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Making and Breaking Connections: Valuable Perspectives on Persuasion, Review of Legal Persuasion: A Rhetorical Approach to the Science Linda L. Berger & Kathryn M. Stanchi

Mary Nicol Bowman

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BOOK REVIEW

Making and Breaking Connections

Valuable Perspectives on Persuasion

Legal Persuasion: A Rhetorical Approach to the Science
Linda L. Berger & Kathryn M. Stanchi (Routledge Publishers
2018), 170 pages

Mary N. Bowman, rev'r*

This useful book brings together classical and modern rhetorical
theory with contemporary persuasion science in a way that is both theo-
retical and deeply pragmatic. Linda Berger is a prolific scholar on applying
contemporary and classical rhetoric to legal persuasion, while coauthor
Kathryn Stanchi has written extensively about persuasion science.
Together, they have created a book that gives readers both a deep under-
standing of these theories and a series of practical principles that legal
academics, lawyers, students, and others can use to develop strategic
choices in legal persuasion.

The book's central insight is that although the authors began from
different places, they "arrived at the same place: legal persuasion results
from making and breaking mental connections."[1] The authors argue that
persuasion is possible because what we read, see, and hear can be inter-
preted in various ways; advocates therefore "can influence their audiences
to make certain mental connections and to turn away from others."[2]

To help advocates make and break mental connections, the authors
explore rhetorical concepts and techniques such as uncovering embedded
plots, characters, and images; using familiar analogies and metaphors to
reinforce existing connections; and using novel metaphors to break unfa-
vorable connections. The authors also explore the cognitive science
around decisionmaking and techniques such as priming and framing to

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* Associate Professor of Law and Director of the Legal Writing Program, Seattle University School of Law.
1 LINDA L. BERGER & KATHRYN M. STANCHI, LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE xi (2018).

2 *Id.* at 3.

activate particular mental categories or schema. The breadth and depth of the material covered in this book will make the book an excellent read for academics, students, and practitioners.

The book's organization also facilitates its usefulness. Each chapter contains a scholarly introduction of the topic, case studies that illustrate the concepts described, a summary that boils the content down to the essential concepts, and a bibliography of both scholarly works and cases and briefs on the topic for greater study. This chapter structure helps readers make connections between theory and practice for each of the topics covered, and it facilitates application of the book's insights by lawyers, law students, and academic readers to the readers' own persuasive efforts.

The larger-scale organization also meets the needs of a variety of different audiences. After an introductory section, the book begins by exploring concepts related to setting, including audience, timing, and location.[3] The book begins with a detailed exploration of the audience for legal arguments, noting that "[t]he advocate's first job is to make connections with the members of her audience."[4] The authors therefore include a practical focus on "how to construct legal arguments that will effectively connect with particular audiences in specific situations."[5] In this section on audience, the authors explain studies related to judicial decisionmaking, demonstrating a disconnect between what judges say about how they decide and what the empirical research shows about how judges actually decide. While judges seem to sincerely believe that "emotion and politics have no place in legal decision making . . . the science is decisive that emotions, experiences, and culture are a critical part of decision making and persuasion."[6] That chapter offers some suggestions to help advocates pitch arguments to appeal both to judges' conscious preferences and to the underlying factors that influence judges, themes that are explored in more detail in the rest of the book.

The chapter that follows discusses *kairos*, recommending that advocates "learn how to sense the most opportune moment to advance a particular argument and how to isolate the essential moments that convey the heart of the problem."[7] That chapter exemplifies one of the techniques that makes the book so helpful: its use of several case studies to illustrate the key concepts. In the chapter on *kairos*, the authors discuss how advocates on both sides of the political spectrum seized opportunities created by recent United States Supreme Court decisions to make

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3 *Id.* at 21–38.   **6** *Id.* at 28.

4 *Id.* at 4.   **7** *Id.* at 37.

5 *Id.*

seemingly rapid change regarding striking down defense-of-marriage statutes or getting courts to declare that closely-held corporations have a right to religious expression. The case study descriptions help to both illustrate the concepts and suggest ways that advocates can apply the concepts to their own cases.

The authors label the next section of the book "*Invention: Stories, Metaphors, and Analogies*";[8] I would describe this section as a deep dive into storytelling. "[S]torytelling allows lawyers to carve out their client's individual situation from the midst of general rules, to imply causation by placing events into a sequence, to build characters through telling details, to evoke emotions, and to guide decision makers to naturally occurring outcomes."[9] This section explores how lawyers tell stories about both "the world in which the issue arose (the facts) and the world into which the client's story has ventured for a solution (the governing law)."[10] In telling both factual and legal stories, lawyers must focus on audience reaction, making sure that the stories both "ring true" to the audience's experiences and "hang together" by ensuring that the plot, characters, setting, and events satisfy the audience's desire for consistency.[11]

Unsurprisingly, the book has an excellent discussion of telling fact stories; that chapter discusses use of master stories to lead to a favorable result or disrupting the traditional arc by shifting the order and emphasis of various story elements.[12] The examples in that chapter are particularly varied and interesting, ranging from the choice of when to start the factual story in the briefs on behalf of schoolchildren in *Brown v. Board of Education*,[13] to various characterizations of a young female student who was assaulted in *Gebser v. Lago Vista Independent School District*,[14] to the effect of location on two cases involving the display of Ten Commandment monuments.[15] These examples illustrate how lawyers can connect their

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8 *Id.* at 39.

9 *Id.* at 50.

10 *Id.* at 52.

11 *Id.* at 54. The idea of the story "ring[ing] true" is often called narrative fidelity, and the idea of a story "hang[ing] together" is often called narrative probability. *Id.*

12 *Id.* at 70.

13 Brown v. Bd. of Educ., 347 U.S. 483 (1954). The briefs for the school children framed the "Trouble," or problem, as the Supreme Court's decision to uphold separate but equal in *Plessy v. Ferguson.* Berger and Stanchi note other possible ways the issue could have been framed that would have led to starting the story in different places, such as with the institution of slavery or the adoption of the United States Constitution recognizing slavery. BERGER & STANCHI, *supra* note 1, at 61.

14 Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998). *Gebser* involved a lawsuit against a school district under Title IX by a student who was 14 years old when her 50-year-old teacher began raping her; the school district's brief depicted the student as someone having a consensual relationship and conspiring with him to hide the relationship from the school district, while the plaintiff's brief portrayed her as naïve and abused by a manipulative adult. BERGER & STANCHI, *supra* note 1, at 65–66.

15 *Id.* at 67.

cases to familiar stories or break their case's typical associations by recasting the participants, drawing attention to the setting, or shifting the point of view.

The book then applies storytelling techniques to the stories of law itself.[16] In Chapter 8, Berger and Stanchi describe using archetypal stories to characterize the evolution of the law in ways that can lead decision-makers to more favorable results than would be likely based on a more traditional syllogistic use of precedent. For example, they describe the "birth story" narrative that presents the evolution of the law as a series of steps that logically and inevitably lead to the creation of a new rule desired by the advocate.[17] Rescue stories, on the other hand, are useful when the advocate has well-established precedent that is now under attack, and the advocate wants to use policy arguments to urge the court to "rescue" the precedent from the attack.[18] The authors therefore recommend that advocates "research and understand the law's history and then decide what story of the law's development best fits the client's purpose."[19]

The following section, "*Arrangement: Organization and Connection*," has an excellent discussion of the rhetorical underpinnings of traditional deductive, syllogistic arguments, which have been around for millennia, as well as the underlying System 1 versus System 2 decisionmaking from cognitive science that these arguments produce.[20] The authors then explore in more detail when advocates benefit from using a traditional syllogism versus radically departing from that form by starting with a more controversial premise and moving the reader to a less-extreme version of what the writer wanted all along.[21] The authors recommend the latter technique "in contexts in which the advocate has determined that the issue is worth litigating, but winning is unlikely," such as in criminal-defense work, plaintiff-side employment litigation, impact litigation, and amicus briefing.[22]

The chapters on metaphor and analogy offer other strategies for developing arguments in situations lacking clear precedential rules or cases.[23] Those chapters explore use of analogies in a variety of situations,

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16 *Id.* at 72–78.

17 *Id.* at 74.

18 *Id.*

19 *Id.* at 78.

20 *Id.* at 125.

21 See *id.* at 138–39 (connecting this tactic to negotiating theory). The authors return to that strategy when discussing adopting a reasonable rather than aggressive tone, positing that this structure primes the audience to see the second argument as more reasonable. *See id.* at 146–47.

22 *Id.* at 139.

23 *See id.* at 162 (synthesizing Chapters 9–12).

such as answering a question of first impression, as in the case involving students wearing black armbands in protest of the Vietnam War.[24] The authors also explore use of novel metaphors and characterizations to shift the perspective of an audience likely to be hostile.[25] For example, the authors discuss *Plyler v. Doe,* a case in which the Supreme Court somewhat surprisingly struck down a Texas statute that allowed the state to withhold education funding for the education of unauthorized immigrant children.[26] In *Plyler,* the characterization of undocumented schoolchildren as "illegal" was overcome by characterizing them as permanent residents because they were likely to remain in the country indefinitely.[27] However, the authors warn advocates to be careful with the emotional tone of these analogies. They describe analogies that evoke negative emotions, such as talking about "hijacking" a government program or associating a prosecutor's argument with a cockroach in a soup; these analogies can lead listeners to associate the negative emotion with the person offering it rather than with the underlying thing that the advocate was trying to attack.[28]

The final section of the book, on "*Connecting through Tone,*"[29] notes that "[a]lthough lawyers disagree about how aggressively to push, the answer from the persuasion science is pretty clear on this question: an advocate who adopts a more-tempered, reasonable tone is more likely to connect to her audience."[30] This section then describes how to create a moderate, reasonable tone through the structure of arguments. For example, advocates can appeal to a decisionmaker's desire for consistency by building arguments gradually or show fidelity to past decisions and underlying commitments while building to a more difficult conclusion.[31] The authors also discuss the benefits and strategies of "two-sided messages," i.e., disclosing and mitigating rather than ignoring adverse information.[32] The authors explore the paradox, well-documented in social science research, that revealing flaws in your argument can strengthen your connection with the decisionmaker, while hiding these flaws can lead the decisionmaker to view you as biased and to over-correct

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24 *Id.* at 91 (discussing Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969)).

25 *Id.* at 163.

26 *Id.* at 101 (discussing Plyler v. Doe, 457 U.S. 202 (1982)).

27 *Id.*

28 *Id.* at 93.

29 *Id.* at 141–60.

30 *Id.* at 141.

31 *Id.* at 144.

32 *Id.* at 150.

in favor of the other side.[33] Based on this research, the authors offer various strategies for effectively managing audience perception while dealing with negative information.

In the preface, the authors note that "the premise of this book is that lawyers should be thinking about theory, and theoreticians should be thinking about the practical, and everybody should be thinking about how to educate the next generation."[34] I saw this premise in action shortly after I finished reading *Legal Persuasion,* when I had the opportunity to sit in on a clinical class in which the second and third year law students were learning about case and client theory. After the clinical professor introduced students to these concepts, the students then brainstormed how they might use five or six sentences to introduce the story of a hypothetical client who was seeking public assistance for the costs of things like food and vet bills to support her service dog. As each student presented his or her story, I noticed students implicitly applying the content from Chapter 8. Some painted the client as a hero, someone who was overcoming the impact of various disabilities by finding a treatment that was more effective than what the agency wanted to cover. Others shifted the focus to the agency's role in providing public assistance, creating space for the agency to be the hero of the story if it found a way to cover the needed costs, while one student focused on the service dog and its value. The various student stories also portrayed "the Trouble" in different ways, from the underlying disabilities that the client struggled to manage to the ancillary costs of the otherwise valuable treatment provided by the service dog to the agency's overly restrictive view of its mission and coverage regulations.

The students then talked about the research they would do and the potential arguments they might make; in doing so, they drew on several different chapters involving invention and sequencing of arguments. They talked implicitly about using traditional deductive arguments if the results of the research seemed promising, but they also touched on the possible role of policy arguments to expand coverage, which sounded like a good opportunity to use a "birth story" frame. And other students were interested in arguments based on more explicit analogies, such as how coverage of expenses for a service dog should be treated like coverage for mobility devices (like wheelchairs) or personal caregivers. After class, I recommended the book to my clinical colleague as a potential resource for students; similarly, even experienced practitioners could benefit from the

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33 *Id.* at 152–53.

34 *Id.* at xii.

book's tools for helping lawyers more explicitly recognize the various frames and choices and evaluate how persuasive each approach might be in context.

In the end, this concise but rich book is well worth exploring for anyone interested in how persuasion works or how to advocate more persuasively in a legal context.

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BOOK REVIEW

Legal Writing Lessons from American Presidents

Communicators-in-Chief:
Lessons in Persuasion from
Five Eloquent American Presidents
Julie Oseid

Megan E. Boyd, reviewer