L. REV. 219, 241–432 (2007).

4. Active learning requires students to engage in higher order thinking, forcing them to engage in analysis, synthesis, and evaluation. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 124 (1st ed. 2007).

Section I of this article describes the primary pedagogical goals of the exercise: To focus on the most challenging aspects of persuasive writing, to use an active learning approach, and to add the real world element by using briefs and judicial opinions from real cases. Section I also discusses how this exercise, by requiring students to exercise their own judgment to develop viable arguments, differs from past uses of briefs and judicial opinions to teach persuasive writing.

Section II of the article then describes the specifics of the exercise, including the materials used, the class discussion, and student reactions. Section III discusses the multiple benefits of this exercise. The primary benefit of the exercise is its effectiveness in teaching students the critical components of persuasive writing; namely theme, organization, and use of case authority. The exercise also helps students to develop high standards for the quality of persuasive writing they expect to see as a reader—standards they transfer to their own work when they begin to write. Best of all, students enjoy the exercise. Students appreciate the opportunity to see how advocacy is conducted in the real world and enjoy their active role in the learning process.

The Appendices to this article contain the documents that students use to record their impressions of the documents that they analyze as part of the exercise.

## I. PEDAGOGICAL GOALS

### A. *To Focus on the Challenging Elements of Persuasive Writing*

This exercise is designed to teach students three critical elements of persuasive writing: Development of a theme,<sup>5</sup> organization of legal arguments,<sup>6</sup> and persuasive use of case authority.<sup>7</sup> While there are several

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5. Theme—also known as theory of the case—is a concise statement why the facts and the law together compel the conclusion that the result being advocated is the *just* result in the case. See MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 37–38 (2d ed. 2006); MICHAEL R. FONTHAM ET AL., PERSUASIVE WRITTEN AND ORAL ADVOCACY IN THE TRIAL AND APPELLATE COURTS 8–9 (2d ed. 2007).

6. To create a well-organized argument, the writer must identify all relevant legal arguments, examine the relationship between the various arguments, and create a hierarchy of arguments in order to present each argument with maximum impact. See BEAZLEY, *supra* note 5, at 70–71; FONTHAM ET AL., *supra* note 5, at 10–16. After having identified each argument and the order in which the various arguments will be presented, the writer must carefully outline each particular argument so that the argument is complete. See BEAZLEY, *supra* note 5, at 75–76.

7. To use case authority well, the writer must provide sufficient information so that the reader understands the case's relevance to the issue. See *id.* at 80–81. Poor use of

other important elements of persuasive writing,<sup>8</sup> in my experience students do not struggle equally with all persuasive writing techniques. With relatively little classroom instruction and targeted comments on students' individual work, most students will improve their persuasive writing with regard to the more obvious issues such as proper punctuation or citation form. But most students struggle quite a bit when learning the critical elements of persuasive writing—how to develop a strong theme, organize legal arguments well, and use case authority for maximum impact.<sup>9</sup>

For example, students may construct a theme, but often they confine it to a short paragraph, usually at the beginning of the brief. Students also may use a shrill or *table-thumping*<sup>10</sup> tone when articulating a theme. Students likewise struggle to organize legal arguments properly; often students may present arguments in the wrong order or have distinct arguments *wander* in and out of each other due to a lack of structure.<sup>11</sup> Finally, students often do not use the cases to their best advantage in the brief, relying on excessive quotations or cursory citations rather than fully describing how the authority supports a particular position.<sup>12</sup>

It is easy to understand why these particular elements of persuasive writing are difficult for students to grasp. Unlike a spelling, grammar, or citation error, the elements of theme, organization, and effective use of case authority are more abstract and subtle. And yet every lawyer who has litigated in private practice has seen a brief that, while it may contain no obvious errors, fails to persuade the reader. The lack of persuasion largely is

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case authority—particularly an overreliance on case quotations—creates *unpersuasive arguments*. *Id.* at 89–90.

8. Other important elements of persuasive writing are the writer's tone, good citation form, appropriate grammar, adherence to rules of punctuation, and lack of spelling or typographical errors. *See id.* at 205. While these elements of legal writing are important, issues of legal analysis and organization are critical to good legal writing and should take precedence when a legal writing professor seeks to improve students' work. Daniel L. Barnett, *Triage in the Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique*, 38 U. TOL. L. REV. 651, 654–55 (2007) (suggesting that legal writing professors who are commenting on student work first address substantive issues of poor legal analysis or organization before grammar or punctuation issues).

9. Cara Cunningham & Michelle Streicher, *The Methodology of Persuasion: A Process-Based Approach to Persuasive Writing*, 13 LEGAL WRITING: J. LEGAL WRITING INST. 159, 193–94, 205 (2007) (identifying the failure to effectively present a theme and lack of organization of the argument as common persuasive writing problems exhibited by novice writers).

10. Stephen V. Armstrong & Timothy P. Terrell, *The Rhetoric of Persuasive Writing*, 15 PERSP.: TEACHING LEGAL RES. & WRITING 189, 189 (2007) (describing the tone as *table-thumping*).

11. FONTHAM ET AL., *supra* note 5, at 9 (explaining that poor organization can cause a brief to *wander*).

12. BEAZLEY, *supra* note 5, at 102, 115–16.

due to defects in these more subtle elements of persuasive writing—theme, organization, and use of case authority.

Thus, the challenge is to isolate these more essential elements of persuasive writing to help students better understand why these elements are so important.<sup>13</sup> By eliminating the distraction caused by grammar, punctuation, or citation errors, this exercise enables students to understand that a piece of advocacy can be aesthetically acceptable yet fail to persuade. By targeting only the more abstract concepts of theme, organization, and use of authority, the exercise helps students focus on the elements of persuasive writing that most often will make the difference between winning or losing a case.

#### B. *To Use an Active Learning Approach*

Another goal in developing this exercise was to use an active learning approach. The differences between active learning and passive learning primarily have been described in the classroom context.<sup>14</sup> Passive learning refers to class instruction in which there is a one-way transfer of information from the instructor to the students, whose primary job is to listen.<sup>15</sup> Active learning is a method of learning that “requires students to [engage in] higher-order thinking [such as] analysis, synthesis, and evaluation.”<sup>16</sup> Simulation exercises, where students assume the role of the practitioner, are a particularly effective form of active learning.<sup>17</sup>

Reading is part of active learning,<sup>18</sup> and students who read real world examples of advocacy are not entirely engaged in passive learning. However, depending on the manner in which the material is presented, students may not be actively engaged for several reasons.

First, when asked to read a piece of well-written advocacy<sup>19</sup> that addresses an unfamiliar legal issue, students may not be able to critically

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13. Barnett, *supra* note 8, at 654–55.

14. Paul L. Caron & Rafael Gely, *Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning*, 54 J. LEGAL EDUC. 551, 552–53 (2004).

15. Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 401 (1999) (Students are engaged in passive learning “when their primary role is to listen to an authority who organizes and presents information and concepts. Active learning occurs when students do more than listen.”).

16. Caron & Gely, *supra* note 14, at 552; Hess, *supra* note 15, at 401.

17. See Hess, *supra* note 15, at 410–11.

18. Caron & Gely, *supra* note 14, at 553.

19. Maria Ciampi has compiled a set of well-written briefs and judicial opinions, together with annotations and commentary to highlight particular persuasive writing techniques. MARIA L. CIAMPI & WILLIAM H. MANZ, *THE QUESTION PRESENTED: MODEL APPELLATE BRIEFS* (2000). Other texts compile excerpts of briefs, judicial opinions, and speeches, also with commentary and annotations that highlight good oral or written advocacy

analyze the document simply because they do not understand the law being applied.<sup>20</sup> First-year law students may be particularly ill-equipped to engage in a critical analysis of legal arguments addressing an unfamiliar issue because they have so little knowledge of the law in general. Even upper-level law students may have difficulty evaluating the strength of an argument that addresses a complex legal issue beyond the students' knowledge.<sup>21</sup>

Without any background in the law, students assigned to read a well-written piece of advocacy simply may accept the professor's opinion that a brief is well-written at face-value and copy the document's form or structure for their own work.<sup>22</sup> Students thus will not engage in any critical analysis of how the writer constructed a persuasive argument.<sup>23</sup> If students view the document only as a fill-in-the-blank form to be adapted for their own work, they are not engaged in the type of higher order thinking that is characteristic of active learning.

The tendency to use the document *passively* may be heightened if the real brief addresses the same legal issue as the students' writing assignment, such as an assignment to draft a trial motion or appellate brief. If the document addresses the same legal issue as a writing assignment and also has the professor's *stamp of approval*, anxious students may treat the document as a template to be copied rather than a tool for learning.

One way to avoid having students use a practitioner's brief as a template for their own work is to ask students to read a poorly written brief and analyze why it fails to persuade. Because federal and state judges are increasingly willing to criticize poor writing, it is not difficult to find an

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techniques. ROSS GUBERMAN, *POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES* (2011); NOAH A. MESSING, *THE ART OF ADVOCACY: BRIEFS, MOTIONS, AND WRITING STRATEGIES OF AMERICA'S BEST LAWYERS* (2013).

20. Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 *CLINICAL L. REV.* 501, 515 (2006) (students will better examine persuasive writing if they understand the underlying law).

21. See CIAMPI & MANZ, *supra* note 19, at 30, 180, 230 (briefs involve issues such as the constitutionality and application of anti-trafficking provisions of the Federal Archeological Resources Protection Act, criminal violations of Section 10(b) of the Securities Exchange Act, and alleged violations of the City Charter of the City of New York by a former New York City Comptroller with regard to business dealings with a business entity).

22. McArdle, *supra* note 20, at 514.

23. Miriam E. Felsenburg & Laura P. Graham, *A Better Beginning: Why and How to Help Novice Legal Writers Build a Solid Foundation by Shifting Their Focus from Product to Process*, 24 *REGENT U. L. REV.* 83, 98 (2011–2012) (students tend to use examples of memos and briefs as templates or *go-bys*); see also Anna P. Hemingway, *Making Effective Use of Practitioners' Briefs in the Law School Curriculum*, 22 *ST. THOMAS L. REV.* 417, 422 (2010) (students should not rely on practitioners' briefs as templates).

example of a poor quality brief.<sup>24</sup> Yet the analysis of a judicially-criticized brief may have limited value to students, primarily due to the nature of the judicial criticism. Judges generally take the time to criticize only the most obvious errors such as “deliberate mischaracterization[s] of precedent,”<sup>25</sup> arguments that are “rambling stream[s] of consciousness,”<sup>26</sup> “inaccurate [or] incomplete case citations,”<sup>27</sup> or “innumerable and blatant typographical and grammatical errors.”<sup>28</sup>

Judicial criticism of poorly written briefs thus clearly delivers a *do not do this* message with regard to these blatant errors. That cautionary message, however, is not much guidance in developing good persuasive writing techniques. Nor does it engage students in active learning. To the contrary, students need not engage in much critical analysis to determine that a document riddled with typographical errors will fail to persuade.

Thus, a primary goal of the exercise is to keep students either from using a well-written brief only as a *do this* template or from dismissing a poorly written brief as a *do not do this* note of caution. To do so, this exercise employs an active learning approach.<sup>29</sup> Rather than having students dutifully follow along while the professor walks them through an example of good persuasive writing, this exercise is student-driven.<sup>30</sup> The students take the lead not only in evaluating the persuasive qualities of several documents, but also in constructing arguments using law with which the students are familiar. The exercise thus requires students to engage in active learning activities such as synthesizing, evaluating, and creating arguments.<sup>31</sup>

Finally, to avoid the situation where students will use the documents as templates or models for their own work, this exercise is not tied to any graded writing assignment. Students are explicitly told their assignment is to

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24. See Hemingway, *supra* note 23, at 421–22 (discussing use of practitioners’ briefs as a “how not to do it” example); see generally JUDITH D. FISCHER, PLEASING THE COURT: WRITING ETHICAL AND EFFECTIVE BRIEFS (2d ed. 2011) (compiling excerpts of judicial opinions that criticize the quality of writing in briefs and other documents).

25. FISCHER, *supra* note 24, at 5.

26. *Id.* at 23.

27. *Id.* at 50.

28. *Id.* at 40.

29. See STUCKEY ET AL., *supra* note 4, at 110, 123–24. Active learning methods seek to replace “passive receipt of information transmitted by an instructor” with other activities, including “talking, writing, reading, reflecting, and evaluating information received.” Caron & Gely, *supra* note 14, at 553.

30. Hemingway, *supra* note 23, at 426–27 (noting that when the professor led the students through examples of strong point headings written in real briefs, the “students dutifully followed along . . . [but] did not seem overly enthused”).

31. Hess, *supra* note 15, at 401 (Students are “more active when they discuss concepts or skills, write about them, and apply them in a simulation or in real life.”).



identify the presence or absence of persuasive writing techniques in the documents; consider whether, why, and how the documents persuade them as readers; and evaluate how persuasive writing—or lack thereof—may have affected the outcome of a real case. Disconnecting the exercise from any graded writing assignment eliminates the worry that students will view the document as a form to be followed rather than a tool for learning.

C. *To Connect with the Real World*

A third goal of this exercise is to have the students understand that good theme, organization, and use of case authority are not academic concepts created by their professor, but are essential tools for the practicing lawyer. The best way to drive this point home is to connect students to the real world of lawyering. Once students see that these persuasive writing techniques can make the difference in the outcome of a real case, they are more eager to master the techniques. Making it real gives the students both focus and incentive to improve their writing.

## II. THE EXERCISE

A. *Format of the Exercise*

This exercise is taught over two sixty-minute class sessions and includes both assigned readings and questionnaires for students to complete. The first step introduces the students to the substantive law around which the exercise revolves. In this exercise, the legal issue is whether a police stop of a vehicle violated the Fourth Amendment's prohibition on unreasonable searches and seizures. This issue is not tied to the students' writing assignment. For this reason, students are able to focus on assessing the persuasive qualities of the documents without trying to replicate the format or style of the documents in their own work.

Before the first class session, students read several Fourth Amendment cases to learn the applicable legal principles. This knowledge of the substantive law vastly increases the students' ability to critically assess whether the briefs and judicial opinions addressing this Fourth Amendment issue either succeed or fail to persuade them as readers.

After completing the background reading, students read and critique two judicial opinions that apply the substantive law. These opinions are majority and dissenting opinions from the same case. Both opinions are very well-written, and they show students how two writers can effectively assert opposing positions when applying the same law to the same facts. To help students focus on the specific elements of theme development, organization

of legal arguments, and use of case authority, they must complete a questionnaire that records their impressions of the persuasive qualities of the two opinions.<sup>32</sup>

Next, we have our first class meeting in which we discuss the substantive legal issue and the students' impressions of the arguments made in the contrasting majority and dissenting opinions. After a thorough discussion on those topics, I give the students the facts of a real case that involves the Fourth Amendment issue. Armed with their background knowledge of the law and two good examples of persuasive writing addressing both sides of the issue, the students together draft the outline of a brief advocating for one party in the case. Students also draft a thematic statement and discuss strategies for using case authority for maximum persuasive impact.

After class, having already developed expectations for persuasive writing techniques that should be present in the brief, students read the real brief that was filed in the actual case. This brief is poorly written. Students compare this brief to the outline we created in class and complete another questionnaire in which they record their impressions of the brief's lack of persuasion. When the class meets again, we discuss the students' reactions to the unpersuasive brief and examine why the brief failed to persuade, focusing on theme, organization, and use of case authority.

To complete the exercise, the students read the decision reached in the actual case in which the poorly written brief was filed. Students examine how the court decided the issue adverse to the party that filed the poorly written brief and consider the extent to which the poor persuasive writing of the brief may have affected the outcome of the case.<sup>33</sup>

#### B. *The Fourth Amendment Issue*

The exercise involves the issue of whether police officers violate the Fourth Amendment's prohibition against unreasonable searches and seizures when they stop a car based only on an anonymous, phoned-in tip that the driver may be intoxicated. The real case around which the exercise revolves is *Harris v. Commonwealth (Harris III)*,<sup>34</sup> a 2008 decision by the Supreme Court of Virginia.

I chose this legal issue and this case for a number of reasons. First, the Fourth Amendment issue is one that first-year law students can understand after reading just a few cases. Second, the background cases are

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32. See *infra* Appendix A.

33. See *infra* Appendix B.

34. 668 S.E.2d 141 (Va. 2008).

fairly short and easy to read. Third, because the courts have not uniformly applied the Fourth Amendment to anonymous phoned-in tips, I can provide the students with several well-written judicial opinions that use good persuasive writing techniques to reach opposite conclusions. Fourth, the fact pattern of the *Harris* case is straightforward.<sup>35</sup> Fifth, a brief filed in the *Harris* case provides numerous examples of poor persuasive writing.<sup>36</sup> Finally, as discussed below, the decision of the Supreme Court of Virginia in *Harris* arguably demonstrates that poor brief writing affected the outcome of the case.<sup>37</sup>

### C. *The Background Reading*

To understand the Fourth Amendment issue, students first read three decisions of the Supreme Court of the United States. The first two cases, *Adams v. Williams*<sup>38</sup> and *Alabama v. White*,<sup>39</sup> applied the Court's 1968 decision in *Terry v. Ohio*<sup>40</sup> and held that the stops made by police using information provided by informants were constitutional.<sup>41</sup> In *Adams*, the police acted on a tip from a known informant that an individual was carrying a firearm.<sup>42</sup> The Court in *Adams* held that the *Terry* stop<sup>43</sup> was constitutional because the "informant was known to [the police] . . . and had provided [reliable] information in the past."<sup>44</sup> In *White*, the police acted on a tip from an anonymous informant who provided specific information about a drug

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35. *Id.* at 144.

36. See Brief for the Commonwealth at 2, *Harris v. Commonwealth*, 668 S.E.2d 141 (Va. 2008) (No. 080437).

37. See, e.g., *Harris III*, 668 S.E.2d at 144–45.

38. 407 U.S. 143 (1972).

39. 496 U.S. 325 (1990).

40. 392 U.S. 1 (1968).

41. *White*, 496 U.S. at 330–31; *Adams*, 407 U.S. at 147–48. In *Terry*, the Supreme Court of the United States first addressed the issue whether a police officer's stop of an individual based only on a suspicion of criminal activity violates the Fourth Amendment's prohibitions against unreasonable searches and seizures. *Terry*, 392 U.S. at 4. The Court held that a police officer, who both personally observes behavior that he or she considers to be potentially criminal activity and reasonably suspects that a firearm may be involved, may conduct a brief search of an individual without violating the Fourth Amendment. *Id.* at 27. The Court's ruling in *Terry* does not directly address the issue of information provided by informants, either anonymously or otherwise, but it is the seminal case on the issue of *stop and frisk*. See 4 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.1, at 352–69 (5th ed. 2012).

42. *Adams*, 407 U.S. at 146–48.

43. A police officer's stop of an individual or car is commonly referred to as a "Terry stop." See, e.g., 4 LAFAYE, *supra* note 41, at § 9.2(d), at 400–01.

44. *Adams*, 407 U.S. at 146.

transaction.<sup>45</sup> The Court held that the anonymous tip was sufficiently reliable both in its factual details and its prediction of the defendant's future criminal behavior to justify the investigatory stop.<sup>46</sup>

In the third case, *Florida v. J.L.*,<sup>47</sup> the Court held that police violated the Fourth Amendment when they stopped and searched an individual based on an anonymous, phoned-in tip that a young man standing at a bus stop wearing a plaid shirt was carrying a gun.<sup>48</sup> The Court held that the tip had not been sufficiently reliable in its prediction of future criminal activity to give police a reasonable, articulable suspicion to make the *Terry* stop.<sup>49</sup> In so holding, the Court characterized the tipster's information as a *bare report* that essentially identified a particular person without any predictive information about the individual's future movements from which the police could determine the reliability of the tipster's information.<sup>50</sup>

After reading these three cases, students should have sufficient background to understand the Fourth Amendment issue. In addition, the *J.L.* decision throws a *monkey wrench* into the application of the Fourth Amendment to *Terry* stops that are based on anonymous tips.<sup>51</sup> A typical anonymous tip about a drunk driver will consist almost entirely of descriptive information (make, model, color of the car, license plate number, description of the individual, route and direction, some past driving infraction)<sup>52</sup> rather than predictive information (e.g., predicting the future manner of driving).<sup>53</sup> While cases decided prior to *J.L.* could rely on the specificity of the tipster's descriptive information to justify the *Terry* stop,<sup>54</sup> any cases decided after *J.L.* would have to address whether the tipster also provided the necessary predictive information.<sup>55</sup> The *J.L.* decision thus is a terrific case to demonstrate one of the key elements of persuasive writing, namely the need to make either a strong analogy when a case favors the writer's position or a compelling distinction when it does not.

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45. *White*, 496 U.S. at 327, 332.

46. *Id.* at 332. The informant in *White* had provided specific information about the suspect, including the suspect's name, address, and apartment number, the day on which the suspect would be possessing drugs, the route she would drive on the day in question, and her destination, among other details. *Id.* at 327.

47. 529 U.S. 266 (2000).

48. *Id.* at 268–69, 274.

49. *See id.* at 271, 274.

50. *Id.*

51. *See id.* at 271, 274.

52. *E.g.*, *State v. Melanson*, 665 A.2d 338, 339 (N.H. 1995).

53. *E.g.*, *State v. Walshire*, 634 N.W.2d 625, 627 (Iowa 2001).

54. *See State v. Tucker*, 878 P.2d 855, 858 (Kan. Ct. App. 1994); *Melanson*, 665 A.2d at 339.

55. *See United States v. Wheat*, 278 F.3d 722, 724, 733 (8th Cir. 2001); *People v. Wells*, 136 P.3d 810, 811, 813 (Cal. 2006); *Walshire*, 634 N.W.2d at 627.

D. *Advocacy that Takes Opposing Positions in the Same Case*

After learning the substantive law, the students assess the persuasive qualities of two contrasting opinions written in a case that involved an anonymous tip of a drunk driver. In *State v. Boyea*,<sup>56</sup> a case decided only nine months after *J.L.*, a narrow majority of the Supreme Court of Vermont upheld the constitutionality of a *Terry* stop of a suspected drunk driver who was brought to the police's attention by an anonymous phoned-in tip.<sup>57</sup> The case contains well-written majority and dissenting opinions, each of which has a well-developed theme, well-organized legal arguments, and effective use of case authority.<sup>58</sup> Because the majority and dissent take opposing positions, students can assess the persuasive writing techniques of two writers who reached opposite conclusions on the same law and facts.

1. Theme: Public Safety v. Individual Privacy

The majority and dissenting opinions provide starkly contrasting themes, and each opinion uses a different technique to integrate the particular theme in the opinion.<sup>59</sup> This difference allows the students to appreciate not just how the writer formulates a theme but also how the theme can be used effectively throughout the document.

The majority opinion, in upholding the constitutionality of the *Terry* stop, strongly asserts a public safety theme.<sup>60</sup> The majority advances this theme by placing the reader in the shoes of a dedicated police officer faced with the following scenario:

Having received a State Police radio dispatch—derived from an unnamed informant—reporting a specifically described vehicle with New York plates traveling in a certain direction on I-89 operating “erratically,” a police officer locates the car, observes it exit the highway, and pulls out in pursuit. The officer catches up with the vehicle within minutes, but then faces a difficult decision. He could, as the officer here, stop the vehicle as soon as possible, thereby revealing a driver with a blood alcohol level nearly three times the legal limit and a prior DUI conviction. Or, in the alternative, he could follow the vehicle for some period of time to corroborate the report of erratic driving. This could lead to one of several endings. The vehicle could continue without incident for

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56. 765 A.2d 862 (Vt. 2000).

57. *Id.* at 862–63, 868.

58. *See id.* at 862–68 (majority opinion), 877–85 (Johnson, J., dissenting).

59. *See id.* at 862–68 (majority opinion), 877–85 (Johnson, J., dissenting).

60. *Id.* at 862–68 (majority opinion).

several miles, leading the officer to abandon the surveillance. The vehicle could drift erratically—though harmlessly—onto the shoulder, providing the corroboration that the officer was seeking for an investigative detention. Or, finally, the vehicle could veer precipitously into oncoming traffic, causing an accident.<sup>61</sup>

This compelling narrative places the reader in the role of protector of public safety, a perspective that will stay with the reader when evaluating the legal arguments that follow.<sup>62</sup>

The majority opinion reiterates and reinforces this theme throughout the opinion, as is critical in good persuasive writing.<sup>63</sup> The opinion provides students with numerous opportunities to note how the writer integrates the public safety theme into the legal arguments to persuade the reader.<sup>64</sup> The majority opinion contains numerous variations of its original public safety theme, including such phrases as: (1) the “imminent risks that a drunk driver poses to himself and the public;”<sup>65</sup> (2) the “potential risk of harm to the defendant and the public;”<sup>66</sup> (3) the “gravity of the risk of harm;”<sup>67</sup> (4) the “public’s interest in safety;”<sup>68</sup> (5) the “danger to the public [that] is clear, urgent, and immediate;”<sup>69</sup> (6) the “dangerous public safety hazard;”<sup>70</sup> and (7) the “threat to the lives or safety of others that is posed by someone who may be driving while intoxicated or impaired,”<sup>71</sup> among many other examples.<sup>72</sup> The theme is articulated both as the rationale for several cases that upheld the constitutionality of a *Terry* stop of a suspected drunk driver and as an independent policy argument in favor of constitutionality.<sup>73</sup> Theme supports precedent and precedent supports theme. Each strengthens the other to create compelling arguments.<sup>74</sup>

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61. *Boyea*, 765 A.2d at 862.

62. *See id.*

63. *See id.* at 862–68.

64. *See id.*

65. *Id.* at 863.

66. *Boyea*, 765 A.2d at 863 (quoting *State v. Lamb*, 720 A.2d 1101, 1104 (Vt. 1998)).

67. *Id.* at 864 (quoting *Lamb*, 720 A.2d at 1105).

68. *Id.* at 865 (citing *State v. Tucker*, 878 P.2d 855, 861 (Kan. Ct. App. 1994)).

69. *Id.* (quoting *Tucker*, 878 P.2d at 861).

70. *Id.* at 864 (quoting *State v. Melanson*, 665 A.2d 338, 340 (N.H. 1995)).

71. *Boyea*, 765 A.2d at 866 (quoting *McChesney v. State*, 988 P.2d 1071, 1081 (Wyo. 1999) (Thomas, J., dissenting)).

72. *See id.* at 862–68.

73. *Id.* at 865 (discussing *Tucker*, 878 P.2d at 862).

74. *See id.* (discussing *Tucker*, 878 P.2d at 862).

The dissenting opinion also has a well-crafted theme that emphasizes the Fourth Amendment's central role as protecting citizens' individual privacy.<sup>75</sup> Like the majority, the dissent places this theme squarely before the reader at the beginning of the opinion:

Constitutional rights are not based on speculations. Whatever frightening scenarios may be imagined by police officers or appellate judges, the Framers of our Constitution struck a balance between individual privacy and the intrusive power of government, a balance that we have a duty to protect. The Fourth Amendment is the source of protection against searches and seizures that are based on unreliable information. When an anonymous tip provides the sole basis for the seizure, the need for reliability is heightened. Today's decision allows the police to dispense with this constitutional requirement and turn over to the public the power to cause the search or seizure of a person driving a car.<sup>76</sup>

After the opening paragraph, the dissenting opinion's use of theme differs from the majority opinion.<sup>77</sup> Unlike the majority opinion, which weaves thematic statements into its discussion of case precedent, the dissenting opinion rather starkly is divided between precedent arguments and policy arguments, the latter argument being a detailed discussion of the original intent of the Fourth Amendment as an essential restraint on government action.<sup>78</sup> The dissent's thematic statements appear largely in this policy discussion.<sup>79</sup> This different use of theme is one technique that the students evaluate as part of the exercise.<sup>80</sup>

## 2. Organization of Precedent Arguments

The majority and dissenting opinions in *Boyea* also show student's stark contrasts in the organization of legal arguments.<sup>81</sup> In *Boyea*, the organizational structure is most evident in the manner in which the majority and dissent present their positive and negative precedent arguments.<sup>82</sup> Although the legal issue involves a federal constitutional issue, the majority

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75. *Id.* at 877–85 (Johnson, J., dissenting).

76. *Boyea*, 765 A.2d at 877.

77. *Id.*

78. *Id.* at 863–67 (majority opinion), 877–85 (Johnson, J., dissenting).

79. *Id.* at 882–85 (Johnson, J., dissenting).

80. *Id.* at 877–85.

81. *See Boyea*, 765 A.2d at 862 (majority opinion), 877 (Johnson, J., dissenting).

82. *Id.* at 863 (majority opinion), 877 (Johnson, J., dissenting).

opinion at first ignores the federal cases, particularly the *J.L.* decision.<sup>83</sup> Rather, the majority opinion discusses several state court cases decided before *J.L.* in which the courts upheld as constitutional *Terry* stops of drunk drivers that were based on anonymous tips.<sup>84</sup> The *Boyea* majority opinion casts these pre-*J.L.* state cases as important precedent, stating when “[c]onfronted with this precise issue, a majority of courts have concluded that failing to stop a vehicle in these circumstances in order to confirm or dispel the officer’s suspicions exposes the public, and the driver, to an unreasonable risk of death or injury.”<sup>85</sup> The majority then describes several of the state court cases in great detail, including both the facts of particular cases and the various courts’ statements about the public safety danger that a drunk driver presents.<sup>86</sup>

By characterizing the state court cases as the majority view and by providing extensive details about the cases, the *Boyea* majority opinion causes the reader to feel the weight of precedent in favor of the constitutionality of the *Terry* stop.<sup>87</sup> This technique first convinces the reader that substantial precedent supports the constitutionality of the stop. In addition, it primes the reader for the majority’s later discussion of the Supreme Court precedent, particularly the Court’s then-recent decision in *J.L.*<sup>88</sup>

The dissenting opinion in *Boyea* organizes its legal arguments in exactly the opposite way.<sup>89</sup> The dissent first notes that the case involves a question of federal constitutional law, emphasizing that the court is “bound by the Supreme Court’s decisions interpreting the Fourth Amendment.”<sup>90</sup> The dissent then discusses the Supreme Court cases, particularly, the decisions in *J.L.* and *White*, at length.<sup>91</sup> This discussion includes very specific information about both the facts and the Court’s rationale in each case, focusing on the Court’s requirement that the tipster’s information be

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83. *Id.* at 866 (majority opinion).

84. *Id.* at 864–66.

85. *Id.* at 863.

86. *Boyea*, 765 A.2d at 863–66. The majority does acknowledge the existence of some state court cases in which courts found *Terry* stops to be unconstitutional. *Id.* at 866–67. This technique accomplishes two goals. *Id.* First, the majority opinion appears more credible because it acknowledges that the case law is not unanimous. *See id.* at 866. Second, the majority distinguishes the facts of those cases in terms of the quality of the tipster’s information to bolster the reliability of the tip in the case before it. *Id.* at 866–67.

87. *Boyea*, 765 A.2d at 863–65.

88. *Id.* at 866–68.

89. *Id.* at 877 (Johnson, J., dissenting).

90. *Id.*

91. *Id.* at 877–81.



both reliable and predictive.<sup>92</sup> The dissent concludes this discussion by asserting that, “[b]ecause the claim here is based solely on the Fourth Amendment, we must ask ourselves how the . . . Supreme Court [of the United States] would be likely to rule about the anonymous tip in this case after *White* and *J.L.*”<sup>93</sup> The structure of the dissenting opinion thus gives the reader the impression that the Supreme Court itself would rule the *Terry* stop to be unconstitutional.<sup>94</sup>

After discussing the federal cases in detail, the dissent discusses the state court cases only briefly.<sup>95</sup> It cites several decisions in which state courts held that anonymous tips to police—reporting a variety of crimes, not just drunk driving—were unconstitutional for a variety of reasons.<sup>96</sup> The dissent thus creates the impression that the prior precedent reaches inconsistent conclusion on the issue of constitutionality and, for this reason, no great weight should be assigned to any of the state court decisions.<sup>97</sup>

By organizing the arguments using federal and state law in exactly opposite ways, the majority and dissenting opinions demonstrate the importance of good organization at the macro level.<sup>98</sup> The majority opinion’s extended discussion of favorable precedent, albeit state court cases addressing a federal constitutional issue, makes a compelling argument in favor of constitutionality.<sup>99</sup> In the dissenting opinion, the prominent and extended discussion of the Supreme Court cases diminishes the persuasive value of the non-binding state court decisions.<sup>100</sup> Students thus see how two writers, reaching different conclusions on the same legal issue, can craft persuasive arguments by altering the order in which precedent-based arguments are presented and in varying the level of detail used to discuss favorable and unfavorable precedent.<sup>101</sup>

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92. *Boyea*, 765 A.2d at 877–79.

93. *Id.* at 880.

94. *See id.* at 877–85.

95. *Id.* at 881–82.

96. *Id.*

97. *Boyea*, 765 A.2d at 881–82.

98. *See id.* at 862 (majority opinion), 877 (Johnson, J., dissenting).

99. *Id.* at 863–66 (majority opinion).

100. *Id.* at 877–79 (Johnson, J., dissenting).

101. *Id.* at 862 (majority opinion), 877 (Johnson, J., dissenting).

### 3. Persuasive Use of Case Authority

The *Boyea* opinions also illustrate effective use of case authority.<sup>102</sup> In each opinion, the discussion of the most favorable cases is very detailed.<sup>103</sup> Both opinions go far beyond a mere fact-to-fact analogy or distinction of the precedent cases; rather the opinions use all of the *pieces and parts* of the cases—facts, rationale and policy arguments—to create a compelling argument for the advocated position.<sup>104</sup> None of the common mistakes of novice legal writers, mainly overreliance on case citations or excessive quotes from the cases, are present.<sup>105</sup>

The best example of how to use case authority for maximum impact is the two opinions' different treatment of the *J.L.* decision.<sup>106</sup> When *Boyea* was decided, the *J.L.* decision was the most recent and relevant precedent on this Fourth Amendment issue.<sup>107</sup> For the majority, *J.L.* was a problematic case that had to be distinguished.<sup>108</sup> The majority effectively does so by employing several different techniques.<sup>109</sup> First, the majority uses words or phrases that characterize the decision as unimportant or narrowly decided.<sup>110</sup> For example, the majority characterizes *J.L.* as a *relatively brief*<sup>111</sup> ruling in which the Supreme Court had been “particularly careful . . . to limit its holding to the facts.”<sup>112</sup> These words and phrases give the reader the impression that the case does not contribute much to the Court's Fourth Amendment jurisprudence.

The majority then engages in robust analogical reasoning.<sup>113</sup> Stating that *J.L.* “provides an illuminating contrast to the case at bar,” the majority provides great detail about the quality of information provided by the tipster:

The informant reported a vehicle operating erratically; provided a description of the make, model, and color of the subject vehicle, as

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102. See *Boyea*, 765 A.2d at 863–66 (majority opinion), 877–80 (Johnson, J., dissenting).

103. *Id.*

104. *Id.*

105. See *id.* The majority opinion in *Boyea* does contain a few block quotations from cases, but the block quotations are used well. See *id.* at 865–66 (majority opinion).

106. *Boyea*, 765 A.2d at 866–68 (majority opinion), 877–81 (Johnson, J., dissenting).

107. *Id.* at 866–67 (majority opinion), 877 (Johnson, J., dissenting).

108. *Id.* at 866–68 (majority opinion).

109. See *id.*

110. *Id.* at 868 n.8.

111. *Boyea*, 765 A.2d at 867.

112. *Id.*

113. See *id.* at 866–68.

well as the additional specific information that it had New York plates; identified the vehicle's current location; and reported the direction in which it was traveling. The officer went to the predicted location and within minutes confirmed the accuracy of the reported location and description, thus supporting the informant's credibility and the reasonable inference that the caller had personally observed the vehicle. The information that the vehicle was acting *erratically* equally supported a reasonable inference that the driver might be intoxicated or otherwise impaired.<sup>114</sup>

The majority distinguishes those facts from the facts of *J.L.*, characterizing the *J.L.* tip as "nothing more than a bare-bones description of an individual standing at a bus stop."<sup>115</sup> Finally, the majority links the facts of the tipster's information to the Court's requirements of reliability and predictability, stating that the information "described with particularity, and accurately predicted, the location of a fast moving vehicle on a freeway."<sup>116</sup>

Yet the majority opinion goes beyond merely comparing and contrasting the facts about the anonymous tips in each case. The majority also uses dicta in *J.L.* to argue that the Fourth Amendment analysis differs because *J.L.* involved the crime of firearms possession, not drunk driving.<sup>117</sup> In *J.L.*, the Court had declined to create a firearms exception that would have created a relaxed requirement of reliability or prediction for anonymous tips about alleged crimes involving firearms.<sup>118</sup> The Court did, however, leave open the possibility that certain anonymous tips, such as "a report of a person carrying a bomb," might present such a danger to public safety to justify a relaxed requirement of reliability.<sup>119</sup>

The majority leverages this piece of the *J.L.* opinion to its advantage. It characterizes *J.L.* as a circumstance involving a "relative lack of urgency,"<sup>120</sup> arguing that the police officers in *J.L.* had time to safely observe the individual to determine whether any criminal activity was underway.<sup>121</sup> The majority thus portrays *J.L.* as a more static situation than a situation involving a drunk driver, stating that "[a]n officer in pursuit of a reportedly drunk driver on a freeway does not enjoy [the] luxury" of observing the driver "without running the risk of death or injury with every passing

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114. *Id.* at 868.  
 115. *Id.* at 867.  
 116. *Boyea*, 765 A.2d at 867.  
 117. *Id.*  
 118. *Florida v. J.L.*, 529 U.S. 266, 272–73 (2000).  
 119. *Id.* at 273–74.  
 120. *Boyea*, 765 A.2d at 867.  
 121. *Id.*; *see J.L.*, 529 U.S. at 268–69.

moment.”<sup>122</sup> The majority even characterizes the drunk driver on the road as a *mobile* bomb.<sup>123</sup>

For the students, the majority’s treatment of *J.L.* is an excellent example of how to *wring* everything out of an important case. The majority does not simply engage in the expected argument—making a factual distinction between the quality of the tipster’s information in *J.L.* and the quality of the tipster’s information in *Boyea*. Rather, the majority engages in a multi-pronged attack on the *J.L.* decision, choosing words and phrases that portray the case as not detailed—a *relatively brief* opinion—and extending the Court’s rationale on a *non-decision*—not creating a firearms exception—so as to further distinguish the case.<sup>124</sup> The students clearly see that persuasive arguments about the applicability of case decisions should extend well beyond a fact-to-fact analogy or distinction.

The dissenting opinion takes a similar approach, but with the opposite goal of portraying *J.L.* as controlling on the issue before the court.<sup>125</sup> Like the majority opinion, the dissenting opinion chooses words and phrases to further this goal, characterizing *J.L.* as “recent and relevant precedent from the [Supreme Court of the] United States”<sup>126</sup> and a “recent pronouncement by th[e] Court on the exact issue of anonymous tips . . . closely analogous case.”<sup>127</sup> The dissent then illustrates the close factual analogy between the tip provided in *J.L.* and the tip provided in *Boyea*.<sup>128</sup> The dissent notes that the description of the car, a “blue-purple Jetta with New York license plates,” is factually indistinguishable from the description of the individual in *J.L.*, “a young black ma[n] wearing a plaid shirt.”<sup>129</sup> The location identified in *J.L.*, a “specific bus stop,” likewise is indistinguishable from the *Boyea* tipster’s statement that the car was traveling between two specific exits on the highway.<sup>130</sup> Finishing the close factual analogy, the dissent notes that the allegation of wrongdoing in *J.L.*, that the young man was *carrying a gun*, likewise is closely analogous to the allegation that Ms. Boyea was engaged in *erratic driving*.<sup>131</sup>

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122. *Boyea*, 765 A.2d at 867.

123. *Id.*

124. *See id.*

125. *See id.* at 877–82 (Johnson, J., dissenting).

126. *Id.* at 877.

127. *Boyea*, 765 A.2d at 877–78.

128. *See J.L.*, 529 U.S. at 268–69; *Boyea*, 765 A.2d at 877–78.

129. *J.L.*, 529 U.S. at 271; *Boyea*, 765 A.2d at 879.

130. *J.L.*, 529 U.S. at 268; *Boyea*, 765 A.2d at 863 (majority opinion), 879–80 (Johnson, J., dissenting).

131. *Boyea*, 765 A.2d at 879 (Johnson, J., dissenting); *see also J.L.*, 529 U.S. at 268.

The dissent also directly addresses the majority's assertion that the different crimes warrant a different analysis.<sup>132</sup> The dissent notes that the *J.L.* Court's rationale for declining to create a firearms exception was the *slippery slope* danger that the courts would be unable to "securely confine such an exception to allegations involving firearms."<sup>133</sup> The dissent characterizes the majority's ruling as an *automobile exception* that exemplifies the very danger of which the Supreme Court had warned.<sup>134</sup> The dissent concludes by stating that the "*automobile* exception has no basis in Supreme Court precedent."<sup>135</sup>

To help students identify and assess the persuasive qualities of the *Boyea* opinions, I ask them to complete a questionnaire in which they critique the two opinions as to the elements of theme, organization, and use of case authority. In class, we use the students' impressions to lead our discussion of the persuasive writing techniques present in the two *Boyea* opinions; this discussion highlights the different approaches taken in the two opinions and the relative effectiveness of both opinions in making strong arguments on opposing sides of the same issue.

In class, I also show students one small section of the concurring opinion in *Boyea*. I do not ask the students to read the concurring opinion because it is rather lengthy; however, I do point out one section where the concurring opinion provides excellent imagery to support the majority's public safety theme.<sup>136</sup> The concurring opinion characterizes the threat to public safety as one of "a drunk driver maneuvering a thousand pounds of steel, glass, and chrome down a public road."<sup>137</sup> This compelling image is one that the class agrees should be used by anyone writing a brief in support of the constitutionality of a *Terry* stop involving a drunk driver.<sup>138</sup>

#### E. *Assessing the Disappointing Brief*

In the same class meeting, after we have fully dissected the majority and dissenting opinions in *Boyea*, we leave the realm of well-written advocacy and turn to the next step of the exercise. Now we begin to work with the *Harris III* case.<sup>139</sup>

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132. *Boyea*, 765 A.2d at 877.

133. *Id.* at 881 (quoting *J.L.*, 529 U.S. at 272).

134. *Id.* at 877.

135. *Id.* at 880.

136. *Id.* at 875 (Skoglund, J., concurring).

137. *Boyea*, 765 A.2d at 875.

138. *Id.*

139. *Harris v. Commonwealth (Harris III)*, 668 S.E.2d 141, 143 (Va. 2008).

The defendant in the *Harris III* case was arrested in the early morning hours of December 31, 2005.<sup>140</sup> On April 3, 2006, a grand jury for the Circuit Court of the City of Richmond, Virginia indicted Mr. Harris on one count of operating a vehicle while intoxicated, a felony given Mr. Harris's two prior convictions for the same offense.<sup>141</sup> On April 26, 2006, Mr. Harris filed a motion to suppress any evidence stemming from the police officer's stop of his car on the ground that the stop violated the Fourth Amendment.<sup>142</sup> On July 7, 2006, the Circuit Court judge denied the motion to suppress, after which Mr. Harris was immediately found guilty.<sup>143</sup> Mr. Harris then appealed the trial court's denial of his motion to suppress.<sup>144</sup> On February 5, 2008, the Court of Appeals of Virginia affirmed the defendant's conviction, ruling that the *Terry* stop of Mr. Harris's car did not violate the Fourth Amendment.<sup>145</sup>

I give my students a set of facts from the *Harris III* case, as follows: The police received an anonymous tip of suspected drunk driving.<sup>146</sup> The tipster had identified: (1) the street location of the car; (2) the direction the car was driving; (3) the car's make, color, and a partial license plate number; and (4) the driver's name and the type of shirt he was wearing.<sup>147</sup> After locating the car on the street named by the tipster, the police officer had followed the driver for a few blocks before pulling the car over.<sup>148</sup> The driver failed the field sobriety tests and he was charged with operating a vehicle while intoxicated, his third drunk driving offense.<sup>149</sup>

I also note the procedural history of the case and the basis for the appellate court's ruling. It is important for the students to understand that the defendant twice had unsuccessfully challenged the constitutionality of the *Terry* stop.<sup>150</sup> Students also must understand the nature of the appellate

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140. Brief for the Commonwealth, *supra* note 36, at 2.

141. Grand Jury Charges, *Commonwealth v. Harris*, 2006 WL 6436367 (Va. Cir. Ct. Apr. 3, 2006) (No. 06-F-1159 BBC).

142. Motion to Suppress at 6, *Commonwealth v. Harris*, No. 06F1159, 2006 WL 6436367 (Va. Cir. Ct. July 7, 2006).

143. *Commonwealth v. Harris (Harris I)*, No. 06F1159, 2006 WL 6436367, at \*1 (Va. Cir. Ct. July 7, 2006), *rev'd*, 668 S.E.2d 141 (Va. 2008). Westlaw incorrectly identifies the case at the trial court level as *Commonwealth v. Moses*, using the defendant's middle name as his last name. *Id.*

144. *Harris v. Commonwealth (Harris II)*, No. 2320-06-2, 2008 WL 301334, at \*1 (Va. Ct. App. Feb. 5, 2008), *rev'd*, 668 S.E.2d 141 (Va. 2008).

145. *Id.* at \*3, 5–6.

146. Brief for the Commonwealth, *supra* note 36, at 2.

147. *Id.*

148. *Id.* at 3.

149. *Id.* at 1, 4 (noting prior convictions).

150. *Harris II*, 2008 WL 301334, at \*2–3, 6; *Harris I*, No. 06F1159, 2006 WL 6436367, at \*1 (Va. Cir. Ct. July 7, 2006), *rev'd*, 668 S.E.2d 141 (Va. 2008).

court's ruling. In ruling that the *Terry* stop was constitutional, the appellate court had not relied solely on the anonymous tip as justifying the stop, but also had noted the police officer's own observations of the driver during the few minutes before the officer pulled the driver over.<sup>151</sup>

Finally, I tell the students that the case has been appealed to the Supreme Court of Virginia and that we will, as a class, construct an outline of the Commonwealth's brief arguing that the stop was constitutional.<sup>152</sup> I tell the students that all of the cases they have read, including *Boyea*, are relevant authority that may be used in the brief. I also give them an excerpt from *Jackson v. Commonwealth*,<sup>153</sup> a 2004 decision in which the Supreme Court of Virginia had distinguished *Boyea*.<sup>154</sup> The court in *Jackson* had held, on facts very similar to *J.L.*, that a *Terry* stop based on an anonymous tip of firearms possession violated the Fourth Amendment.<sup>155</sup> In its brief arguing that the stop in *Jackson* was constitutional, the Commonwealth had cited *Boyea* and other cases involving anonymous tips about drunk driving.<sup>156</sup> In rejecting that argument, the Supreme Court of Virginia had expressed approval for the holding in *Boyea* as appropriate for a drunk driving offense, stating:

Nor are we persuaded by the cases relied on by the Commonwealth and the Court of Appeals. Those cases are either inapposite or involved tips that contained indicia of reliability not present here. For example, *Wheat*, 278 F.3d 722; *State v. Walshire*, 634 N.W.2d 625 (Iowa 2001); *Rutzinski*, 241 Wis.2d 729, 623 N.W.2d 516; and *State v. Boyea*, 171 Vt. 401, 765 A.2d 862 (2000), all addressed the reliability of anonymous reports of erratic or drunk drivers. That circumstance and the imminent public danger associated with it are not factors in this case. . . . We agree that "[i]n contrast to the report of an individual in possession of a gun, an anonymous report of an erratic or drunk driver on the highway presents a qualitatively different level of danger, and concomitantly greater urgency for prompt action." *Id.*<sup>157</sup>

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151. *Harris II*, 2008 WL 301334, at \*5.

152. *Harris III*, 668 S.E.2d 141, 143 (Va. 2008).

153. 594 S.E.2d 595 (Va. 2004).

154. *Id.* at 603.

155. *Florida v. J.L.*, 529 U.S. 266, 268, 273–74 (2000); *Jackson*, 594 S.E.2d at 597, 603.

156. *See State v. Boyea*, 765 A.2d 862, 867 (Vt. 2000); *Jackson v. Commonwealth*, 594 S.E.2d 595, 603 (Va. 2004); Brief for the Commonwealth, *supra* note 36, at 13, 16, 19.

157. *Jackson*, 594 S.E.2d at 603 (alteration in original) (quoting *Boyea*, 765 A.2d at 867).

Thus, armed with (1) the facts of the *Harris III* case; (2) the precedent cases, including *J.L.* and *Boyea*; and (3) the Supreme Court of Virginia's statements in *Jackson*, the class begins to construct an outline of the Commonwealth's brief in the *Harris* case. We develop our theme, organize our legal arguments, and discuss how best to use our case authority.

With respect to theme, the students suggest that the brief should adopt the *threat to public safety* theme articulated by the majority in *Boyea*.<sup>158</sup> The students recognize that the theme will be strengthened by the *Boyea* concurring opinion's image of "a thousand pounds of steel, glass, and chrome [being maneuvered] down a public road."<sup>159</sup> Students also propose that the Supreme Court of Virginia's statement in *Jackson* should be featured prominently in the Commonwealth's brief in the *Harris III* case.<sup>160</sup> Several students suggest that the introduction of the brief filed in the *Harris III* case should remind the Supreme Court of Virginia of its statement made in *Jackson* only a few years earlier. In the real brief that the students will later read, the quote from *Jackson* does not appear until page sixteen of a twenty-one page brief.<sup>161</sup>

When the class discusses how to organize legal arguments, we have two choices. The appellate court in *Harris II* had found the stop to be constitutional based not solely on the tipster's information but also on the police officer's observation of *unusual* driving before stopping the car.<sup>162</sup> The Commonwealth thus has two alternative arguments. One argument is that the stop was constitutional based solely on the tipster's information.<sup>163</sup> The other argument is that the tip and the officer's personal observations together gave rise to a reasonable articulable suspicion of drunk driving sufficient to justify the stop.<sup>164</sup>

As we prepare our in-class outline of the *Harris III* brief, we discuss how best to present these two arguments. Because the first argument—that

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158. *Boyea*, 765 A.2d at 862–65, 867.

159. *Id.* at 875 (Skoglund, J., concurring).

160. *Jackson*, 594 S.E.2d at 603.

161. Brief for the Commonwealth, *supra* note 36, at 16 (quoting *Jackson*, 594 S.E.2d at 603). Although this article provides the Westlaw citation to the Commonwealth's brief, I use the PDF form of the document in class so that students can see the appearance of the brief as it was filed with the court.

162. *Harris II*, No. 2320-06-2, 2008 WL 301334, at \*5–6 (Va. Ct. App. Feb. 5, 2008), *rev'd*, 668 S.E.2d 141 (Va. 2008); Brief for the Commonwealth, *supra* note 36, at 9 (describing the driving as *unusual*).

163. Brief for the Commonwealth, *supra* note 36, at 15.

164. *Id.* at 7–8. The Virginia Court of Appeals, in affirming the trial court's denial of Mr. Harris's motion to suppress, specifically distinguished the facts of the case from those present in either *Jackson* or *J.L.* on the grounds that the police officer, by observing Mr. Harris's driving before pulling him over, had "corroborated the criminal component" of the tipster's information. See *Harris II*, 2008 WL 301334, at \*5–6.



the tip alone was sufficient to justify the stop—allows the writer to advance a compelling theme and use highly relevant cases like *Boyea*, it appears to be the leading argument. Some students question whether the brief's first legal argument should be grounds upon which the Commonwealth previously won the case.<sup>165</sup> This is a debatable issue, and we usually have a good discussion about the order of presenting these two arguments.

When we discuss how best to structure the single argument that the tip provided sufficient information to justify the stop, students suggest that the argument begin with a detailed discussion of *Jackson* and its approval of the *Boyea* holding in the drunk driving context.<sup>166</sup> The students also suggest that the argument should discuss in detail any favorable state court cases, particularly *Boyea*. Students also recognize that other favorable cases may have been decided in the years following *Boyea* and suggest that the brief use any positive precedent decided after *Boyea*.

When we discuss how to best use the case authority, the class agrees that the majority opinion in *Boyea* should be highlighted as a closely analogous case. We compare the quality of the information of the tip in the *Boyea* case to the tip provided in *Harris III*, to argue that the tipster in *Harris III* provided even more reliable information than the tipster in *Boyea* (partial license plate, name of the driver, and what the driver was wearing).<sup>167</sup> In addition, we discuss how the majority opinion in *Boyea* provides other means to distinguish the *J.L.* decision based on the public safety theme and the *firearms* exception.<sup>168</sup>

We end our class meeting with a firm—if somewhat basic—outline of the structure of the Commonwealth's brief to be filed before the Supreme Court of Virginia in the *Harris III* case. After class, I provide the students with a copy of our class outline, the actual brief in the *Harris III* case, and a form that asks them to record their impressions of persuasiveness of the brief.

In our second class meeting, we review the students' reaction to the Commonwealth's brief filed in the *Harris III* case. Students highlight several reasons why the brief failed to persuade. They can identify the absence of the key elements of persuasive writing: Theme, organization of legal arguments, and persuasive use of case authority. They understand that the cumulative effect of the brief's defects with regard to these elements makes the document unpersuasive. In addition, the students are disappointed

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165. See Brief for the Commonwealth, *supra* note 36, at 9.

166. See *State v. Boyea*, 765 A.2d 862, 875 (Vt. 2000); *Jackson*, 594 S.E.2d at 603; Brief for the Commonwealth, *supra* note 36, at 9–11, 13.

167. *Boyea*, 765 A.2d at 863 (describing the tipster's information); Brief for the Commonwealth, *supra* note 36, at 7, 9–10.

168. *Florida v. J.L.*, 529 U.S. 266, 274 (2000); *Boyea*, 765 A.2d at 866–67.

that the brief failed to live up to the expectations they had developed when we outlined the brief in our earlier class. Indeed, their disappointment is heightened by the fact that the students had certain expectations about the document before they read it.

The Commonwealth's brief in *Harris III* lacks a theme. The first argument, which asserts that the stop was constitutional based on the tip and the officer's personal observations together, has no theme at all.<sup>169</sup> It also is the longer of the two arguments identified in the brief, taking ten pages of the sixteen pages of the Argument section.<sup>170</sup> The second argument only half-heartedly asserts the obvious public safety theme.<sup>171</sup> The heading for this second argument, "Stop Supported [b]y Danger [f]rom Intoxicated Driver," is an incomplete sentence that is not written persuasively.<sup>172</sup> The phrase "threat to public safety" appears only twice in the brief; it appears once in-text on page fifteen of the twenty-one page brief and once in a parenthetical following a case citation.<sup>173</sup> The quote from the *Jackson* decision regarding the "greater urgency for prompt action" needed when police receive a report of a drunk driver does not appear until page sixteen of the brief.<sup>174</sup> The image set forth in the concurring opinion in *Boyea*—that of the "drunk driver maneuvering a thousand pounds of steel, glass and chrome down a public road"—is not in the brief at all.<sup>175</sup>

The brief also is poorly organized. Again, the two main arguments in support of the constitutionality of the stop are (1) that the tipster's information, standing alone, was sufficiently reliable to justify the stop; or (2) that the police officer personally observed enough suspicious driving to justify the stop.<sup>176</sup> The *Harris III* brief is weak because it begins with the second argument.<sup>177</sup> This argument relies on more generic Fourth Amendment principles to analyze whether a police officer's observations in a variety of circumstances can give rise to a reasonable suspicion of criminal

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169. See Brief for the Commonwealth, *supra* note 36, at 7–14. The lack of a theme is evident even from a brief review of the Table of Contents. *See id.* at i. The relevant point headings in the Argument Section are "The Officer Properly Conducted An Investigatory Stop" and "Sufficient Independent Corroboration." *Id.* Neither heading provides a hint of a theme that might support the constitutionality of the stop. *See id.*

170. *Id.* at 4–14.

171. See Brief for the Commonwealth, *supra* note 36, at 15–21.

172. *See id.* at 15.

173. *Id.* at 15, 16 (quoting *State v. Stolte*, 991 S.W.2d 336, 343 (Tex. Ct. App. 1999)).

174. *Id.* at 16 (quoting *Jackson v. Commonwealth*, 594 S.E.2d 595, 603 (Va. 2004)).

175. *State v. Boyea*, 765 A.2d 862, 875 (Vt. 2000); Brief for the Commonwealth, *supra* note 36, at 1–21.

176. Brief for the Commonwealth, *supra* note 36, at 7–21.

177. *See id.* at 5–6.

activity.<sup>178</sup> Because the argument does not feature factually relevant drunk driving cases, the writer cannot either advance a compelling theme using the precedent or make robust analogies to cases involving substantially similar facts.

The brief itself amply demonstrates this weakness. The first paragraph of the argument consists of three sentences; each sentence extensively quotes a different case, and each quotation sets forth only a general principle of Fourth Amendment law.<sup>179</sup> This structure is not persuasive for two reasons. First, the boring recitation of legal principles does not persuade the reader that the position being advanced is the correct result under the law.<sup>180</sup> Second, the absence of a strong discussion of factually relevant cases gives the reader the impression that no such compelling precedent exists.

Moreover, after a few pages, the police officer observation argument begins to morph into an argument that the tipster's information alone was sufficient to justify the stop.<sup>181</sup> At this point, the brief begins to cite some of the relevant case law, particularly the *J.L.* decision, on the issue of the reliability of anonymous tips.<sup>182</sup> However, the brief lacks a cohesive presentation of the cases that addressed anonymous tips about drunk driving.<sup>183</sup> To the contrary, the brief makes only passing references to the relevant cases by name, as if the cases previously had been discussed for the

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178. *See id.* at 5–7.

179. *Id.* at 5–6. The first paragraph of the argument section reads:  
It is elementary that “the fourth amendment does not proscribe all searches and seizures, only those that are ‘unreasonable.’” *Stanley v. Commonwealth*, 16 Va. App. 873, 875, 433 S.E.2d 512, 513 (1993) (quoting *Terry v. Ohio*, 392 U.S. 1, 9 (1968)). “Whether a search is unreasonable is determined by balancing the individual’s right to be free from arbitrary government intrusions against society’s countervailing interest in preventing or detecting crime and in protecting its law enforcement officers.” *Harrell v. Commonwealth*, 30 Va. App. 398, 403, 517 S.E.2d 256, 258 (1999). “In deciding whether to make a stop or effect a pat-down search, an officer is entitled to rely upon the totality of the circumstances—the whole picture.” *Peguese v. Commonwealth*, 19 Va. App. 349, 351, 451 S.E.2d 412, 413 (1994)(en banc).

*Id.*

180. One such example is the legal proposition that “[a] trained law enforcement officer may be able to identify criminal behavior which would appear innocent to an untrained observer.” Brief for the Commonwealth, *supra* note 36, at 6 (quoting *Alston v. Commonwealth*, 581 S.E.2d 245, 251 (Va. Ct. App. 2003)). That legal proposition seems to have no bearing on the case given the Commonwealth’s argument that the defendant’s driving was unusual or erratic. *Id.* at 9.

181. *See id.* at 10.

182. *See id.* at 9–10 (citing *Florida v. J.L.*, 529 U.S. 266, 273–74 (2000)).

183. *See id.* at 11–12.

reader.<sup>184</sup> The brief thus demonstrates how the failure to present arguments in the correct order can lead to a scattershot presentation of the law.

Finally, the brief makes poor use of the case authority. The brief does cite *Boyea* and several decisions of other state courts in which the courts found a *Terry* stop based on the anonymous tip of a drunk driver to be constitutional.<sup>185</sup> However, the brief contains no detailed discussion of any drunk driving case. Thus, the brief makes no argument analogizing the facts of *Harris III* to any prior drunk driving case. *Boyea* and other favorable cases are cited in a long string citation of state court cases or in two separate, page-long block quotations from a single California case, the facts of which are not explained to the reader.<sup>186</sup> In this regard, the brief amply demonstrates how case citations and block quotations do not convince the reader that the precedent is well-reasoned and should be followed.

Not only does the brief omit any robust analogies to favorable cases, the brief also does not distinguish *J.L.* from the facts in the case. The only attempt to distinguish *J.L.* is an extensive block quote from the Court of Appeals decision in *Harris III*.<sup>187</sup> Given that the Supreme Court of Virginia in *Jackson* strictly followed *J.L.* in a case involving a crime of firearms possession, the failure to distinguish *J.L.*, or otherwise argue that drunk driving differs from the crime of firearms possession, cripples the brief's ability to persuade the reader.<sup>188</sup>

#### F. *Assessing the Consequences of Poor Advocacy*

Our second class meeting discusses all of the defects of the *Harris* brief. The students, having acquired competence in recognizing and assessing strong persuasive legal writing, drive this discussion in class. Moreover, they are quite animated in their assessment of the brief and its

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184. Brief for the Commonwealth, *supra* note 36, at 10–11. When the brief first refers to the *J.L.* decision in-text, it does so as if the reader already knows all of the relevant information about the case. *Id.* at 10 (“The open nature of the conduct here, unlike that of possession of a concealed weapon, as in *J.L.*, reduces the concern about the basis for the informant’s knowledge about the activity.”). When the brief first mentions the *Jackson* decision in-text, it does so in a single sentence that divides two lengthy block quotations from the *Harris* Appellate Opinion. *Id.* at 11–12.

185. *See id.* at 13, 16–17.

186. *Id.* at 11 (block quotation of the appellate court’s opinion), 12 (second block quotation of the appellate court’s opinion), 17 (block quotation of *People v. Wells*, 136 P.3d 810, 815–16 (Cal. 2006)), 18 (block quotation of *Wells*, 136 P.3d at 816). Viewing the brief in PDF form best demonstrates why page-long block quotations bore the reader. *See* Brief for the Commonwealth, *supra* note 36, at 11–18.

187. *Id.* at 11–12.

188. *See Jackson v. Commonwealth*, 594 S.E.2d 595, 600–01 (Va. 2004) (citing *Florida v. J.L.*, 529 U.S. 266, 271 (2000)).

disappointing qualities. Because of the work they have done to learn the law and assess the arguments, the students are invested in the quality of the Commonwealth's brief, and they are disappointed that the real product did not live up to their expectations.

We conclude this exercise by briefly reviewing the potential consequences of the brief's lack of persuasion. First, the students read the Supreme Court of Virginia's decision in *Harris III*, in which the court held that the *Terry* stop had violated the Fourth Amendment.<sup>189</sup> We discuss whether poor briefing by the Commonwealth led to an adverse result in the case. Next, the students read an opinion authored by Chief Justice Roberts of the Supreme Court of the United States in which Chief Justice Roberts dissented from the Court's denial of the Commonwealth's petition for a writ of certiorari in the *Harris IV* case.<sup>190</sup> This well-written opinion brings the lesson full circle.

#### 1. The Supreme Court of Virginia's Decision in *Harris IV*

The *Harris IV* case was narrowly decided by a 4-3 majority of the Supreme Court of Virginia.<sup>191</sup> There are a number of indications in the opinion that poor briefing could have played a part in the court's decision. First, in determining that the stop was unconstitutional, the Supreme Court of Virginia reversed the rulings of both of the lower state courts.<sup>192</sup> A criminal defendant who has lost at both the trial and appellate court levels faces a high obstacle to win in the court of last resort.<sup>193</sup> The fact that the Commonwealth lost before the Supreme Court of Virginia after having won twice in the lower courts is itself significant when assessing the strength of the Commonwealth's arguments before the Supreme Court of Virginia.

Second, the majority in *Harris III* barely acknowledges that the case involves drunk driving or the threat to public safety that drunk driving poses.<sup>194</sup> The majority never cites the court's own prior statement in *Jackson* about the "greater urgency for prompt action" that may be required when police receive a tip about a suspected drunk driver.<sup>195</sup> Nor does it mention any of the decisions of other state courts, like *Boyea*, in which *Terry* stops

189. *Harris III*, 668 S.E.2d 141, 147 (Va. 2008).

190. *Virginia v. Harris (Harris IV)*, 558 U.S. 978, 978-81 (2009) (Roberts, J., dissenting), *denying cert. to* 668 S.E.2d 141 (Va. 2008).

191. *Id.* at 978.

192. *Harris III*, 668 S.E.2d at 147.

193. 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.7(g), at 616 (5th ed. 2012) (noting obstacles to a defendant's successful appeal of an adverse ruling on a Fourth Amendment issue).

194. *Harris III*, 668 S.E.2d at 150 (Kinser, J., dissenting).

195. *Id.* (quoting *Jackson v. Commonwealth*, 594 S.E.2d 595, 603 (Va. 2004)).

based on anonymous tips of drunk driving were found to be constitutional.<sup>196</sup> In fact, the majority in *Harris III* never uses the word *drunk*, a strong indication that the majority did not view the case as one involving the danger to public safety posed by drunk drivers on the road.<sup>197</sup>

Finally, the nature of the court's ruling indicates that poor briefing may have resulted in a poorly-crafted legal rule on this Fourth Amendment issue. Relying heavily on *White, J.L.*, and *Jackson*, the majority held that the anonymous tip did not contain sufficient indicia of reliability to justify the stop.<sup>198</sup> It went far beyond the facts of the particular case, however, to hold that an investigatory stop of a suspected drunk driver is never justified "unless the suspected driver operates his or her vehicle in some fashion objectively indicating that the driver is intoxicated."<sup>199</sup> The Supreme Court of Virginia thus created a blanket rule that, in all cases involving an anonymous tip of a drunk driver, the person behind the wheel actually must *drive drunk* before police may stop the car.

The three dissenting justices in *Harris III* severely criticized the majority for failing to address the obvious public safety concerns posed by a drunk driver, stating that "the majority fails to understand" the contours of the legal issue before it.<sup>200</sup> The dissent highlights the Supreme Court of Virginia's prior statement in *Jackson*, that a drunk driver presents a public safety danger that requires a "greater urgency for prompt action."<sup>201</sup> The dissent also quotes the majority opinion in *Boyea* characterizing the drunk driver as akin to a *mobile* bomb.<sup>202</sup> Finally, the dissent chides the majority for ignoring substantial precedent like *Boyea*, stating:

On brief, the Commonwealth discusses at length the decisions from other jurisdictions holding that anonymous tips about incidents of drunk driving require less corroboration than tips

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196. Compare *id.*, with *State v. Boyea*, 765 A.2d 862, 868 (Vt. 2000).

197. In contrast, the majority opinion in *Boyea* uses the word *drunk* nine times. See *Boyea*, 765 A.2d at 863–67. This repeated use of the word *drunk* bolsters the public safety theme.\* In contrast, the majority in *Harris III* only uses the word *intoxicated*, and mainly uses the word only to describe either information from the tip or the crime with which the defendant was charged. See *Harris III*, 668 S.E.2d at 143–44, 146 (defendant "was charged with feloniously operating a motor vehicle while intoxicated;" officer received a report from dispatch about an *intoxicated* driver; the tip included the information that the driver was intoxicated).

198. *Harris III*, 668 S.E.2d at 145–46 (citing *Florida v. J.L.*, 529 U.S. 266, 270 (2000); *Alabama v. White*, 496 U.S. 325, 328–31 (1990); *Jackson v. Commonwealth*, 594 S.E.2d 595, 599–600 (Va. 2004)).

199. *Harris III*, 668 S.E.2d at 146.

200. *Id.* at 147 (Kinser, J., dissenting).

201. *Id.* at 150 (quoting *Jackson*, 594 S.E.2d at 603).

202. *Id.* (quoting *Jackson*, 594 S.E.2d at 603).

concerning matters presenting less imminent danger to the public, and decisions holding that anonymous tips concerning drunk driving may be sufficiently reliable to justify an investigatory stop without independent corroboration. In light of its decision, the majority, in my view, should address the Commonwealth's argument.<sup>203</sup>

Having read the brief itself, students understand that the dissenting justices are being charitable when they state that the Commonwealth's brief discusses relevant drunk driving cases from other jurisdictions at length. Indeed, it does not appear that the majority in *Harris III* ignored a well-reasoned argument that was made at length in the Commonwealth's brief. Rather, it seems that the majority virtually ignored the argument because the brief did not place the argument squarely before the court, let alone articulate the argument coherently or persuasively.

## 2. Chief Justice Roberts's Dissenting Opinion

In October 2009, the Supreme Court of the United States denied a writ of certiorari that the Commonwealth of Virginia had filed in the *Harris IV* case.<sup>204</sup> Chief Justice Roberts, along with Justice Scalia, dissented.<sup>205</sup> The dissenting opinion is the final reading of the exercise.

The Roberts dissent strongly articulates the public safety theme that was so absent in the Commonwealth's brief. The first sentence of the dissent tells the reader that "[e]very year, close to [thirteen thousand] people die in alcohol-related car crashes—roughly one death every [forty] minutes."<sup>206</sup> The dissent then casts the *Harris III* decision as one that threatens public safety, stating that the Supreme Court of Virginia has created a legal rule that will "undermine . . . efforts to get drunk drivers off the road."<sup>207</sup> The dissent characterizes the legal rule created as one that "commands that police officers following a driver reported to be drunk *do nothing* until they see the driver actually do something unsafe on the road."<sup>208</sup> These strong statements dramatically convey the risk posed by the *Harris III* ruling—that police

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203. *Harris III*, 668 S.E.2d at 150 n.3 (Kinser, J., dissenting) (citations omitted).

204. *Harris IV*, 558 U.S. 978, 978 (2009) (Roberts, J., dissenting), *denying cert. to* 668 S.E.2d 141 (Va. 2008).

205. *Id.* Chief Justice Roberts's dissenting opinion earned him a "Green Bag Award" for exemplary legal writing from the Green Bag Journal. *Exemplary Legal Writing, GREEN BAG ALMANAC & READER*, [http://www.greenbag.org/green\\_bag\\_press/almanacs/almanacs.html](http://www.greenbag.org/green_bag_press/almanacs/almanacs.html) (last visited Feb. 16, 2014).

206. *Harris IV*, 558 U.S. at 978 (Roberts, J., dissenting).

207. *Id.*

208. *Id.*

officers must watch helplessly from the side of the road while drunk drivers careen into oncoming traffic.

The dissent also organizes the discussion of the case law to best effect. While stating that the federal and state courts are *split*<sup>209</sup> on the issue of whether the Fourth Amendment prohibits investigative stops of suspected drunk driving based on anonymous tips, the dissent characterizes the cases finding in favor of constitutionality as the *majority viewpoint*.<sup>210</sup> Cases in which such stops have been held to be unconstitutional, including *Harris III*, are characterized as the *minority viewpoint*.<sup>211</sup> The dissent concludes by arguing that, given the clear conflict and the high stakes in terms of the potentially devastating effects of drunk driving, the Court should have heard the case.<sup>212</sup>

By reading Chief Justice Roberts's dissenting opinion, students complete the exercise with a well-written example of advocacy. In addition, by reading the Supreme Court of Virginia's opinion in *Harris III* together with the Chief Justice Roberts's dissenting opinion, students see the real-world consequences of poor persuasive writing. They experience the frustration expressed by the dissenting justices of the Supreme Court of Virginia in *Harris III*, namely that the majority did not thoughtfully consider relevant persuasive authority on this very important issue of the proper balance between Fourth Amendment protections and the dangers of drunk driving.

### III. BENEFITS OF THE EXERCISE

This exercise, with its focus on essential elements of persuasive writing in the context of real cases, provides several important benefits to students. First, the exercise succeeds in teaching students the most challenging elements of persuasive writing. Second, the exercise teaches students that, as in the documents they have read, they must critically examine their own work for the presence or absence of these persuasive writing techniques. The exercise thus encourages students to take a more robust view of the writing process, particularly the time and attention needed to review and revise their work. Third, the exercise energizes and empowers students by giving them confidence that they can competently assess and improve their own work. Finally, students see that these persuasive writing

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209. A split among lower federal courts and state courts on a constitutional issue is a common reason for the Supreme Court to grant certiorari in a case. *See, e.g.*, *Florida v. J.L.*, 529 U.S. 266, 269 (2000).

210. *Harris IV*, 558 U.S. at 980.

211. *See id.* at 981.

212. *Id.*



techniques are not esoteric or unimportant concepts, but important tools that can affect the development of the law in the real world.

A. *Teaching the Critical Elements of Persuasive Writing*

With its focus on particular elements of theme, organization, and good use of case authority, the exercise is a powerful tool to teach students essential persuasive writing techniques. The exercise accomplishes this goal on several different levels. Students first learn to identify the presence or absence of persuasive writing techniques through critical reading and assessment. Because students know the substantive law, they are better able to identify and analyze the presence or absence of persuasive writing techniques when they read the various documents in which the law is applied.<sup>213</sup> In addition to reading pieces of advocacy, students also step into the writer's role and test their emerging understanding of persuasive writing techniques by applying the law to the facts of the *Harris III* case. Students form judgments about the ordering of precedent or policy arguments and the juxtaposition of positive precedent with negative precedent. They examine how best to use relevant cases to make persuasive analogies or distinctions. This multi-step approach, where students first read arguments and then create their own arguments, deepens the students' understanding of the particular elements of persuasive writing that are the focus of the exercise.

Students' ability to understand the need for these key elements of persuasive writing is enhanced by the fact that several documents assert opposing positions on the same legal issue. In my view, this method is superior to one where students read excerpts of documents addressing a variety of legal issues, each of which might illustrate a particular persuasive writing technique. In this exercise, students are better able to focus on the persuasive writing techniques because the law does not change materially from document to document, only the manner in which the writer uses the law. The ability to see the differences in writing while the law stays the same is a highly effective teaching tool.

Finally, students become more aware of specific elements of persuasive writing because they analyze a document that, as to the critical persuasive writing elements, disappoints them as readers. This example of *deficient* advocacy enables the students to understand what qualities must be

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213. See Judith B. Tracy, "I See and I Remember; I Do and I Understand" *Teaching Fundamental Structure in Legal Writing Through the Use of Samples*, 21 *TOURO L. REV.* 297, 316 (2005) (noting that students have a different learning experience when students are familiar with the law contained in the document they read).

present in order for a document to persuade the reader.<sup>214</sup> Indeed, students become quite animated when we critique the *Harris* brief in class. They make specific suggestions about how the brief might be improved. This level of class participation plainly demonstrates that students are actively engaged in assessing the lack of quality of the poorly written brief.<sup>215</sup> The depth of their analysis of the *Harris* brief demonstrates that they have indeed engaged in higher order thinking that is characteristic of active learning.<sup>216</sup>

B. *A Robust View of the Drafting and Revision Processes*

In addition to teaching essential elements of persuasive writing, the exercise teaches students to take a robust view of the writing process. At the initial drafting stage, the structure of the exercise also reduces, if not eliminates, the concern that the students will use the well-written pieces of advocacy as templates or fill-in-the-blank forms. First, because the examples of well-written advocacy are judicial opinions, not briefs, students may be less likely to use the documents as templates. In addition, students may have difficulty selecting just one of the many examples of well-written advocacy to be the template. A third reason may be that the exercise involves a careful examination of a legal issue that does not relate to the students' writing assignment.<sup>217</sup> Students, therefore, are able to focus on assessing the materials without the corresponding desire to replicate portions of the documents in their own writing assignment.

By reducing the tendency to use a document as a template, the exercise also encourages students to take a more robust view of the writing process, particularly the process of revising a working draft. Students often initially view revision or editing as nothing more than a quick, final review of a document to eliminate any spelling or punctuation errors.<sup>218</sup> Because the

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214. See *id.* at 318 (describing the use of *deficient samples* of objective analyses to demonstrate to students why an analysis may not provide complete information to the reader).

215. Hemingway, *supra* note 23, at 426–27 (describing how students *came alive* when analyzing poorly written work of *actual lawyers*).

216. See *id.* at 422–23.

217. Anna Hemingway sets forth several good reasons why students should read practitioners' briefs that involve a legal issue and authorities that students must use in their own writing assignment. *Id.* Those reasons include the students' heightened interest in the material and linking the students' academic assignment to the real world of lawyering. *Id.* I am concerned, however, that overworked and anxious law students will succumb to the tendency to use the documents as templates. I prefer that my students focus solely on a robust assessment of the exercise materials without any eye towards adapting or using those materials as part of their own writing assignment.

218. See Cunningham & Streicher, *supra* note 9, at 196–97 (stating that students tend to edit at the *micro* level only); Patricia Grande Montana, *Better Revision:*

*Harris* brief does not contain distracting grammar or punctuation errors, students' suggestions to improve the brief's persuasive qualities focus exclusively on substantive deficiencies. Students thus learn that they should evaluate their own work using the same measures by which they evaluate the *Harris* brief, which refines their understanding of the revising and editing process. As one student noted: "When reading my own work I sometimes don't fully complete my thoughts or [I] use conclusory statements because I can easily understand the logic and reasoning. However, in reading this poorly-constructed [brief], I couldn't follow all of the logic or arguments created so it 'drove home' some comments I've received from professors on exams and memos."<sup>219</sup>

### C. *Boosting Students' Confidence*

The exercise also has a benefit for students that I did not expect. My students find the exercise to be a confidence boost.<sup>220</sup> One student commented that the exercise allowed him to see how much he has learned, in that he can identify mistakes and poor structure of the brief.<sup>221</sup> Another student stated, "reading the *Harris* brief gave me confidence that I do possess some admirable writing techniques and skills."<sup>222</sup> Overall, students find it refreshing to be exposed to something other than five-star writing, which some see as an unattainable goal.<sup>223</sup>

### D. *A Connection to the Real World*

Finally, because the exercise uses real world materials, students quickly learn that these persuasive writing techniques are essential tools for the practicing lawyer. Indeed, the exercise has a great impact on the students because the materials are from a real case. Students are interested to see how a poor brief can influence the outcome of a case.<sup>224</sup> They invariably ask many questions about the case, including whether the decision in *Harris* was

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*Encouraging Student Writers to See Through the Eyes of the Reader*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 291, 293 (2008) (noting that students often view the editing process as polishing the document to add topic sentences, change words, or fix grammar or citation form).

219. Student comments were submitted in writing and are on file with the author.

220. See *supra* Part II.E-F.

221. See *supra* Part II.E-F.

222. See *supra* Part II.E-F.

223. McArdle, *supra* note 20, at 519 (reading practitioner work of uneven quality can help a discouraged novice writer).

224. See *supra* Part II.E-F.

followed by other state courts, whether Mr. Harris committed another drunk driving offense, and whether the Supreme Court of the United States has taken another similar case or clarified the issue of anonymous tips in cases of suspected drunk driving. Students worry about the dismissal of a case involving a habitual drunk driver. They see the real world implications of the *Harris* decision as potentially affecting the development of the case law on this legal issue.

#### IV. CONCLUSION

This *real world* focus of the exercise demonstrates to students that these persuasive writing techniques are not simply professor-created metrics to assess and grade their work, but important tools both for the practitioner and the development of the law. Once they perceive that the material being taught actually matters in *The Real World*,<sup>225</sup> they are anxious to master the techniques.

I highly recommend this exercise to those legal writing professors looking for a way to highlight the essential yet subtle aspects of persuasive writing for students. The materials effectively teach the material, and students enjoy the process.

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225. See *supra* text accompanying note 1.

APPENDIX A—*STATE V. BOYEA* QUESTIONNAIRE

You have read two opinions that advocate opposing positions even as they apply the same law to the same facts. Use this questionnaire to record your impressions of the quality of the advocacy in each opinion with regard to three critical components of persuasive writing: development of a theme, organization of legal arguments, and use of case authority.

The Majority Opinion

1. Does the majority opinion have an easily identifiable theme? What is it? Where does the majority first assert its theme?
2. Review the majority opinion and identify at least three instances where the majority makes a thematic statement.
3. Are these thematic statements standing alone, or do they appear as part of a discussion of case precedent?
4. Look carefully at the order in which the majority opinion discusses federal and state court cases addressing the constitutionality of *Terry* stops.
  - a. What case does it discuss first? What cases are discussed next?
  - b. Where does the majority discuss the Supreme Court cases?
  - c. Do you find this ordering of the discussion to be persuasive? Why or why not?
5. Consider the manner in which the majority discusses specific cases. For example, what is significant about the majority's discussion of the *McChesney* case in terms of persuasive writing? Does the holding of the case support the majority's opinion in favor of constitutionality? How does the majority use the case?
6. Consider how the majority's use of the *J.L.* decision. How does the majority distinguish *J.L.*? Does it distinguish the case on its facts and, if so, how?

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- a. Other than a fact-to-fact comparison, how does the majority distinguish *J.L.*?
  7. What is the main policy argument made by the majority? Where does it appear in the opinion? Is it segregated to a particular discussion?
  8. If you were writing a brief in support of the constitutionality of a stop of a drunk driver based on an anonymous tip, what 3–5 quotes from the majority opinion in *Boyea* would you use in your brief?

The Dissenting Opinion

1. Does the dissenting opinion have an easily identifiable theme? What is it? When does the theme first appear in the dissenting opinion?
2. Review the dissenting opinion and identify at least three instances where the dissent makes a thematic statement.
3. Look carefully at the order in which the dissenting opinion discusses federal and state court cases. How does this order of presenting the law differ from the majority?
  - a. Do you find this ordering of the discussion to be persuasive? Why is it persuasive?
4. Consider how the dissenting opinion discusses a single case. Specifically, how does the dissenting opinion use *J.L.* to argue that the stop was unconstitutional? Does it distinguish the case on its facts and, if so, how?
  - a. Does it go beyond a fact-to-fact comparison? How so?
5. Consider how the dissenting opinion deals with the state court cases that were discussed in the majority opinion? How would you characterize the dissenting opinion's treatment of those cases?
  - a. Do you find this treatment of the state court cases to be persuasive in terms of advancing the dissenting opinion's argument? Why or why not?
6. If you were writing a brief arguing that the stop of a drunk driver based on an anonymous tip was unconstitutional, what 3–5 quotes from the dissenting opinion in *Boyea* would you use in your brief?

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## APPENDIX B—BRIEF REVIEW FORM

<b>Overall Appearance</b>	<b>Yes</b>	<b>No</b>
The brief has a neat and professional appearance.		
Comments:		
The Table of Authorities is neat and correctly organized (cases, constitutions, statutes, rules or regulations, secondary sources).		
Comments:		
The Table of Contents contains point headings that use persuasive language to “tell the story” and/or highlight legal positions. Point headings are complete sentences.		
Comments:		
The brief does not contain distracting use of bold face type, underlining or italics. The font and typeface are appropriate.		
Comments:		
The brief contains no spelling or editing errors.		
Comments:		



<b>Introduction</b>	<b>Yes</b>	<b>No</b>
The introduction contains a central theme or message to support the party's position.		
Comments:		
The client is introduced in a sympathetic and/or positive light.		
Comments:		
The opposing party is introduced in a less than flattering light using appropriate language (no personal attacks).		
Comments:		
The introduction previews the legal arguments, but with a focus on asserting theme (that the ruling sought is the just result).		
Comments:		
The introduction clearly states the relief sought.		
Comments:		

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<b>Statement of the Case (Appellate Brief)</b>	<b>Yes</b>	<b>No</b>
Provides a complete procedural history by identifying relevant filings in the lower court with dates provided (showing thoroughness).		
Comments:		
Uses procedural history to best advantage by emphasizing favorable rulings or casting doubt on unfavorable rulings (ex: "although noting X, the lower court nonetheless ruled Y." Or, "in a well-reasoned opinion, the lower court correctly ruled Y").		
Comments:		

Statement of Facts	Yes	No
The Statement of Facts begins by introducing the parties and their relationship to one another (relative to the legal dispute). The client is described favorably and opposing party is cast in an unflattering/unfavorable light given the case and its issues (a legally unfavorable light, not a personal attack).		
Comments:		
The Statement of Facts uses good tone, diction, context and juxtaposition to present facts in the light most favorable to the party while still disclosing all relevant facts (gives most airtime to the best facts).		
Comments:		
The Statement of Facts includes emotional facts necessary to bolster the client's position or characterization of the facts.		
Comments:		
The Statement of Facts does not discuss irrelevant facts.		
Comments:		

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<b>Statement of Facts (Cont'd)</b>	<b>Yes</b>	<b>No</b>
The Statement of Facts does contain legal arguments or legal conclusions.		
Comments:		
The Statement of Facts is organized either chronologically or topically to present the facts clearly for the reader, choosing the organization structure that best benefits the client.		
Comments:		

Summary of Argument	Yes	No
Uses the theme or central message to introduce the reader to the summary of the legal arguments.		
Comments:		
Provides the correct level of detail (just enough, not too much) on the legal arguments to allow the reader to understand the client's position.		
Comments:		
Uses persuasive writing style at the word and sentence level to portray the client's position as the just result in the case.		
Comments:		
Focuses on positive arguments only. Saves discussion of negative arguments for the Argument section.		
Comments:		

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Argument Section	Yes	No
<p>Ordering of Arguments</p> <ul style="list-style-type: none"> <li>• Has a clear structure of arguments that presents the arguments in a logical order and to best effect for the client.</li> <li>• Starts with “positive” arguments.</li> <li>• When making policy arguments, uses precedent to bolster policy arguments; weaves policy points into case discussions.</li> <li>• Transitions well to “negative” arguments.</li> </ul>		
Comments:		
<p>Use of Legal Authority:</p> <ul style="list-style-type: none"> <li>• Uses a synthesized Rule (if appropriate) that is not a collection of general, boring principles of law.</li> <li>• Fully describes favorable precedent without excessive use of case quotations. Case illustrations of favorable precedent give the reader all of the necessary information needed to demonstrate the applicability of the case to the issue and the impact of its ruling on the current case.</li> <li>• Fully distinguishes unfavorable precedent. Gives the reader all of the necessary information about the case to demonstrate why the precedent is distinguishable or otherwise should not be followed in the current case.</li> </ul>		
Comments:		

Argument Section (Cont'd)	Yes	No
<p>Application to Facts:</p> <ul style="list-style-type: none"> <li>• Contains a complete application of the facts to the law by (a) restating the relevant facts; (b) characterizing those facts to show their relevance; and (c) linking the characterized facts to the Rule by using the language of the legal Rule.</li> <li>• Makes complete analogies to favorable precedent that, if appropriate, go beyond a fact-to-fact comparison to include policy arguments from the precedent case.</li> <li>• Makes relevant factual distinctions vis-a-vis unfavorable precedent.</li> <li>• “Ties up” policy positions to the facts and desired ruling.</li> </ul>		
<p>Comments:</p>		
<p>Persuasive Writing Style:</p> <ul style="list-style-type: none"> <li>• Continues to reiterate and reinforce the theme of the brief.</li> <li>• Uses persuasive writing style at the word and sentence level such that the Argument reads as a piece of persuasive writing without being “over the top” in tone.</li> <li>• Is not so dry in tone that it fails to persuade.</li> </ul>		
<p>Comments:</p>		