Hitting the Wall as a Legal Writer and Pushing Beyond It
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At around 20 miles, many marathon runners hit the wall, experiencing a depletion of glycogen that manifests itself in a sudden loss of energy and progress. Similarly, many first year law students who work their way over a semester from low grades to “B” or “B+” on their written work hit the wall before reaching the elusive “A” grade. As a legal writing specialist, I often see these students. They come frustrated, disappointed, concerned about their grades in a shrinking job market, and asking what they have to do to get an “A” on a paper. As questions go, this is a hard one.

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

Telling a student what is wrong with a “B+” or “A-” paper is harder. Admittedly, the student may have written a paper that is strong in some areas, but weaker in others: a variation on the problems of “C” or “B” papers.¹ But the student “may be doing everything expected, and doing it pretty well,”² and yet the work lacks pizzazz, some value-added factor³ that shows competence plus something more.

Not only are these value-added factors harder to identify and teach, but there are political and pedagogical considerations that make answers tricky. Different professors may be looking

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² E-mail from Kris Franklin to Elizabeth Fajans (July 12, 2010, 12:05 p.m. EST) (on file with author). See text infra, at n. 17.

³ E-mail from Ruth McKinney to Elizabeth Fajans (July 7, 2010, 9:32 a.m. EST) on file with author. The writing specialist at Seattle describes the work of a B+ student as “competent, maybe a little unimaginative, and it may be subtly off on things like emphasis.” Email from Anne Enquist to Elizabeth Fajans, (Oct. 2, 2009. 3:30 pm PST) (on file with author).
for different things or have different standards. Different legal documents call for different criteria. Standards change depending upon level of education and degree of experience. Rubrics and grade point sheets, if used, may be insufficiently nuanced at the upper end, and even if nuanced, an institution’s mandatory curve or mean may skew and confound rubrics and

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4 In the exam context, Professor Kissam contrasts the answer key/score sheet method of grading which tends to award issue spotting, identification of legal authorities, and application with a holistic approach more responsive to “a general understanding, inferential abilities, analytic abilities, and practical judgment.” Phillip C. Kissam, Law School Examinations, 42 Vand. L. Rev. 433, 448–49 (1989). Professor Fine notes that “different professors produce grades in different ways, taking into account different criteria, including comparison to peers, comparison to evaluative criteria, effort, growth, or behavioral compliance [with deadlines, page length, etc.]” Barbara Glesner Fine, Competition and the Curve, 65 UMKC L. Rev. 879, 880 (1997). These differences lead to the classic “stories about discrepancies among professors—the apparently inappropriate generosity or harshness of individual faculty members.” Robert C. Downs & Nancy Levit, If It Can’t Be Lake WoeBegone. . . A Nationwide Survey of Law School Grading and Grade Normalization Practices, http://works.beypress.com/nancy_levit20 Professors Clark and DeSanctis echo this concern.”When several years ago we proposed moving to a letter-graded . . . system, one of our central concerns involved how to ensure that our . . . professors would use the same standards for assessing papers. Would it be possible for a professor to assign a B to a paper because that professor “over-valued,” for example, the Statement of Facts in a trial brief and thus attributed more points to that than to any other section, and more points than another professor? . . . Would a creative use of policy argument in an appellate brief stand out to one professor, but strike another as a throwaway argument?” Jessica Clark & Christy DeSanctis, Toward a Unified Grading Vocabulary: Using Grading Rubrics to Set Student Expectations and Promote Consistency in Legal Writing Courses, http://ssrn.com?abstract=18908329 (forthcoming J. LEGAL EDUC. 2011). Although concerned, these two teachers think this problem can be overcome by rubrics that set expectations, “but accommodate both student and stylistic choices.” Id. at 32.

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

6 Professors often modify standards or “rubrics according to the level of the course.” Sophie Sparrow, Describing the Ball: Improve Teaching by Using Rubrics—Explicit Grading Criteria, 2004 Mich. St. L. Rev 1, 25. As Professor McKinney says, “the qualities that make an "A" paper an "A" are directly related (obviously) to the underlying assignment itself. Assignments from early in the semester may only demand insights regarding the holding in one particular case. By the end of the first year, the kinds of insights that would make me smile are those that include insights about individual cases, about how the cases (or other controlling law) weave together, and how the policy behind the laws can be expressed through wise application or modification of the law.” E-mail from Ruth McKinney to Elizabeth Fajans (July 23, 2011, 4:23 p.m. EST) (on file with author).

7 Formative assessments, that is, rubrics that “describe both what the students should learn and how they will be evaluated.” Sparrow, id. at 6, are more effective than summative assessments that come too late to assist in a student’s development. In addition, rubrics that describe the characteristics of excellent, good, and weak student work are often more helpful than a checklist that establishes general criteria. Compare the general criteria rubric in Melissa Shafer, Effective Assessment: Detailed Criteria, Check-Grading, and Student Samples, 14 Second Draft 6 (1999), with level-specific criteria like those in Jessica Clark & Christy DeSanctis’s article, supra note 4, or Sophie Sparrow’s article, supra note 6. Nonetheless, even the most specific guidelines seem to stress predictive analysis rather than innovative ideas. And while many rubrics stress clarity, few stress other rhetorical techniques that can have significant impact on readers. This is why Sophie Sparrow cautions that rubrics need constant refinement to add complexities consistent with our goals for student learning. Id. at 34.
grading criteria. Nonetheless, we owe it to our students to identify some of the qualities that might turn competent work into truly impressive work, even if we can provide them no guarantees.

In this essay, Part I describes what some teachers say they reward with high grades. Part II then scrutinizes successful student papers in an effort to articulate and illustrate some value-added factors. They exhibit independent and often original thinking, as well as novel application. More surprisingly, perhaps, these papers demonstrate a noticeable sophistication in writing.

I. What Teachers say Merits the A

In asking colleagues how they answer the question “how can I get an ‘A’,” one friend responded, “I’m always tempted to say ‘evidence of independent thought’ -- but how do I explain what that looks like?” This response reminded me of Justice Stewart’s famous comment on hard-core pornography: “I shall not today attempt to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this is not that.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). I have little doubt that law professors know “A” work when they see it. But like other categories that lack clearly defined parameters, explanations for their judgments, like those below, are often surprisingly subjective and general.

**Explanation I**

My most craven desire … is for the beautiful, perfect exam.

The exam that makes me leap out of my chair for joy. The exam that makes me want to cry. The exam that I don’t think I could have written any better myself, and in fact, may be better than what I would have written, for it contains some insights and some analysis that did not occur to me even as I carefully constructed the hypothetical.

**Explanation II**

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8 Whatever the merits of a required curve, it does create grading problems. As Steven Friedland notes, “[t]he desire, even mandate, of many schools to impose grading curves exacerbates the reliability of grade distinctions. Whether called for or not, curves require instructors to distribute evaluations and make qualitative distinction between papers that are sometimes quite similar in substance. Ironically, the imposition of a grading curve necessitates a more subjective, norm-referenced grading, in which professors judge students against other students in the class, not against some objective, standardized measure.” *A Critical Inquiry into the Traditional Uses of Law School Evaluation*, 147 PACE L. REV. 147, 184-185 (2002). As one professor more cynically comments, “[i]f a student asks a professor, ‘How do I earn an A in this class?’ a professor operating under a policy of required means and distributions cannot simply describe the criteria of a good exam answer. For a student in such a class, fulfilling each of these criteria is neither necessary nor sufficient. The truly honest answer is “Do more and better than 90% of your classmates . . . .” Fines, *supra* note 4, at 882.

9 E-mail from Linda Berger to Elizabeth Fajans (Jan. 22, 2010, 9:51 a.m. EST) (on file with author).

I do think those [papers showing evidence of independent thought] are the papers that I give the highest grades to—as long as they also do most of what I expected—and I occasionally will indicate in class that I’m always happy to see a good argument that I had not thought of — but I don’t say it very loud or very often for fear they will go crazy on me.\textsuperscript{11}

\textit{Explanation III}

When I hire new adjuncts, there are always a few who will end up being my "stars." Those "stars" are the ones who can not only tell an “A” paper when they read it -- they can help a “B” student learn how to become an “A” writer. . . a musician with perfect pitch or an artist who can see light.

The problem with using a rubric [to help students achieve “A” work] is that it misses the "magic" that some “A” papers have -- the value-added factor that makes the paper shine (despite a few typos or a bluebooking errors throughout). It has to do with weight or insight or logic or something. The closest I can come to telling my students what I'm looking for is this:

(1) I tell them that the rubric is not an elements test. It is a factors test and a balancing test. Some of the factors definitely weigh-in heavier than others.\textsuperscript{12} . . . The thing that is MOST important is pristine logic followed by precise communication of that logic. That's it. If you've got both, you've got an “A”. (And if it's a persuasive piece rather than objective, it has to sing like a harmonic note).

and

(2) I tell them that, all rubrics aside, if I am laughing or smiling broadly when I finish reading their paper, they are in the “A” range (because I love nothing more than a beautiful piece of legal writing . . . ); if I am content, but tired, then they're in the “B” range (because I had to work harder than I should have to understand their points, but they had good points); if I am getting frustrated or angry, they're in the “C” range (because they are expecting me to do their work for them); and if I'm getting scared, they're in the “D” or worse range (because I am afraid for their clients and alarmed about how they got to this place in my class and where they're going).\textsuperscript{13}

\textsuperscript{11} E-mail from Linda Berger to Elizabeth Fajans (Jan. 22, 2010, 9:51 a.m. EST) (on file with author).
\textsuperscript{12} Clark and DeSanctis essentially agree with this notion. “The most critical elements of a rubric are that it is sufficiently detailed so as to announce expectations and , to some extent, circumscribe the number of points associated with each element, while at the same time providing enough flexibility to the professor to distinguish between and among papers at a level of nuance that is impossible to capture according to a purely objective methodology.” Supra note 4, at 8.
\textsuperscript{13} E-mail from Ruth McKinney to Elizabeth Fajans (July 7, 2010, 9:32 a.m. EST) (on file with author).
Intermingled with comments about how teachers react to student work are nuggets of information about what they prize: original insight, independent thought; pristine logic and communication. Another professor adds to this list, stating he values seminar papers because they push students beyond analysis and application and force them to deal with greater intellectual complexities like “the uncertainties, value conflicts, and current intellectual frustrations that pervade the practice of law and that become critical for effective practice.” These intellectual goals comport with Benjamin Bloom’s seminal work on a taxonomy of educational objectives, a taxonomy that organized cognitive operations into a hierarchy of conceptual thinking (in ascending order: Remembering, Understanding, Applying, Analyzing, Evaluating, and Creating). Kris Franklin, the director of academic support at New York Law School, describes how she uses Bloom’s hierarchy in explaining her grading criteria to students.

In my own grading I think I intuitively and, perhaps unconsciously, draw a distinction between work that earns an “A” and work that falls unequivocally into the “A paper” category. That is, I think I give a lot more “A’s” than I really see unquestionably “A” work. . . . To me, doing everything that is expected, and doing it all pretty well, is solid “B+” work. As far as I’m concerned, “B+” work can sometimes back into getting an “A” or “A-” grade, but it isn’t quite the same thing as doing “A” work. “A” work is unique and not always definable in advance. When I’m explaining the difference I usually end up talking about “A” work as involving a complete understanding of the problem and a thorough and competent attempt to resolve it, while weaving these together in ways that show not just mastery but terrific legal judgment and often genuine creativity.

The best tool I’ve found for making this comprehensible to students is a little flip chart describing the hierarchy of modes of thought in Bloom’s Taxonomy. I have my academic support students buy a copy of the flip chart, [which] is filled with examples of the kinds of questions they can ask at each level of thinking that the Taxonomy envisions. (The questions themselves are useful tools, even though the chart isn’t designed for law at all.) But then I group the levels and point out that the first two, Remembering and Understanding, are both expected and required in their graduate/professional training, so that working on that level gets them only to about a “C-” (students around the room groan when I ask them what levels the bulk of their outline and other review materials operate on, because it is almost always here).

I then tell them that the next two of Bloom’s Levels, Applying and Analyzing (which to my way of thinking tend to merge in law), should be the bulk of what students are doing with any problem, and are what is needed to get

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anywhere in the “B” range. I remind students that this is where most of their energy should go, and that how well they do this will almost always be the difference between high “B” work and low “B” work, and sometimes, can get them in the “A” range.

But to draft what I think of as truly “A” work, students must fully develop their Level III/IV analysis, but then pass on at least briefly at least to Level V, “Evaluating,” or occasionally, even Level VI, “Creating.” Seeing it laid out in a chart this way, and sometimes critiquing their own or other students papers to determine what levels of thinking they’re working on where, helps students viscerally feel the difference between A and B papers more concretely.¹⁷

Professor Franklin’s observation that evaluation and creative thinking, Bloom’s two highest cognitive operations, are key to excelling in law school has been echoed by others. Judith Wegner notes that “[a]lthough faculty in many classrooms dwell on comprehension, analysis, simple application and synthesis, that’s not all we evaluate. Most essay exams require complicated application, complicated synthesis, and complicated evaluation, and we don’t teach that nearly enough.”¹⁸ Professor Friedland suggests law schools “adapt Bloom’s pyramid of learning to its educational process. For example, it is widely acknowledged that mere memorization of rules and principles is a lower grade of thinking and consequently less valuable that the application of those principles.”¹⁹

One first step in helping students to scale the cognitive ladder is to explain the type of thinking that goes into creating and evaluating ideas. Evaluation, one of the cognitive operations at the top of Bloom’s chart, requires probing the validity of a premise or argument. Evaluation begins with recognizing assumptions behind a premise or argument. This may require examining, for example, underlying facts; statements and interpretations of rules, cases, and policies; and social, cultural, and legal history. It may also require evaluating inferences made on the basis of evidence already collected (like the intent of a defendant or a legislature).²⁰ On the basis of these observations, the next step is to assess the relevance, strength, and sufficiency of the supporting evidence before reaching a conclusion about the validity of a narrative, premise, or argument.²¹

If, as these teachers imply, sound evaluation often moves a student from the “B” range to the “A” range, original thinking is even a better predictor and more of a guarantee. Creative ideas

¹⁷ E-mail from Kris Franklin to Elizabeth Fajans (July 12, 2010, 12:05 p.m. EST) (on file with author).
¹⁸ Judith Wegner, Better Writing, Better Thinking: Thinking Like a Lawyer, 10 JAWLD 9, 10 (2004).
²¹ Id. at 214. This article elaborated on the cognitive skills involved in evaluation.
sometimes come in a flash—in that moment when we awake in the night with the answer to a problem that has been gnawing at us. But sometimes ideas need to be puzzled out, requiring us to experiment with putting material together in innovative ways that may lead to inventive and pragmatic solutions. New ideas often emerge from seeing analogies; aggregating, disaggregating, or recombining elements of a problem; transferring concepts, ideas, information, solutions from other fields or other areas of law; reversing roles; extending a line of reasoning or a principle beyond its original purpose; challenging assumptions; and creating narratives that show point-of-view.22

Identifying evaluation and creation as factors in superior work and providing explanations and examples of them in legal documents may help students push beyond the “B” barrier. Artful writing is another important factor, however, especially in persuasive documents where the theory of the case must be visible in the way facts and law are framed. That means that the story upon which the legal case is based must be made sufficiently compelling for the decision-maker to want the narrator’s client to prevail. It means having perfect pitch, so readers find the story plausible, but not coercive. It means framing facts and law affirmatively. It means arming students “with knowledge of how people react to the disclosure of negative information . . . [to] have a better feel for a winning strategy.”23 It is not only in persuasive writing that these rhetorical skills come into play, however. Even in objective documents, legal writers want to convince the reader that the analysis correctly predicts the outcome of a case.

It is these skills then that we must introduce when students hit the wall: both independent and original thought, pristine logic, sound legal judgment, and imaginative excursions into other fields or allied areas of law. We must also stress the importance of psychological insight and good ears, ears that hear nuance—the difference between advocacy and aggression, respect and fawning, rational persuasion and outright manipulation.

Admittedly, some students come to law school with these cognitive and writing skills sufficiently in hand, but many others need time to develop higher-level skills or to adapt them to a new discipline. One thing we can do to assist them in this endeavor is to compare the work of high achieving students with work slightly less finessed in an effort to make the differences visible and thereby attainable.

II. Value-Added Factors

Close evaluation, independent and original thinking, and artful writing are three attributes that collectively help students move into the “A” range. And although I, like Justice Stewart,
could never “succeed in intelligibly” articulating all the ways these attributes can be fulfilled, it is possible to give examples of each that will path the way for other discoveries.

Thus, under the category of close evaluation, it might be helpful to compare a brief that evaluates and uses non-legal sources effectively in policy arguments with one that is less accomplished. Examining a memo that pays close attention to burden of proof might be educational to students because these procedural issues are essential to sound evaluation of a law’s applicability, but often ignored by law students. Under the category of original thinking, fresh insights can come from critiquing examples that demonstrate independent thought, as well as those that are more mainstream. Finally, under the category of artful writing, excerpts that display strategic sequencing, sensitivity to tone, and foreshadowing and framing can help students learn how to elicit favorable audience response.

In discussing these three attributes, it is important to remember that they are often interrelated and inextricably intertwined in practice: well supported policy arguments can undermine adverse decisions, but an aggressive, bullying tone can render audiences resistant to the message. Nonetheless, it is helpful to label intellectual and rhetorical operations because by naming them, students have access to a menu of usable techniques and need not rely on instinct alone. Thus, in the discussions below, I try to focus on one factor at a time, but point out when the factors buttress or butt each other.

A. Close Evaluation
   1. Using Policy to Argue for the Un/desirability or In/applicability of a Rule

   Policy plays an important role in cases of first impression and in statutory interpretation where attorneys must advocate for the creation of a rule or a particular understanding of a statute. These arguments generally appeal to core interests and values and explain why a rule will or will not benefit society.24 The identification of a desirable goal is, of course, a normative one,25 but non-legal information can help advocates support their normative judgments and inform their arguments about how a rule would work in reality. This is important because unchallenged normative goals may advantage the more powerful groups in society and result in unfair and poorly conceived law. In addition to using policy to advocate for or against a rule, lawyers often raise the policy underlying a rule to explain why the policy does or does not apply to the client’s situation.26

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26 Id. at 212.
For policy arguments to be truly effective, however, students need to be familiar with different types of policy arguments and the types of authority they may need to use to make those arguments. There are four broad categories, although these sometimes become intertwined. Normative arguments are arguments about the values and goals that a law should promote and include moral arguments, social policy arguments, and corrective justice arguments. Economic arguments examine the economic consequences of a rule. Institutional competence arguments are structural arguments about the proper relationship of courts to other courts and courts to other branches of government. And judicial administration arguments look at the practical effects of a ruling on the administration of justice. Law students become fairly adept at making institutional competence and administration of justice arguments, and often competently summarize other policy arguments if they are articulated in cases.

More problematic, however, is students’ unfamiliarity with researching, evaluating, and using the non-legal studies and theories that often underpin policy arguments. When students need to evaluate policy arguments or create their own—by looking at statistical data collated by social scientists or scientists, or at economic or psychological theories—they have more trouble finding and evaluating sources to determine the validity and the sufficiency of the evidence supporting the policy argument. They need to search for confirmation that the findings are closely related to the issue they are examining and that the findings “are supported by a substantial body of work and . . . have survived critical appraisals by . . . professionals.”

Since misuse of non-legal information undermines the legitimacy of a policy argument and the credibility of the advocate, the information must be carefully assessed before being incorporated.

**a. Policy Arguments that a Rule Is or Is Not Desirable**

Policy arguments explaining why a rule is or is not desirable depend heavily on non-legal sources explaining the reasons for that position. This is done with aplomb in a brief explaining why a statute prohibiting adoption by unmarried, co-habiting couples is undesirable. The writer uses studies from reputable organizations that have done comprehensive reviews of the relevant literature, like the American Psychological Association, articles that have been published in respected journals, like the American Journal of Orthopsychiatry, and books written by experts in the field. This shows the writer cares about the legitimacy of its supporting sources, which in turn demonstrates the writer’s sound judgment.

The New Devon statute prohibiting unmarried cohabiting couples from adopting is not rationally related to a legitimate government interest. While providing stable homes with positive role models for adopted children is a

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29 See Margolis, supra note 25.
legitimate goal, the statute prohibiting unmarried cohabiting couples from adopting does not further that goal.

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

Scientific research also refutes assumption about homosexual couples and their inability to provide stable homes. State courts have cited to or found as fact information provided in the APA’s Resolution on Sexual Orientation, Parents, and Children (2004), which states that empirical research supports the argument that homosexual couples form stable, committed relationships. In re Adoption of Doe, WL 5006172 (Fla. Cir. Ct. 2008); In re Marriage Cases, 43 Cal.4th 757. According to the APA, studies of homosexual persons “show that the vast majority…have been involved in committed relationships…that large proportions are currently involved in such a relationship (across the studies, roughly 40-70% of gay men and 45-80% of lesbians), and that a substantial number of those couples have been together ten or more years.” See L.A. Peplau & L.R. Spalding, The Close Relationships of Lesbians, Gay Men, and Bisexuals, in Close Relationships: A Sourcebook 114 (2000); L.A. Kurdek, Lesbians and Gay Couples, in Lesbian, Gay, and Bisexual Identities over the Lifespan 243 (D ’Augelli & Patterson, eds., 1995); P.M. Nardi, Friends, Lovers, and Families: The Impact of AIDS on Gay and Lesbian Relationships in Changing Times: Gay Men and Lesbians Encounter HIV/AIDS 55, 71-72 (Levine et al, eds., 1997). Also, research shows that homosexual parents do not differ substantially in their ability to parent a child. See, e.g., E.C. Perrin, Sexual Orientation in child and Adolescent Health Care 105, 115-116 (2002); C.A. Parks, Lesbian Parenthood: A Review of the Literature, 68 AM. J. ORTHOPSYCHIATRY 376 (1998) . . . .

In contrast to the extensive research and carefully chosen sources cited in the excerpt above, an opponent’s brief in this case cites only one law review article and two cases to support the policy underlying New Devon’s statute. There is no social science research.

The legislative classification of unmarried people is rational because it is directly related to the statute’s objective to provide adopted children with stable homes. The Lofton court recognized an “unprovable assumption” that unmarried couples
are less stable than married ones as a legitimate basis for legislative action. *Lofton*, 358 F.3d at 819. Marriage holds a legally cognizable signification of willingness to work together in caring for a child. *Stanley v. Ill.*, 92 S.Ct. 1208, 1218 (1972) (Burger, J. dissenting). It provides couples with legally enforceable rights and duties to each other and their children and is symbolic of the couple’s commitment to care for their child. *Id.* at 1219. Because unmarried couples lack such a commitment, there is a higher likelihood that they will separate than there is that a married couple will divorce. Milton C. Regan, Jr., *Unmarried Partners and the Legacy of Marvin v. Marvin*, 76 NTDLR 1456 (2001). Families in which parents are unmarried and can come and go when they please without involvement of the state are patently less stable than those in which the parents have made a legal commitment to one another. (R. 12). Placing adoptive children in the homes of such couples directly conflicts with the state’s goal of providing them with a stable living environment. The state of New Devon is well aware of the current social science research, and under the rational basis standard, it is entitled to pick and choose which experts it will rely on to influence its legislative policies. *Lofton*, 358 F.3d. at 825. Thus, it has a rational basis for believing that unmarried couples are less stable than married ones. (Avon Barksdale)

Although the *Lofton* court admits that the notion that unmarried couples have less stable relations than married couples is an “unprovable assumption,” this brief writer does not recognize the need to support that assumption with any authority other than a single decision and an article written by a law professor rather than an expert in the social sciences. The *Lofton* court stated that Florida was entitled to make this assumption because the appellants had offered no “competent evidence to the contrary.” This is not true in the New Devon appeal, however, as evidenced by the appellant’s brief. Thus, this brief should back New Devon’s law with research supporting its position and refuting appellants.

In addition, the writer accepts the *Lofton* court’s statement that under the rational basis test, courts are “entitled to pick and choose which experts it will rely on to influence its legislative policies” when the results of social science research are in flux. No reason is given for this deference to one court’s normative choices, even though the court itself gave several reasons for its statement. For example, the court said that until there is consensus on whether unmarried couples provide a home that is as nurturing as a married couple’s home, it is in children’s best interest to adhere to traditional customs. *Id.* at 826. That position is arguable and my not even speak to the equal protection issue, but the court at least provides an explanation without which skeptical, critical readers are unlikely to be convinced. That is more than this brief writer did. Unsupported assumptions, conclusory statements, and un-interpreted authority do little to bolster a policy argument.
b. Policy Arguments about Why a Rule Does or Does Not Apply to the Client’s Situation

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

Courts have repeatedly found circumstances in which the government transferred immigration detainees intentionally to make filing a habeas petition more difficult to fall within the exceptions to the immediate custodian rule. The court in Vazquez recognizes an exception where the INS spirits “an alien from one site to another in an attempt to manipulate jurisdiction.” 233 F.3d at 696. The Roman court held “an exception might be appropriate if the INS were to exercise its transfer power in a clear effort to evade an alien’s habeas petitions” but found the facts alleged by the Petitioner failed to meet that standard. Roman, 340 F.3d at 326. To justify such an exception, however, “[Petitioner] must articulate specific allegations of bad faith and, if necessary, produce reasonably particularized evidence in support of those allegations.” Costa v. INS, 233 F.3d 31, 37 (1st Cir. 2000), (quoting United States v. Gertner, 65 F.3d 963 (1st Cir. 1995).

The Government acted in bad faith under the framework in Costa v. INS by twice transferring Lima without notice immediately after counsel promised to file a habeas petition on his behalf. In these situations, it is logical to extend to immigration detainees the exception the Padilla court articulated for federal prisoners, namely that “if there is an indication that the Government’s purpose in removing a prisoner were to make it difficult for his lawyer to know where the habeas petition should be filed…habeas jurisdiction would be in the district court from whose territory the petitioner had been removed.” Padilla, 542 U.S. at 454 (Kennedy, J., concurring).

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

Law students learn fairly early that rules, holdings, and facts while not infinitely manipulable, are pliable. As many legal writing textbooks note, rules can be articulated or interpreted differently in different decisions, holdings can be framed broadly or narrowly and precedent facts can be detailed or general depending on the conclusion the writer wishes to draw.30 Indeed, the ability to frame law and use cases persuasively is expected part of standard

legal analysis. But students are rarely as sensitive to burden of proof or standard of review issues, and rarely factor them into the analysis of a case. It is a measure of discrimination to do so, and an even greater measure when a student realizes these procedural rules can also be framed advantageously and woven into their analysis. For example, standards of proof can be variously described to minimize or maximize the burden of proof, and standards of review can be described to give courts greater or lesser discretion. The first semester memo below on whether a plaintiff’s mental health is sufficiently in controversy for a court to grant an order for a psychiatric exam is unique in the way this novice law student uses the burden and standard of proof in analyzing and evaluating the facts (full citations omitted).

The plaintiff’s nine year history of depression and periodic use of antidepressants while under the care of a psychiatrist may place her mental health in controversy. If there is an alternate cause for the alleged harm related to the mental health of the party, the party’s mental health may be in controversy. Vilkhu. In Vilkhu, the complainant suffered from an ongoing hernia that provided a possible alternate cause of the physical harm allegedly caused by the claimed assault. Id. Because the hernia could have contributed to the alleged physical harm, the court ordered an exam to determine causation issues. Id. Similarly, in Hodges, there was evidence that the complainant suffered from ongoing paranoid schizophrenia, a mental illness that might have affected his perception of the events underlying his claims of harassment. This condition led the court to rule that the illness could be an alternate cause of the alleged harm, thus placing his mental health in controversy. Although mere allegations of such an illness do not show an individual’s health is “genuinely in controversy” without a “requisite affirmative showing of proof,” Schlagenhauf, the movant need not prove the merits of his or her case in order to show more than “mere relevance.” Id. An indication that the exam would “shed light” on remaining claims would likely suffice. Vilkhu.

In the instant case, although the plaintiff’s doctor has asserted that Brown is mentally healthy aside from periodic spells of depression, this assertion is less forceful in light of Brown’s nine years of ongoing psychiatric care and repeated use of antidepressants. Like the hernia in Vilkhu and the paranoid schizophrenia in Hodges, Brown’s prior counseling and use of antidepressants offer sufficient evidence of ongoing depression that could serve as alternate cause for the alleged mental distress Brown suffered during the period of harassment and her recovery. The defendant need not prove causation; it need only demonstrate that Brown’s depression presents an alternate potential cause of the alleged harm such that it should be permitted to determine the nature and extent of such a cause. A court could conclude
that the source and pervasiveness of Brown’s depression are factual questions relevant not only to her claim of mental harm, but also to her claim of harassment.

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

B. Independent and Original Thinking

1. Effective Analogies

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

[T]he full body scan machine is also unreasonably invasive and extensive. Both backscatter and millimeter wave machines create a chalk-like image of the entire body, likened to a “virtual strip search. American Civil Liberties Union, ACLU Backgrounder on Body Scanners and “Virtual Strip Searches” (Jan. 8, 2011) http://acluorg/tech-and-liberty-/aclu-backgrounder-body-scanners-and-virtual-strip-searches. They can even capture a detailed portrait of one’s face, although the Transportation and Security Administration [TSA] order backscatters which are equipped with an algorithm that blurs images to make faces unidentifiable, and it ordered millimeter wave machines to include technology to blur facial features. Transportation and Security Administration, Privacy: Advanced Imaging Technology, http”//www.tsa.gov/approachtech/aitprivacy.shtm. The TSA also ordered machines equipped with a program which does not allow for the storage or saving of the images, and once images are screened and pass inspection, they are erased in order to be able to view the next image. Id. However, an officer has the discretion to discard the image, and thus may capture and save images to electronic devices, such as cameras, even though these are banned. In addition, images from the scan are viewed and interpreted by an officer in a room separate from the screening area. The distance may make the search less embarrassing for the passenger being searched. However, officers can easily abuse their
discretionary authority and discriminatorily order secondary searches based on a person’s physical characteristics.

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

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

Because they reveal true-to-life contours of a passenger’s nude body, including his or her genitals, AIT body scans amount to virtual strip searches and are thus overly intrusive absent individualized suspicion. Strip searches are maximally invasive and require individualized suspicion even in the administrative context. Redding, 129 S.C. at 2641-43 (school’s search of a thirteen-year-old student, involving ‘pulling out her bra and underwear, was unreasonable absent reasonable suspicion that the search would yield drugs.’). Except in rare circumstances supported by objectively reasonable individualized suspicion, warrantless strip searches are almost always unconstitutional. Sec. & Law Enforcement Empl. V. Casey, 737 F.2dd 187, 203-04 (2d Cir. 1984) (individually suspected corrections officer could be strip-searched for limited purpose of controlling flow of contraband into the prison). . . . Thus characterized, without individualized suspicion, AIT body scans of domestic air passengers as a first-line screening method are overly intrusive.

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

2. **Arguments Stemming from Role Reversal**

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

Although the government argues the immediate custodian rule is a strategy for minimizing forum-shopping by alien habeas petitioners, the rule enables such forum-shopping by the Government. In Farah, the practical effect of transferring the Petitioner out of state “was to prevent him from filing his Petition while he was present in this state. To now hold that Farah may only file his Petition in the state that the INS determines to send him would be to allow the INS to forum shop, intentionally or not.” Farah, 2002 WL 31828309 at *3. As in Farah, the practical effect of Lima’s transfer from Varick to Hudson was to prevent him from filing in the District of Brooklyniana by moving him out of state and beyond the reach of his attorney. His transfer from Hudson to Oakdale similarly prevented his filing a habeas petition in New Jersey and moved him far beyond the reach of his replacement counsel to a forum chosen by Immigration and Customs Enforcement [ICE]. Whether intentionally or not, by repeatedly transferring Lima just prior to his filing his habeas petition and without informing him or his counsel, the government was able to exercise complete discretion as to where Lima could—and could not—file his petition for relief. Thus, even if the government did not act in bad faith, the “practical effects” of the government’s conduct is same as if it acted in bad faith. Lima therefore falls within the exception to the immediate custodian rule.

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

3. Re-characterization

Creative arguments also emerge by re-characterizing facts to fit other causes of action or new defenses. Thus, for example, sexual harassment can be re-characterized or categorized as an employment discrimination claim. In the passage below, the writer argues that overly intrusive airport searches violate not only an individual’s right to privacy, but also give rise to a constitutional violation of an individual’s right to travel freely, noting that “the constitutional right to travel may not be conditioned upon the relinquishment of another constitutional right.” United States v. Davis, 482 F.2d 843, 912-13 (9th Cir. 1973). The right to travel is a constitutional right and cannot be conditioned upon a surrender of Fourth Amendment rights.

Mr. Hanson has the right to travel in interstate commerce. Edwards v. California, 314 U.S. 160, 172-73 (1941). Passenger screenings that are more intrusive than necessary run the risk of discouraging interstate commerce, however. Although older cases like Davis and its progeny said that as long as passengers had the choice to ‘opt-out’ of flying and travel by other means, there was no interference with the right to travel. 482 F.2d at 910-11, abrogated by Aukai, 497 F.3d at 960-62.
However, those cases were decided when air travel was prohibitively expensive for a large segment of the population and passengers had other viable and common travel options. Since airlines were deregulated thirty-five years ago, fares have dropped dramatically, opening access to air travel to ever greater percentages of Americans. Breyer, Stephen “Airline Deregulation, Revisited,” Bloomberg Businessweek, Jan. 20, 2011, http://www.businessweek.com/bwdaily/dnflash/content/jan2011/jan2011/db20110120-138711.htm. Moreover, given its history of frequent airline bailouts, the federal government clearly recognizes the centrality of air travel. Coupled with federal and state neglect of intercity passenger rail, domestic interstate air travel has become the sine qua non of travel and interstate commerce. Providing a passenger with the choice between flying and enjoying Fourth Amendment protection forces their consent at the sacrifice of constitutional rights, resulting in “considerable hardship.” United States v. Albarado, 495 F.2d 799, 806-807 (2nd Cir. 1974). Thus, the government should not place unreasonable restrictions on the right to travel freely.

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

4. Extension & Transfer

New ideas can come from transferring legal concepts from one domain to another or from extending a line of reasoning to new situations. As one professor notes, sometimes “a body of law designed to remedy particular harms or wrongs . . . may be extended as we recognize appropriate new members of a category.” 31 Examples of exporting include using public trust doctrine in environmental law or applying traditional property principles to new forms of property like welfare and other government entitlements. 32 Arguments can also be based on the refusal to use old principles in new situations. This is the basis of an argument that an unauthorized driver of rental car who uses the car with the permission of the lessee has the right to challenge the constitutionality of a search of the vehicle because arcane common law property interests do not apply in this situation.

Supreme Court precedent makes it clear that a reasonable expectation of privacy may be shown “either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.” Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978). The Court has made it painstakingly clear, however, that “arcane distinctions” governing property law ought not to control. Id. at 149 n.17.

31 Menkel-Meadows, supra note 22, at 129.
32 Id. at 129.
With respect to the first prong, the Court has admitted that “one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude.” *Id.* Indeed, the *Rakas* Court explained the holding of two leading Supreme Court cases largely in these terms. *See, e.g., Rakas*, 49 U.S. at 149 (concluding that the defendant in *Jones v. United States*, 362 U.S. 257 (1960), had a legitimate expectation of privacy because he “had complete dominion and control over the [property] and could exclude others from it,” and emphasizing the fact that the defendant in *Katz v. United States*, 389 U.S. 347 (1967), had “shut the door behind him to exclude all others”). Not surprisingly, courts have applied the reasoning of *Rakas* by adopting a modified bright-line rule toward unauthorized drivers. For example, the Ninth Circuit grants standing to unauthorized drivers “upon a showing of ‘joint control’ or ‘common authority’ over the property searched.” *United States v. Thomas*, 447 F3d. 1191, 1198 (9th Cir. 2006). Similarly, the Second Circuit has noted that an unauthorized driver of a rental car “may legitimately conclude that the car is his during the time he has permission to use it” and that his exercise of “dominion and control” over the vehicles gives him a legitimate expectation of privacy. *United States v. Little*, 945 F. Supp. 79,83 (S.D.N.Y. 1996), *aff’d*, 133 F.3d 908 (2nd Cir. 1998).

Moreover, technical violation of a lease agreement, without more, is consistent with a reasonable expectation of privacy when an unauthorized driver’s possession of the vehicle is not “wrongful.” *E.g. Thomas*, 447 F.3d at 1198. For example, a lessee who retains possession of a rented car or room after the lease has expired violates the terms of the rental agreement, but such contractual violation does not affect the reasonableness of the occupant’s expectation of privacy. *Id.; e.g., United States v. Cooper*, 133 F.3d 1394 (11th Cir. 1998) (finding a reasonable expectation of privacy in a rental car four days overdue). Significantly, in *Jones*, the Court noted that the defendant’s presence was not “wrongful” because he had the tenant’s permission. 362 U.S, at 267. Since he would have been a trespasser within the meaning of criminal law without permission, the Court plainly intended “wrongful” to mean illegal. Breach of a rental car agreement is hardly “wrongful” in that sense. Use by a person not named in the lease may be grounds for cancelling the lease, but it is not a violation of any law. To interpret the presence of an authorized driver as “wrongful” would be to permit a private contractual right to trump a constitutional right. *See Justin E. Simmons, Hertz and the Fourth Amendment: A Post-Rakas examination of an Unauthorized Driver’s Standing to Challenge the Legality of a Rental Car Search*, 15 GEO. MASON L. REV. 479, 503-506 (2008).

5. Detailed Application of Law To Fact
A detailed application of law to fact can lead to a more nuanced understanding of both the law and the narrative. In the first example, the repercussions stemming from a city employee’s demotion for the exercise of her free speech rights rounds out the meaning of irreparable harm and shows why monetary damages do not sufficiently redress her injuries.
The unique interplay of the circumstances surrounding Ms. Rodriguez’s demotion also establishes irreparable harm. The Third Circuit does not usually grant injunctive relief for lost wages that can be redressed at trial. See Singh v. School Dist. of Phila., No. 10-2028 2010 WL 3220336, at *6 (E.D.Pa. Aug. 11, 2010). However, a denial of Ms. Rodriguez’s motion for reinstatement and the resulting monetary losses implicate a complex web of issues that stretch beyond mere monetary damage. If Ms. Rodriguez is forced to leave her job because of her inability to pay her education loans, she will be abandoning the career aspirations that initially inspired her to earn the education that caused the debt. Conversely, if Ms. Rodriguez chooses to stay at her new administrative job, she suffers the stress that comes from debt, potential eviction, and harassment of creditors. Aside from these considerations, the demotion itself will severely impede the progress of Ms. Rodriguez’s career in civil service. See Iles v. De Jongh, Civil. Nos. 2007/0094, 2007/0053, 2007/0019, 2009 WL 44349475, at *7 (D.V.I. Nov. 24, 2009) (concluding two government employees suffered irreparable harm as a result of loss in job title and reputation). The repercussions of these options show that regardless of Ms. Rodriguez’s course of action, the end result will be irreparable harm to her career and emotional stability. This consideration, in conjunction with the chilling effect that the defendant’s retaliation has levied on her freedom of expressive association, indicate that immediate reinstatement to her previous position of Assistant to the Director of Communications in the Office of the Mayor is the only remedy that will prevent Ms. Rodriguez from suffering irreparable harm. Firetree v. Creedon, No. 1:08-CV-0245, 2008 WL 2078152, at *6.

Damage to her career and stress resulting from debt, eviction, and harassment are all harms that cannot be redressed by a monetary award. In contrast, in the next example, the writer mostly ignores the non-tangible harms the plaintiff faces and tries with lesser effect to prove her monetary harms constitute such extraordinary hardship that it is irreparable harm. While this is a legitimate secondary argument, the writer misses the chance to marshal facts that speak more directly to the standard.

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

C. Artful Writing
   1. Persuasive Sequencing & Perfect Pitch
Studies of human decision-making suggest that the order in which persuasive messages are presented influences their success. Those organizations that “‘prime’ the reader by leading her, step-by-step, toward acceptance of the final thesis” are the most successful. This involves constructing a chain of overlapping propositions “so the acceptance of one leads inexorably to the next.”

One frequently successful chain—the foot-in-the-door strategy—opens with an attractive, fairly uncontroversial premise, “on the theory that if the reader agrees with the first few premises, she is more likely to accept the ultimate thesis.” This strategy also “has the advantage of subtlety” since research shows that argument “is more persuasive if the intent to persuade is not obvious.” It is important that the reader believes she has “arrived independently at the decision. . . . Preserving the appearance of audience autonomy lessens the likelihood that the audience will feel coerced or angry, feelings that can lead to the so-called ‘boomerang effect’ in which the message recipient responds to the persuasive message by rejecting it.”

It is not just the appearance of autonomy that writers should strive for, however. They actually need to give readers space to make their own decisions, especially because overt pressure and confrontational demands may be offensive, threatening, and counter-productive. Thus, writers need to reconcile advocacy and respect and “calibrate the force of a plea, assertion, demand, request, or refusal,” finding the perfect pitch.

The second strategy—the door-in-the-face strategy—opens with a more controversial premise that the reader may likely reject. This strategy operates on the theory that the reader, “having rejected the first larger request, is thereafter somewhat more inclined to acquiesce to a second, smaller request.” When this strategy works, it is because the sequence of requests operates like a negotiation, where one party’s concession is reciprocated by the other party. Door-in-the-face is not as consistently successful as foot-in-the-door, however, and can depend on context.

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

(I)

The writ of *habeas corpus* (the “Great Writ”) is an indispensible foundation to the integrity of our system of justice. For centuries this basic right has proved a bulwark against insidious government overreach and has served as a last refuge for those whose most basic liberty has been wrongfully taken from them. Granting Jose Lima’s petition for *habeas* relief is appropriate here because Lima properly named the Attorney General (“AG”) as the respondent to his petition for immigration *habeas* relief since Congress granted the AG authority in matters of immigration detention and removal. If Lima’s immediate custodian is the respondent, the warden of Lima’s detention center in Louisiana, his access to justice is impaired. To avoid this kind of scenario is why the writ of *habeas corpus* was enshrined in our Constitution.

Recognizing the AG’s authority is essential because the stakes as to the outcome of the proper respondent question are high. This court has already noted that Petitioner has a meritorious claim in his *habeas* petition and Petitioner’s ability to meaningfully participate in his parallel Immigration Court proceedings depend on his release from detention in Louisiana and his return to Brooklyn. In addition, there is substantial evidence of Immigration and Customs Enforcement (“ICE”) misconduct in this case. If the court accepts the Government’s arguments that the proper respondent in alien *habeas* petitions such as this one falls within the immediate custodian rule (“ICR”), the Government’s ability to willfully transfer a detainee far from counsel and his dependent family—and away from his ongoing challenge to his removal from the United States—will be unchecked and the interests of justice preserved in the writ of *habeas corpus* will not be served. As such, the motion to dismiss should be denied.

(II)

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

The petitioner is asking the immediate custodian rule, which applies to normal federal prisoners, be ignored in favor of a rule which would provide more
equal justice to all immigration detainees. In being allowed to name the Attorney General as respondent to his petition, Petitioner Lima would be recognizing the Attorney General’s unique role in immigration that gives him widespread control. The government is hoping to maintain the immediate custodian rule so it can continue its mistreatment of hard working American residents, just trying to support their families home and abroad, by isolating them in distant and overcrowded detention centers, thereby making it nearly impossible to have a petition granted.

The first example opens effectively by connecting the larger framework of the writ of habeas corpus, the Great Writ, to the case involving Jose Lima, an illegal alien arguing the immediate custodian rule does not apply to aliens pending deportation. This structure follows the “foot in the door” strategy where the advocate begins with relatively uncontroversial premises [here, support for the Great Writ], hoping that the reader’s agreement with the first few premises will make her more likely to accept the ultimate thesis [that the ICR effectively deprives Lima of habeas relief and thus the court should recognize an exception to the rule].

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

The second example makes essentially the same points, but uses the more contentious “door in the face” strategy in the hope that the recipient will accept a second, smaller request in reciprocation for rejecting the first. Here, the opening two contentions will likely be rejected because the tone is so heavy handed and assertive, as in, “this is a classic example of bullying by the United States government,” and the government supports the immediate custodian rule only “so it can continue its mistreatment of hardworking American residents.” These statements not only rob the reader of the right to make autonomous decisions about the government’s tactics and motivations, but may conflict with some readers’ generally positive attitude toward government, causing them to generate counter-arguments. Moreover, instead of establishing a bargaining dialogue, which depends on the first premise being sufficiently reasonable so as not to generate a hostile response, the reader may decide the first premise is so farfetched that there

43 Stanchi, Id. at 415-29.
44 Stanchi Id. at 445.
45 Stanchi, Id at 434-441
46 Stanchi, Id. at 426-27.
47 Id. at 432.
is no obligation to reciprocate by conceding to the second request, which asks the Attorney
General to be recognized as respondent to Lima’s petition instead of his immediate custodian.
The strategy here could well have a boomerang effect.

Equally problematic, the door-in-the-face strategy here has some undesirable substantive
repercussions. By focusing on the government’s bullying and mistreatment, instead of Lima’s
right to access, the advocate appears to concede the need to show bad faith, instead of
inadvertent or inefficient bureaucratic confusion that has the same practical effect but a lower
burden of proof.48 A similar—if less serious—thing happens when the advocate says “as a result
of his unfortunate arrest and cruel transfer to Western Louisiana, … [Lima was] deprived of
adequate counsel and, more importantly, contact with his loved ones.” While we recognize the
student’s desire to humanize the petitioner, in the context of this litigation, “contact with loved
ones” is less important than deprivation of counsel. Here, a carelessly used intensifier inverts the
relative importance of the arguments, demonstrating how inartful writing can interfere with the
weight of the arguments.

Finally, there are other ill considered word choices. The prose is sometimes clichéd, “the
country he has known to come [sic] and love,” or “just trying to support their families home and
abroad.” Composition teachers call such phrases “instant prose,” clichéd expressions that spill
out “without thought or commitment and almost without effort.”49 Without effort, prose may
make the point, but be too lifeless to inspire interest or empathy. In addition, the prose here is
occasionally inopportune: “The petitioner is asking the immediate custodian rule, which applies
to normal federal prisoners, be ignored in favor of a rule which would provide more equal justice
to all immigration detainees.” “Ignores” suggests the court should willfully disregard the law, a
suggestion courts are unlikely to find palatable. It would be more diplomatic and more accurate
to say instead that “the immediate custodian rule, which applies to normal federal prisoners, does
not and should not extend to immigration detainees.” This sentence also has some obfuscating
adjectives: should we infer from the wording that there is a different rule for “abnormal federal
prisoners” than for “normal” prisoners”? Finally, the assertions sometimes border on the
misleading, as in the statement that the government supports the immediate custodian rule only
so it can continue “its mistreatment of hardworking American residents.” Not only is the
assertion about the government’s motivation unsupported, but the writer wrongly describes
undocumented immigrants as Americans. Here, poor strategic choices and writing that veers
between banal, overzealous, and imprecise damage the advocate’s credibility and weaken
otherwise sound substantive arguments.

2. Foreshadowing & Framing

48 The “bad faith” argument should be the fall-back argument in case the “practical effects” argument fails.
49 Sylvan Barnet & Marcia Stubbs, BARNET & STUBB’S PRACTICAL GUIDE to WRITING 377 (Little, Brown & Co.
1975).
In most legal documents, both persuasive and objective, a key decision is how to “prime” the audience to lead the reader step-by-step to a final thesis. One technique involves foreshadowing. Foreshadowing works by projecting a “backwards causality,” where an “early scene simultaneously predicts and confirms a future that then appears as an inevitability, the only course the story could have taken.”

It works “by unobtrusively planting clues early on, [which] can help control the creation of … hypotheses, leading the viewer—seemingly on her own—to the conclusion the writer will ultimately be advocating.”

a. Using Facts to Foreshadow Thesis

Because there are almost always rival interpretations of stories, using facts to foreshadow a thesis must be done artfully. “The historical reconstruction that makes up much of storytelling is considered more trustworthy if it simply presents the facts without any instrumental or predetermined direction . . . . Despite occasional reminders that this convention embraces a cognitive impossibility and open acknowledgment that it is often at odds with the instrumental nature of remedying-seeking stories, most cultures abide by and even exalt the pretense that what happened can be found and reported without bias.”

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

In the two examples that follow, a seemingly unbiased historical reconstruction of the petitioner’s background makes the opening paragraph in the first statement of facts seem more credible than the overtly persuasive opening paragraph of the second.

(I)

Jose Lima arrived in the United States in 1987 from Guatemala at the age of three and has spent the last 23 years—nearly all of his life—residing in Brooklyn, New York. He attended New York City public schools, where he participated in athletics and graduated with academic honors. He is married to Carmela Martinez, a lawful permanent resident, and is a parent with Martinez to

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52 Higdon Id at 1244.
54 Higdon, supra note 37, at 1230-31.
an 18-month-old son, Ernesto Lima, a U.S. citizen. Lima works over 40 hours a week at electronics store in Brooklyn to provide for his wife and child and has never been convicted of any crime in the United States.

Lima’s Arrest

On October 16, 2010, Lima participated in a peaceful rally in support of immigrant’s rights in Huntingdon, New York, and stayed overnight at a friend’s house. As he slept quietly, armed Immigration and Customs Enforcement agents swarmed around the apartment and slammed on the door. They stormed through the apartment, waking Lima with a flashlight in his face, and demanded to see his papers. Discovering he was from Guatemala, the agents handcuffed Lima and marched him into a van.

(II)

Mr. Lima has lived in the United States since the tender age of three. In the nearly two and a half decades that Petitioner has lived in the Brooklyn area, he has become a part of the local community in many areas. Although he only began attending Brooklyn public schools when he was six years old, Petitioner Lima graduated high school in 2002, at the age of eighteen. During his time at the local public schools, including Coy L. Cox School (PS 369), Mr. Lima established himself as a valuable part of the community by maintaining a 3.1 grade point average, playing soccer for his schools’ teams, and receiving an award for “Distinguished Achievement in Math.” In 2002, Mr. Lima attempted to pursue even greater scholastic endeavors when he applied and was admitted to a local college. Unfortunately, like so many Americans, due to the costs of higher education and Mr. Lima’s limited means, he was forced to leave school prior to the completion of his first year.

Lima’s Arrest

Mr. Lima, friends, and relatives joined other supporters of the DREAM Act in Huntingdon, New York on October 16, 2010. After the rally, he stayed at a friend’s house. . . . Early the next morning, ICE agents entered the apartment allegedly looking for a gang member and demanded to see the papers of everyone present. Because the petitioner did not have the proper paperwork, the ICE agents took him into custody.

The opening paragraph of the first fact statement appears trustworthy because it reads like a factual synopsis of the petitioner’s biography. It details facts favorable to Lima, but does so without embellishments, indeed without adjectives. Thus it directs the reader’s attention to the petitioner’s hard work and worthy activities, but leaves it to the reader to infer Lima’s good character. This good impression of him makes the reader all the more fearful for Lima’s fate when ICE agents swarm the building, slam on the apartment door, and storm in. This Gestapo-type raid, conveyed again without adjectives but with effective use of verbs, makes Lima’s later contentions of government bad faith seem possible.

The second statement has some good details, but it seems less credible because it tries too hard to pull on the heart strings. Expressions like “tender age of three” and “valuable part of the community” may be attempts to elicit sympathy for Lima, but the phrases are examples again of
instant prose—easily written and easily forgotten. Worse, some characterizations are pretentious: pursuing “greater scholastic endeavors” sounds pompous, desiring a college education does not. In contrast to this aggrandizement, the advocate makes some puzzling concessions and statements: “He became part of the local community in many areas,” but failed to assimilate in other areas? “Although he only began attending Brooklyn public school when he was six, he graduated at the age of 18.” Since most children begin public school at six and graduate at eighteen, the writer’s point is unclear. Presumably, the writer was trying to suggest Lima adapted to school as quickly as individuals born in the United States, but the writing is so roundabout that the reader may miss the point. Between unclear distinctions and overwriting, the prose backfires. For this paragraph, simple would be better.

In contrast, the paragraph on Lima’s arrest could use some of the drama of the first example. The events are so neutrally recounted that the reader is unlikely to feel any indignation, although the writer may have tried for this with his misleading implication that Lima was arrested for improper paperwork, rather than for illegal residence. Deceit is the wrong way to elicit empathy.

Facts can also effectively open the argument section of a brief, as in this introduction arguing that full body scans and enhanced pat-downs at airports are reasonable at inception. The thesis paragraph opens with a litany of facts that persuasively foreshadow the conclusion

The courts have emphasized the grave and urgent nature of the special need of battling airborne terrorism especially. See Davis, 482 F.3d,at 270 and City of Indianapolis v. Edmund, 531 U.S. 32 (2000). There is no doubt that in the post-9/11 United States, “[the] government…has the most compelling reasons—the safety of hundreds of lives and millions of dollars worth of private property—for subjecting airline passengers to a search for weapons or explosives that could be used to hijack an airplane.” See Singleton v. Comm’r of Internal Revenue, 606 F.2d 50, 52 (3rd Cir. 1979). . . . Modern-day terrorists now employ previously inconceivable tactics in the mission to destroy American lives and property. Their arsenal is no longer “confined to the cumbersome gun or knife…for modern technology has made it possible…that enough plastic explosives to blow up an airplane can be concealed in a toothpaste tube.” Moreno. Recent terrorist activity has proven this all too terrifying reality. In 2006, British authorities uncovered an Al-Qaeda plot to “blow up United States-bound airliners” by mixing household liquids “into an explosive cocktail.” Alan Cowell, Britain Charges 11 in Plane Case; Bomb Gear Cited, N.Y. Times, Aug. 22, 2006. Nigerian terrorist Abdul Farouk Abdulmutallab went to similarly unimaginable lengths on Christmas Day 2009, immediately preceding the government’s deployment of AIT and pat-down procedures at airports across the nation, by attempting to detonate a mixture of nonmetallic powders and liquid he had concealed in his underwear. O’Connot & Schmitt, Terror Attempt Seen as Man Tries to Ignite Device of Jet, N.Y. Times, Dec. 25, 2009. These alarming attempts emphasize the government’s absolute need to strategically adapt the way in which it “approached the task of ensuring
the safety and security of the” nation’s air transportation. See United States v. Aukai & Cassidy v. Chertoff (holding that prevention of terrorist attacks on large vessels engaged in mass transportation and determined by the Coast Guard to be at heightened risk of attack constitutes a special need.)

Unlike magnetometers, both advanced imaging technology [AIT] and enhanced pat-down procedures can detect the kinds of nonmetallic weapons and explosives that stocked the liquid bombers’ and underwear bomber’s arsenals. . . . Because these procedures discover these hidden dangers and prevent their development “before the lives of an airplane’s passengers and crew are endangered,” they are classic administrative searches. Therefore both AIT and pat-down screening procedures are reasonable at inception.

The magnitude of the terrorist threat, conveyed in a crescendo of cases and newspaper articles reporting different terrorist weapons and attempts, plays on the audience’s fears and makes it responsive to the conclusion that the need to thwart terrorism outweighs the reasonably circumscribed intrusions on individual privacy. The writer effectively uses both affective and cognitive priming.

In a final set of opposing briefs on this issue, the writers open the fact statements with narrative details that paint the client, an air passenger subject to an administrative search, in a sympathetic light, but the connection between those factual details, the legal issue, and the thesis is too tenuous for either opening to be truly effective.

(I)
Plaintiff George Hanson suffers from Crohn’s disease, an often-debilitating illness affecting the gastrointestinal tract. He recently had to undergo a partial colostomy. As a result of the surgery, Mr. Hanson currently uses a colostomy bag, which he must wear at all times.

(II)
On October 15, 2010, plaintiff George Hanson arrived at Joralemon Airport for what was supposed to be an uneventful flight to Baltimore, Maryland for a business meeting. At the airport security check-in, Mr. Hanson cooperatively unpacked his laptop from his carry-on bag, removed his shoes, emptied his belongings from his pockets, and placed all these personal items onto the conveyor belt of the x-ray screening machine. While the items passed through the machine, a TSA agent, Larry Striker, ordered him to step into a full-body scan machine. This marked the beginning of incidents to come, which would invade and injure Mr. Hanson.

Instead of the vague and melodramatic “this marked the beginning of incidents to come, which would invade and injure Mr. Hanson,” it would have been helpful if both statements actually
foreshadowed Hanson’s injury. Let the reader know that Hanson was embarrassed to enter the body scan unit and that a rough pat-down caused poor Mr. Hanson’s colostomy bag to leak, soiling and humiliating him. This incident led him to sue, claiming the pat-down was unreasonably intrusive as a first line screening method. Without this framework, the reader fails to appreciate the significance of these openings. With them, the reader can concentrate on details with the overall context in mind.

b. Inoculating Against Adverse Information

Many advocates “minimize the ‘airtime’ given to negative information because of the worry that space devoted to adverse points will inflate their importance or unduly highlight them.” Others think a preemptive strike is more effective, especially when a different spin on the negative information neutralizes its harm. One way to undermine opposing arguments is to foreshadow them, inoculating readers against them. Inoculation theory works like a vaccine, where “a small dose of a message contrary to the persuader’s position makes the message recipient immune to attack from the opposing side . . . because the introduction of a small dose . . . induces the message recipient to generate arguments that refute the opposing argument, the intellectual equivalent of producing antibodies.”

Research has shown that the key to inoculation is a warning of an “impending attack or threat, combined with a refutation of the attack.” When the threat is sufficiently scary, the recipient is likely to be open to the advocate’s refutation. Moreover, stealing the opponent’s thunder through inoculation when coupled with framing negative information in ways that neutralize it works like a “sword (to boost credibility, to transform from negative to positive) and a shield (to resist attack).”

An adverse decision comes under a two-fold attack in the following brief on New Devon’s statute prohibiting unmarried couples from adopting.

This court should not follow the Lofton court’s decision to ban homosexuals from adopting due to a lack of well-established evidence. Lofton v. Sec’y of Dep’t of Children & Family Serv., 358 F.3d 804 (Fla. 2004). First, when research is inclusive, it is especially dangerous to base law on assumptions; this is precarious territory that the court should not cross. Craig v. Boren, 429 U.S. 190, 204 (1976). Second, individualized determination is a superior method of evaluating parental fitness. In Stanley v. Illinois, Justice White called procedures based on presumption “cheap” in comparison to individualized determination. Stanley, 405 U.S. at 656. It disregards the real interests of children and defers to outdated formalities instead of present realities. Id. at 657. The

55 Stanchi, supra note 23, at 390.
56 Id. at 399-400.
57 Id. at 406.
58 The thesis paragraph in section II(C)(2)(a) on airborne terrorism turns on this dynamic.
59 Stanchi, supra note 23. at 426-27.
adoption process is already an intense public procedure where the adopters’ lives must go under the microscope of the state. *Lindley v. Sullivan*, 889 F.2d 124 (7th Cir. 1989). There is no need to limit the application pool even further when each couple will be individually evaluated. To take the easy way out by barring unmarried couples on the assumption that they are unfit does not serve in the best interests of the child and weighs heavily on the matter of equal protection.

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

In the next brief, the argument that an individual’s Fourth Amendment rights are threatened by prolonged government surveillance using global positioning systems is met with a barrage of decisions holding to the contrary, a strategy that strengthens the reader’s immunity to the opposing argument.

With the exception of one circuit, the courts agree that threat to the Fourth Amendment presented by random mass surveillance, an issue reserved in *Knotts*, does not involve the length of time the global positioning system device is in use, but only its dragnet use. In *Marquez*, agents monitored defendant’s vehicle with a GPS for five or six months, changing the battery seven times. *Marquez*, 605 F.3d at 607. In *Pineda-Moreno*, law enforcement utilized the GPS surveillance for approximately four months. *Pineda-Moreno*, 591 F.3d at 1213. Even in *Karo*, the Court admitted the portions of the five months prolonged surveillance that occurred before the beeper entered a home, though it held the beeper surveillance in a home was unconstitutional. *Karo*, 468 U.S. at 719. In all these cases, the court did not find the length of the surveillance to be problematic so long as the police had sufficient grounds for suspecting the defendants. Thus, the capability of a GPS to monitor continuously for twenty-four hours has never been the primary question concerning wholesale surveillance; rather it is blanket surveillance of random citizens that is the privacy concern. Any interpretation that relies solely on the time period of the GPS monitoring is inconsistent with precedent, and wholly against the weight of precedent.

The last excerpt begins well, articulating the thesis that a global positioning system is extra-sensory technology that requires a warrant, but fails to use precedent effectively.

GPS tracking provides not only the permissible “sense-augmenting” capabilities of a beeper, but also the problematic ‘extra-sensory’ capabilities of a thermal imager; the difference is that sense-augmenting devices are only a more effective way of providing information already available to the senses, while extra-sensory devices provide information that would otherwise
not be known. The Court has generally allowed law enforcement to use technology that provides sense-augmenting capabilities without a warrant, but has required a warrant for extra-sensory technology. In *Kyllo*, the government became suspicious that the defendant was growing marijuana in his home, a process that typically requires high intensity lamps. Government agents used thermal imagers to discover these lamps were being used due to the heat emanating from various sections of the home. *Kyllo*, 533 us 27 at 29-30. The Court, recognizing the power of technology to infringe upon privacy and finding it significant that this specific technology revealed information in the home that could not have been obtained otherwise, held that the use of this device on a home constituted a warrantless search under the Fourth Amendment. *Id.* at 40. The GPS used to track Sloan has this same feature of providing extra-sensory information that would otherwise unobtainable. The D.C. Circuit has noted that the GPS provides information regarding the whole of one’s movements, and this whole can reveal much more than the sum of its parts. *Maynard*, 615 F.3d at 558.

To inoculate the reader against the argument that GPS technology is only sense-augmenting, the brief needs to explain more clearly what makes the GPS like a thermal imager, that is, what make the GPS extra-sensory rather than just a technologically efficient equivalent to visual surveillance. To do this, more of the *Maynard* court’s reasoning is needed to explain why the whole of an individual’s movements may reveal more than the sum of its parts, as was done in a different brief.

No one trip could reveal habits and patterns that make the difference between “a day in the life and a way of life.” *Maynard*, 615 F.3d at 542. Whether a person visits a doctor and then a gynecologist, followed days later by a trip to a baby store, tells more about a woman than either isolated trip. *Id.* at 563. Similarly, all of the trips Sloan made to the nursery told police more about this activities than any one trip. Therefore, while Sloan’s individual trips may have been exposed to the public, 24/7 surveillance of the whole of his movements is a search for which a warrant is required.

Second, the writer needs to confront the Court’s particular concern with using this technology in the home by focusing on that part of the decision concerned with the power of technology to infringe upon privacy. The writer needs to argue that there comes a point when technology invades privacy even when an individual is in a public place. Without thorough explanations, contentions—even if true—don’t adequately rebut arguments that GPS tracking is just sense-augmenting. The attempt at inoculation fails.
Conclusion

Because grades depend on balancing a variety of factors, institutional and individual, it is impossible to assure students that the value-added factors discussed above assure an “A” grade. But it also seems true that an “A” might require more than clear organization, careful presentation, and solid analysis. A paper with all those qualities might, as Professor Franklin has said, back into an “A,” especially in schools with a mandatory curve, but true “A” work is not simply about perfecting the first four levels of Bloom’s hierarchy of cognitive development. It is also about nuanced evaluation, independent thought, and finesse in execution. These finer details require attentiveness to the validity of evidence and malleability of law. It requires thinking outside the box—theory, role reversal, and transference and extension of legal and interdisciplinary principles and theories. It requires increasing sensitivity to the impact of language, to foreshadowing and framing, and to audience reaction. These are the factors that make a paper “sing.” They are rarely achieved easily because they require conscious thought and frequent refining. But they can be explained and discussed and that discussion may edge students closer to the finish line.