# Teaching Students to Make Effective Policy Arguments in Appellate Briefs

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Legal writing teachers frequently lament the quality of policy arguments contained in student briefs. They are vague, general, and unsupported by authority. They often start with the stock phrase "For reasons of public policy …" without identifying which "public policy" is being asserted or discussing specifically how the proposed rule will advance that policy.[1] As legal writing teachers, we can do a better job of teaching our students how to make these arguments more effective by focusing on policy argumentation as a specific and distinct skill. We very deliberately teach students different kinds of legal arguments (arguing from a rule, arguing by analogy, etc.), how to structure them, and how to support them with authority. We should do the same with policy arguments.

For most students, the introduction to policy-based reasoning occurs in doctrinal courses such as contracts and torts. In these courses, students are taught how to discern the underlying policy in a particular judicial decision. Many legal writing programs pick up on this and teach students how to identify the underlying policy of an existing rule and show how that policy applies to a particular fact pattern or client situation.[2] This is a very limited use of policy, however, and only part of the skill of making policy arguments that a student should learn in order to become an effective advocate.

An equally important part of the skill of policy argumentation is implicated when the advocate is urging a court to adopt a particular legal rule for a new situation, not just apply an existing rule to a set of facts.[3] This type of argument is particularly important in appellate brief writing, where advocates will frequently be addressing novel issues of law. This kind of policy argumentation is generally not taught in law school legal writing programs. Although many of the legal writing and appellate advocacy textbooks mention policy arguments, some do not, and none of them has any specific discussion of how to make those arguments effectively.[4] It is time for legal writing professionals to take up the task of teaching students to make sound, persuasive policy arguments.

The approach to teaching policy that is most consistent with legal writing pedagogy, and which provides a clearer understanding of how policy can be used in the real world of law practice, focuses on the "use" of policy rather than its "discovery."[5] Instead of trying to discern how policy considerations affected a particular decision, students should be taught to understand the nature of different types of policy arguments and how an understanding of policy can affect the way a legal problem is viewed. This will allow students to make choices about "what policy argument best

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

[2] Most of the legal writing textbooks cover this type of policy argument. *See, e.g.*, Linda H. Edwards, *Legal Writing—Process, Analysis, and Organization* 107 (2d ed., Aspen L. & Bus. 1999) (hereinafter referred to as Edwards, *Legal Writing*); Richard K. Neumann Jr., *Legal Reasoning and Legal Writing* 131 (3rd ed., Aspen L. & Bus. 1998); Diana V. Pratt, *Legal Writing: A Systematic Approach* 325 (3d ed., West 1999); Helene S. Shapo, Marilyn Walter & Elizabeth Fajans, *Writing and Analysis in the Law* 44 (4th ed. 1999)(hereinafter referred to as Shapo).

[3] For a fuller discussion of the difference between arguing the policy of an existing rule and arguing policy for a new rule, see Margolis, *supra* note 1 at 211–213.

[4] *See, e.g.*, Ruggero J. Aldisert, *Winning on Appeal* (Revised 1st ed., NITA 1996) (no specific discussion of policy arguments); Carole C. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument* 100 (West 1998) (general explanation of equity and policy arguments); Edwards, *Legal Writing*, *supra* note 2 at 107 (discussing policy-based reasoning, but no discussion of how to make policy arguments); Neumann, *supra* note 2 at 271–272 (3rd ed. 1998) (discussing the importance of policy arguments, but not how to support them); Laurel Currie Oates, Anne Enquist & Kelly Kunsch, *The Legal Writing Handbook* 61–62 (2nd ed., Aspen L. & Bus. 1998) (listing policy as a "type" of argument with no explanation of what a policy argument is); Diana V. Pratt, *Legal Writing: A Systematic Approach* 320–326 (3d ed. 1999) (discussing policy arguments and sources for support, but no specific explanation of how to put together); Shapo, *supra* note 2 at 198–202 (section discusses types of policy argument, but not how to support them).

[5] Paul Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. Miami L. Rev. 409, 456 (1986).

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supports a particular side in a particular dispute."[6]

This approach is most consistent with the way lawyers actually use policy in the context of representing clients. It doesn't assume that there is an objectively correct policy that requires a particular outcome, but rather that in a particular case, involving particular facts, there is a policy consideration that benefits one party more than the other. Thus, rather than encouraging students to find the "correct" policy, this approach encourages students to find the policy that best advances their hypothetical client's interests. Because this approach has more of a real-world feel, students are more likely to learn what policy analysis is about.[7]

This approach is also similar to the way most legal writing programs teach case analysis. Rather than reading cases simply to figure out what they mean, which is the approach generally taken in doctrinal courses, in legal writing classes, students read cases so that they can use them to solve problems.[8] Using this same functional approach, legal writing professors encourage students to articulate a rule from a case, or synthesize a rule from a group of cases, in a way that benefits their hypothetical client. For example, in some situations a narrow, fact-based statement of the rule may be more beneficial if it is to the client's advantage to apply the rule narrowly, while in other situations a more abstract articulation of the rule might allow the client to assert that the rule applies to a different fact scenario. This ability to use cases in different ways is a crucial skill, particularly for persuasive writing such as is necessary in an appellate brief.[9] Students recognize that this is a valuable skill they will need in practice and, as a result, struggle to master it. If policy arguments are taught in the same way, students should likewise be motivated to grasp them.

Why is teaching students to use policy effectively important? Because policy can play an extremely important role in judicial decision making, particularly in cases that require a court to resolve a novel issue of law or develop a new rule of law. Renowned judge Benjamin Cardozo recognized this in his famous book *The Nature of the Judicial Process*,[10] asserting that to address novel issues of law, judges must turn to "public policy, the good of the collective body."[11] Judges today recognize that this is still an important part of judicial decision making.[12]

Policy can play a role in almost any case, but policy plays an especially important role in three types of cases—common law cases of first impression, constitutional cases raising novel application of constitutional provisions, and cases of first-time statutory interpretation.[13] In these cases, there is no directly binding authority that directs the court to act in a particular manner. Instead, the court must create new law, assuming a "legislative" function. When faced with this situation, judges can employ a variety of approaches, including reasoning based on precedent, principle, and policy. When judges rely on policy-based reasoning, they often base this reasoning on intuition or experience, rather than on a well-researched argument.[14]

A lawyer writing a brief should be apprehensive about relying on judges' intuitions about public policy. If a lawyer is writing a brief in a case in which policy is likely to be a factor, she should make a sound, well-researched, effective policy

[6] *Id.*

[7] *Id.*

[8] *See* Ralph L. Brill, Susan L. Brody, Christina L. Kunz, Richard K. Neumann Jr. & Marilyn Walter, *Sourcebook on Legal Writing Programs* 6 (ABA Section of Legal Education and Admissions to the Bar 1997) (hereinafter *Sourcebook*).

[9] This is particularly true when an appeal raises an issue of first impression, in which there is no directly binding authority. I use an appellate brief problem that raises an issue of first impression for the express purpose of giving the students this experience and having them practice the skill of using cases that could arguably support a result for either party. Many other legal writing professors use similar problems, as evidenced by a review of Idea Bank submissions for the 1998 Legal Writing Institute Conference.

[10] Benjamin Cardozo, *The Nature of the Judicial Process* (1921).

[11] *Id.* at 72.

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

[13] For a full review of these types of cases and why policy plays a critical role, see Margolis, *supra* note 1 at 219–232 (asserting that the American common law method creates gaps in the law that must be filled, even in cases involving statutes or other positive law, and that filling gaps is most often done with policy).

[14] *Id.* at 221 (citing Oliver Wendell Holmes Jr., *The Common Law* 1 (Little Brown & Co. 1990) (1881)).

argument in the brief, just as she should make sound, well-researched legal arguments.[15] In legal writing, we teach students to write briefs that precisely explain how a case supports a particular point. We emphasize the importance of presenting a case from the client's viewpoint, rather than letting the judge read the law and decide how it applies. We should do the same with policy, encouraging students to make effective policy arguments from the client's viewpoint to back up their legal arguments in appropriate cases.

## The Nature and Types of Policy Arguments

In order to do this, we need to teach our students about the different kinds of policy arguments that can be made, as well as how to effectively support those arguments with persuasive authority. While there are several different types of policy arguments, all policy arguments share the common attribute of advocating that a proposed legal rule will benefit society, or advance a particular social goal (or, conversely, that the proposed rule will cause harm and should not be adopted). Because a new rule, or a new application of an existing rule, will have implications beyond the individual case, the appellate court deciding the case will be concerned with how the rule will work for future litigants, as well as for society at large. Thus, all policy arguments involve an assessment of how a proposed rule will function in the real world.

In constructing a policy argument, the advocate must first convince the court that the particular goal is a desirable one for the individual client, and also for society as a whole. The goals for most policy arguments are ideals for which there is general social consensus—ideals such as fairness, justice, efficiency, and promotion of public health and welfare. Identifying the goal is the simplest part of developing a sound policy argument.

Then the advocate must show the court how the proposed rule would serve to achieve that goal. In this two-step process, it is usually in the second step that brief writers fall short. When extracting policy from an existing source of law, the type of policy-based reasoning lawyers are generally trained to do, an advocate can generally argue for the application of that reasoning to a new situation. It is much more difficult, however, to construct this same kind of policy analysis when it cannot be found in a source of legal authority.[16] Students must have an understanding of the different types of policy arguments in order to successfully accomplish this.

There are very few sources in which to find information about the nature of different types of policy arguments.[17] Very few legal writing–oriented materials have any description of different types of policy arguments.[18] It is difficult to divide policy arguments into firm categories, since there is considerable overlap between different types of policy arguments. In order to provide a concrete overview, however, I have synthesized the various types into four broad categories, some of which have sub-categories: 1) arguments about judicial administration, including firm versus flexible rule arguments, "floodgates of litigation" arguments, and "slippery slope" arguments; 2) normative arguments, including moral, social utility, and corrective justice arguments; 3) institutional competence arguments; and 4) economic arguments.

### A. Judicial Administration Arguments

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

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[15] In *Beyond Brandeis*, the author suggests that an attorney may, in fact, have an ethical obligation to make such arguments and support them with all available sources of authority, both legal and nonlegal. *See id.* at 206.

[16] Margolis, *supra* note 1 at 212.

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

[18] The exceptions are Shapo, *supra* note 2 at 198–202 (describing in some detail four types of policy arguments: normative arguments, economic arguments, institutional competence arguments, and judicial administration arguments) and *Sourcebook*, *supra* note 8 at 19 (describing four types of policy arguments: economic consequences arguments, administrative efficiency arguments, institutional competence arguments, and fairness and justice arguments).

efficient judicial system. There is little dispute that this is a valuable goal for society.

The dual goals of fairness and efficiency are sometimes at odds, however. This tension gives rise to the first type of judicial administration argument, the "firm versus flexible rule" argument. The argument for a firm rule is that a clear, specific standard will be easy for the court to administer, and therefore promote efficiency. A firm rule also promotes fairness by leaving little room for judicial discretion and leading to more consistent application, which makes it easier for citizens to understand the rule and act accordingly. A flexible rule would create confusion, be more prone to judicial abuse, and undermine the rule of law. Thus, the "firm rule" argument attempts to show how both fairness and efficiency are promoted by adoption of a clear, precise rule. The "flexible rule" argument, on the other hand, focuses more heavily on fairness. The argument for a flexible rule is that flexibility will allow the court to adapt to changing times and new circumstances, and take into account the individual circumstances of each case. Because a flexible rule will be more responsive and fair, it will promote greater confidence in the judicial system.

There are three other judicial administration arguments that focus primarily on efficiency. These can be made individually or combined with the firm/flexible rule arguments. The first is the "floodgates of litigation" argument.[19] This argument asserts that a proposed rule, if adopted, will inundate the court with lawsuits. This could either be because the rule is confusing, because it is very broad, or because the problem it addresses is extremely common. The "flood" of litigation would overwhelm the courts and lead to inefficient use of the courts' valuable time and resources.

The second of these arguments is the "slippery slope" argument. This is similar to the "floodgates" argument, but contains an element of fairness as well as efficiency. This argument asserts that if the proposed rule is adopted, the court will not be able to prevent its application to a broader and broader set of cases. First it will be applied to one new circumstance, then another, leading the court to hear a whole range of cases it never intended to entertain. This argument may also assert that adoption of the rule will lead to a large number of frivolous claims. This argument calls on the same efficiency themes as the "floodgates" argument, but also raises the specter of fairness by suggesting that it is unfair to open the door to a whole new type of liability, unexpected by both citizens and the courts.

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

### B. Normative Arguments

The next major category of policy arguments is normative arguments—arguments that a proposed rule promotes or undermines shared societal values. Although there is significant overlap between different types of normative arguments, they can be broken down into roughly three categories: moral arguments, social utility arguments, and corrective justice arguments.[20] Normative arguments tend to appear more "political" in nature because, in today's complex society, there is rarely widespread social consensus on issues of morality or other social good. As a result, the goal in a normative policy argument is not always as obvious or easy to establish as the goal in a judicial administration argument.

Moral arguments generally take the form of asserting that a particular rule should be adopted because it is consistent with generally accepted standards of society. The goal is a system in which the laws are consistent with, and promote, those moral values society deems important. For example, an advocate might make a moral policy argument to support a rule that promotes public safety. The goal at the heart of this argument is a society in which we protect and care for one another, an altruistic view of the world not shared by all. Just as judicial administration arguments

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

[20]Shapo, *supra* note 2 at 199.

raise a tension between efficiency and fairness, moral arguments raise a tension between individualism and altruism.[21] Moral arguments, therefore, often come in opposing pairs such as "form versus substance" and "freedom versus security."[22]

The next type of normative argument is the social utility argument. Under this argument, the advocate asserts that a proposed rule will serve a social good and benefit society or, conversely, will undermine a social value and harm society. In this type of argument, the goal is a society that promotes the health and well-being of its citizens. The argument asserts that the proposed rule either deters or encourages conduct that affects the goal. Social utility arguments often intersect with moral and economic arguments, and focus on goals such as public health, public safety, economic health, and national security. Social utility arguments are particularly useful in tort law cases[23] in which a court is asked to impose liability and compensate an individual for harm.

The final normative policy argument is the corrective justice argument.[24] This argument centers on the goal of fairness and asserts that as between two innocents, the one that caused the damage should be responsible. This is also an argument that is most useful in cases in which the court must determine tort liability. Because this argument focuses more directly on the actual parties before the court, it is less likely to be useful in cases raising novel issues. In common law cases of first impression, however, in which the court is being asked to establish a new cause of action, corrective justice arguments could be very useful.[25]

[21] *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1737–1738 (1976) (hereinafter *Form and Substance*).

[22] James Boyle, *The Anatomy of a Torts Class*, 34 Am. U. L. Rev. 1003, 1058 (1985).

[23] Social utility arguments can also be made in cases of first-time statutory interpretation, in which a court uses policy norms to decide on the application of a statute to a new situation. *See* Margolis, *supra* note 1 at 226 (citing Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 Stan. L. Rev. 1, 16 (1998)).

[24] Shapo, *supra* note 2 at 199.

[25] For a more detailed explanation of the frequency with which state courts are asked to find new causes of action, see Margolis, *supra* note 1 at 223–223 (citing Kaye, *supra* note 12 at 7).

C. Institutional Competence Arguments

The third major category of policy arguments is "institutional competence."[26] These are arguments about which branch of government (generally the judiciary or the legislature) should address a particular issue. The goal at the heart of institutional competence arguments is the fair and efficient running of the legal system, as well as the maintenance of the constitutional separation of powers. While it is generally understood that legislatures create new law and courts apply the law and resolve disputes, there is a gray area that makes room for institutional competence arguments.

The gray area is a product of the common law method in American legal decision making, even in cases involving positive law (i.e., statutes and constitutions). Under the common law method, judges have the power to fill in gaps in the law and formulate new rules. Thus, judges have a degree of legislative power, creating the potential for arguments over whether an issue is better suited to the courts or the legislature.

An argument that an issue is better suited for the courts focuses on the nature of courts as institutions set up for resolving individual disputes and dealing with complex factual issues. The argument would emphasize the court's ability to be responsive to changing circumstances, and to be objective. In addition, the court has a unique ability to entertain witnesses and make objective determinations of credibility. Finally, this argument would emphasize the court's freedom from the political constraints faced by the legislature. Because courts combine all of these abilities, the legal issue is best resolved by a court.

The argument that the legislature is better suited to resolve an issue focuses on similar concerns. This argument asserts that courts are not competent to resolve the issue because resolution involves a change in the law, which is within the legislature's province. The legislature is better able to reflect changes in public opinion, and to hold hearings and gather complex and varied facts that may not be relevant in the context of litigation. Allowing the court to create law on such an important issue would threaten the separation of powers.

[26] Kennedy, *Form and Substance*, *supra* note 21 at 1752.

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D. Economic Arguments

Economic policy arguments have become more important in modern legal decision making as a result of the Law and Economics movement.[27] Most law students and lawyers are at least somewhat familiar with economic policy arguments. A lawyer with a background in economics can make very complex economic policy arguments, but there are simpler economic arguments that all students can be taught to make. Economic arguments place economics, rather than fairness or justice, at the center of judicial decision making.[28] The goal for economic arguments is economic efficiency and promotion of a free-market economy. Economic arguments can be very persuasive because they give the appearance of scientific rigor and neutrality, often masking the political choices inherent in the arguments.[29]

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

Another form of economic argument asserts that a cost-benefit analysis dictates that a rule should be adopted. Under this analysis, the arguer must show that the economic benefits created by the rule outweigh the costs of implementing it. If the benefits do not outweigh the costs, then the rule should not be implemented. The key to a cost-benefit analysis is the determination of the factors going into the cost. In addition to obvious costs, such as the monetary cost of fixing a defective part, costs such as emotional damage can be factored in. The inclusion or exclusion of particular factors can greatly affect the nature of a cost-benefit policy argument.

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

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

## Supporting Policy Arguments with Persuasive Authority

The biggest problem with policy arguments is that, even when they are made, they are not generally supported with authority. Without support, policy arguments convey the mushy, "any position can be supported by some policy, so why should the policy have any impact?" message that causes many to be cynical about the use of policy arguments. There can be little dispute that, to be persuasive, policy arguments should be substantiated. Policy arguments should be supported just like legal arguments are supported with authority. We would never teach our students to make a legal argument off-the-cuff, without any reference to statutes or precedent that supports the argument. Similarly, we should not encourage students to make policy arguments without teaching them how to effectively support those arguments.

One source of support for policy arguments is legal authority, including cases, statutes, and legislative history. Legal authority can be particularly useful in supporting the goal underlying the argument. For example, virtually every jurisdiction has a case that identifies public safety as a valuable social goal. For the second step in policy argumentation, however, traditional sources of legal authority are often inadequate.

[27] *See* Richard A. Posner, *Economic Analysis of Law* 211–22(4th ed. 1992) (asserting that economics in the law has come to the forefront over the last 30 years).

[28] *See generally*, Shapo, *supra* note 2 at 200.

[29] Boyle, *supra* note 22 at 1059–1060.

Because, by definition, the argument is advocating a rule or application of a rule that has never been implemented, it is unlikely that existing cases and/or statutes have addressed the effect the rule will have on the goal.

Nonlegal materials[30] are often the best, and sometimes the only, support for policy arguments. It makes sense that legal arguments, which are based on precedent, should be supported by precedent, while policy arguments, which are nonprecedential,[31] should be supported by nonprecedential, nonlegal sources. Policy arguments are arguments about the effect a legal rule will have, how it will operate in the real world. Therefore, facts about the real world, rather than legal principle, are most appropriate to support these arguments.

Used in this way, nonlegal materials play the same role as nonbinding, persuasive case authority.[32] In legal writing, we teach students to use relevant persuasive authority, particularly when there is no binding authority. We would never tell students to make an argument without any authority when there was relevant persuasive authority that would support the argument. In the same way, we should not be teaching students to make policy arguments without authority, as long as there is a source of information that supports the argument.

## Conclusion

Policy arguments are an important, but often overlooked, part of appellate advocacy and brief writing. As teachers of legal writing and advocacy, it is time for us to take up the task of teaching our students to make clear and effective policy arguments in writing. It is no longer good enough to say "policy is important and you should support your legal arguments with policy rationales." We need to give our students clear, detailed information about the nature and types of policy arguments, as well as how to support them with persuasive authority. There are many challenges associated with teaching this subject. We need to learn more about policy arguments ourselves.[33] We need to think about how policy arguments should be structured, and how to effectively research nonlegal materials. Much more work can be done in determining what kinds of information provide the best support for different types of policy arguments. Finally, this is one more thing to teach in programs that already contain too much work for too little credit. In spite of the challenges, however, policy arguments are important, and the time has come to devote more attention to them.



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[30] Nonlegal materials are factual or theoretical information that is not part of the trial record of the case on appeal. This information can include scientific theory and data, sociological data, statistical information, economic theory and data, psychological theory and data, and news of current events. *See* Margolis, *supra* note 1 at 201, n.27. For a more detailed analysis of nonlegal materials and why they are appropriate to use as authority in appellate briefs, *see id.* at 202–219.

[31] *See* Boyle, *supra* note 22 at 1055.

[32] *See* Margolis, *supra* note 1 at 209.

[33] This work is really just a beginning at understanding policy arguments and how they can be used in appellate briefs. There are many more issues to be explored as we learn more about writing and teaching these often complex arguments. *See id.* at 235–236.