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The Sociological and Cognitive Dimensions of Policy-Based Persuasion

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THE SOCIOLOGICAL AND COGNITIVE DIMENSIONS OF POLICY-BASED PERSUASION

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Experts in legal advocacy have long recognized the importance of policy arguments in legal persuasion.[1] Despite the prevalence of policy arguments as tools in legal advocacy, very little scholarship has been produced instructing legal advocates on how to write effective policy arguments in their briefs. Professor Ellie Margolis addressed this oversight in modern advocacy pedagogy in her 2001 article, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*.[2] Professor Margolis' article takes a

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[1] *See, e.g.*, JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD 349–50 (4th ed. 2010); LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION 6, 310–11 (5th ed. 2010); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 309–13 (6th ed. 2009); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 264–70 (5th ed. 2008).

[2] Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy*

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number of important steps toward improving the instruction on effective policy argumentation. First, her article explains the types of legal issues that give rise to policy arguments and explores the general functions that policy arguments serve in the resolution of those issues.[3] Second, her article reviews in detail various substantive categories of policy arguments that previously had been explored in jurisprudential scholarship and examines the applicability of these categories to legal advocacy.[4] Third, Professor Margolis, in the most pragmatic part of the article, explains how legal advocates can strengthen their policy arguments by incorporating citations to persuasive authority, both legal and non-legal.[5]

Professor Margolis' article brought much-needed attention to the lack of adequate training in policy-based persuasion and offered the first formalized instruction in that area. This article builds on Professor Margolis' work by exploring policy arguments from a social science perspective. More specifically, this article examines policy-based persuasion from the standpoints of both sociology theory and cognitive psychology theory. For legal advocates to truly master the skill of policy persuasion, the cognitive processes underlying this type of advocacy must be explored and understood. Knowing the mental processes involved in policy persuasion will enable legal advocates to produce more effective arguments based on policy. Moreover, understanding how policy arguments fit within the legal system from a sociological standpoint will help advocates more fully appreciate how policy persuasion differs from other types of legal persuasion. This knowledge, too, will allow advocates to employ this strategy

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Arguments in Appellate Briefs, 62 MONT. L. REV. 59 (2001) [hereinafter Margolis, *Closing the Floodgates*]. For Professor Margolis' specific discussion of the lack of literature on making effective policy arguments, see *id.* at 60 & n.8.

   [3] *Id.* at 65–70.

   [4] *Id.* at 70–79.

   [5] *Id.* at 79–83 (applying to policy-based persuasion her general advice on citing non-legal materials in legal arguments, which she explored in her previous article, Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197 (2000) [hereinafter Margolis, *Beyond Brandeis*].

more readily and effectively. This article takes the first step in exploring policy-based persuasion from both of these social science perspectives.

Part I of this article generally defines the concept of a *policy argument* in terms of sociological principles and cognitive psychology principles. This section identifies the unique role policy-based persuasion plays in legal decision-making and explores the general mental processes underlying this type of advocacy. Part II sets out a new categorization scheme for policy arguments based on the different broad cognitive processes involved in such arguments. In this section, we will see that policy arguments, from a cognitive perspective, fall into two broad categories: policy arguments that focus primarily on the future, and policy arguments that focus on both the present and the future. The discussion of these two broad categories of policy arguments sets up the final section, Part III, where we explore specific rhetorical strategies brief writers can use to improve the effectiveness of their policy arguments. Building on the categorization scheme set out in Part II and the other principles of social science explored in Part I, this final section identifies and examines specific guidelines for maximizing the persuasive impact of policy-based advocacy.

I. A Social Science Definition of a Policy Argument

A. *A Working Example: The Interspousal Immunity Scenario*

Before we explore a definition of a policy argument in terms of sociological and cognitive principles, I will set out a hypothetical example of this type of argument. I will return to this example many times in this article to illustrate various points about policy arguments.

Assume that we are lawyers practicing in a jurisdiction that recognizes interspousal immunity as a defense to a tort suit.[6] Under interspousal immunity, a spouse as a general matter cannot

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[6] I have used this interspousal immunity example of a policy argument in my prior writings. *See* Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing 95–96 (3d ed. 2013).

sue the other spouse for injuries resulting from a tort.[7] Jurisdictions that recognize interspousal immunity generally do so for two reasons. First, these jurisdictions believe that allowing one spouse to sue another would have an embittering effect on the marriage due to the adversarial nature of litigation. Thus, in an effort to preserve marital harmony, these jurisdictions bar such suits.[8] Second, these jurisdictions also fear that allowing insured spouses to sue each other could lead to rampant insurance fraud. Because spouses live together and share finances and living expenses, there is a fear that an insured defendant spouse would not earnestly defend against the suit because a judgment for the plaintiff spouse paid by the defendant's insurer would actually benefit both spouses.[9]

Assume further that we are representing a defendant in a tort suit and are confronted with an issue of first impression in our jurisdiction: whether interspousal immunity applies to bar a suit between divorced parties for a tort committed during marriage. The plaintiff's counsel in such a scenario could logically argue that interspousal immunity should not bar the suit because the parties are no longer spouses. What's more, the plaintiff's attorney could argue that the reasons underlying the immunity do not apply in this situation because (1) there is no longer marital harmony—or even a marriage—to protect from the rigors of the adversarial process, and (2) insurance fraud is not more likely to occur in this situation than in any other arms-length lawsuit because a judgment for the plaintiff does not automatically benefit the defendant ex-spouse.

In response to this logical argument by the plaintiff's counsel, we as the defendant's counsel could make a policy argument. We could argue that allowing this suit would actually encourage divorce on a societal scale. The argument would go like this: If the court were to hold in this case that interspousal immunity does not apply to a suit between divorced spouses for a tort committed during marriage, then a spouse injured through the tortious conduct

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[7] *See generally, e.g.*, Robeson v. Int'l Indemnity Co., 282 S.E.2d 896 (Ga. 1991). The discussion of interspousal immunity in the text is based on Georgia law.

[8] *E.g.*, *id.* at 898–99.

[9] *E.g.*, *id.*

of his or her mate in the future could avoid the interspousal immunity defense by divorcing before filing suit. An injured spouse would be advised by his or her attorney that he or she could stay married to the tortfeasor and be barred from recovery or divorce the tortfeasor and seek compensation in court. It is not unlikely that many injured spouses would choose the option of divorce and recovery over the option of marriage and no recovery. Thus, from a societal standpoint, such a rule would amount to a financial incentive for divorce.

With this policy argument, we as counsel for the defendant spouse could try to persuade the court to hold that suits for torts committed during marriage are barred even if the parties divorce prior to the initiation of the lawsuit. Our argument would be based on the policies of protecting marriage as a social institution and avoiding the encouragement of divorce.

B. *The Definition of a Policy Argument*

Many definitions of a policy argument have been offered in the previous literature on the topic.[10] I, however, offer a new definition of a policy argument in terms of sociological and psychological principles:

> **A policy argument is an argument made by a legal advocate to a court that urges the court to resolve the issue before it by establishing a new rule that advances or protects a particular social value implicated by the issue.**

To see how I have arrived at this definition, the words of the definition must be examined closely.

1. *". . . to a court . . ."*

The first part of the definition states as follows: "A policy

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[10] *See* authorities cited *supra* note 1. *See also* WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT 51 (2d ed. 2008); Margolis, *Closing the Floodgates*, *supra* note 2, at 70.

argument is an argument made by a legal advocate to a court." This language highlights the fact that the definition is limited to the context of legal advocacy in the court system. Policy arguments can be made in many different contexts in society, especially in the context of the legislative processes of local, state, and federal legislatures.[11] This article, however, focuses only on the use of policy arguments by legal advocates in the context of making legal arguments to a court of law. We saw this type of policy argument in the interspousal immunity example above, where we discussed how the defendant's attorney could use a policy argument in defending his or her client in court.

2. ". . . advances or protects a particular social value . . ."

The second part of the definition that will be examined actually comes near the end: "A policy argument is an argument . . . *that advances or protects a particular social value implicated by the issue.*" In terms of cognitive processes, policy arguments persuade in a very different manner than other types of legal argumentation. Most legal arguments are based on established (and binding) legal authority such as statutes, administrative rules, and case law.[12] As a consequence, these types of legal arguments, from a cognitive standpoint, are based largely on principles of formal logic such as deductive reasoning[13] and analogical reasoning.[14] Policy

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[11] *See, e.g.*, ROBERT J. MARTINEAU & ROBERT J. MARTINEAU, JR., PLAIN ENGLISH FOR DRAFTING STATUTES AND RULES 13–19 (2012); ROBERT J. MARTINEAU & MICHAEL B. SALERNO, LEGAL, LEGISLATIVE, AND RULE DRAFTING IN PLAIN ENGLISH 93 (2005); ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 59–68 (1997).

[12] *See, e.g.*, DERNBACH ET AL., *supra* note 1, at 151 ("The relevant rules of law . . . provide the framework for your analysis . . . ."); EDWARDS, *supra* note 1, at 17 ("The foundation of any legal analysis is the relevant rule of law."); HUHN, *supra* note 10, at 51 ("There is a fundamental difference between policy arguments and the other four types of legal arguments [we have discussed]."); SHAPO ET AL., *supra* note 1, at 113 ("Begin [legal analysis] by explaining the controlling rule in the jurisdiction in which your problem is located."). *See generally, e.g.*, JAMES A. GARDNER, LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF EFFECTIVE ADVOCACY 38–39 (2d ed. 2007).

[13] *See* authorities cited *supra* note 12. Professor Gardner's entire book is

arguments, on the other hand, are not based on established legal authority[15] or on processes of formal logic. Policy arguments are instead based on an appeal to a judge's value system.

Consider the interspousal immunity scenario, for example. In that discussion, we assumed that we were legal advocates defending a party from an ex-spouse in a tort suit. As a policy argument, we argued that if the court held that interspousal immunity was inapplicable and that the suit was allowed, the precedent established by that ruling would encourage divorce as a means of bypassing the interspousal immunity defense in future tort suits between spouses. Although this argument seems logical, it is not based on principles of formal logic. Instead, it is based on an appeal to a judge's value system and, more specifically, the value the judge places on marriage as a social institution.

The unique nature of policy arguments can best be illustrated by comparing it to rule-based, or deductive, reasoning. The formal logic of deductive reasoning is predicated on a binding major premise.[16] Consider this famous example of a formal deductive syllogism:[17]

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devoted to deductive reasoning in the context of legal argument. *See generally* GARDNER, *supra* note 12.

[14] *See, e.g.*, DERNBACH ET AL., *supra* note 1, at 101–05; EDWARDS, *supra* note 1, at 106–12; HUHN, *supra* note 10, at 42–43, 119–22; SHAPO ET AL., *supra* note 1, at 62–64; Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUDIES FORUM 7, 10 (1996) [hereinafter Edwards, *The Convergence*].

[15] Policy arguments can be based on an express statement of policy underlying the relevant legal rule. However, this article focuses on the skill of crafting an original policy argument rather than the skill of formulating an argument based on an existing statement of policy. Professor Margolis also recognized the difference between these two types of policy arguments and similarly focused her articles on the skill of crafting novel policy arguments. *See* Margolis, *Beyond Brandeis*, *supra* note 5, at 211–12; Margolis, *Closing the Floodgates*, *supra* note 2, at 60.

[16] *E.g.*, GARDNER, *supra* note 12, at 4, 53–70; Anita Schnee, *Logical Reasoning "Obviously,"* 3 LEG. WRITING 105, 107–08 (1997).

[17] GARDNER, *supra* note 12, at 5.

All men are mortal.	(MAJOR PREMISE)
Socrates is a man.	(MINOR PREMISE)
Therefore, Socrates is mortal.	(CONCLUSION)

In this example, the major premise—All men are mortal—is an undeniable truism and serves as the basis for the formal deductive logic that follows it.[18] Legal arguments based on binding established rules also are grounded in the formal logic of deductive reasoning. Consider this example from James A. Gardner:[19]

In order to be enforceable, a contract must be supported by consideration.	(MAJOR PREMISE)
The contract between Tim and Mary is not supported by consideration.	(MINOR PREMISE)
Therefore, the contract between Tim and Mary is not enforceable.	(CONCLUSION)

The major premise in this syllogism—that enforceable contracts must be supported by consideration—is a rule mandated by binding law. Thus, the conclusion is not a product of choice or personal preference; it is product of formal deductive reasoning.[20]

Policy arguments function quite differently. In the interspousal immunity example, there is no binding rule (i.e., major premise) that states that a judge must avoid establishing rules that encourage divorce. Consequently, the policy argument we explored is not based on deductive reasoning flowing from an indisputable major premise. Rather, our argument—that the court should rule in our favor to avoid encouraging divorce on a societal scale—is based on an effort to tap into the judge's value for marriage as a social institution. A judge is not required to protect marriage as an institution, and our policy argument is only as strong as the judge's personal commitment to that institution.

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[18] *See id.*

[19] *Id.* at 9.

[20] *Id.* at 6–8 (discussing the "power of syllogistic reasoning").

To more fully appreciate what this means in terms of psychology theory, we must examine the nature of values in human cognition. According to renowned social psychologist Milton Rokeach, a social value is "an enduring belief that a specific . . . end-state of existence is . . . socially preferable to an opposite or converse . . . end-state of existence."[21] Thus, in Rokeach's terms, a policy argument is an argument that asks a judge to reach a conclusion that advances or protects a specific end-state of social existence over the opposite end-state of social existence. In terms of the interspousal immunity scenario, our policy argument seeks to persuade the judge that an end-state of societal existence that preserves marriages (or, at least, does not undermine them) is preferable to an end-state of existence in which the law actually encourages divorce as a mechanism for avoiding interspousal immunity.

People, however, do not hold their values in a cognitive vacuum. Rather, people possess a mental hierarchy of values in which their more cherished values are ranked as higher in importance than less cherished values.[22] As a consequence, if a person is forced to make a decision based on values and the issue under analysis implicates two or more competing values, the higher ranked value or values in the person's personal value hierarchy will generally control the decision.[23] Thus, decision-making based on values is more often not a choice between either advancing or not advancing a particular value; it is more often a decision about which of the competing values to advance.

What's more, a person's hierarchy of values is personal to him or her. The rank order of a person's values is a product of a lifetime of experiences and can—and often does—differ from person to person.[24] Thus, different people could reach different conclusions when forced to decide between the same competing

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[21] MILTON ROKEACH, THE NATURE OF HUMAN VALUES 5 (1973). Professor Rokeach discusses both personal values (like salvation and peace of mind) and social values (like world peace and brotherhood). *Id.* at 5, 7–8. Only social values are relevant to our discussion of policy arguments, so the definition of a value quoted in the text has been altered accordingly.

[22] *Id.* at 6, 14.

[23] *Id.*

[24] *Id.* at 6.

values.

The concept of a hierarchical system of values is very important to the topic of policy-based persuasion because legal issues often implicate two or more competing values. That is, the parties on both sides of a legal issue often have policy arguments,[25] and a judge's task is not to decide whether to advance an individual value in isolation, but rather to decide which value should be advanced over the other. Let's again consider our interspousal immunity example. As the attorney for the defendant in this hypothetical scenario, we argued that the suit between the ex-spouses for a marital tort should be barred because to hold otherwise would encourage divorce as a means of getting around interspousal immunity in future cases. The plaintiff's counsel, however, has competing policy arguments. The attorney for the plaintiff can argue that barring the application of interspousal immunity in this situation is supported by the policy of citizens having access to the courts to resolve conflicts as well as the policy supporting a person's right to be compensated for injuries caused by another person.[26] Thus, a judge confronted with these conflicting policy arguments must decide which end-state of existence is preferable: the social state in which the rights of legitimate claimants are sacrificed in an effort to preserve marriages on a societal scale, or the social state in which the law allows a person injured by a spouse to seek compensation in court upon divorce despite any incentive to divorce such a law may create.

Furthermore, because people's value systems (i.e., value hierarchies) differ, different judges could reach different conclusions on this issue. And it is the personal nature of value

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[25] *See, e.g.*, Edwards, *The Convergence*, *supra* note 14, at 14–15 (discussing the competing policy arguments in *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805)); Margolis, *Closing the Floodgates*, *supra* note 2, at 65 & n.34.

[26] Both of these values—access to courts and compensation for injury—are frequently used in policy-based persuasion. *See, e.g.*, Al Shimari v. CACI Premier Tech., Inc., 657 F. Supp. 2d 700, 719 (E.D. Va. 2009) ("[P]ublic policy favors granting access to the courts and resolution of conflicts through the adversarial system."); Sam v. Sam, 134 P.3d 761, 768 (N.M. 2006) ("New Mexico has a particular interest in providing compensation or access to the courts to residents of the state.").

hierarchies that most poignantly differentiates policy-based persuasion from other forms of formal legal persuasion. As we saw earlier, deductive reasoning based on binding rules and established facts results in consistent conclusions. By contrast, arguments based on policy could result in different conclusions from different judges because each judge may differ in how he or she personally ranks the values implicated by the competing policy arguments.

3. *". . . by establishing a new rule . . ."*

The third salient part of my definition of a policy argument is the language that states, "A policy argument is an argument . . . that *urges the court to resolve the issue before it by establishing a new rule*." It is here where principles of sociology become relevant. A policy argument in legal advocacy goes beyond the interests of the parties presently before the court and actually urges the court to establish a new rule that will apply to society generally.[27]

In sociology theory, the term *institutionalization* refers to the process by which a value or mode of behavior is embedded into and made a part of a social institution.[28] The law itself is commonly recognized as one of the most important and powerful

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[27] *E.g.*, Margolis, *Closing the Floodgates*, *supra* note 2, at 70 ("[A]ll policy arguments share the common attribute of advocating that a proposed legal rule will benefit society by advancing a particular social goal or, conversely, that the proposed legal rule will cause harm and should not be adopted."). *See also* SHAPO ET AL., *supra* note 1, at 264–69 (discussing policy arguments in the context of "questions of law").

[28] *See, e.g.*, Jeffrey C. Alexander, *Analytic Debates: Understanding the Relative Autonomy of Culture*, *in* CULTURE AND DEBATES: CONTEMPORARY DEBATES 1, 5–6 (Jeffery C. Alexander & Steven Seidman eds., 1990); DERIK GELDERBLOM, SOCIAL INSTITUTIONS 6–8 (2003); PHILLIP SELZNICK, LEADERSHIP IN ADMINISTRATION 5–7, 138–39 (1984); TALCOTT PARSONS ON INSTITUTIONS AND SOCIAL EVOLUTION: SELECTED WRITINGS 115–28 (L. H. Mayhew ed., 1982); John W. Meyer & Brian Rowan, *Institutional Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 341 (1977); John W. Meyer & Brian Rowan, *Introduction* to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 1, 14–15 (Walter W. Powell and Paul J. DiMaggio eds., 1991).

social institutions.[29] In terms of the social institution that is *the law* then, the process of institutionalization would refer to the act or process of embedding a value or mode of conduct within a rule of law, thereby putting the power of the government behind the protection and advancement of that value or mode of conduct, at least within the narrow area addressed by the rule.[30]

As we discussed previously, policy arguments seek to resolve an issue by asking the court to establish a new rule that would advance or protect a particular social value. Thus, in sociological terms, a policy argument seeks to institutionalize a value by encouraging a court to establish a new rule that would protect or advance that value. Likewise, if the policy argument is successful, the new rule is established for the express purpose of securing the

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[29] *E.g.*, EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF LAW 118 (4th ed. 1981) ("[T]he law [is] a social institution [designed] to satisfy social wants.") (quoting ROSCOE POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 47 (1954)); Howard Erlanger et al., *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 359 ("Decades of sociolegal scholarship have established that law is a social institution."); Richard A. Posner, *Foreword* to ESSAYS IN LAW AND ECONOMICS 5, 5 (Michael Faure & Roger Van deh Bergh eds., 1989) ("Law is a social institution of enormous antiquity and importance."); Donald E. Shelton, *Technology and the Judiciary: The Promise and the Challenge*, 39 JUDGES' J., no. 1, 2000, at 6, 6 ("The law is a social institution and evolves by societal changes, not by its own instance.").

[30] For general discussions on how the law empowers some values and disempowers others, see for example, Robert M. Cover, *The Supreme Court, 1982 Term-Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983) ("Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest."); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 865–66 (1992) ("[The law is] both: a social institution through which people tell about their relationships with others and with the state; and an authoritative language, or discourse, with the power to suppress stories and experiences not articulated in accepted forms."); Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law*, 40 WM. & MARY L. REV. 1623, 1624 (1999) (discussing Cover) ("The role of the judge . . . is purely negative. It is 'jurispathic,' or law-killing, in the sense that the judge will select one of the squalling brood of conflicting legal meanings to elevate and to enforce with the violence of the state—and will slay the rest.").

value in question.

Let's again consider the interspousal immunity example. In that example we argued that allowing a person to sue an ex-spouse for a tort committed during marriage would encourage divorce in the future as a means of getting around interspousal immunity. Thus, we argued that the court should establish a new rule that a person cannot sue an ex-spouse for a marital tort even if the person divorces the potential defendant prior to filing suit. By making this argument, we were asking the court to institutionalize within the legal institution the value of protecting marriages, at least within this narrow context. And if our argument was successful and the court established this new rule, the new rule would exist for the express purpose of protecting marriage on a societal scale, even at the sacrifice of the competing values of compensation for injuries and access to the courts.

This aspect of policy-based persuasion—the aspect that seeks the establishment of a new rule of law—is what differentiates policy persuasion from a related form of legal persuasion called narrative persuasion. Narrative persuasion, or fact-based persuasion, occurs when a legal advocate includes facts in his or her brief that are not relevant to the legal issue before the court but which put the advocate's client in a favorable light or the opposing party in an unfavorable light.[31] Narrative persuasion is designed to motivate the decision-maker into wanting to rule in favor of the advocate's client or, at least, against the opposing party.[32]

Like policy persuasion, narrative persuasion is based on an appeal to a judge's values.[33] In narrative persuasion, an advocate includes facts that are designed to implicate a value reflected by those facts. Unlike policy persuasion, however, narrative persuasion does not seek to have that value embedded into a new

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[31] *E.g.*, Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 LEGAL COMM. & RHETORIC: J. ALWD 99, 102 (2012) (citing NEUMANN, *supra* note 1, at 309–11; Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING 53 (2008)). *See also, e.g.*, SHAPO ET AL., *supra* note 1, at 414–19.

[32] NEUMANN, *supra* note 1, at 309–11; Chestek, *supra* note 31, at 102.

[33] *E.g.*, Edwards, *The Convergence*, *supra* note 14, at 11 ("Narrative reasoning evaluates a litigant's story against cultural narratives and the moral values and themes these narratives encode.").

rule of law. Rather, the facts are included to persuade and influence the judge separate and apart from the law applicable to the issue before the court.[34]

The case of *Springham v. Kordek*[35] highlights the similarities and differences between policy-based persuasion and narrative persuasion. In my prior writings, I summarized the facts of *Springham* as follows:[36]

> In *Springham*, the adult surviving children of an abandoned mother sued their estranged father after he attempted, following his wife's death, to sell the family home and retain all of the proceeds. The facts of the case showed that the father had abandoned his wife and four minor children years earlier and that the children, upon reaching adulthood, helped their mother make the mortgage payments on her home. The mortgage on the home was in the names of both the mother and the father; thus, the children's efforts to avoid foreclosure benefitted both their mother and their absentee father. After the mother died, the father reentered the scene to claim the property and to sell it. The children then filed suit to enjoin the father's sale of the property and to impose a lien on the property as subrogees for the mortgage payments they had made.
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> The trial court ruled in favor of the father, and the children appealed. The main issue on appeal was whether the children had gained rights as subrogees or whether they had acted as mere "volunteers" or "intermeddlers," who were not entitled to rights of subrogation. The appellate court reversed the trial court and held that the children did acquire lien rights under Maryland's law of

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[34] NEUMANN, *supra* note 1, at 309–11; SHAPO ET AL., *supra* note 1, at 414–19; Chestek, *supra* note 31, at 102.

[35] 462 A.2d 567 (Md. Ct. Spec. App. 1983).

[36] I have used the *Springham* case in the past to illustrate narrative persuasion. *See* SMITH, *supra* note 6, at 92–94.

subrogation.[37]

During the appeal, the children's attorney, in addition to arguing the relevant law of subrogation, had the opportunity to engage in narrative persuasion by including facts that portrayed the father as being ungrateful for the children's efforts in saving his home from foreclosure. By including and highlighting facts regarding the father's surprisingly callous attitude toward the children, the attorney could activate the appellate judges' values for gratefulness and appreciativeness and, in so doing, tacitly motivate the court to root against the father in the final resolution of the legal issue.

The appellate briefs for the *Springham* case are not available on electronic databases, so we can't know for sure if the attorney for the children engaged in this type of persuasion in the brief to the court. What we do know is that the court was significantly motivated by these facts to view the father in a less-than-favorable light. In fact, genuine animus toward the father is reflected in several places in the court's published opinion. Judge Solomon Liss began his opinion for the court with a biting literary reference to Shakespeare's *King Lear*:

> Shakespeare, in his tragedy "King Lear," portrayed the bitterness of a parent plagued by ungrateful children. In Act I, IV 283, Lear laments,
>
>> Ingratitude, thou marble hearted fiend,
>> More hideous, when thou shows't thee in a child,
>> Than the sea monster.
>
> And again, in Act I, IV 312, Lear cries out,
>
>> How sharper than a serpent's tooth it is
>> To have a thankless child.
>
> This case illustrates that ingratitude is not the sole prerogative of ungrateful children.[38]

Later in the opinion, the court addresses the father's claim that the children acted as intermeddlers who "interfered with his

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[37] *Id.* at 92–93.

[38] *Springham*, 462 A.2d at 568.

liability for the debt."[39] Responding to this claim with incredulity and dismay toward the father, the opinion states:

> The appellee perhaps gives his children less credit than they deserve. It is obvious that they knew that by making the mortgage payments they protected not only their mother but their father as well. To suggest that the father has shown less than the minimum of gratitude which might be expected is to state the obvious.[40]

It comes as no surprise to the readers of the opinion that the court, in the end, decided against the father and in favor of the children's rights as subrogees.[41] To the extent that the law of subrogation was ambiguous on the issues before the court, it is safe to assume that the court was motivated by the facts of the case to resolve those ambiguities in favor of the children.

While the *Springham* case shows how narrative persuasion can be a powerful tool of advocacy, it also demonstrates how narrative persuasion differs from policy persuasion. The attorney for the children in this case had the opportunity to use facts to activate values favorable to his clients. However, the attorney was not in a position to seek to institutionalize those values in a new rule of law. That is, the attorney could not advocate that there should be a separate rule under the law of subrogation for subrogors who act in an ungrateful manner. The father's conduct was not legally relevant to the issues of subrogation law before the court, and the court did not expressly rule in the children's favor based on the father's ingratitude. Rather, these facts worked behind the scenes to motivate the court to rule against the father.

Policy-based persuasion, in contrast, uses values in a more overt manner. A policy argument not only activates a judge's values, but also asks the judge to institutionalize those values in a new rule of law. Thus, while both policy-based persuasion and narrative persuasion rely on an appeal to values, they differ dramatically from a sociological standpoint. Only in policy-based persuasion does an advocate seek to create new law in an effort to

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[39] *Id.* at 570.

[40] *Id.* at 570 n.3.

[41] *Id.* at 458–59.

advance or protect the implicated values.

Further blurring the line between policy-based persuasion and narrative persuasion is the fact that a single value can serve as the basis for both types of advocacy. Consider, for example, the value of fairness. Fairness commonly serves as the basis for narrative persuasion, as advocates often have an opportunity to incorporate in their briefs facts that may not be relevant to the legal issue before the court but which nevertheless demonstrate the unfairness of the opposing party's conduct or position. We can see the use of the value of fairness in narrative persuasion in the *Springham* case discussed above. While the court chose to characterize the father's behavior toward his children in terms of the more specific concept of ungratefulness, the court could have just as easily described the father's behavior in terms of the more general concept of unfairness. To be sure, the father in *Springham* acted unfairly when he ungratefully sought to divest his children of any interest in the family home after they had single-handedly saved the home from foreclosure. And while the unfairness of the father's conduct was not relevant to the issues of subrogation law facing the *Springham* court, these facts and the general value of fairness they invoked worked behind the scenes to motivate the court to rule against the father on the real legal issue presented in the case.

The value of fairness, however, can also underlie policy-based persuasion. Consider, for example, the case of *Ahtna Tene Nene v. Alaska Dept. of Fish & Game*.[42] One of the issues in the *Ahtna* case was whether a *pro se* litigant (named Manning) who had graduated from law school but who had not become a member of the Alaska state bar could collect attorney fees for his own work in the litigation.[43] The party opposing the award of attorney's fees had the opportunity to argue, in addition to other arguments, a policy argument based on fairness: that it would be unfair to allow a person to take advantage of the benefits of being a lawyer when that person is not subject to the burdens associated with being a lawyer.[44] The Alaska Supreme Court found the policy of fairness

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[42] 288 P.3d 452 (Alaska 2012).

[43] *Id.* at 461–63.

[44] *See* Brief of Appellant at 10–11, Ahtna Tene Nene v. Alaska Dept. of Fish & Game, 288 P.3d 452 (Alaska 2012) (Nos. S-13968, S-14297), 2011 WL

to be persuasive and expressly included it as one of the court's rationales for its holding that *pro se* law graduates who are not members of the state bar cannot collect attorney's fees:

> Moreover, the policy rationales for denying fee awards to lay pro se litigants apply equally to law school graduates who are not licensed to practice.
>
> . . .
>
> > [Manning] does not pay bar dues . . ., is not subject to the Alaska Rules of Professional Conduct, is not subject to the Alaska Bar Rules, does not maintain a year round legal staff . . . or law office . . ., does not carry legal malpractice insurance, does not have an IOLTA account [Interest on Lawyers Trust Account], does not provide pro bono services to the indigent, is not available for Administrative Rule 12 legal assignments, and does not serve on discipline, fee arbitration, or other committees or volunteer programs within the Alaska Bar Association.
>
> Allowing Manning to reap the benefits of being a lawyer, including the ability to recover fees, without taking on the obligations and responsibilities of being a lawyer is *fundamentally unfair*.[45]

This quote shows that the Alaska Supreme Court expressly based its holding, at least in part, on the value of fairness. Consistent with policy-based persuasion and policy-based decision-making, the value of fairness did not merely operate behind the scenes in *Ahtna*. Instead, the court institutionalized the value of fairness as a component of the court's newly established

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7449957. Although the attorney did not argue fairness expressly, he did argue the facts that served as the basis for the court's ruling in this regard. *See id.*

   [45] *Ahtna*, 288 P.3d at 462–63 (alteration in original) (emphasis added) (quoting the superior court).

rule of law. Thus, the *Ahtna* case demonstrates that policy arguments can be based on the value of fairness.[46] More important for the present discussion, however, the juxtaposition of the *Ahtna* case with the *Springham* case shows how policy-based persuasion based on the value of fairness differs substantially from narrative persuasion based on the value of fairness.

II. TYPES OF POLICY ARGUMENTS

The previous literature on policy arguments in legal advocacy discusses a four-category organizational scheme.[47] This categorization is based on the types of values implicated by policy arguments. Professors Helene S. Shapo, Marilyn R. Walter, and Elizabeth Fajans offer this summary:

> Policy arguments can be categorized in many ways, but one useful system is to divide them into four basic groups: normative arguments, that is, arguments about shared values and goals that the law should promote; economic arguments, which look at the economic consequences of a rule; institutional competence arguments, that is structural arguments about the proper relationship of courts to other courts and courts to other branches of government; and judicial administration arguments, arguments about the practical effects of a ruling on the administration of justice.[48]

This list of types of policy arguments is useful in brief writing

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[46] *But see* EDWARDS, *supra* note 1, at 6 (suggesting that the value of fairness is applicable to narrative persuasion only); Edwards, *The Convergence*, *supra* note 14, at 16–17 (same).

[47] EDWARDS, *supra* note 1, at 94–95; SHAPO ET AL., *supra* note 1, at 264–69; Margolis, *Closing the Floodgates*, *supra* note 2, at 70–79. Before these categories of policy arguments were discussed in the context of legal persuasion, they were originally discussed in the context of jurisprudence scholarship by Professor Duncan Kennedy and later by Professor James Boyle. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003, 1055–60 (1985).

[48] SHAPO ET AL., *supra* note 1, at 264.

as a reminder of the types of arguments legal advocates should consider in crafting their briefs. However, this organizational scheme is less helpful from a cognitive psychology standpoint because there is no evidence that any one of these categories is cognitively more persuasive than any other. Thus, I will offer an alternative organizational scheme for policy arguments from a cognitive perspective.

In terms of cognitive processes, policy arguments can be divided into two main categories: (1) Policy Arguments Based on Future Implications Only, and (2) Policy Arguments Based on Present and Future Implications. The significance of these categories will become evident in Part III of this article, where we will explore strategies for improving the effectiveness of policy-based persuasion.

A. Policy Arguments Based on Future Implications Only

The first category covers policy arguments that are designed to protect the implicated social value *in the future*, but which are not designed to protect that value in the case presently before the court. These types of policy arguments tacitly recognize that it is too late to protect the value in the present case and instead seek to protect that value in the future through the establishment of a new rule of law. Let's consider some examples:

1. *The interspousal immunity example (from the defendant's perspective)* - As you will recall, previously I posited the hypothetical issue of whether interspousal immunity should bar a suit between divorced spouses for a tort committed during the marriage of the parties. In that context, we first explored a policy argument for the defending party. As attorneys for the defendant, we argued that the court should bar this type of suit because if it were allowed, divorce would be encouraged in the future as a means of getting around interspousal immunity.[49] This argument, in the resolution of the hypothetical present case, advocates for a new rule that would protect marriages in the future. Obviously, this argument is not designed to protect the marriage of the parties in

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[49] *See supra* Part I.A.

the present case. The parties have already divorced, and there is nothing the court could do to prevent that short of traveling back in time. Thus, this policy argument focuses on the future only; it asks the court to resolve the present case by establishing a rule that would protect the institution of marriage in the future.

2. *Klinger v. Adams County School District and the definition of "expenses"* - The second example of a "future implications only" policy argument comes from the case of *Klinger v. Adams County School District*.[50] In *Klinger*, a teacher violated a Colorado statute that requires public school teachers to give the employing school district written notice of termination at least 30 days prior to the beginning of a new school year.[51] If a teacher gives late notice, the statute authorizes the school district to withhold from the teacher's final paycheck the "expenses" incurred by the district in hiring a replacement teacher.[52] After Ms. Klinger gave a late notice of termination to the Adams County School District, the District asked some salaried employees to allocate some of their time to the task of hiring a replacement for Ms. Klinger.[53] After a replacement teacher was hired, the School District determined the monetary value of the reallocated salaried-employees' time and deducted that amount from Ms. Klinger's final paycheck.[54] The issue addressed by the Colorado Supreme Court in this case was whether the term "expenses" in the statute includes only out-of-pocket expenditures or whether it also includes the monetary value of reallocated salaried-employees time.[55]

In addressing this issue, the attorneys for the School District argued that the term "expenses" should be interpreted to include employee time for policy reasons. The attorneys argued that the statutory term should be interpreted broadly—i.e., that it should include more expenses rather than less—so that the provision would serve as a strong deterrent against teachers giving late

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[50] 130 P.3d 1027 (Colo. 2006).

[51] *Id.* at 1029–30 (discussing COLO. REV. STAT. § 22-63-202(2)(a) (2005)).

[52] *Id.* at 1029.

[53] *Id.* at 1030.

[54] *Id.*

[55] *See id.*

notices of termination in the future.[56] The attorneys for the School District explained that late notices and the resulting late hiring processes undermine the state's school districts' ability to offer quality education to students in several ways: first, late hiring involves a depleted pool of less-qualified applicants; second, late hiring distracts the other teachers from preparing for the new school year; and third, teachers hired late in the process are less prepared for the start of new school year.[57]

The School District's policy argument can be characterized as a "future implications only" policy argument because the argument's goal of protecting education applies to the future only. Obviously, a broad interpretation of the statutory word "expenses" could not deter Ms. Klinger herself from giving a late notice of termination. She had already given a late notice, and the consequences of that late notice were already incurred by the School District. Thus, the School District's policy argument did not seek to protect the educational process from Ms. Klinger's conduct specifically; the argument called for the court to resolve Ms. Klinger's case by establishing a new rule that would protect education in the future.

3. *Smith v. United States and "using a firearm"* - The case of *Smith v. United States*[58] involved a federal criminal statute that enhances a criminal's punishment if he or she "*uses . . . a firearm*" during and in relation to a drug-trafficking crime.[59] In that case, the defendant, Smith, used a firearm as an item of barter when he attempted to trade the firearm to an undercover officer in exchange for drugs.[60] The issue before the United States Supreme Court was whether the statutory phrase "uses . . . a firearm" applies only to

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[56] Answer Brief for Petitioner at 11–15, Klinger v. Adams Cnty. Sch. Dist., 130 P.3d 1027 (Colo. 2006) (No. 04SC724), 2005 WL 2211410.

[57] This argument is made most clearly in the amicus brief of the Colorado School Board Association. *See* Brief of Amicus Curiae Colorado Association of School Boards in Support of Respondents at 6–8, Klinger v. Adams Cnty. Sch. Dist., 130 P.3d 1027 (Colo. 2006) (No. 04SC724), 2005 WL 2211411.

[58] 508 U.S. 223 (1993).

[59] *Id.* at 226–27 (emphasis added) (interpreting 18 U.S.C. § 924(c)(1) (1990)).

[60] *Id.* at 225–26.

using a firearm as a weapon or whether it also includes using a firearm as an item of barter.[61] The prosecuting attorney argued, among other things, that the phrase in question should be interpreted broadly for the policy reasons of citizen safety and violence prevention. More specifically, the prosecuting attorney argued that the presence of a gun at a drug deal injects an element of dangerousness into the situation even if the gun is there as an item of trade. Consequently, the prosecuting attorney argued that the phrase "use a firearm" should be interpreted broadly to discourage drug dealers from taking firearms to drug transactions.[62] The Supreme Court agreed with the prosecution and upheld Smith's conviction under the firearms statute.[63]

The prosecutor's policy argument in *Smith* was a "future implications only" policy argument. The prosecutor argued that the Court should uphold Smith's conviction in order to set a precedent that would discourage future behavior. The argument was not designed to deter Smith himself from taking a gun to a drug transaction. He had already done that. Thus, the argument's goal was to have the Court resolve the present case based on the precedent the case could establish and the impact that precedent would have on the future.

4. *The "closing the floodgates" example* - The final example of a "future implications only" policy argument highlights how common and widespread these types of policy arguments are in legal advocacy. I refer to the popular "floodgates of litigation" policy argument.[64] As Professor Margolis explains,

> [t]his argument asserts that the proposed rule, if adopted, will inundate the court with lawsuits. This may occur because the proposed rule is confusing, overly broad, or the problem it addresses is

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[61] *Id.* at 225, 227.

[62] *See* Brief for the United States at 29–30, Smith v. United States, 508 U.S. 223 (1993) (No. 91-8674), 1992 WL 547234.

[63] *Smith*, 508 U.S. at 238–41.

[64] The popularity of the "floodgates of ligation" policy argument is reflected in Professor Margolis' article, both in the title and in her statement that "[t]his argument is much overused." *See* Margolis, *Closing the Floodgates*, *supra* note 2, at 59, 73 n.74.

extremely common. According to this argument, the "flood" of litigation would overwhelm the courts and lead to inefficient use of the courts' valuable time and resources.[65]

The "floodgates of litigation" policy argument is also a "future implications only" policy argument. When an advocate makes this argument, the advocate is encouraging a court to issue a ruling that will prevent a flood of litigation in the future. Obviously, the court cannot prevent the present litigation because it already exists. Thus, the argument asks the court to establish a rule that will protect judicial resources from future cases only.

B. Policy Arguments Based on Present and Future Implications

The second category of policy arguments covers policy arguments that apply both to the case presently before the court as well as to future cases on the same issue. As we saw, policy arguments that fall under the previous category focus exclusively on the precedent that the present case can establish and the potential impact of that precedent in the future. Policy arguments that fall under this second category function very differently; they focus on both the present and the future. In terms of the present, these types of policy arguments explain how a particular social value dictates a result in the case presently before the court. In terms of the future, these types of policy arguments rely on the idea that a favorable ruling in the present case will establish a precedent that will continue to protect the implicated social value going forward. Here are three examples:

1. *The interspousal immunity example (from the plaintiff's perspective)* - In the previous section, we saw how the policy argument for the defendant in the interspousal immunity example qualifies as a "future implications only" policy argument.[66] By contrast, the policy arguments for the plaintiff on that same issue can be characterized as "present and future implications" policy arguments. Recall that the issue we explored in this hypothetical

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[65] *Id.* at 73.

[66] *See supra* Part II.A.1.

scenario was whether interspousal immunity should bar a suit between divorced spouses for a tort committed during the marriage of the parties. In this context, we explored two policy arguments that the plaintiff could raise. First, from the perspective of the plaintiff, we argued that the immunity doctrine should not apply and the suit should be allowed because of the policy that favors allowing citizens to have access to the court system to resolve grievances. Second, we argued that the suit should be allowed because of the policy that supports compensating a person who is injured by the tortious conduct of another.[67]

Unlike with "future implications only" policy arguments, these arguments for the plaintiff have implications for the present case as well as future cases. Clearly, the present plaintiff would like access to the courts to seek compensation for his or her injuries. And if a court was persuaded by these policy arguments and held that a divorced spouse could sue an ex-spouse for a martial tort, this ruling would enable the present plaintiff to do just that. In terms of the future, the ruling would serve as a precedential rule of law that would apply to future cases. This new rule would institutionalize the values of access to the courts and compensation for the injured in this limited context and would guarantee the right to sue in like cases in the future. Thus, whereas the "future implications only" policy arguments we explored in the previous section sought to protect or advance a social value in the future only, "present and future implications" policy arguments have relevance and applicability to the case at hand as well as to future cases on the same issue.

2. *Ahtna Tene Nene v. Alaska Dept. of Fish & Game* - Earlier, we discussed the *Ahtna* case, where the issue before the Alaska Supreme Court was whether attorney fees could be awarded to a *pro se* litigant who graduated from law school but who was not a member of the state bar.[68] In that example, we explored a policy argument raised by the party advocating against the attorney's fees. That policy argument was based on the value of fairness and asserted that it would be "fundamentally unfair" to allow a person

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[67] *See supra* text accompanying note 26.

[68] *See supra* text accompanying notes 42–45.

to collect fees as an attorney when that person is not subject to the duties and responsibilities of bar membership.[69] This policy argument can also be characterized as a "present and future implications" policy argument. The policy argument was used to convince the court to establish a rule that denied attorney's fees to the law graduate in that case.[70] The ruling in the *Ahtna* case, however, also established a precedent that will prevent the recovery of attorney's fees by similarly-situated law graduates in the future. Thus, the policy argument had implications on the case presently before the court as well as on future cases involving the same issue.

3. *Constitutional civil rights cases and Illinois v. Caballes*[71] - Most policy arguments in cases involving constitutional civil rights can also be classified as "present and future implications" policy arguments. This is true because most issues of constitutional rights are resolved based on policy considerations,[72] and the policy considerations are typically applicable to the present litigants as well as future similarly-situated litigants. By way of example, let's consider the case of *Illinois v. Caballes*.

In *Caballes*, a criminal defendant sought to have evidence of illegal drugs found in his automobile excluded from his prosecution based on the assertion that it was obtained during an illegal search.[73] The facts showed that police pulled Caballes over for a traffic violation and, without suspicion of drug use, used a drug-sniffing dog from outside the automobile to smell for drugs within the automobile.[74] The dog detected the scent of drugs, and a subsequent physical search of the interior of the automobile revealed drugs.[75] The issue before the United States Supreme

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[69] *See id.*

[70] *See id.* (citing *Ahtna*, 288 P.3d at 462–63).

[71] 543 U.S. 405 (2005).

[72] *See, e.g.*, Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1540 (2000) ("The Bill of Rights is rife with terms of uncertain meaning that inescapably demand political value judgments in interpretation.").

[73] *Caballes*, 543 U.S. at 407.

[74] *Id.* at 406.

[75] *Id.*

Court was whether the use of a drug-sniffing dog from outside of a vehicle when there is no suspicion of drug use amounts to a violation of the Fourth Amendment protection against unreasonable searches.[76]

In addition to arguing by analogy based on prior Fourth Amendment precedent, the parties for both sides had the ability to argue policy. The policy underlying the prosecution's position, as is true for all unreasonable search cases, was the value of protecting society from criminal behavior.[77] The policy for the defense, not surprisingly, was based on the values of privacy and citizen protection from governmental intrusion.[78] The policy arguments for both the defense and the prosecution can be classified as "present and future implications" policy arguments because they had relevance to Caballes' case specifically as well as to future cases on the same issue. For example, from the defendant's perspective, the search infringed upon Caballes' privacy rights, and a favorable decision by the Court would protect those rights by excluding the incriminating evidence from Caballes' prosecution. The favorable ruling would also protect the value of privacy in the future by establishing a precedent that would discourage police officers from this type of conduct.

The Supreme Court ultimately held that the search was legal and that the evidence obtained in the search could be used in Caballes' prosecution.[79] Thus, the policy of protecting society against criminal conduct had implications on the case at bar, as the evidence was used to convict Caballes and society was thereby protected from his conduct. The policy also applies to the future through the precedent that the *Caballes* case established. In fact, a case with nearly identical facts arose only two months later in the

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[76] *Id.* at 407.

[77] *See, e.g.*, *id.* at 408 (quoting United States v. Jacobsen*,* 466 U.S. 109, 123 (1984)) ("We have held that any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'").

[78] *See, e.g.*, Brief for the Respondent at 13, Illinois v. Caballes, 543 U.S. 405 (2005) (No. 03-923), 2004 WL 2097415 ("The lack of physical intrusion into a motorist's trunk makes a dog sniff less intrusive than an ordinary search, but it does not mean that the sniff invades no privacy interest.").

[79] *Caballes*, 543 U.S. at 410.

Seventh Circuit. Not surprisingly, that case, *United States v. Johnson*,[80] was decided in favor of the prosecution based on the new rule established in *Caballes*.

As *Caballes* demonstrates, policy arguments in cases involving constitutional civil rights almost always have relevance to the instant case as well as to the future. Thus, policy arguments in these types of cases can readily be characterized as "present and future implications" policy arguments. The frequency of constitutional civil rights cases alone demonstrates how common this second category of policy arguments is in legal advocacy.

III. MAXIMIZING THE PERSUASIVE IMPACT OF POLICY ARGUMENTS IN LEGAL ADVOCACY

The first two parts of this article explained the general nature of policy-based persuasion in terms of sociology theory and cognitive psychology theory. This part explores specific strategies legal advocates can employ to improve the effectiveness of their policy arguments in their briefs. As we will see, social science theory, especially cognitive psychology theory, offers many insights into the human mind that can help advocates maximize the persuasive impact of policy arguments. The strategies discussed in this section are organized around the four most important cognitive processes relevant to policy-based persuasion: (A) the fear of future loss; (B) the assessment of probability; (C) the assessment of importance; and (D) memory.

A. *Take Advantage of the Fear of Future Loss*

Several cognitive phenomena, when considered together, suggest that policy arguments that focus primarily on future implications are more persuasive than policy arguments that focus on present implications. The processes at play here are the following:

- *The Uncertainty Effect*: The uncertainty effect refers to

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[80] 123 F.App'x 240, 240 (7th Cir. 2005) ("At argument, Johnson could not distinguish this case from *Caballes*, and neither can we.").

the tendency of people, when deciding between alternatives, to avoid options that reflect uncertainty.[81]

- *Status Quo Bias*: Status quo bias refers to the strong tendency of people to prefer the status quo over change.[82]

- *The Mere Exposure Effect*: The mere exposure effect refers to the tendency of people to prefer things with which they are familiar over things with which they are less familiar.[83] This effect is similar to status quo bias.[84]

All three of these processes include an element of fear. The uncertainty effect, for example, reflects a fear of uncertainty and unpredictability. Likewise, the related processes of status quo bias and the mere exposure effect reflect fears of change and unfamiliarity, respectively.

Fear is also integral to policy-based persuasion. As we explored in Part I, policy arguments are based on the assertion that a decision for the advocate will result in the betterment of society, a societal gain if you will. The corollary to this notion is that the

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[81] *See, e.g.*, ROLF DOBELLI, THE ART OF THINKING CLEARLY 239–41, 350 (Nicky Griffin trans., 2013); Uri Gneezy et al., *The Uncertainty Effect: When a Risky Prospect is Valued Less than Its Worst Possible Outcome*, 121 Q. J. ECON. 1283 (2006).

[82] *See, e.g.*, DOBELLI, *supra* note 81, at 242–44; DANIEL KAHNEMAN, THINKING, FAST AND SLOW 304–05 (2011); Shane Frederick, *Automated Choice Heuristics*, *in* HEURISTICS AND BIASES 555 (Thomas Gilovich et al. eds., 2002); W. Samuelson & R. Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK AND UNCERTAINTY 7 (1988).

[83] *See, e.g.*, Robert F. Bornstein & Catherine Craver-Lemley, *Mere Exposure Effect*, *in* COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGEMENT AND MEMORY 215, 215–34 (Rudiger F. Pohl ed., 2004); D. E. Berlyne, *Novelty, Complexity, and Hedonic Value*, 8 PERCEPTION & PSYCHOPHYSICS 279 (1970); Robert F. Bornstein, *Exposure and Affect: Overview and Meta-analysis of Research*, 106 PSYCHOL. BULL. 265 (1989); Arie W. Kruglanski et al., *Motivational Effects in the Mere Exposure Paradigm*, 26 EUR. J. SOC. PSYCHOL. 479 (1996).

[84] *See, e.g.*, Bornstein, *supra* note 83, at 265–89.

failure to implement the advocate's policy will result in a societal loss. Thus, underlying all policy arguments is a fear of loss to society and a corresponding desire to avoid that loss.

Recall that in Part II of this article we explored two primary types of policy arguments: "future implications only" policy arguments and "present and future implications" policy arguments. While both of these types of policy arguments invoke a fear of loss, the three cognitive phenomena discussed above suggest that policy arguments that warn against future loss are more persuasive than policy arguments that warn against immediate loss. For one thing, "future implications only" policy arguments, by definition, focus on the future and, as such, trigger the fear of uncertainty and unpredictability. The consequences warned of in a "future implications only" policy argument will occur only in the future and, thus, are imbued with the uncertainty that accompanies all future predictions. By contrast, "present and future implications" policy arguments focus on consequences that will occur in the present case as well as in the future. The "present" consequences will occur immediately upon the judge's decision and, thus, are known and predictable. And even though the ruling, as precedent, would also impact the future, the future impact is predictable as well because it is the same as the present impact. Thus, the uncertainty effect suggests that policy arguments that warn of future loss only are more motivating and persuasive than policy arguments that are based on an immediate impact.

Status quo bias and the mere exposure effect also suggest that in the context of policy-based persuasion, the fear of future loss is more persuasive than the fear of immediate loss. The future negative consequences warned of in a "future implications only" policy argument represent more change and unfamiliarity than the negative consequences underlying a "present and future implications" policy argument. The negative consequences of a "present and future implications" policy argument are more readily envisioned by and comprehendible to a judge because those consequences would occur immediately upon the judge's decision. Conversely, the negative consequences underlying a "future implications only" policy argument are less appreciable to a judge because those consequences would occur only in the more distant future. By virtue of their temporal proximity, the consequences of

a "present and future implications" policy argument seem more natural and familiar than consequences that would take place only in the future. Moreover, because future potential consequences seem less familiar, they represent a more dramatic change from the status quo than more easily envisioned changes that would take effect immediately.

By way of example, let's again consider the interspousal immunity hypothetical. In that example, we considered the issue of whether interspousal immunity should bar a suit between divorced spouses for a tort committed while the parties were married. As you will recall, the defendant's policy argument on this issue was a "future implications only" policy argument: that allowing this suit would establish a precedent that would encourage divorce in the future as a means of avoiding interspousal immunity. One the other side of the issue, the plaintiff had "present and future implications" policy arguments: that the suit should be allowed to protect citizens' rights to compensation and access to the courts.

The phenomenon of the uncertainty effect suggests that most judges would be more motivated to avoid the unpredictable future consequences underlying the defendant's policy argument than they would be to avoid the more predictable immediate consequences underlying the plaintiff's policy argument. Status quo bias and the mere exposure effect suggest the same thing. The social state of an ex-spouse being denied access to the court system, which would happen immediately upon the court's ruling to that effect, is easily imagined and tangible to a judge. And even though such a ruling for the defendant would also impact the future, the future impact is also imaginable because it is the same as the present impact: the denial of court access to legitimate claimants. By contrast, the prospect of a future social state in which the law encourages divorce seems like an unfamiliar, scary, and distant change to the social landscape. And this prospect is even scarier because the impact would occur in the future only. Because the threatened impact is not relevant to the instant case, the impact is left only to the imagination. Thus, these cognitive phenomena suggest that in the context of the interspousal immunity example, the defendant's "future implications only" policy argument would be more persuasive to a judge than the

plaintiff's "present and future implications" policy arguments because most people would be more motivated to avoid the future negative consequence than the immediate negative consequences.

Given a choice then, it seems that advocates would be better off trying to construct their policy arguments as "future implications only" policy arguments rather than "present and future implications" policy arguments. Sometimes, however, an advocate does not have a choice between these two types of policy arguments because some legal issues lend themselves only to "present and future implications" policy arguments. When this is the case, an advocate would be well advised in arguing the "present and future implications" policy argument to emphasize the potential impacts of the court's decision on the future. In fact, an advocate in this situation may want to consider explaining how the decision in the present case could begin a slippery slope[85] of increasingly bad consequences in the future. By way of example, let's take another look at the *Illinois v. Caballes* case.

Recall that in *Caballes*, the United States Supreme Court was confronted with the issue of whether a dog sniff by a police dog from outside of a vehicle constitutes an illegal search under the Fourth Amendment.[86] Recall further that the defendant in this case had a "present and future implications" policy argument based on the value of privacy.[87] In an effort to take advantage of the "fear of future loss" cognitive phenomenon, the attorney for the defendant could have stressed the possible future negative consequences that could flow from a decision allowing this type of police conduct. In fact, Justice Ruth Bader Ginsburg employed this exact strategy in

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[85] A "slippery slope" argument asserts that a particular decision in the present case will set a precedent that will lead to increasingly bad consequences in the future (i.e., a slippery slope toward undesirable results). *See, e.g.*, Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 361–62 (1985). For in-depth discussions of slippery slope arguments in the law, see generally, for example, *id.*; Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CALIF. L. REV. 1469 (1999); Mario J. Rizzo, *The Camel's Nose Is in the Tent: Rules, Theories, and Slippery Slopes*, 51 UCLA L. REV. 539 (2003); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

[86] *See supra* text accompanying notes 71–79 (discussing *Caballes v. Illinois*, 543 U.S. 405(2005)).

[87] *See id.*

her dissenting opinion in *Caballes*. In her effort to explain why the value of privacy dictated a result for the defendant, Justice Ginsburg emphasized the scary future that would result from a favorable decision for the prosecution:

> Today's decision . . . clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots. . . . Nor would motorists have constitutional grounds for complaint should police with dogs, stationed at long traffic lights, circle cars waiting for the red signal to turn green.[88]

This quote from Justice Ginsburg reflects an important advocacy strategy. In a policy argument that had implications for the present case, Justice Ginsburg nevertheless primarily focused on the future. Her argument was designed to tap into the human fear of future loss by stressing the negative consequences the case could spawn in all of our futures.

B. Increase the Perception of the Probability of the Consequences

The second group of advocacy strategies revolves around the assessment of probability. As we saw in Part I, all policy arguments focus on how the court's decision will have consequences for a particular social value. And while the immediate consequences are certain in a "present and future implications" policy argument, the asserted consequences are only speculative in a "future implications only" policy argument. It necessarily follows, then, that proving the probability of the asserted consequences is integral to this kind of policy argument. What's more, in the preceding section on the fear of future loss, we saw that even with "present and future implications" policy arguments, an advocate will often explore the possible additional "slippery slope" negative consequences that could flow from the court's decision in the present case. In these situations too, then, proving the probability of the asserted consequences is integral to the argument. Thus, for both types of policy arguments, proving

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[88] *Caballes*, 543 U.S. at 422 (Ginsburg, J., dissenting).

the probability of asserted consequences can be crucial. In this section, we will explore specific strategies by which an advocate can increase in the audience's mind the perception that a certain consequence underlying a policy argument is more probable.

1. Cite Non-Legal Materials That Help Prove the Probability of the Asserted Consequences

The first strategy for improving the perceived probability of the consequences asserted in a policy argument is to cite non-legal materials that support the assertion. Professor Margolis wrote two articles about the strategy of citing non-legal materials for policy arguments in briefs.[89] While Professor Margolis did not render this advice specifically in the context of proving probability, her advice, nevertheless, is particularly relevant here. According to Professor Margolis' general advice, a legal advocate can increase the effectiveness of a policy argument by citing non-legal materials for factual assertions that underlie the argument.[90] Examples of non-legal materials include such things as scientific studies, economic data, history scholarship, medical reports, social science studies, and news of current events.[91]

Non-legal materials such as those listed above can often be used to prove the probability of a consequence underlying a policy argument. Consider, for example, our interspousal immunity hypothetical. As the defendant in that hypothetical, we argued that the court should bar a suit between divorced spouses for a tort committed during marriage because to hold otherwise would encourage divorce in the future as a way of getting around the interspousal immunity defense. This "future implications only" policy argument is based on the assertion that future injured spouses would opt to get divorced in order to be able to sue the other spouse for compensation. But that argument begs the question: what is the probability that a married person would

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[89] *See* Margolis, *Beyond Brandeis*, *supra* note 5, at 210–19; Margolis, *Closing the Floodgates*, *supra* note 2, at 79–83.

[90] Margolis, *Beyond Brandeis*, *supra* note 5, at 210–19; Margolis, *Closing the Floodgates*, *supra* note 2, at 79–83;

[91] Margolis, *Beyond Brandeis*, *supra* note 5, at 201 n.27; Margolis, *Closing the Floodgates*, *supra* note 2, at 81 n.117.

actually terminate his or her marriage merely for the right to receive compensation for injuries? In an effort to enhance the perceived probability of this consequence, we, as attorneys for the defendant, could cite sociological studies that show that financial issues and concerns are a leading cause of divorce among Americans.[92] Such studies would help us demonstrate the likelihood that, given a choice, a significant percentage of future injured spouses would choose the option of divorce and financial recovery over the alternative option of marriage and uncompensated injury.

Professor Margolis' scholarship provides another example:

> [I]n a case in which the court is asked to impose tort liability on a mother for injury to a child caused by the mother's negligent conduct during pregnancy, the mother may argue that a duty to a fetus would be unduly intrusive because it would affect every moment of a woman's life, even before pregnancy (the policy argument). As support, she may provide medical information . . . about the many ways a woman's conduct before and during pregnancy, such as diet, physical activity and choice of work, could affect the health of a fetus.[93]

Although Professor Margolis did not phrase it as such, this excerpt is an illustration of how an advocate can enhance the perceived probability of the consequences underlying a "present and future implications" policy argument. The policy argument is based on the value of privacy and the desire to be free from unwanted intrusion into one's life. This argument can be characterized as a "present and future implications" policy argument because the value of privacy applies to the instant mother as well as future mothers. Professor Margolis' policy argument, however, comports with our earlier advice and focuses primarily on the future "slippery slope" consequences that could result from

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[92] *See, e.g.*, Kathy Chu, *Many Marriages Today Are 'Til Debt Do Us Part*, USA TODAY (May 8, 2006) http://usatoday30.usatoday.com/money/perfi/basics/2006-04-27-couples-cash-series_x.htm (discussing several surveys that show that financial issues play a large role in divorce).

[93] Margolis, *Beyond Brandeis*, *supra* note 5, at 213 (citing Chenault v. Huie, 989 S.W.2d 474, 478 (Tex. App. 1999)).

a decision in the present case. In this context, Professor Margolis explains how citing medical reports can enhance the persuasiveness of this argument. Phrased in terms of our discussion, the use of such non-legal materials can help prove the likelihood (i.e., probability) that the court's recognition of this new legal duty of the mother in the present case would lead to the asserted future negative consequences.

A real-life example of the use of non-legal materials to prove the probability of a threatened consequence in a policy argument can be seen in Justice Sandra Day O'Connor's majority opinion in *Smith v. United States*[94] Recall that the issue in *Smith* was whether the statutory phrase "uses . . . a firearm" in relation to a drug deal includes using a gun as an item of barter.[95] In answering that question in the affirmative, Justice O'Connor relied on the policy argument that guns at drug deals—even guns intended as consideration—can lead to violence. To prove the probability of her assertion, Justice O'Connor cited *The American Enterprise*, a non-legal source:

> When Congress enacted the current version of [this statute], it was no doubt aware that drugs and guns are a dangerous combination. In 1989, 56 percent of all murders in New York City were drug related; during the same period, the figure for the Nation's Capital was as high as 80 percent. The American Enterprise 100 (Jan.-Feb. 1991).[96]

As these three illustrations demonstrate, one way a legal advocate can enhance the perceived probability of the threatened consequences underlying a policy argument is to cite non-legal sources that help demonstrate the likelihood of those consequences. Such use of non-legal materials can significantly strengthen a policy argument by proving to the reader that the threatened impact on future society is a real possibility.

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[94] 508 U.S. 223 (1993). The *Smith* case was originally discussed at *supra* text accompanying notes 58–63.

[95] *Smith*, 508 U.S. at 225, 227 (interpreting 18 U.S.C. § 924(c)(1) (1990)).

[96] *Id.* at 240.

2. Combine more extreme, less likely consequences with less extreme, more likely consequences: The Conjunction Fallacy

Advocates will often want to include highly extreme and dramatic consequences in their future-oriented policy arguments. Unfortunately, as a general rule, the more extreme a consequence is, the less probable it seems. To overcome this dilemma, an advocate should consider combining the more dramatic consequence with a less dramatic, yet more likely, consequence.

Cognitive studies in probability assessment show that most people will consider the occurrence of a highly unlikely circumstance to be more probable when it is linked to a more likely circumstance. This is a cognitive phenomenon known as the *conjunction fallacy*.[97] The conjunction fallacy is best illustrated by a famous study by Amos Tversky and Daniel Kahneman. In this study, participants were asked to read the following description of a person named Linda:

> Linda is thirty-one years old, single, outspoken, and very bright. She majored in philosophy. As a student, she was deeply concerned with the issues of discrimination and social justice, and also participated in antinuclear demonstrations.[98]

The participants were then asked,

> Which alternative is more probable?
> 1. Linda is a bank teller.
> 2. Linda is a bank teller and is active in the feminist movement.[99]

Before you read on, take a minute and answer this question yourself.

During the many times this study was repeated, between

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[97] *See, e.g.*, KAHNEMAN, *supra* note 82, at 156–65; John E. Fisk, *Conjunction Fallacy*, *in* COGNITIVE ILLUSIONS, *supra* note 83, at 23–42; MASSIMO PIATTELLI-PALMARINI, INEVITABLE ILLUSIONS: HOW MISTAKES OF REASON RULE OUR MINDS 64–73 (Massimo Piattelli-Palmarini & Keith Botsford trans., 1994).

[98] KAHNEMAN, *supra* note 82, at 156.

[99] *Id.* at 158. I describe here the short version of this study, which came after much longer versions. *See id.* at 156–58.

eighty-five and ninety percent of the participants consistently chose option 2 as being more probable.[100] You may have even chosen option 2 yourself. Mathematically, however, option 1 is more probable because the probability of two events happening is always less than the probability of only one of the two happening. While it may seem likely based on her description that Linda is a feminist, it is much less likely that she is both a feminist and a bank teller than just a bank teller.[101] This common miscalculation of probability is a manifestation of the conjunction fallacy. Because Linda being a "feminist" seems likely, the human mind automatically chooses the option containing that quality even though that quality is conjoined with a less likely circumstance (being a bank teller). Thus, the chance of Linda being a bank teller seems more likely when it is linked to a more probable circumstance.[102]

Resourceful legal advocates can use this cognitive phenomenon to their advantage in policy-based persuasion. When explaining the potential negative consequences of a future-oriented policy argument, advocates should link more extreme consequences with less extreme consequences. This combination often will trigger the conjunction fallacy and cause the audience to view the extreme consequences as more probable than those consequences would seem if they were presented in isolation. We can see this strategy in action in Justice Ginsburg's dissent in the *Illinois v. Caballes* case. Recall that in arguing in favor of privacy rights and against the majority's decision to allow police to use drug-sniffing dogs on the outside of an automobile without

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[100] *Id.* at 158.

[101] Professor Kahneman explains it this way:

> Think in terms of Venn diagrams. The set of feminist bank tellers is wholly included in the set of bank tellers, as every feminist bank teller is a bank teller. Therefore the probability that Linda is a feminist bank teller must be lower than the probability of her being a bank teller.

Id. at 157.

[102] *See, e.g.*, *id.* at 159; PIATTELLI-PALMARINI, *supra* note 97, at 71–73; Fisk, *supra* note 97, at 27.

[103] Caballes, 543 U.S. at 422 (Ginsburg, J., dissenting). This quote was discussed in context. *See supra* note 88 and accompanying text.

suspicion of the driver's drug possession, Justice Ginsburg warned of slippery-slope consequences that could follow from the majority's decision:

> Today's decision . . . clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots. . . . Nor would motorists have constitutional grounds for complaint should police with dogs, stationed at long traffic lights, circle cars waiting for the red signal to turn green.[103]

Whether Justice Ginsburg did it purposefully or not, her compelling statement gets much of its power from the conjunction fallacy. The predication that police with dogs will patrol traffic lights after the *Caballes* decision would seem too extreme and improbable if it was presented in isolation. However, by combining it with the more likely consequence of police using dogs in parking lots, Justice Ginsburg's statement triggers the conjunction fallacy and, thereby, makes the more extreme consequence seem more probable.

3. Provide vivid and easily imaginable examples of future consequences: The Availability Heuristic

The last probability strategy we will discuss involves a cognitive phenomenon called the *availability heuristic*. According to the availability heuristic, people have a tendency in evaluating probability to view events or circumstances that they can readily imagine from their past experiences as being more probable than events and circumstances that have less relevance to their past experiences.[104] "According to this heuristic principle, one basis for the judgment of the likelihood of an uncertain outcome is *cognitive availability*; that is, the ease with which this outcome can be pictured or constructed. The more available an outcome is, the

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[104] *See generally, e.g.*, KAHNEMAN, *supra* note 82, at 129–45 (discussing the ground-breaking work first published in Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973)); Rolf Reber, *Availability*, *in* COGNITIVE ILLUSIONS, *supra* note 83, at 147–63.

more likely it is perceived to be."[105] In short, the availability heuristic is the process of judging probability by "the ease with which instances come to mind."[106]

Legal advocates can take advantage of the availability heuristic by including vivid, easily-imaginable examples when describing the future consequences underlying a policy argument. We can see this strategy also at work in the quote from Justice Ginsburg's dissent in the *Caballes* case discussed in the prior section. Note that both of the warned consequences—dog patrols in parking lots and dog patrols at traffic lights—are vivid and easily imaginable because we all encounter these locations on a regular basis. The ease with which these locations come to mind enhances the perceived probability of these consequences becoming a reality. Justice Ginsburg's argument, by contrast, would not have been as persuasive had she warned of dog patrols in less common—and, therefore, less cognitively available—locations, such as the holding deck of an automobile ferry or the police automobile impound lot.[107]

C. Increase the Perception of the Importance of the Consequences

In Part I, we saw that policy arguments are based on an appeal to a judge's values. It necessarily follows then that the strength of a policy argument depends largely on how *important* the judge considers the value implicated by the argument. We also saw that most questions of law implicate policy considerations on both sides of the issue and that the more important value according to the judge's personal hierarchy of values will generally control the decision to the sacrifice of the competing value or values. Thus, the cognitive processes for assessing importance, and specifically

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[105] Steven J. Sherman et al., *Imagining Can Heighten or Lower the Perceived Likelihood of Contracting a Disease: The Mediating Effect of Ease of Imagery*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 98, 98 (Thomas Gilovich et al. eds., 2002) (emphasis added).

[106] KAHNEMAN, *supra* note 82, at 129, 459 (quoting Tversky & Kahneman, *supra* note 104).

[107] Granted, these examples also would be less effective because they would potentially affect fewer people.

the cognitive processes for assessing the importance of a value, are critical to policy-based persuasion. In this section we will explore strategies by which a legal advocate can enhance in the judge's mind the perceived importance of a value implicated by a policy argument.

It is important to note that some social values can be ranked inalterably high or low in a judge's hierarchy of values and that legal advocates can do very little to influence such entrenched values. Furthermore, some commonly recurring legal issues—like constitutional issues—implicate the same competing values—such as crime control versus privacy, or public safety versus gun rights. With regard to such recurring issues, most judges have already decided which of the competing values is more important to them personally, and there is very little a legal advocate can do to alter that hierarchy in a specific case. That said, there are many times when a legal advocate can favorably influence in a judge's mind the perceived importance of a value underlying a policy argument. Many legal issues pit two or more values against each other that a judge has only rarely (if ever) compared in the past. In these circumstances, the judge must decide, without a preconceived ranking, which of the competing values is personally more important. And it is in these instances that an opportunity to persuade exists.

For example, in our interspousal immunity hypothetical, a judge must choose between the value of protecting marriage as an institution and the values of citizen access to courts and compensation for injuries. Most judges have never thought about juxtaposing these values, much less have had to choose between them. Thus, a legal advocate on either side of this issue would have an opportunity to try to enhance in the judge's mind the perceived importance of the value or values underlying the advocate's argument over the competing value or values.

1. *State Policy Arguments in Terms of Avoiding a Societal Loss Rather Than in Terms of Acquiring a Societal Gain*

Earlier, we discussed the fact that policy arguments can be viewed either as arguments designed to achieve a societal gain or

as arguments designed to avoid a societal loss.[108] Despite these two possible approaches, I have consistently used the terminology of the latter in this Part, explaining the various advocacy strategies we have covered thus far in terms of avoiding loss. I have taken this approach because several cognitive phenomena, when considered together, suggest that policy arguments are more persuasive if they are phrased in terms of avoiding a loss as opposed to acquiring a gain.

Here is a description of the relevant cognitive phenomena:

- *Loss Aversion:* Loss aversion refers to the well-documented tendency of people to be more motivated by the fear of loss than they are by the prospect of gain.[109] Consider this simple but popular example: "For most people, the fear of losing $100 is more intense than the hope of gaining $150."[110]

- *The Endowment Effect:* The endowment effect is related to loss aversion. This term refers to the tendency of people to experience more pain in giving up something they possess than the pleasure they would experience in acquiring the same thing.[111] Professor Dobelli offers this example in the context of commodities: "We consider things to be more valuable the moment we own them. In other words, if we are selling something, we charge more for it than what we ourselves would be willing to spend."[112]

- *Negativity Bias*: Negativity bias refers to the tendency of people to be more impacted by negative experiences and information than they are by positive experiences and

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[108] *See supra* Part III.A.

[109] *See, e.g.*, DOBELLI, *supra* note 81, at 95–97, 327–28 (citing the "original research that brought the *loss aversion* to light: Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk,"* 47 ECONOMETRICA 263 (1979)); KAHNEMAN, *supra* note 82, at 283–82, 300–09.

[110] KAHNEMAN, *supra* note 82, at 284.

[111] *See, e.g.*, *id.* at 289–99 (crediting Richard Thaler for the term *endowment effect*); DOBELLI, *supra* note 81, at 67–69.

[112] DOBELLI, *supra* note 81, at 67.

information.[113]

The combination of these three phenomena strongly suggests that legal advocates should phrase their policy arguments in terms of avoiding loss. While loss aversion suggests this strategy most directly, the endowment effect and negativity bias confirm this advice. Any future negative consequences resulting from a court's decision will require society to give up an existing asset: a positive or neutral state of existence. Conversely, future positive consequences represent the prospect of a societal gain. Under the endowment effect, the fear of giving up a societal asset is more powerful and motivating than the pleasure associated with acquiring a new societal asset. What's more, any discussion about avoiding a future loss is, by definition, a discussion phrased in the negative, whereas the discussion of a societal gain is necessarily positive. Negativity bias indicates that a discussion phrased in the negative is more influential and memorable than a discussion phrased in the positive.

Set out below is a list of the policy issues we have discussed so far in this article. For each issue, I explain how the policy argument in question can be phrased as avoiding a societal loss rather than as acquiring a societal gain.

- *The Interspousal Immunity Hypothetical (from the defendant's perspective):*[114] State the argument in terms of avoiding the encouragement of divorce on a societal scale (avoiding a societal loss), rather than in terms of protecting the institution of marriage (acquiring a societal gain).

- *The Interspousal Immunity Hypothetical (from the plaintiff's perspective):*[115] State the argument in terms of avoiding the infringement or diminishment of the rights to court access and compensation, rather than as protecting those rights.

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[113] *See, e.g.*, KAHNEMAN, *supra* note 82, at 302. *See generally* Roy F. Baumeister et al., *Bad Is Stronger Than Good*, 5 REV. GEN. PSYCHOL. 323 (2001); Paul Rozin & Edward B. Royzman, *Negativity Bias, Negativity Dominance, and Contagion*, 5 PERSONALITY & SOC. PSYCHOL. REV. 296 (2001).

[114] *See* discussion *supra* Part I.A.

[115] *See supra* text accompanying notes 25–26.

- *Klinger v Adams County School District and the definition of "expenses"*:[116] State the argument in terms of discouraging or deterring teachers from giving late notices of termination, rather than in terms of encouraging teachers to give timely notices. State as avoiding a reduction in the quality of education, rather than as protecting the quality of education.

- *Smith v. United States and "using a firearm"*:[117] State the argument in terms of discouraging the taking of firearms to drug transactions, rather than in terms of encouraging drug dealers to leave their guns at home. State as avoiding danger and violence, rather than as advancing public safety. (It is interesting to note that Justice O'Connor, who wrote the majority opinion in *Smith*, referred to "danger" and "violence" four times in the opinion, but made no reference to "safety" or any variation of the word "safe."[118])

- *The "closing the floodgates" example*:[119] State the argument in terms of avoiding the "flood" of litigation, rather than as protecting the resources and efficiency of the court system.

- *Ahtna Tene Nene v. Alaska Dept. of Fish & Game and "the right to attorney's fees"*:[120] State the argument in terms of avoiding "fundamental unfairness," rather than as advancing or promoting fairness.

- *Illinois v. Caballes and the "suspicionless dog sniff"*:[121] State the argument in terms of avoiding an infringement on privacy rights, rather than as securing privacy rights.

As these illustrations demonstrate, most policy arguments can

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[116] *See* discussion *supra* Part II.A.2.

[117] *See* discussion *supra* Part II.A.3.

[118] Smith v. United States, 508 U.S. 223 *passim* (2003).

[119] *See* discussion *supra* Part II.A.4.

[120] *See supra* text accompanying notes 42–45.

[121] *See* discussion *supra* Part II.B.3.

be phrased in terms of either avoiding a loss or acquiring a gain. The cognitive phenomena discussed above suggest that legal advocates should choose the former over the latter.

2. Cite Non-Legal Materials That Help Prove the Importance of the Implicated Value

In the section on probability assessment, we discussed the strategy of an advocate citing non-legal sources to enhance the perceived *probability* of a future consequence underlying a policy argument.[122] Interestingly, non-legal sources can also be used to enhance the perceived *importance* of a value implicated by a policy argument. Consider again the interspousal immunity example. Earlier we discussed the strategy of an advocate for the defense citing non-legal sources to help establish the likelihood (i.e., probability) that some injured spouses, given the opportunity, would choose to divorce their mates in order to get around the interspousal immunity defense. Non-legal sources could also be used by the defense to enhance the importance of the implicated value: the institution of marriage. An advocate, for example, could cite social science studies that demonstrate the benefits of marriage to society and the negative effects of divorce, both on the children of a marriage and on society in general.[123] Citing to such materials could help elevate the importance of marriage within the value hierarchy of the judge deciding this issue. Thus, in considering the use of non-legal materials, a legal advocate should realize that such materials can be used in two completely different capacities in a policy argument: (1) to help prove the *probability* of the asserted consequences of the policy argument, as we saw earlier in this article, and (2) to help enhance the perceived *importance* of the value implicated by the policy argument, as we can see in this section.

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[122] *See supra* Part III.B.1.

[123] *See, e.g.*, Hyun Sik Kim, *Consequences of Parental Divorce for Child Development*, 76 AM. SOC. REV. 487 (2011).

3. Cite Cases from Other Contexts That Help Prove the Importance of the Implicated Value

In addition to citing non-legal materials to prove the importance of a value implicated in a policy argument, an advocate can also cite case law for this purpose.[124] That is, an advocate can cite case law—either from another jurisdiction or from within the same jurisdiction but in a different context—that has previously recognized the importance of the value implicated in the advocate's policy argument. Using case law in this manner can help the advocate enhance the perceived importance of the value in question by demonstrating that courts have relied on that value in resolving policy questions in the past.

We can see an illustration of this strategy in the case of *Maryland v. Blackman*.[125] One of the issues in *Blackman* was whether a person has the right to use violence to resist an illegal frisk by police officers.[126] In deciding this issue, the Maryland Court of Special Appeals relied on the policy argument that in order to secure the safety of peace officers, the law should discourage citizens from engaging in violent self-help, even if they are being wronged by the police.[127] In support of this policy rationale, the court cited a prior case—*Jupiter v. Maryland*[128] — that recognized the policy against violent self-help in a completely different context. In the *Jupiter* case, the Maryland Supreme Court had articulated a policy against violent self-help in affirming the robbery conviction of a man who engaged in self-help by using a shotgun to force a store employee to sell the man beer.[129] Although the *Jupiter* case recognized the policy against violent self-help in a completely different setting, the *Blackman* court cited *Jupiter* as support for its policy conclusion:

> Close questions as to whether an officer possesses articulable suspicion must be resolved in the

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[124] Professor Margolis briefly discusses this strategy. *See* Margolis, *Closing the Floodgates*, *supra* note 2, at 80–81.

[125] 617 A.2d 619 (Md. Ct. Spec. App. 1992).

[126] *Id.* at 630–31.

[127] *Id.* at 630.

[128] 616 A.2d 412 (Md. 1992).

[129] *Id.* at 417.

courtroom and not fought out on the streets. Albeit uttered in the different context of not permitting a "claim of right" to be asserted as a defense to robbery, the words of Judge Rodowsky in *Jupiter v. State*, 328 Md. 635, 616 A.2d 412 (1992), well express our disdain for permitting self-help by way of force and violence, "There are strong public policy reasons why self-help, involving the use of force against a person, should not be condoned."[130]

As this quote illustrates, the *Blackman* court cited a case decided in a completely different context to enhance the perceived importance of the value underlying its policy rationale. That is, the author of the *Blackman* opinion used the *Jupiter* case not as authority on the substantive issue before the court, but as authority for the importance of the implicated value itself. Advocates should take notice of the strategy used by the court in *Blackman* and consider using case law from a different context (or from the same context in a different jurisdiction) to enhance the importance of the value underlying a policy argument in a brief.

4. Consider Using a Thematic Literary Reference.

In my *Advanced Legal Writing* textbook, I explore the rhetorical functions of thematic literary references in persuasive legal writing.[131] In that discussion, I specifically examine how a thematic literary reference can be used by a legal advocate to enhance the importance of a value implicated in a legal argument.[132] That discussion has relevance here in our exploration of strategies for increasing the perceived importance of a value in the context of policy-based persuasion.

As I define it in my book, a *thematic literary reference* occurs when "a persuasive writer, in making an argument, includes a reference to a literary work the theme of which supports the writer's argument."[133] Much scholarship has been produced in the

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[130] *Blackman*, 617 A.2d at 630.

[131] *See* SMITH, *supra* note 6, at 285–97.

[132] *Id.* at 291–95.

[133] *Id.* at 285.

field of cognitive science that demonstrates that the reading of literary works helps shape a person's values and morals.[134] According to this scholarship, when people read literary works, they are allowed to observe and vicariously experience the consequences of certain types of behavior and, by so doing, develop and refine their values systems.[135] As Mark Johnson put it, "Fictional narratives provide us with rich, humanly realistic experimental settings in which we can make our own moral explorations."[136]

Here is my prior explanation of how a thematic literary reference can enhance the perceived importance of a value implicated in a legal argument:

> [O]ne strategy in persuasion is to attempt to elevate in the mind of the decision-maker the importance of the value supporting an advocate's position over the competing values. If literary works helped to form the favorable value in the mind of the decision-maker in the first place, then an allusion to one of these literary works can serve to activate and enhance the importance of that value among and in relation to the various other values in the decision-maker's value system. Referring to a literary work that is part of the decision-maker's mental storehouse of literary texts allows the decision-maker to "relive" the original experience of reading that text. As Professor Johnson explained above, the decision-maker's original reading of the text helped to form the value in question by allowing him or her to see the implications and consequences of that value within the "experimental setting" of literary fiction. A later allusion to that text in a persuasive document allows the decision-maker to re-experience that imaginary journey of discovery and to again appreciate the importance of the value or

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[134] *See, e.g.*, *id.* at 293 (discussing MARK JOHNSON, MORAL IMAGINATION: IMPLICATIONS OF COGNITIVE SCIENCE FOR ETHICS (1994)).

[135] *See, e.g.*, *id.*

[136] *Id.* (quoting JOHNSON, *supra* note 134, at 198).

lesson learned on that journey. Thus, for issues that implicate competing yet equally ranked values in the mind of the decision-maker, the incorporation of a reference to a literary work that aided in the original formation of one of those values has the power to enhance the importance of that value over the competing values. Consequently, that value will likely play a greater role in the ultimate decision by the decision-maker.[137]

We can see an example of the use of a thematic literary reference in a policy argument in Justice William Brennan's dissent in the case of *Florida v. Riley*.[138] In *Riley*, the majority of the United States Supreme Court upheld warrantless police helicopter surveillance from an altitude of 400 feet.[139] In his dissent, Justice Brennan made a policy argument based on the value of privacy and offered the following thematic reference to George Orwell's novel, *1984*:

> The Fourth Amendment demands that we temper our efforts to apprehend criminals with a concern for the impact on our fundamental liberties of the methods we use. I hope it will be a matter of concern to my colleagues that the police surveillance methods they would sanction were among those described 40 years ago in George Orwell's dread vision of life in the 1980's:
>
> > The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said. . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It

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[137] *Id.* at 294.

[138] 488 U.S. 445, 456–67 (1989) (Brennan, J., dissenting).

[139] *Id*. at 450–52 (majority opinion).

> was the Police Patrol, snooping into
> people's windows.
>
Nineteen Eighty-Four 4 (1949).

> Who can read this passage without a
> shudder, and without the instinctive reaction that it
> depicts life in some country other than ours? I
> respectfully dissent.[140]

For those who read *1984*, the novel likely played a role in the formation and solidification of the value of privacy from governmental intrusion. Thus, Justice Brennan's literary allusion to this work was designed to enhance in the minds of his readers the perceived importance of the value of privacy. This was done in an effort to prove that the majority reached the wrong result by sacrificing the value of privacy in the name of the competing social value of crime prevention.

As we can see from this example, a thematic literary reference can add significant force to an argument based on an appeal to values. Because all policy arguments, by definition, are based on an appeal to values, this strategy is available to legal advocates in this context. For more information on how specifically to construct a thematic literary reference, I encourage you to read my lengthy treatment of this topic in my textbook.[141]

D. Increase the Memorability of the Policy Argument

The final cognitive process relevant to policy-based persuasion is memorability. A policy argument in a brief is persuasive only if the reader can remember the argument after he or she puts the brief down. Thus, the memorability of the argument is also critical in policy-based persuasion.

For our purposes, the most important cognitive phenomenon regarding memorability is the *Van Restorff Effect*. According to the Van Restorff Effect, people remember things that are highlighted or that otherwise stand out from their surroundings.[142] While that

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[140] *Id.* at 466–67 (Brennan, J., dissenting).

[141] *See* SMITH, *supra* note 6, at 285–97.

[142] *See, e.g.*, R. Reed Hunt, *The Subtlety of Distinctiveness: What von Restorff Really Did*, 2 PSYCHONOMIC BULL. & REV. 105 (1995).

concept seems like common sense, cognitive research confirms it. Thus, the final general strategy for improving a policy argument in a brief is to make it stand out from the rest of the brief.

One way to make a policy argument stand out in a brief is to give the argument its own section in the brief, together with its own point heading.[143] The literature on brief writing provides conflicting advice on whether a policy argument in a legal brief should be interwoven with another argument or whether it should be given its own section and point heading.[144] From a memorability standpoint, however, the Van Restorff Effect strongly suggests that a policy argument in a brief should be presented prominently, not subtlely.[145]

The second way to draw attention to a policy argument is to incorporate poetic language. Cognitive scientists have confirmed what classical rhetoricians have long known: ideas expressed with rhetorical flair are more memorable than ideas expressed in common prose.[146]

Many rhetorical devices, called figures of speech, have been identified as giving language a poetic quality.[147] Some of these figures of speech are familiar to most of us, like metaphor, simile, and alliteration. Others are less known and can have bizarre-

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[143] *See, e.g.*, Robert F. Lorch, Jr., *Text-Signaling Devices and Their Effects on Reading and Memory Processes*, 1 EDUC. PSYCHOL. REV. 209 (1989).

[144] *Compare, e.g.*, CAROLE C. BERRY, EFFECTIVE APPELLATE ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT 111 (3d ed. 2003) ("The advocate should not separate the equity and policy arguments from the arguments of fact and law."), *and* MICHAEL R. FONTHAM ET AL., PERSUASIVE WRITTEN AND ORAL ADVOCACY IN TRIAL AND APPELLATE COURTS 92 (2002) ("You should use [policy arguments] to reinforce the argument rather than as main points."), *with* BRADLEY G. CLARY ET AL., ADVOCACY ON APPEAL 75 (3d ed. 2008) ("In terms of the organization of your argument, a discussion of these public policy considerations may fit after you have laid out your legal analysis and may warrant one or several separate argument subheadings.").

[145] *See, e.g.*, Lorch, *supra* note 143.

[146] For the cognitive science perspective, see for example Matthew S. McGlone & Jessica Tofighbakhsh, *Birds of a Feather Flock Conjointly (?): Rhyme as Reason in Aphorisms*, 11 PSYCHOL. SCI. 424 (2000). For a classical rhetoric perspective, see for example SMITH, *supra* note 6, at 193–94 (citing ARISTOTLE, THE RHETORIC OF ARISTOTLE (Lane Cooper trans., 1932)).

[147] *See, e.g.*, SMITH, *supra* note 6, at 193–339.

sounding names, like metonymy and epistrophe.[148] A complete list of rhetorical figures of speech is beyond the coverage of this article. For those interested in a comprehensive discussion of how to incorporate figures of speech in persuasive legal writing, I encourage you to review Chapters 9–15 of my textbook, *Advanced Legal Writing*.[149] Here, however, I will provide a couple of simple examples in the context of policy persuasion.

Recall the Supreme Court case of *Smith v. United States*, in which Justice O'Connor wrote a majority opinion holding that the phrase "uses . . . a firearm" in relation to a drug transaction includes using a firearm as an item of trade for drugs.[150] Recall further that Justice O'Connor supported this conclusion with the policy argument that firearms are dangerous and pose a threat to safety even if they are present as only items of barter. Justice O'Connor punctuated this argument with this artful use of alliteration: "[A]s experience demonstrates, [a gun] *can be converted instantaneously from currency to cannon*."[151] The use of this poetic language was not accidental. Her elegant use of alliteration helped Justice O'Connor etch her policy argument in the mind of her reader.

As another example, consider this clever use of simile in a per curiam decision by the Supreme Court while arguing the policy of free expression:

> "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."[152]

In another example, Judge Kenneth Hall of the Fourth Circuit

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[148] Mytonymy "involves referring to a thing, not by its literal name, but by a word suggestive of or associated with it." *Id.* at 325. Epistrophe occurs when "the writer uses the same word or group of words at the end of successive clauses." *Id.* at 330.

[149] *Id.* at 193–339.

[150] Smith v. United States, 508 U.S. 223, 238–41 (1993) (originally discussed at *supra* Part II.A.3).

[151] *Id.* at 240 (emphasis added).

[152] Buckley v. Valeo, 424 U.S. 1, 19 n.18 (1976) (per curiam).

crafted an artistic metaphor to highlight his argument for a broad definition of mail fraud:

> "[A] civil RICO suit may be maintained, not only in mail fraud cases where the deceitful mailing is the blade rushing down toward the guillotine victim, but also in cases involving more grandiose schemes to cheat, where the mail is but part of the frame that holds the blade."[153]

And here is an alliterative example from Supreme Court Justice Frank Murphy as he expresses the Court's commitment to the policies underlying federal income tax law and the Court's holding that embezzled funds are not subject to income tax:

> "Moral turpitude is not a touchstone of taxability."[154]

In all of these examples, the authors of the opinions made their policy arguments more memorable by using a figure of speech to highlight a key component of the argument. As a final example, we return again to where we started: our interspousal immunity hypothetical. In that scenario we, as attorneys for the defendant, argued that a suit between divorced spouses for a tort committed during marriage should be barred because to hold otherwise would encourage divorce as a means of getting around the interspousal immunity defense. As we discussed earlier, this policy argument is based on the value of marriage as a social institution and the corresponding fear of widespread divorce. The main thrust of the argument is that the preservation of marriage as a social institution is more important than an individual's right to sue for personal injuries. To highlight this argument, we could perhaps employ the rhetorical device of *alliterative antithesis*, which creates rhythmic phrasing by combining alliteration with the parallel grammatical

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[153] Chisolm v. Transouth Fin. Corp., 95 F.3d 331, 337 (4th Cir. 1996). "RICO" refers to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (2012).

[154] Comm'r of Internal Revenue v. Wilcox, 327 U.S. 404, 408 (1946).

structure of antithesis:[155]

> *A citizen's right to sue is outweighed by the*
> *commonwealth's commitment to marriage.*

A statement such as this—that is, a statement that summarizes an important component of our policy argument using a poetic figure of speech—would help us as brief writers to highlight that point within our brief. And highlighting this point, according to the Van Restorff Effect, would help make the argument more memorable to our reader.

IV. CONCLUSION

Policy arguments are indispensable to effective written legal advocacy. As this article demonstrates, social science scholarship offers many insights into human behavior that can assist legal advocates in improving the persuasiveness of their policy arguments.

As an initial matter, we explored the general characteristics of a policy argument in terms of sociological and cognitive principles and examined the unique role that such arguments play in legal advocacy. We also saw that from a cognitive perspective, policy arguments in legal advocacy can be broken down into two broad categories: (1) policy arguments that focus on only the future societal consequences of the court's decision in the present case, and (2) policy arguments that focus on both the present and the future societal consequences of the court's decision in the present

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[155] SMITH, *supra* note 6, at 334–35.

> [A]ntithesis is a stylistic device by which a writer sets out two contrasting statements in close proximity to each other and uses similar language and parallel grammatical structure for both statements. Alliteration . . . occurs when a writer intentionally uses the same letter or letter sound at the beginning of two or more words in a single sentence or in group of related sentences. The combination of these two devices results in *alliterative antithesis*.

Id. For detailed instructions on how to craft an original passage of alliterative antithesis, see *id.* at 334–39.

case.

In the last section, we explored four general cognitive strategies advocates can use to improve the persuasiveness of their policy arguments. The latter three of these four strategies included specific sub-strategies that offer detailed guidelines for brief writers. Here is a summarizing outline of the strategies we explored:

1. **Take advantage of the *fear of future loss*** – From a cognitive standpoint, policy arguments that fall under the first category—i.e., policy arguments that focus primarily on future potential consequences—are generally more persuasive than policy arguments that fall under the second category—i.e., policy arguments that focus on both immediate and future consequences. The cognitive phenomena underlying this observation include the *uncertainty effect*, *status quo bias*, and the *mere exposure effect*. In view of these phenomena, advocates, in making policy arguments, should stress the potential future impact of the court's decision on society over the more immediate impact.

2. **Increase the perceived *probability* of the consequences underlying a policy argument** – Because future-oriented policy arguments focus on the potential future consequences of a court's decision in the present case, the strength of such arguments depends largely on how probable the foretold consequences seem in the mind of the judge. Strategies for increasing the perceived probability of the foretold consequences include the following:
   - Cite non-legal materials that help prove the probability of the asserted consequences.
   - Take advantage of the *conjunction fallacy* by combining more extreme consequences with less extreme, more likely consequences.
   - Account for the *availability heuristic* by providing vivid and easily imaginable examples of the asserted consequences.

3. **Increase the perceived *importance* of the consequences underlying a policy argument** – The strength of a policy argument also depends largely on the importance the deciding judge gives to the threatened consequences and the social values implicated by those consequences. Strategies for increasing the perceived importance of the consequences underlying a policy argument include the following:

   - Take advantage of a number of related cognitive phenomena—including *loss aversion*, the *endowment effect*, and *negativity bias*—by stating policy arguments in terms of avoiding a societal loss rather than in terms of acquiring a societal gain.
   - Cite non-legal materials that help prove the importance of the asserted consequences and the attendant social values. As we saw, non-legal materials can be used in two completely different capacities in a policy argument: (1) to help prove the *probability* of the asserted consequences of the policy argument, as indicated in item 2 above; and (2) to help enhance the perceived *importance* of the value implicated by the policy argument, as indicated here.
   - Cite cases from other contexts that help prove the importance of the asserted consequences and the attendant social values.
   - Consider using a thematic literary reference.

4. **Increase the *memorability* of a policy argument** – To be persuasive, a policy argument must be remembered by the reader after the reader puts the advocate's brief down. Strategies for increasing the memorability of a policy argument include the following:

   - Give a policy argument in a brief its own section and point heading.

- Use poetic language—i.e., a rhetorical figure of speech—to highlight an important component of a policy argument.

While this article explores the implications of social science theory on policy-based persuasion, it is intended only as a first step. Many additional revelations about human cognition and social interaction can be applied to this topic. While the literature on written legal advocacy has been slow to address in any serious way the skill of policy-based persuasion, I predict this topic will garner more attention in the future. Many legal issues, particularly issues on appeal, come down to a choice between competing policy considerations. As a consequence, the future of advocacy pedagogy will undoubtedly include further exploration into the cognitive and sociological dimensions of policy-based decision-making.