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### The Science of Persuasion: An Initial Exploration

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# THE SCIENCE OF PERSUASION: AN INITIAL EXPLORATION

*Kathryn M. Stanchi\**

2006 MICH. ST. L. REV. 411

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## INTRODUCTION

What is persuasive? This question is at the heart of lawyering and legal writing.

The art of persuasion requires empathy as well as a deep understanding of human psychology and the complex emotional and intellectual processes that result in perception and attitude change. Measuring persuasiveness is exceedingly difficult, yet this endeavor continues to preoccupy a number of disciplines, including philosophy, communications, psychology, and rhetoric. On some level, what tactics persuade is more than a little mysterious and cannot be precisely quantified or definitively articulated. What is persuasive to one may be neutral to another and even repellent to a third. Nevertheless, there are clues about how human beings respond to persuasive tactics, and lawyers should be taking greater advantage of the information.

The purpose of this Article is to enhance knowledge of effective persuasive legal writing by taking the exploration in a somewhat different direction from the traditional approaches. This Article argues that it is critical for persuasive writers to study the existing social-science data about human decisionmaking.<sup>1</sup> Trial lawyers have taken serious steps to study and probe social science for ideas about how to persuade (or pick) juries.<sup>2</sup> Yet, decades after Jerome Frank reminded us that judges, like juries, *are* human, appellate lawyers have been slow to follow their trial brethren in the pursuit of scientific data about what persuades people.<sup>3</sup>

Instead, the study of persuasive writing has been dominated by a kind of “armchair psychology”—a set of conventions and practices, handed down from lawyer to lawyer, developed largely from instinct and speculation.<sup>4</sup> By and large, the information available to students and lawyers about

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1. See Michael J. Saks, *Turning Practice into Progress: Better Lawyering Through Experimentation*, 66 NOTRE DAME L. REV. 801, 802–03 (1991) (making a parallel argument for trial practitioners).

2. See, e.g., H. Mitchell Caldwell et al., *Primacy, Recency, Ethos and Pathos: Integrating Principles of Communication into the Direct Examination*, 76 NOTRE DAME L. REV. 423 (2001); John B. Mitchell, *Why Should the Prosecutor Get the Last Word?*, 27 AM. J. CRIM. L. 139 (2000); Saks, *supra* note 1, at 802–03 (urging trial lawyers to treat persuasion as an empirical question).

3. Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931). There are some notable recent exceptions. For example, Michael Smith provides evidentiary support from cognitive psychology, literary theory, and classical rhetoric for the persuasive strategies outlined in his text, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing*. But the concept of integrating techniques gleaned from social science into legal writing is relatively new and largely unexplored.

4. See Kathryn M. Stanchi, *Moving Beyond Instinct: Persuasion in the Era of Professional Legal Writing*, 9 LEWIS & CLARK L. REV. 935 (2005) (reviewing MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING*

persuasive legal writing reproduces these conventions and practices without analysis or critique, and without taking stock of the growing body of research from other disciplines that would provide some evidence about whether the conventional wisdom is an accurate account of human decisionmaking.

#### I. STUDYING PERSUASION IN OTHER FIELDS TO EXPAND KNOWLEDGE ABOUT PERSUASION IN LAW

There are several reasons why persuasive legal writers need information beyond the conventional wisdom and platitudes that have dominated the study of legal advocacy writing. First, now that there is social-science data about human responses to persuasive tactics, lawyers have an obligation to use it to test and reexamine the validity of the conventional wisdom. There is nothing wrong with instinct, unless, of course, it is wrong.<sup>5</sup> The social-science data may suggest that the conventional wisdom is an accurate assessment of human decisionmaking, or it may suggest that the conventional wisdom is outdated, or wrong. Either way, lawyers would be more effective writers if they knew more about the science of persuasion.

Even if the conventional wisdom is fully supported by research into human behavior, it is worth learning about this research to acquire a richer understanding of why and when certain strategies do or do not work. Without information about the “why” and the “when,” advocates run the risk of using certain rhetorical strategies slavishly or inappropriately. Advocacy is most effective when the lawyer has the tools to make deliberate, conscious decisions about the persuasive device to employ and how and when to employ it. This requires knowing why a particular tactic works, under what circumstances it worked, and when it fails. Thus, the second reason to study the social-science data about persuasion is to enhance and deepen lawyers’ understanding of persuasion, to help them make better, more effective choices about the techniques they use in their persuasive writing.

Finally, there is benefit to simply identifying and cataloging persuasive techniques. Attaching names to persuasive tactics and illustrating their use in legal documents permits other lawyers to see and understand a wider array of techniques. This expands the complement of tools available to advocates, which will make advocacy writing more versatile and interesting, as well as more effective.

That said, there are caveats to the exploration of persuasion in other disciplines. Much of the available information about human decisionmaking processes does not study legal decisionmaking or target lawyers or

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(2002); Saks, *supra* note 1, at 802–03 (arguing trial lawyers learn persuasion based on advice from others and trial and error).

5. See Saks, *supra* note 1, at 803–04.

judges as message recipients. Moreover, there is little explicit discussion of law or legal writing; rather, I have taken the data and the explanations and extrapolated from them to explain, support, or illuminate something about various persuasive legal writing techniques. Therefore, my application of these data to the legal writing context offers few bright-line rules for the advocate.

In this context, extrapolation is further muddied by the unique qualities of legal reasoning, some of which may cause the legal audience to react differently from non-lawyers to certain persuasive techniques. The conventional wisdom of persuasive legal writing has been taught and used by generations of lawyers. As a result, the legal audience might expect and be comfortable with certain traditional techniques.<sup>6</sup> This might suggest that the legal audience is more likely to be persuaded by conventional techniques over persuasive techniques that depart from the conventional wisdom, however effectively they may influence the lay audience.

However, even with these caveats, studying data about persuasion from other disciplines is a useful exercise. These qualifications simply suggest that lawyers should use the information about persuasion wisely and carefully. Even though more and diverse data about persuasion does not necessarily make decisions about persuasive legal writing easy or clear, it permits better informed and more conscious argument drafting, which can only improve the power of advocacy writing.

The study of persuasion and human decisionmaking spans a number of fields, including communications, philosophy, rhetoric, and social psychology.<sup>7</sup> The sheer number of experiments and theories, as well as the data collected, is vast. This Article examines the data and theories underlying two concepts: sequential request strategies and involvement. First, the Article discusses how the data and theories of social science might inform persuasive legal writing, and looks at examples to demonstrate and explain the application of the data and theories to law. Part II explores how the data

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6. See, e.g., RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 243–55 (rev. 1st ed. 1996) (arguing appellate persuasion differs from persuasion in other arenas, and judges may react unfavorably to unconventional arguments). Indeed, a social-science theory supports this phenomenon: Language Expectancy Theory posits people “develop cultural and sociological expectations about language behaviors that subsequently affect their acceptance or rejection of persuasive messages.” Michael Burgoon et al., *Language Expectancy Theory*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 117, 121 (2002).

7. See, e.g., THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE (James Price Dillard & Michael Pfau eds., 2002) (multi-disciplinary); SOCIAL PSYCHOLOGY: A HANDBOOK OF BASIC PRINCIPLES (E. Tory Higgins & Arie W. Kruglanski eds., 1996) (social psychology); G. RAY FUNKHOUSER, THE POWER OF PERSUASION: A GUIDE TO MOVING AHEAD IN BUSINESS AND LIFE (1986) (business); FRANS H. VAN EEMEREN ET AL., FUNDAMENTALS OF ARGUMENTATION THEORY: A HANDBOOK OF HISTORICAL BACKGROUNDS AND CONTEMPORARY DEVELOPMENTS (1996) (interdisciplinary).

and theory of sequential request strategies can inform the structure and order of legal arguments. It looks at two different strategies, one called “foot in the door” and the other called “door in the face.” Part III investigates audience motivation and involvement.

## II. SEQUENTIAL REQUEST STRATEGIES AND THE CHAINING OF LEGAL ARGUMENTS

Sequential request strategies test how message recipients react to a series of persuasive messages that are presented in a certain order.<sup>8</sup> In the two most well-known sequential request strategies, the “critical” request (the one the persuader is most interested in the recipient’s reaction to) follows some other request.<sup>9</sup> The idea is to determine whether it is possible to influence the recipient’s decision about the critical request by “priming” the recipient with a certain kind of prior request.

Persuasive legal writers may not be familiar with the psychological term “priming,” but much of the conventional wisdom of legal writing incorporates the concept. Persuasive writers are told to begin their briefs with the strongest arguments, to lead paragraphs with strong thesis sentences, and to precede legal text and rules with strong argumentative statements.<sup>10</sup> In the most artful briefs, the advocate has devised an organization that carefully primes the reader by leading her, step-by-step, toward acceptance of the final thesis that is the winning proposition for the advocate.<sup>11</sup>

This organizational priming means that the advocate has consciously constructed a series of overlapping propositions together in a chain, so that the acceptance of one proposition leads inexorably to the next. The most interesting and effective argument chains link points or premises that the reader might not have necessarily connected together.<sup>12</sup> In legal writing,

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8. DANIEL O’KEEFE, *PERSUASION: THEORY AND RESEARCH* 169 (1990).

9. *Id.*

10. See, e.g., ALDISERT, *supra* note 6, at 211; MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 76–77, 156 (2002).

11. See VAN EEMEREN ET AL., *supra* note 7, at 105–17 (discussing argument by association model developed by Perelman and Olbrechts-Tyteca). The process of constructing argument chains in legal writing has been likened to the process of “[f]orward chaining” in artificial intelligence, in which a series of inferences is connected “so that the conclusion of one inference also functions as a premise in the next one.” Douglas N. Walton, *A Pragmatic Model of Legal Disputation*, 73 NOTRE DAME L. REV. 711, 724–25 (1998).

12. One commentator has suggested a modification of the “chain” metaphor, arguing that the best legal arguments are constructed as cables of connected and intertwining threads, so that unlike the “chain [which] is no stronger than its weakest link,” the argument is solid throughout its length. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 351 (1990). True enough, but for this Article, the chain metaphor is more apt because the focus is on the skeleton of the argument (the series of links), as opposed to the body of evidence supporting the links. For

chaining is not only a way of structuring an argument but also of moving the argument forward. A useful metaphor for this tactic is the series of steps up to the high diving board: as the persuader gets the target up each step closer to the edge of the board, it becomes that much easier to decide to jump and that much harder to decide to go back down.<sup>13</sup>

Chaining is a successful persuasive tactic in part because of the nature of arguments. Arguments are “goal-directed” conversations that revolve around an issue about which the parties have conflicting opinions.<sup>14</sup> Each party is trying to move the conversation toward acceptance of her opinion, using an array of persuasive strategies, sometimes called “moves.” An argument strategy or “move” is successful if it “extrapolates forward” toward the goal of the conversation.<sup>15</sup> A move that “extrapolates forward” helps resolve the conflict by showing one or the other proposition to be more or less likely.<sup>16</sup> Put another way, the goal of persuasion is to move the target audience forward along the “action decision sequence” away from the human propensity for inaction or habitual action and toward the advocate’s desired action.<sup>17</sup> This decisional momentum is one of the primary purposes of chaining.

In persuasive legal writing, argument chaining is a longstanding and fairly typical strategy, though not all lawyers use it well. The strategy harkens back to the syllogism, the quintessential form of deductive reasoning in classical rhetoric.<sup>18</sup> Unlike the classical syllogism, however, the forward chain in legal writing almost always has points of weak connection between the premises and conclusion. The artful advocate can make the chain look ironclad, even when it is not.

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my purposes, the important point is that the advocate is attempting to link together—as firmly as possible—a number of premises that the reader might not previously have linked together. The question is whether there is any information about how to construct the skeleton or basic links of the chain. This is a question about the structure and order of arguments, separate from the question of evidence. Moreover, even with the cable metaphor, the cable will be weaker in certain areas, because some arguments will have fewer threads than others.

13. FUNKHOUSER, *supra* note 7, at 114.

14. Walton, *supra* note 11, at 724.

15. *Id.*; see also FUNKHOUSER, *supra* note 7, at 70–72.

16. Walton, *supra* note 11, at 724.

17. FUNKHOUSER, *supra* note 7, at 70–72. The action decision sequence is a model of human decisionmaking that posits that human beings all take a series of predictable sequential steps before making any decision. The sequence begins with some stimulus to action, at which point the target must decide whether to take any action (or make any decision), and, after a series of sequential steps, ends with the target deciding whether to do what the persuader wants. *Id.*

18. See Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 492–93 (2003). In its simplest form, the syllogism has a major premise, a minor premise, and a conclusion. *Id.*

In contrast to the formally valid syllogism, the forward chain in legal writing is usually a form of “quasi-logical argumentation,” in which the advocate presents elements or premises in such a way as to give the target audience the impression that the elements or premises are logically connected.<sup>19</sup> In quasi-logical argumentation, the advocate creates the illusion that the link between the premises and ultimate conclusion is as unassailable as a formal syllogism, but the logic may not actually be provably valid in the formal sense.<sup>20</sup> Rather, the advocate seeks to influence the audience by making the argument look like a mathematical or logical proof.<sup>21</sup> To make the chain appear strong and solid, advocates manipulate language to make the premises look homogenous, congruent, and unambiguous to the audience.<sup>22</sup>

#### A. The First Link: How to Start an Argument

Chaining arguments is a kind of sequential request strategy. As with any sequential request strategy, a key decision is how to begin the forward chain—with what premise(s) should the writer “prime” the audience to influence acceptance of the “critical” request. The entire chain, and therefore the structure of the argument, will be determined by the premises that begin it. In persuasive legal writing, the conventional wisdom often suggests that the advocate begin the chain with relatively uncontroversial premises, on the theory that if the reader agrees with the first few premises, she is more likely to accept the ultimate thesis.<sup>23</sup> Using the diving board metaphor, this tactic begins by attempting to convince the message recipient to get on the first step of the high dive.

Sometimes the argument chain will be preceded by the ultimate conclusion—the assertion, however controversial or bold, that the advocate is trying to get the court to accept. This is typical of legal reasoning, and

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19. VAN EEMEREN ET AL., *supra* note 7, at 107. Argumentation theorist Stephen Toulmin has argued that the formal syllogism does not accurately portray the way people actually think. Toulmin’s “people’s logic” rejects the classical syllogism in favor of a more informal approach to logic. See Michael Burgoon & Erwin P. Bettinghaus, *Persuasive Message Strategies*, in *PERSUASION: NEW DIRECTIONS IN THEORY AND RESEARCH* 141, 147 (Michael E. Roloff & Gerald R. Miller eds., 1980); see also Paul T. Wangerin, *Multi-Disciplinary Analysis of the Structure of Persuasive Arguments*, 16 *HARV. J.L. & PUB. POL’Y* 195, 202 (1993).

20. VAN EEMEREN ET AL., *supra* note 7, at 107; see also Robbins, *supra* note 18, at 496 (conceding the requirements of formal logic cannot be strictly applied to most legal argumentation because, in law, most premises are not “indisputably true”).

21. VAN EEMEREN ET AL., *supra* note 7, at 107.

22. *Id.* at 108.

23. See Robbins, *supra* note 18, at 493 (noting valid syllogisms have seemingly “ironclad” quality such that if you agree with the premises, you cannot dispute the conclusion).



represents a form of “anti-climax” order.<sup>24</sup> Preceding the chain with the conclusion, as opposed to starting with a less controversial premise, is a common approach in legal writing. In the high-dive metaphor, this tactic would begin by urging the message recipient to jump off the high dive, and would follow with an argument chain detailing why this is a good idea. Since the conclusion is often followed by argument chains that begin with a less controversial premise (at some point the persuader must try to convince the message recipient to get on that first step), the two tactics are less dissimilar than they may first appear.

The focus here is less on whether to begin with the conclusion or not, but in what way to begin the chain of reasons supporting the conclusion. In many cases, the persuader will have a choice among arguments, some of which may be “safe”—i.e., likely acceptable—and those that may be riskier. The theories about human decisionmaking that follow tell the persuader a bit about how the message recipient might react to the different approaches. An understanding of these theories gives the legal advocate a deeper knowledge with which to make strategic decisions about the construction of the chains.

### 1. *Start With Premises Likely to Be Accepted: “Foot in the Door”*

Empirical research on human behavior and decisionmaking provides some evidence that argument chains are more likely to persuade readers if the first links of the chain are well-settled or widely accepted premises. In one experiment, researchers tested the so-called “foot in the door” strategy by studying how test targets reacted to a large and difficult request if the targets had previously agreed to perform a small and easy request.<sup>25</sup> The foot-in-the-door strategy posits that “a powerful predictor of future compliance is past compliance.”<sup>26</sup> The results demonstrated that people are more likely to accede to large requests if they had previously agreed to smaller ones, even if there is a significant time delay, and even if there is no obvious relationship between the two demands.<sup>27</sup> It is almost a “bobble-head” ef-

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24. See, e.g., RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY AND STYLE 100–04 (5th ed. 2005); LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 90–91 (2003); see also O’KEEFE, *supra* note 8, at 159. Most studies reveal organization by climax or anti-climax order does not make a difference in persuasive effect. *Id.*

25. O’KEEFE, *supra* note 8, at 169; see also Kelton V. L. Rhoads & Robert Cialdini, *The Business of Influence: Principles that Lead to Success in Commercial Settings*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 513, 525–26 (James Price Dillard & Michael Pfau eds., 2002); Burgoon & Bettinghaus, *supra* note 19, at 155–57.

26. Burgoon & Bettinghaus, *supra* note 19, at 155.

27. O’KEEFE, *supra* note 8, at 169–70. For example, people were more willing to put a big sign on their lawn that advocated safe driving if they had previously signed a peti-

fect: once the message recipient starts nodding “yes,” it is likely that she will continue to nod “yes.” The foot-in-the-door response is so strong that it creates a “halo effect”: when people agreed to the initial commitment, future agreement was likely even for requests that were only remotely related to the initial one.<sup>28</sup>

Researchers attribute the success of foot-in-the-door to a change in self-perception that occurs when people perform—or agree to perform—the initial request.<sup>29</sup> That is, once a person accedes to the initial request, she begins to see herself differently; her attitude changes and in her own mind she becomes the sort of person who agrees to certain kinds of requests.<sup>30</sup> This is a fairly common psychological observation about human beings: they derive their current attitudes and decisions from observing their own past behavior.<sup>31</sup> People asked to make a decision do a “self-observation” and then use their own past behavior as a way of gauging their attitudes and beliefs. They then use what they have observed about their belief system to reach a decision about a current problem. In other words, much like legal reasoning, people have a cache of personal decisional “precedent” which they use to decide current problems.

On the simplest level, for example, if a person’s self-assessment reveals her to be someone who has cared for stray cats in the past, she will see herself as someone who is compassionate toward homeless animals, and she will be likely to accede if someone asks her to take a stray cat into her home. However, the self-observation process is rarely this concrete and rigid; rather, again, as in legal reasoning, the precedent is susceptible to extrapolation and generalizing. So, if the person determines that she cares for stray cats, not only will she be likely to take in a stray cat, but may also see herself generally as a compassionate person, and be more likely to sign a petition to protect wetland ecosystems, or protest a bear hunt, or even attend an anti-war demonstration.

The persuader who uses the foot-in-the-door technique manipulates the “self-observation” process of the message recipient. The persuader influences the recipient’s assessment of her belief system by purposefully adding a particular decision to the cache that the recipient will use to determine her beliefs and make the future decision. Foot-in-the-door is a way of

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tion to “keep California beautiful.” *Id.* It did not matter if the request was made by the same person or a different person, or if there was a significant time delay between the small and large request. *Id.*

28. Rhoads & Cialdini, *supra* note 25, at 526.

29. *Id.*; O’KEEFE, *supra* note 8, at 170–71.

30. Burgoon & Bettinghaus, *supra* note 19, at 156.

31. *Id.*; O’KEEFE, *supra* note 8, at 75; Shelly Chaiken, Wendy Wood, & Alice H. Eagley, *Principles of Persuasion*, in *SOCIAL PSYCHOLOGY: A HANDBOOK OF BASIC PRINCIPLES* 705–06 (E. Tory Higgins & Arie W. Kruglanski eds., 1996) [hereinafter Chaiken, Wood].

creating precedent for a message recipient to use in deciding a problem. So, in the prior example, if the persuader can convince the recipient to donate to a cat shelter, the persuader is in a better position to convince the recipient to take in the stray cat, or oppose the bear hunt. By carefully choosing that first request, the persuader can alter the course of the recipient's decision-making.

The success of foot-in-the-door depends not only on the process of human decisionmaking, but also on certain aspects of human nature. Foot-in-the-door is particularly effective in people who have a strong preference for consistency in behavior.<sup>32</sup> But, overall, most people tend to seek "self-consistency," which is why foot-in-the-door has such broad success as a compliance strategy. People tend to make decisions that decrease feelings of inconsistency and increase feelings of consistency when compared with their prior behaviors.<sup>33</sup> So, when they engage in the decisionmaking process, they are scanning their prior decisions so they can make consistent future decisions. If they make a decision that seems inconsistent with prior behavior or with their perception of their belief system, they experience "cognitive dissonance" and will resolve that dissonance by changing their belief system to conform to the decision made, or changing their decision.<sup>34</sup> Foot-in-the-door works when the persuader creates a scenario that leads the recipient to make a certain decision that is consistent with the decision the persuader ultimately wants from the recipient.

The second reason for the consistent success of foot-in-the-door is that people seek "self-affirmation." A person will therefore seek to make a decision that confirms her belief that she is a person of integrity and morality.<sup>35</sup> People have attitudes or beliefs in part to serve their self-image. Thus, attitudes are said to be ego-defensive; that is, people will not espouse attitudes or beliefs that force them to admit negative information about themselves.<sup>36</sup> Attitudes are also "value-expressive," as they allow us to present ourselves as having certain core traits such as competence, knowledge, and sensitivity.<sup>37</sup> People will make decisions that protect and affirm their positive images of themselves. The foot-in-the-door strategy taps into the self-image

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32. Rhoads & Cialdini, *supra* note 25, at 526. The fact that foot-in-the-door does not influence young children is said to demonstrate the importance of a desire for behavioral consistency to the success of the strategy.

33. Eddie Harmon-Jones, *A Cognitive Dissonance Theory Perspective on Persuasion*, in *THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE* 99, 102 (James Price Dillard & Michael Pfau eds., 2002); KATHLEEN KELLEY REARDON, *PERSUASION: THEORY AND CONTEXT* 68–69 (1981).

34. See Harmon-Jones, *supra* note 33, at 102; Chaiken, Wood, *supra* note 31, at 704–05.

35. See Harmon-Jones, *supra* note 33, at 102–03.

36. See REARDON, *supra* note 33, at 67.

37. *Id.*

part of human decisionmaking because the recipient's agreement to the first request leads her to a certain generalization about what kind of person she is. The recipient will then make future decisions in a way that affirms this generalization.

What does all of this have to do with persuasive legal writing? On the most concrete level, advocates can interpret the foot-in-the-door data to strongly suggest that argument chains should begin with premises that the reader will readily accept. In part, a successful argument chain breaks down the ultimate thesis of the argument into a series of linked premises that lead to the thesis. Foot-in-the-door suggests that the audience is more likely to accept the ultimate thesis if the earlier premises leading up to it are phrased in a way that induces compliance in the reader. The persuasive writer wants to create an argument chain that leads the judge to start nodding "yes" to her arguments.

Most judges also share the common human desire to affirm their positive self-image. They want to see themselves as fair, compassionate, logical, and moral people.<sup>38</sup> A well-constructed argument chain can create the impression that the ultimate decision is the fairest, most compassionate, most logical, and so on. This is also a confirmation of the common strategy in which the advocate struggles for the high moral or policy ground, attempting to convince the judge that a decision for the advocate's client is the fairest, most compassionate decision.

But, on a theoretical level, the premise underlying the foot-in-the-door technique gives persuasive writers much information about how to sway judges. The knowledge that most human beings perform a "self-observation" of past behavior to determine their beliefs and then will use those beliefs to make the current decision is especially useful. The strong pull toward self-consistency is also useful information. In law, there is an even greater value placed on consistency and order. This means that even though judges are skeptical readers trained to ferret out any dubious premises or tenuous connections, they are susceptible to a strong human drive to behave consistently with their own prior decisions. Of course, lawyers already know that judges will seek to make future decisions that are consistent with prior ones. Indeed, the whole foundation of the legal decision-making process—*stare decisis*—presupposes a high level of consistency in decisionmaking. This is not necessarily news to the persuasive writer,

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38. See RONALD WAICUKAUSKI, PAUL MARK SANDLER & JOANNE EPPS, *THE WINNING ARGUMENT* 86–87 (2001) (stating that judges are human and influenced by emotions, such as sympathy); LOUIS J. SIRICO, JR. & NANCY L. SCHULTZ, *PERSUASIVE WRITING FOR LAWYERS AND THE LEGAL PROFESSION* 16 (2d ed. 2001) (judges moved by "appeals to their desire to do the right thing in a larger, social policy kind of way"); ROBIN WELLFORD, *LEGAL REASONING, WRITING AND PERSUASIVE ARGUMENT* 318 (2002) (stating that "judges strive to 'do the right thing'").

though it is certainly helpful to have empirical confirmation of the conventional wisdom.

However, the newer and more powerful implication of foot-in-the-door for persuasive writers is the knowledge that the “self-observation” process of message recipients does not always involve a “set” cache of beliefs and decisions; rather, the process is susceptible to influence by the advocate. The advocate can organize her argument in such a way as to add to the cache of prior decisions that the reader will use to perform her self-observation. In that way, the advocate can influence the message recipient’s determination—or perception—of the beliefs that will drive the ultimate decision. By crafting argument chains that add to the body of prior decisions that the reader will use to determine “what kind of person” she is, the advocate can demonstrate to the reader that she is the “kind of person” who agrees with the advocate’s ultimate position. The impact on the reader’s decisionmaking process can be especially significant when the argument chain leads with premises that the reader is likely to accept, but that the reader may not have independently connected to the advocate’s thesis.

Foot-in-the-door also has the advantage of subtlety. It affects the reader’s desire for consistency and self-affirmation, but does so in a somewhat indirect and non-obvious way. Affecting the “self-observation” process of the reader preserves the reader’s impression that she has independently arrived at the decision, when in fact the decision has been influenced by the advocate. Preserving the appearance of audience autonomy lessens the likelihood that the audience will feel coerced and angry, feelings which can lead to the so-called “boomerang effect” in which the message recipient responds to the persuasive message by rejecting it or making a decision opposite to the one advocated.<sup>39</sup>

This is not to say that a well-crafted argument chain will convince a reader that she is a completely different “kind of person,” or that it effectively convinces judges to make decisions they are otherwise firmly against.<sup>40</sup> But, for example, in close cases where judges do not have a firm predisposition, or where the argument chain demonstrates non-obvious links between prior favorable decisions or premises and the decision sought, foot-in-the-door suggests that the momentum of agreement is difficult to resist.

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39. Michael Burgoon et al., *Revisiting the Theory of Psychological Reactance: Communicating Threats to Attitudinal Freedom*, in *THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE* 213, 215–16 (James Price Dillard & Michael Pfau eds., 2002).

40. There are a number of studies, in fact, that document the relative ineffectiveness of persuasive strategies when the level of discrepancy between the decision sought by the persuasive message and the message recipient’s position is very large. See O’KEEFE, *supra* note 8, at 162.

The momentum created by a series of agreeable premises is important in the creation of legal argument chains because the chains are rarely iron-clad or formally valid.<sup>41</sup> The “halo” effect of the foot-in-the-door strategy that occurs because people tend to generalize about their beliefs from prior decisions implies that the persuasive writer has some flexibility in crafting a chain. The advocate is not necessarily bound rigidly to premises with obvious connections; though, of course, the degree to which the argument chain deviates from acceptable norms correlates to the risk that the reader will reject one or more of its premises, destroying the foot-in-the-door effect.<sup>42</sup>

The foot-in-the-door research suggests a number of strategies for argument chaining. First, the initial request must be attractive and induce compliance, but it also must be “of sufficient magnitude” to trigger the self-scanning process.<sup>43</sup> The request must “prompt” the message recipient to “infer attitudes from behaviors.”<sup>44</sup> So, the first few links in the argument chain must be carefully chosen to be small enough to ensure a positive reaction from the legal audience, but large enough to trigger a self-consistency and self-affirmation process. Moreover, in terms of stare decisis and choice of authority, foot-in-the-door suggests that prior decisions by the same judge will be especially persuasive, and can be forged into the chain to stimulate an even stronger self-consistency reaction. However, this is not necessary to the principle; essentially, the chaining process works by formulating legal arguments with which the judge will agree at the time she reads the brief, creating a flow of agreement leading to the advocated premise.

## 2. Argument Chains that “Work on” the “Foot in the Door” Principle

The vast majority of well-written, persuasive appellate briefs contain multiple examples of argument chains that begin with a series of linked premises that the court is likely to accept and that lead the court to agree with the more controversial premise—the critical request. In *Davis v. Monroe County Board of Education*,<sup>45</sup> for example, the petitioner’s brief used a number of argument chains that began with widely accepted premises that set the reader on the path to acceptance of the advocate’s ultimate thesis.<sup>46</sup> In two basic argument chains designed to convince the Supreme Court that

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41. See Robbins, *supra* note 18, at 496; see also VAN EEMEREN ET AL., *supra* note 7, at 107–08, 132–34.

42. See TRUDY GOVIER, A PRACTICAL STUDY OF ARGUMENT 53 (1985) (stating persuasive arguments must be composed of premises that are acceptable and connected to the conclusion).

43. Burgoon & Bettinghaus, *supra* note 19, at 158.

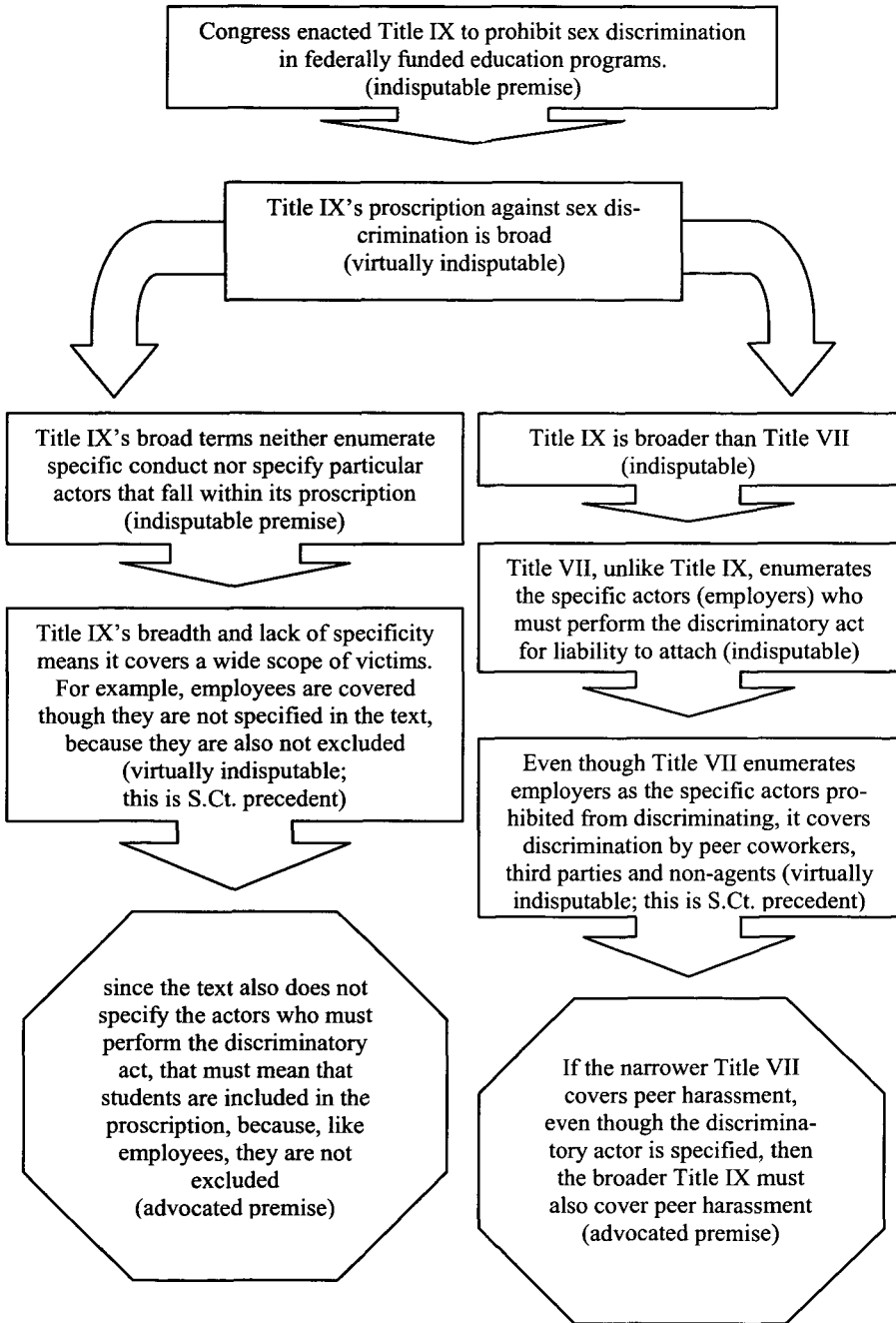
44. *Id.* at 159.

45. 525 U.S. 1065 (1999).

46. See Brief of Petitioner, *Davis*, 525 U.S. 1065 (No. 97-843) [hereinafter *Davis* Petitioner Brief].

Title IX covers student-to-student sexual harassment, the petitioner’s argument followed this complex path:

**Argument Chain:**



In both chains, the advocated premise is preceded by several premises that either must be agreed with or are virtually indisputable. The reader is set early on a path of acquiescence. Moreover, the argument premises are linked so that the premise of one forms the foundation or reason for the next one, so that agreement with the prior premise leads to agreement with the subsequent. The form of the chain is: if A, then B; if B, then C; etc. The premises that lead up to the advocated premise are not only individually difficult for the reader to disagree with (A, B, and C are all uncontroversial), but also interconnected so that it is difficult to agree with one and disagree with the next (if you agree with A, you must agree with B, because the form of the chain is that if A, then B).

The two chains work on the same principle as the foot-in-the-door in that they play on the reader's preference for consistency. The chains create for the reader a cache of prior consistent decisions linked to the advocated premise, so that the reader will be likely to experience dissonance if she rejects the advocated premise. It is, of course, still possible for the reader to disagree with the advocated premise, because the logic here only looks ironclad. But the chain makes acquiescence easier mentally, because it makes acquiescence seem more consistent with the reader's beliefs. If the reader rejects the advocated premise, she will have to work to resolve the apparent inconsistency created by her rejection.

The foot-in-the-door phenomenon can be especially useful to the advocate who must make comparisons that are both unconventional and push the boundaries of law and social norms. In the *Davis* example, an inevitable consequence of petitioner's argument is that an elementary school child can be a sexual harasser, a position that is socially and culturally problematic. Yet, petitioner's argument chains are constructed in a way that makes the comparison appear simple and conventional. For example, in the chain comparing Title VII to Title IX, the reasoning is a simple syllogism that is difficult to dispute: if X is broader than Y, and X covers B, Y must cover B also. The chain encourages the reader to focus on this simple transitive instead of the more problematic comparison between peers who are office coworkers and peers who are elementary school students.

But, foot-in-the-door can also help in cases where the advocate decides to—or must—confront a difficult legal or social norm directly. In these cases, foot-in-the-door chaining can help by convincing the reader that a particular decision is properly included in the prior cache the reader will use to make the decision. For example, in the case of *Rosa v. Park West Bank and Trust Co.*,<sup>47</sup> plaintiff-appellant Rosa, a biological male, was denied a loan by the defendant bank because he appeared for his loan request

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47. 214 F.3d 213 (1st Cir. 2000).



dressed in “traditionally female” clothing.<sup>48</sup> The audience might not have readily made the comparison between *Rosa* and *Price-Waterhouse v. Hopkins*,<sup>49</sup> in which a woman was denied partnership in part because of her abrasive, aggressive demeanor. The argument chain crafted by appellant Rosa, however, makes this non-obvious connection seem self-evident:

Actions based on sexual stereotypes are acts of impermissible sex discrimination (virtually indisputable, S.Ct. precedent).

↓

When a firm denies a woman partnership because the woman did not meet the firm’s stereotype of femininity, the firm has impermissibly discriminated against her (virtually indisputable, S.Ct. precedent).

↓

When a woman is told that she should walk, talk and dress more femininely, she is the victim of impermissible sex stereotyping because she did not conform to notions of what a “real woman” should look like (virtually indisputable, S.Ct. precedent).

↓

When a man is told to dress in a more masculine fashion, he is the victim of sex stereotyping because he has not conformed to what a “real man” should look like (advocated premise).

↓

When a man is the victim of sex stereotyping, he has been subject to an act of impermissible sex discrimination (advocated premise).

The chain works, in part, because of the foot-in-the-door principle. It is constructed in such a way that the reader is led to believe that if she agrees with the prior premises, she must find for appellant Rosa.<sup>50</sup> In other words, if the reader believes sex stereotyping is illegal, she must agree that the bank’s behavior was also illegal. A decision against appellant Rosa would be inconsistent and dissonant.

### 3. “Door in the Face”: Create a Scenario of Initial Rejection

Seemingly contrary to foot-in-the-door, there is some research that compliance is enhanced by making a large request first.<sup>51</sup> The strategy of

48. Jennifer L. Levi & Mary L. Bonauto, *Brief of Plaintiff-Appellant Lucas Rosa in the United States Court of Appeals for the First Circuit*, 7 MICH. J. GENDER & L. 147, 149 (2001) (reprinting the brief in full with minor changes).

49. 490 U.S. 228 (1989).

50. Of course, the foot-in-the-door effect in this case, as in most, will depend on whether the audience accepts the advocate’s characterization of precedent. For a true foot-in-the-door effect, the legal audience must actually agree with the premises, not simply acknowledge that it is bound by precedent. The agreement is what drives the consistency and dissonance reactions. Argument chains like this one also have the effect of making the legal audience feel that the advocate’s premise is required by precedent. This is also an effective strategy, but is slightly different from foot-in-the-door.

51. See O’KEEFE, *supra* note 8, at 172–73.

beginning a persuasive message with a more contentious proposition that the reader is likely to reject is called the “door in the face” strategy.<sup>52</sup> The research shows that the recipient, having rejected the first larger request, is thereafter somewhat more inclined to acquiesce to a second, smaller request.<sup>53</sup> Door-in-the-face is not as consistently successful as foot-in-the-door, however, and can depend on context.

For example, door-in-the-face is effective mostly if there is little or no time delay between requests, if there is no change in the identity of the requester, and if the request relates to the public interest or other humanitarian cause.<sup>54</sup> Although these limitations suggest that the door-in-the-face is a somewhat unpredictable persuasive tactic, many of them (time delay, identity of requester) will not affect the application of the strategy to persuasive legal writing. However, in considering door-in-the-face in the advocacy-writing context, it is important to be clear that door-in-the-face persuades the target to acquiesce to the *smaller* request; the result is not that the audience eventually acquiesces to the larger request.

Nevertheless, the door-in-the-face phenomenon, and particularly the explanations for why door-in-the-face works, should be of interest to the persuasive legal writer. At first glance, door-in-the-face seems to be of greatest relevance to legal negotiators in that it confirms the longstanding negotiating practice of posing an initial request that overshoots the desired outcome.<sup>55</sup> But the principles that underlie door-in-the-face can bear on advocacy techniques as well, and have the potential to change the way advocates think about forward chaining in certain contexts.

One primary explanation for the effectiveness of door-in-the-face is that it works because the sequence of the requests can reestablish the interaction between persuader and target as a bargaining or negotiation interchange, as opposed to a situation where the persuader is “acting upon” a passive message recipient.<sup>56</sup> Once the situation is reestablished as a negotiation, the social “rules” of negotiation apply, one of which is that concession

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52. *Id.* at 171.

53. *See id.* at 171–72. In one experiment, for example, a student approached people near a college campus asking them to volunteer two hours per week for two years at a local juvenile detention center. Not one person agreed to this request. However, 50 percent of those to whom the initial request was made agreed to a second request to take a group from the detention center to the zoo for two hours. Only 17 percent in the control group, to whom no initial request was made, agreed to the zoo trip. *Id.* at 172; *see also* Daniel J. O’Keefe, *Guilt as a Mechanism of Persuasion*, in *THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE* 333 (James Price Dillard & Michael Pfau eds., 2002).

54. *See* O’KEEFE, *supra* note 8, at 172–73.

55. *See, e.g.*, Richard Birke & Craig Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEG. L. REV. 1 (1999); Michael P. Vandenburg, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 53 (2003).

56. *See* O’KEEFE, *supra* note 8, at 172.

by one side should be reciprocated by concession on the other. Thus, the persuader's concession in asking for the smaller request leads to concession in the message recipient, and the recipient is led to accede to the smaller request.

Relatedly, some researchers attribute the door-in-the-face effect to the message recipient's feelings of obligation, responsibility, or duty to someone who has made a concession or done the recipient "a favor."<sup>57</sup> For this reason, the effect is likely to be stronger in cultures in which "tit-for-tat" reciprocity is the norm. Others attribute the door-in-the-face effect to guilt: refusal to accept the initial request induces guilt and agreeing to the smaller request reduces it.<sup>58</sup> Another explanation posits that the contrast between the two requests increases the likelihood of agreement to the smaller, because the message recipient perceives the smaller request as less burdensome because she will compare it to the larger request.<sup>59</sup>

A number of things about these explanations bear closer examination in the persuasive-legal-writing context. First, the implication that door-in-the-face works by changing the nature of the interaction between persuader and recipient is something that should pique the interest of any advocate. Persuasion is, at its core, a coercive process.<sup>60</sup> Yet, no one likes to feel as though she is being coerced. In fact, a danger of pushing too hard with any persuasive message is a phenomenon called "psychological reactance," in which the message recipient perceives the persuasive message as a threat to her autonomous decisionmaking.<sup>61</sup> The message recipient will seek to reestablish her autonomy through various means, which can result in a boomerang effect.<sup>62</sup>

The explanations for door-in-the-face suggest that this strategy changes the appearance of the persuasive process so that it looks less coercive and more like a dialogue, which in turn may reduce the risk of a boomerang effect. Altering the process of audience decisionmaking is one of the primary ways for a persuader to gain compliance (the other being altering the content of the message).<sup>63</sup> In typical advocacy situations, the per-

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57. See Rhoads & Cialdini, *supra* note 25, at 516.

58. See O'Keefe, *supra* note 53, at 333-34.

59. See O'KEEFE, *supra* note 8, at 172.

60. See generally Gerald Miller, *On Being Persuaded*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 4 (James Price Dillard & Michael Pfau eds., 2002) (stating effectiveness of persuasion depends on coercion and a complex web of threats and promises). The legal system itself is replete with this kind of coercion. See Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601-02 (1986). Miller and Cover make similar points: just because the violence or coercion underneath a system is not direct or obvious, does not mean it is not there. But both foot-in-the-door and door-in-the-face indicate that how coerced the recipient *feels* can make a substantial difference.

61. Burgoon et al., *supra* note 39, at 215-16.

62. *Id.*

63. FUNKHOUSER, *supra* note 7, at 101.

suauder uses certain techniques to gain something from the recipient, whose role is to “receive” the message and make a decision; the persuader is “working on” the recipient. Door-in-the-face seems to work by changing the recipient’s perception of her role in the dialogue from the more coercive “worked on” to the more cooperative “worked with.”

Instead of someone who “receives” the message and makes a decision, the recipient becomes someone who is actively engaged with the persuader in finding a solution to the problem (as with two negotiating parties).<sup>64</sup> This role makes the persuader look less like a coercer, which reduces the threat to the recipient’s feelings of autonomy and reduces the possibility of psychological reactance. Instead, persuader and recipient look like partners in the quest for mutual agreement. In addition to encouraging compliance, this perception can also increase the recipient’s motivation, a psychological state that is favorable to the persuader. In the words of one researcher, the door-in-the-face technique “empowers the requester through rejection.”<sup>65</sup>

The other facet of door-in-the-face that should be of interest to the legal advocate is that, as with foot-in-the-door, audience self-concept plays a central role in the persuasive process. Whereas with foot-in-the-door the recipient is moved to comply so that she behaves consistently with her (possibly idealized) self-concept, with door-in-the-face the initial rejection can create a conflict with the recipient’s self-concept. Rejecting an initial foray can elicit feelings of guilt or hypocrisy and make the recipient question whether she is—or wants to be—the kind of person who says “no” to certain requests.<sup>66</sup> The persuasive message has created a subtle threat to the recipient’s self-image that the recipient will be motivated to resolve.<sup>67</sup> The persuasive message that elicits rejection can work to compromise the recipient’s feelings of integrity—for example, her feelings that she is a moral, ethical, fair person.<sup>68</sup> The recipient seeks to reduce this threat (or “cognitive dissonance”) by complying with the second request, thereby reaffirming her self-image.<sup>69</sup>

Compliance that is the result of a threat to the recipient’s self-concept and the resulting feelings of guilt is called “transgression compliance,” because it is the recipient’s perceived or actual “transgression” that drives the compliance.<sup>70</sup> Transgressions have a “powerful” and “dependable” effect

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64. Kelton & Cialdini, *supra* note 25, at 516 (stating “[t]hose who comply in the face of concessions report that they feel more control over” and “more satisfied” with the results of the interchange).

65. *Id.* at 515.

66. O’Keefe, *supra* note 53, at 331–32 (describing the effectiveness of guilt and hypocrisy induction strategies).

67. *Id.* at 335.

68. *Id.*

69. Harmon-Jones, *supra* note 33, at 100–02.

70. O’Keefe, *supra* note 53, at 332.

on subsequent compliance.<sup>71</sup> Although powerful, transgression compliance is a persuasive strategy with significant risks. The primary risk is that most people do not like to have their self-concept threatened, and may react with anger or resentment, neither of which are conducive to persuasion.<sup>72</sup> However, this negative effect is more pronounced when the persuader explicitly points out the recipient's inconsistency, and is less likely when the persuader simply creates a scenario in which the message recipient independently realizes it, which is what happens with door-in-the-face.<sup>73</sup>

The complex psychological processes that make up the decisionmaking process during door-in-the-face encounters can be useful information for the persuasive legal writer. First of all, door-in-the-face implies some support for preceding an argument chain with the conclusion, however controversial, because initial reader skepticism can prime the reader for future compliance. Relatedly, and perhaps more surprisingly, the door-in-the-face phenomenon contradicts one of the most widely held pieces of conventional wisdom in advocacy: advocates should never ask for anything more than they need to get the desired result for the client, and they certainly should not start a brief with an argument that is likely to elicit rejection.<sup>74</sup> Consistent with foot-in-the-door, the conventional wisdom is that the narrowest and least controversial request represents the surest route to persuading a judge, and the advocate should always start the brief with the strongest (surest) argument.<sup>75</sup>

The door-in-the-face phenomenon suggests that, in some instances, it may be worthwhile for the advocate to rethink or reject this piece of conventional wisdom, and that it may be less risky to do so than legal advocates think. While I am not suggesting that advocates start briefs with high-risk arguments of dubious validity, the data does suggest that the rigid conservatism of legal writing might be worth rethinking in some cases. The data offers some support for advocates to take greater risks and use more creativ-

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71. *Id.*

72. *Id.* at 337–39.

73. *Id.* at 338. For example, an explicit statement that the message recipient has behaved inconsistently in the past, sometimes called a “hypocrisy induction,” can lead to a boomerang effect. There is a difference, however, between that more aggressive strategy and the door-in-the-face.

74. *See, e.g.*, BEAZLEY, *supra* note 10, at 152–53 (emphasizing importance of not raising “fringe” or risky issues on appeal); ALDISERT, *supra* note 6, at 118–20, 139–40, 145 (urging lawyers to avoid risky arguments, and to state the issues on appeal “as narrowly as possible to achieve [the client’s] objective”). Interestingly, although Judge Aldisert exhorts lawyers to throw out all arguments except the strongest two or three, he drops a footnote that tells an anecdote of a winning argument that was almost left out of a brief. *See id.* at 120 n.8.

75. *See, e.g.*, GIRVAN PECK, WRITING PERSUASIVE BRIEFS 133–34 (1984) (encouraging advocates to make strongest arguments first); ALDISERT, *supra* note 6, at 117, 139–40, 211 (strongly recommending that arguments start with most powerful point, one with “reasonable probability to persuade,” and “throwaway” issues should be last).

ity in legal argumentation, and to do so earlier in the brief. For example, an advocate might consider an argument chain that employs door-in-the-face principles in contexts such as “impact” litigation, where a big request may be worth the risk, or when a client can get a favorable result with a safer argument but would ultimately be better served by a riskier one. Beginning the chain with the riskier proposal may elicit rejection (or it may not), but it can also prime the audience for compliance with smaller assertions. The door-in-the-face phenomenon implies that the advocate does not lose much by making the big request—and actually may gain ground, particularly if a smaller request is also a part of the chain, and is still ultimately a “winner” for the client.

Finally, the success of door-in-the-face challenges the idea that arguing in the alternative, or offering a number of different routes to the desired outcome, is evidence of a weak argument. Door-in-the-face, like starting an argument chain with a bigger premise and then proposing a smaller one, is a kind of “argument in the alternative.” Although arguing in the alternative is a familiar strategy, it is one that advocates disagree about. While some commentators see argument in the alternative as a valid persuasive strategy, others caution that the strategy can make both arguments appear weak.<sup>76</sup> Echoing the explanations for door-in-the-face, the concerns about “argument in the alternative” are that the strategy makes the advocate look like she is negotiating, and therefore that she herself is not fully persuaded by or committed to the bigger argument. However, the data about door-in-the-face suggests that the advocate’s shift to a stance that looks more like negotiation can be a position of strength rather than weakness, precisely because it looks less like a power play, and encourages the recipient to react as if she were negotiating.

On the other hand, the legal culture is not one in which “tit-for-tat” reciprocity is the norm between judges and lawyers. Judges know that they are the decisionmakers and most are not disposed to “negotiate” with counsel about a decision; they are less likely to feel the sense of guilt or obligation that lead to the door-in-the-face reaction. Nevertheless, reciprocity is the norm in American society, and judges are undoubtedly at least somewhat susceptible to the “social rules” of discourse, particularly when the issue is one—or the persuader presents an argument—that induces feelings of guilt or hypocrisy that the audience is moved to resolve. The door-in-

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76. See, e.g., ALDISERT, *supra* note 6, at 117 (throughout the book, Judge Aldisert admonishes lawyers to avoid “throwaway” or risky issues). Judge Aldisert notes emphatically, “Put your best foot forward. And only your best foot!” *Id.* at 140-41. This suggests that arguing in the alternative is not an effective persuasive strategy. Later in the book, however, Judge Aldisert notes the benefits of arguing in the alternative, stating that providing alternate, independent grounds for relief increases the advocate’s chances of winning. *Id.*

the-face data suggests that this strategy might be especially useful in cases that raise important or compelling policies related to the public interest.

In designing legal argument chains, door-in-the-face suggests great care in the crafting of those first links. The first premises must be large enough to induce rejection, but not so large that rejection is reasonable and the recipient believes that the rejection is appropriately a reflection of her attitudes and beliefs.<sup>77</sup> Unlike foot-in-the-door, it is important for door-in-the-face messages *not* to trigger the self-scan process in such a way as to confirm for the audience that continuous rejection would be the most consistent (and affirming) approach.<sup>78</sup> Moreover, the initial premise(s) must not be absurd or likely to stimulate a hostile response; they need only be of sufficiently greater magnitude to incur rejection—just a few steps away from the critical request with which compliance is sought.<sup>79</sup>

#### 4. *Argument Chains that “Work on” the “Door in the Face” Principle*

Because the door-in-the-face principle conflicts with a longstanding tradition of appellate advocacy writing, briefs that begin with an aggressive, controversial premise are rarer than those that begin with benign, agreeable premises. There are, however, some examples that demonstrate the tactic. In the plaintiff-respondent's brief in *Meritor Savings Bank v. Vinson*,<sup>80</sup> for example, the respondent began her merits brief before the United States Supreme Court by arguing that certiorari was improvidently granted, and made arguments about the record that she did not make in her brief responding to the petition for certiorari.<sup>81</sup>

Although beginning the merits brief with this argument had its strategic and logical advantages, the argument had many of the hallmarks of a door-in-the-face initial request.<sup>82</sup> First, it was risky. It was highly unlikely that the Supreme Court would accede to an argument that raised something new in the merits brief that was not argued in the response to the petition for certiorari, which, as petitioner pointed out, was the more appropriate place

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77. Burgoon & Bettinghaus, *supra* note 19, at 159.

78. *Id.*

79. *Id.*

80. 477 U.S. 57 (1986).

81. Brief of Respondent Mechelle Vinson at 1, 15–23, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), 1986 WL 728234, at 1, 8–11 [hereinafter *Meritor Respondent's Brief*]; see also Reply Brief of Petitioner, *Meritor*, 477 U.S. 57 (No. 84-1979), 1986 WL 728303 [hereinafter *Meritor Petitioner's Reply Brief*].

82. As a matter of strategy, leading with this argument gave respondent a context for raising factual arguments central to her theory of the case. Logically, it made sense to lead with it as a procedural issue. See, e.g., ALDISERT, *supra* note 6, at 139 (procedural issues are “threshold” issues that logically must come first).

for the argument procedurally.<sup>83</sup> Moreover, there was nothing to indicate that there was disagreement among the members of the Court about granting the petition for certiorari, which means that, at a minimum, four Justices voted to grant certiorari and the others did not feel strongly enough to dissent.<sup>84</sup> Second, the attack on certiorari was a “big” request. It asked the Court to reverse its initial decision and publicly admit that it had mistakenly granted the original cert petition. Finally, the request asked for a “big” win; were respondent to convince the Court to reverse its initial grant of certiorari, that decision would let stand as precedent a court of appeals opinion highly favorable to the respondent on a number of cutting-edge issues. For all of these reasons, the Court was likely to reject the argument, and, indeed, it did. Neither the majority opinion nor the two separate concurring opinions even mention the argument.

On the other hand, the request was neither unreasonable nor absurd, and there is evidence that the Court found aspects of it persuasive. Aspects of the respondent’s arguments about certiorari, particularly the abstract and ambiguous quality of key facts in the record, are echoed in the Court’s discussion of respondeat superior liability.<sup>85</sup> A request that involves a high risk of rejection but is reasonable is critical to the door-in-the-face response. Moreover, the respondent achieves a number of significant victories with the arguments that follow the “big” request, including an overall win on result (the Court affirmed the favorable decision below). But, respondent also achieves victories on a smaller scale. For example, the Court somewhat surprisingly accepts respondent’s argument about how “voluntary” sexual conduct can be the result of “unwelcome” sexual advances. It also accepts the validity of her analogy to racial harassment cases.<sup>86</sup>

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83. *Meritor* Petitioner’s Reply Brief, *supra* note 81, at 2–3.

84. *PSFS Savings Bank v. Vinson*, 474 U.S. 815 (1985) (petition for certiorari granted; no dissenting opinions).

85. *Compare Meritor* Respondent’s Brief, *supra* note 81, at 16–18 (record is “cloud[ed]” and “ambigu[ous]” because a key finding of fact is “wholly hypothetical” and makes “any consideration of notice, knowledge, policy or procedure . . . wholly abstract”), *with Meritor*, 477 U.S. at 72 (question of employer liability has “rather abstract quality” because of “state of record” and makes determination of notice standard premature).

86. The difference between “welcome” advances and “voluntary” conduct is a core theory of respondent’s case, but a difficult point to explain. Nevertheless, the Court got it. *Compare Meritor* Respondent’s Brief, *supra* note 81, at 35–36 (court of appeals was correct in finding that “sexual intercourse may appear voluntary even though the advances that initiated it were entirely unwelcome”), *with Meritor*, 477 U.S. at 68 (“correct inquiry is whether respondent . . . indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary”). The race analogy is less difficult, but could easily have been rejected, given a history of some divergence between sex and race cases and petitioner’s heavy reliance in its brief on the distinction between sex and race. *Compare Meritor* Respondent’s Brief, *supra* note 81, at 44–45, *with Meritor*, 477 U.S. at 66 (same principle used for racial harassment cases should be used in sexual harassment cases).



The context of *Meritor* is also consistent with the door-in-the-face phenomenon. The Court characterized the behavior in the case as “pervasive harassment” as well as “criminal conduct of the most serious nature.”<sup>87</sup> Moreover, the Court notes that because the petitioner’s grievance procedure required respondent to complain first to her supervisor, who was also the perpetrator, it was “not altogether surprising that respondent failed to invoke the procedure.”<sup>88</sup> The allegations make the case one in which an initial rejection might very well induce a guilt or dissonance reaction, making even Supreme Court Justices wonder whether they are the “kind of people” who decide that this conduct is without federal remedy. Consistent with the door-in-the-face strategy, respondent’s brief first lays the groundwork for a dissonance reaction, and then offers multiple ways to resolve it, several of which the Court takes.

While it is impossible to say with certainty whether the result in *Meritor* is a function of the door-in-the-face phenomenon, the case gives an excellent example of how the strategy might translate in an appellate writing context, and demonstrates a result that is consistent with a door-in-the-face response. At the very least, the example should give advocates pause about the conventional wisdom of appellate writing that advocates should always make the least controversial request first. It seems clear that the respondent did not *lose* anything by leading with a “big” request, and there is some evidence that she may have gained some ground. *Meritor*, along with the social-science data, demonstrates that the safe route is not the only route, and gives creative advocates yet another tool for persuasion.

### III. AFFECTING AUDIENCE INVOLVEMENT

A critical variable affecting the impact of a persuasive message is the level of involvement of the target audience with the issue and the message.<sup>89</sup> “Involvement” in social science is something of a term of art, and, although it is a complicated concept, generally refers to the level of personal relevance to the issue felt by the audience.<sup>90</sup> It is what allows the audience to connect the content of the persuasive message to personal experience, or to personal beliefs or values.<sup>91</sup>

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87. *Meritor*, 477 U.S. at 67.

88. *Id.* at 73. The Court also noted wryly that “[p]etitioner’s contention that respondent’s failure [to report] should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.” *Id.*

89. Michael D. Slater, *Involvement as Goal-Directed Strategic Processing: Extending the Elaboration Likelihood Model*, in *THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE* 175, 175 (James Price Dillard & Michael Pfau eds., 2002).

90. O’KEEFE, *supra* note 8, at 99.

91. Slater, *supra* note 89, at 177. It should be noted here that some researchers disagree over the definition of involvement, with some limiting it narrowly to the concept of

Defined this way, audience involvement is not a new concept for persuasive legal writers. However, while legal writers have long sought to influence the level of audience connection with a legal issue, the conventional wisdom of persuasive legal writing can treat the relationship between emotional or motivating arguments and their result as a kind of linear equation. The thinking often runs along these lines: if an advocate makes the “right” motivating argument, the judge will “want” to make a decision consistent with the policy or value raised by the argument and will be more inclined to make a decision in the advocate’s favor.<sup>92</sup>

While this is undoubtedly part of the story, the social-science data shows that when an advocate makes a convincing motivating argument, something else—something a bit more complex—happens to the audience other than picking from among competing values. While there is no question that most people, judges included, will respond to arguments directed at values, the question is why, and how? A look at the data and theories about audience involvement—and there is a great deal of it—reveals that involvement or motivation is a significantly more complex and multifaceted concept that deserves more thoughtful treatment by legal advocates.<sup>93</sup>

#### A. How Involvement Affects the Decisionmaking Process

One of the most interesting things about audience involvement is that it affects not only the ultimate decision, but also the process by which a person thinks about a persuasive message. In other words, involvement plays such a central role in *what* the ultimate decision or result is because it affects *how* the decision is made. A motivating argument can affect how the judge reads the briefs, how she approaches the arguments made, what

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direct personal relevance and others including such things as the person’s view of the issue’s importance, or the connection between the person’s self-concept and the issue. O’KEEFE, *supra* note 8, at 111.

92. The typical tools for influencing involvement—policy arguments, factual narratives—are often discussed as though the primary challenge lies in discovering the most emotionally resonant policies or facts, which, if they bear on a value held by the judge, will lead the judge to a favorable decision. WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 66–68 (2002); *see also* SIRICO & SCHULTZ, *supra* note 38, at 103–04; CATHY GLASER ET AL., *THE LAWYER’S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH, AND ADVOCACY* 318–20 (2002); WELLFORD, *supra* note 38, at 318. Another theory posits that decisionmakers have a value system comprised of numerous beliefs and attitudes that are ordered in a hierarchy of importance. One purpose of rhetorical strategies aimed at judicial values is to “activate” favorable values and “deactivate” unfavorable ones, or otherwise influence the importance of competing values in the judge’s system. *See* MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 60–61 (2002).

93. *But see* Wangerin, *supra* note 19, at 200 (acknowledging that involvement is central to persuasion, but arguing that it has little or nothing to do with “the structure of persuasive arguments”).

kinds of arguments will sway her, and whether her decision will be strong and long-lasting or weak and easily shakable. To truly understand what she is doing when she makes arguments directed toward audience motivation, therefore, the advocate must understand involvement and how it affects the process by which decisions are made.

The relationship between audience involvement and the decisionmaking process is described by a theory called the Elaboration Likelihood Model (ELM). The ELM posits that evaluation of persuasive arguments takes place on a continuum; at one end of the continuum is central route processing and at the other is peripheral route processing.<sup>94</sup> Central and peripheral processing of persuasive messages differ in the depth of audience consideration of the issue and the message. Central route processing is characterized by careful, critical evaluation of the merits of arguments, or "high elaboration." During central route processing, the message recipient actively engages with the persuasive message, generating her own thoughts and arguments in response to the information she has received.<sup>95</sup> Peripheral route processing, on the other hand, is less thoughtful and engaged, and is often based on heuristics or shortcuts unrelated to the substantive merits of the message.<sup>96</sup> For example, when a judge considers whether the facts of a precedent case are applicable or distinguishable from the case before her, she is actively engaged with the merits of the arguments before her, and processes more centrally. When a judge decides to reject an argument because the advocate lacks credibility, the process is more peripheral.<sup>97</sup>

One of the tenets of the ELM is that, generally, as audience involvement increases, the audience moves toward central processing of the persuasive message; as it decreases, the audience moves toward peripheral processing.<sup>98</sup> A typical experiment testing audience involvement studied the decisionmaking processes of college undergraduate students.<sup>99</sup> The students heard identical persuasive messages advocating that senior comprehensive examinations be required as a condition of graduation.<sup>100</sup> The only variable was that one group of students was told that the policy was to be adopted at their institution (high-involvement condition) and another group was told

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94. Steve Booth-Butterfield & Jennifer Welbourne, *The Elaboration Likelihood Model: Its Impact on Persuasion Theory and Research*, in *THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY & PRACTICE* 155, 157 (James Price Dillard & Michael Pfau eds., 2002); O'KEEFE, *supra* note 8, at 98.

95. Booth-Butterfield & Welbourne, *supra* note 94, at 156–57.

96. *Id.* at 156.

97. *See id.* at 158.

98. *Id.* at 159–60. There are a number of other variables that impact how a message is processed, according to the ELM, including the level of message complexity and message repetition. O'KEEFE, *supra* note 8, at 99.

99. O'KEEFE, *supra* note 8, at 100.

100. *Id.*

that the policy was to be adopted at a different, far away institution (lower involvement).<sup>101</sup> In contrast to the low-involvement group, the high-involvement group exhibited decisionmaking processes associated with the central route—that is, more thoughtful consideration of the arguments.<sup>102</sup> The students who felt more personally connected to the issue were more careful and critical in their evaluation of the merits.

In terms of persuasive legal writing, this data confirms something relatively unsurprising: the decision in a case will be affected by how much the audience cares about the issue.<sup>103</sup> More specifically, the ELM suggests that the degree of attention that the judicial audience gives to a case or an advocate's argument will vary with the judges' level of involvement in the issue. While the description of central route processing sounds like the process in which most judges engage when evaluating briefs, it is unlikely that judges process all messages with the same degree of elaboration. Judges are busy,<sup>104</sup> and likely prioritize both the cases and the arguments and give different levels of attention to different cases, issues, and arguments.

The ELM also suggests that advocates can influence the level of attention given to their persuasive messages by influencing the level of involvement the reader feels. The advocate can move the audience closer to central processing and more elaboration or push her away from central processing to a more peripheral consideration.<sup>105</sup> While most persuasive legal writers are aware of the importance of influencing how much their audience cares about an issue, what they may not know is that involvement has a significant effect on the ultimate decision because it affects the process of audience decisionmaking.

So, why should legal writers care about *how* the audience processes the message? Why would they want to influence the decisionmaking process? After all, the ELM does not purport to direct the substance of persuasive messages.<sup>106</sup> Advocates can achieve a “good” (or “bad”) result through either central or peripheral processing.<sup>107</sup> Moreover, advocates already use a number of strategies to influence involvement—even if they do not know the social-science term of art. Policy arguments, analogies or examples, precedent choice, and factual narratives all play on audience involvement,

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101. *Id.*

102. *Id.* at 99.

103. *Id.* at 177.

104. See ALDISERT, *supra* note 6, at 115–16.

105. Although complicated, audience involvement is not static or purely internal; rather, it can be “situationally induced.” Booth-Butterfield & Welbourne, *supra* note 94, at 160.

106. Andrew J. Cook, Kevin Moore & Gary D. Steel, *The Taking of a Position: A Reinterpretation of the Elaboration Likelihood Model*, 34 J. THEORY SOC. BEHAV. 315, 318 (2004).

107. O'KEEFE, *supra* note 8, at 105.

in different ways and to different degrees. Is it really necessary for legal advocates to understand the intricacies of how involvement affects result?

The answer is yes. Legal advocates should care about how the audience processes the message. They will be better and more effective writers if they understand and have greater control over their handling of involvement. A main reason that legal writers should care about the decisionmaking process is that, in the context of persuasion (as with many areas of law), process is inextricably entangled with result. It is an axiom of legal practice that if you influence the process, you influence the result, and advocacy is no exception. With involvement, the ways in which the decisionmaking process can affect result is illuminated by the differences between the central and peripheral processes of decisionmaking.

There are two primary differences between the decisionmaking processes that will interest the persuasive legal writer seeking to influence involvement: the different decisionmaking routes (1) call for different argument strategies and (2) produce different kinds of decisions. In terms of argument strategy, different kinds of persuasive messages will influence the message recipient who processes centrally versus the recipient who processes peripherally. For example, substantive argument merits are quite important to central processing, and less important to messages processed peripherally. When recipients process centrally, strong merits arguments will elicit favorable results and weak arguments will elicit unfavorable results.<sup>108</sup> Things like typographical errors and advocate credibility become less important as a person moves closer to central processing of a message.<sup>109</sup> The opposite is true for messages processed peripherally.<sup>110</sup> In peripheral route processing, argument merits exercise less influence on the message recipient. Strong merits arguments will not necessarily yield favorable results, and weak arguments will do less damage. Rather, things like advocate likeability or credibility will loom larger in the decision.<sup>111</sup>

Central and peripheral processing also differ in the strength of the result they produce. The decision that results from central processing—because it is based on an elaborative, critical process of argument evaluation—is likely to be stronger and more persistent than decisions reached through peripheral processing.<sup>112</sup> Because during central processing the message recipient, often independently, has generated, evaluated, and answered counterarguments to the arguments presented, the resulting decision is less vulnerable to counterarguments raised by opponents.<sup>113</sup> Decisions

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108. *Id.* at 110.

109. *Id.* at 97–98.

110. *Id.* at 110.

111. *Id.* at 98.

112. Booth-Butterfield & Welbourne, *supra* note 94, at 157.

113. *Id.* at 157–58.

resulting from peripheral processing, on the other hand, are more vulnerable and held with less confidence.

At the very least, this data suggests that legal advocates approach involvement and motivation carefully, with an understanding that motivating arguments will affect the audience decisionmaking process, and with an eye toward what kind of process might favor the client's position. This disrupts some of the linearity with which lawyers have approached audience motivation. Audience involvement does not simply lead the decisionmaker in a straight line to a particular decision.

Moreover, the persuasive legal writer needs to know that involvement will affect how much influence strong (and weak) merits arguments will have on the reader, and how critically the reader will assess them. She should also know that when she makes a motivating argument, she is not merely giving the judge a reason to find for her client; she is ensuring that the audience will give close, critical consideration to the merits of the arguments, testing the argument with self-generated counterarguments and examples.<sup>114</sup> It is also important for her to know how certain decisions she makes will affect the impact of other rhetorical features of the argument, such as her own credibility or likeability, or grammatical or typographical errors.

This is important news; it can mean the difference between winning and losing. Legal advocates are well-aware that argument merits are not the only influence on judicial decisionmaking; they know that credibility, how a brief looks, and other things unrelated to substance can affect the decision.<sup>115</sup> But, they may not have known that they can assert some control over how much influence these criteria have. There will certainly be times when an advocate wants scrutiny that is more careful and considered. But there are also times—for example, if she wants a summary affirmance or a denial of review or certiorari, or if her position has a strong surface appeal but will weaken under critical scrutiny—that she might prefer a less central process or a process that is more influenced by peripheral cues. In either case, she should have control over the tools that affect these processes. In addition, the advocate should also know what she risks when courting a favorable decision through a more peripheral process. The decision might be favorable, but also vulnerable to her opponent's arguments and subject to change. This may be a risk that the advocate wants to—or must—take, but she should do so consciously.

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114. O'KEEFE, *supra* note 8, at 99; Booth-Butterfield & Welbourne, *supra* note 94, at 159.

115. SMITH, *supra* note 4, at 101, 169; BEAZLEY, *supra* note 10, at 168, 175; *see also* Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 SUFFOLK U. L. REV. 1 (1997).

Finally, advocates should understand the intricacies of how involvement works, because otherwise they risk using it ineffectively. Advocates already use strategies to affect involvement, but may not know the nuances of how particular motivating strategies affect the decisionmaking process. So, they may be using strategies in ways that are ineffective or, worse, harmful to their cases. As the following section demonstrates, involvement is as complex as human motivation, and different advocacy goals call for different involvement strategies.

## B. The Nuances of Audience Involvement

If the first step for the advocate in the use of motivating arguments is whether and under what circumstances to stimulate audience involvement, the second question is how to stimulate involvement effectively and knowledgeably. Like the decision whether to push judges toward greater involvement, how to do so is a more complex question than legal advocates might think. It is a bit more complicated than figuring out what beliefs or values the judges hold in the greatest esteem and finding a way to connect those values to the issue in the case. First of all, there are different kinds of involvement a message recipient can feel, and the recipient will process the message differently depending on what kind of involvement is experienced.<sup>116</sup> Second, the different kinds of involvement mean that a message can be pitched to trigger a certain kind of involvement, depending on how the advocate wants the recipient to process the message.

### 1. *The Different Kinds of Audience Involvement*

In terms of a message recipient's intrinsic beliefs, social scientists draw a distinction between "outcome-relevant" involvement and "value-relevant" involvement.<sup>117</sup> Outcome-relevant involvement refers to a direct personal stake in the outcome of the issue; the college students in the ELM study who believed that the graduation requirements at their own institution were going to change had high outcome-relevant involvement.<sup>118</sup> On the other hand, value-relevant involvement refers to issues that impact important personal values or beliefs.<sup>119</sup> Message recipients also can experience

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116. Booth-Butterfield & Welbourne, *supra* note 94, at 161–62, 178–80.

117. *Id.* at 161–62. The same researchers also identified a third type of involvement called "impression-relevant" involvement, which refers to the link between social interaction or relationships and message content. Slater, *supra* note 89, at 177.

118. Slater, *supra* note 89, at 177.

119. *Id.*; O'KEEFE, *supra* note 8, at 99 (message recipient's motivation to consider message thoughtfully increases as level of personal relevance increases); Cook et al., *supra* note 106, at 316.

another type of involvement called “response involvement.”<sup>120</sup> When a decision is in some way public, as are judicial opinions, message recipients may be motivated to exhibit the “correct” attitude or response, which may be different from their actual personal belief.<sup>121</sup> In a given case, a message recipient can experience some or all of these different kinds of involvement, to different degrees for different issues.

Value and outcome involvement, in particular, have very different (and somewhat surprising) effects on message processing. High outcome involvement is, as with the graduation requirements study, associated with central processing. Those recipients with high outcome involvement showed a high degree of attention to argument merits; they had a favorable response when confronted with strong arguments and an unfavorable one when confronted with weak arguments. High value-relevant involvement, however, was *not* associated with the same degree of argument attention as high outcome involvement.<sup>122</sup> Message recipients whose strongly held values were at issue in a case did not show high elaboration and were not influenced favorably by strong arguments (or unfavorably by weak ones).

In terms of message framing, the data suggests that a message crafted to induce a feeling of personal outcome involvement in the recipient is more likely to be processed centrally, with great elaboration, and with increased attention to argument merits.<sup>123</sup> If the message is reframed in terms of more abstract values, the result is a decreased elaboration, a more peripheral mode of processing, and minimal impact of argument strength—closer to what we might call a “knee-jerk” response.<sup>124</sup> As one commentator explained, this means that an appeal to values could be a way to “short-circuit intelligent debate.”<sup>125</sup> Think of how politicians use appeals to “family values” to stimulate a certain response, one that can be quite impervious to logical arguments.

Another wrinkle is that a value-involved message recipient will experience a different reaction depending on whether the message conflicts with or confirms her values. If a message conflicts with the recipient’s values, the recipient is motivated to “protect” her beliefs (“value-protective processing”).<sup>126</sup> To protect her beliefs, the message recipient will respond to any substantive arguments that conflict with her beliefs by generating counterarguments. This means that in value-protective situations, stronger arguments in the persuasive message will not lead to attitude change, and

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120. O’KEEFE, *supra* note 8, at 115–16.

121. *Id.* at 115–16 n.19.

122. *Id.* at 177, 179.

123. Slater, *supra* note 89, at 180.

124. *Id.*

125. *Id.*

126. *Id.* at 179–80.



may make the belief of the message recipient more entrenched. Rather, to induce attitude change in someone who has strongly held beliefs, the peripheral—not central—route is the more effective means, particularly “if values are held with any real commitment.”<sup>127</sup> In other words, if a person has strong values and the advocate’s desired result conflicts with those values, merits arguments are not likely to wield great influence, regardless of their strength. The opposite occurs for a value-involved message recipient when the message confirms her beliefs (“value-affirmative processing”).<sup>128</sup> In that situation, strong merits arguments will influence the message recipient by making more secure the beliefs consistent with the message.<sup>129</sup>

One of the more interesting involvement studies not only confirmed that peripheral—not central—cues are the more effective route for changing the attitudes of value-protective message recipients, but also identified narrative evidence as an effective peripheral cue. In this study, college students were divided into two groups, depending on whether their values inclined them to agree or disagree with the social acceptability of alcohol use.<sup>130</sup> The participants were then subjected to a message about alcohol use, buttressed either by statistics or by a short narrative depicting the negative consequences of alcohol on a fellow student.<sup>131</sup> The value-protective message recipients demonstrated belief change when confronted with the narrative evidence and were less persuaded by the statistics.<sup>132</sup> Researchers posited that the narratives circumvented counter-arguing by engaging the message recipients on more affective (and less cognitive) level.<sup>133</sup> The statistics, on the other hand, served only to encourage counter-arguing.

The opposite result was reached for the value-affirmative message recipients, who exhibited classic central processing in response to statistical evidence but were not affected by the narratives.<sup>134</sup> When considering the formulation of a particular persuasive message, in other words, the study showed that “statistical evidence is superior for reinforcing beliefs of those already inclined to believe the message, and anecdotal evidence is superior for influencing a much more difficult audience—those who disagree with the message.”<sup>135</sup>

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127. *Id.* at 180.

128. *Id.*

129. *Id.*

130. *Id.* at 184.

131. *Id.*

132. *Id.*

133. *Id.* at 180, 184, 188. This is something of a simplification of the conclusions, which evaluated a number of variables on the path to belief change. *Id.* at 184.

134. *Id.* at 184.

135. *Id.* at 185.

## 2. How the Data About Involvement Informs Persuasion in Law

The data about involvement offers some new and challenging information to persuasive legal writers. Among the more interesting information is the importance of narrative evidence to attitude change. Persuasion by narrative or anecdote is a strategy that, particularly in legal scholarship, has engendered a fair amount of controversy but is, nevertheless, commonplace in law practice.<sup>136</sup> Even so, the contours of how and why narrative works in persuasive legal writing, as well as the level of respect it commands as compared with arguments based on doctrine, continue to be an area of controversy and disagreement.<sup>137</sup>

The study of value-protective message processing confirms the persuasive strength and effectiveness of narrative, and adds a couple of intriguing details. It gives legal writers a glimpse of *how* narrative works—by a largely peripheral process that discourages counter-arguing—but also *on whom* it is most effective. While it is unlikely to have any influence on people who agree with the message, anecdotal or narrative messages are the *only* likely path to attitude change in an audience whose beliefs or values conflict with the message. By contrast, substantive merits arguments induce greater entrenchment in the value-protective audience. Not only does this data give renewed validity to the place of good storytelling in legal argumentation, but it also may bestow some greater respect for the effectiveness of nontraditional narrative briefs such as that filed by amici in *Webster v. Reproductive Health Services*.<sup>138</sup> Persuasive legal writers should use this information to decide not only the structure but the emphasis of their persuasive documents. Deciding how much narrative to include in the brief and whether to structurally highlight it can affect the outcome, particularly in cases where the advocate is in a difficult position with a skeptical or hostile audience.

The other intriguing part of the data is the distinct effects on audience decisionmaking induced by the different kinds of involvement. These dis-

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136. Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (drawing distinction between personal narrative and more conventional “storytelling” in persuasive writing). Farber and Sherry argue that the personal narrative of legal scholarship is more problematic as a persuasive analytical tool than the traditional forms of legal narrative, such as personal testimony or a lawyer’s retelling of a client’s “story.”

137. See, e.g., Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUT. L.J. 459, 462–63 (2001) (noting that techniques for fact drafting often get neglected in law school because professors may believe these skills to be “too soft” or “too mushy” for law school).

138. Brief for Women Who Have Had Abortions et al. as Amici Curiae Supporting Appellees, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1115239.

tinct effects suggest that advocates should make conscious, deliberate decisions about crafting their persuasive messages to encourage different types of audience involvement, depending on what kind of involvement is likely to serve the client's interests. If the audience experiences response involvement, argument merits will matter less than what the message recipient thinks the "correct" public response should be. If the message triggers outcome-relevant involvement, the audience will process centrally, arguments will be evaluated carefully and critically with a high degree of counter-arguing, and argument strength will be influential. If the message induces value-relevant involvement, the audience is likely to process more peripherally, which means argument merits will not be highly influential, and instead the audience will use heuristics or "shortcuts" to make a decision.

The critical piece of information is that legal writers may not know that when they ratchet up value involvement, they are not necessarily increasing the level of care and attention to their message. Nor are they pushing the reader toward deeper consideration of the merits of the arguments; in fact, just the opposite is occurring. Advocates ratcheting up value involvement may be "short-circuiting" the elaborative process. They may get a decision in their favor, but they also risk that the decision might be weak and vulnerable to counterargument. It is outcome involvement that is the key to greater depth of message processing, a process in which argument strength will be a decisive factor.

### 3. *Drafting Legal Arguments to Affect Involvement*

Once the advocate decides which process is the best route to the desired outcome, the question becomes how to craft arguments directed at the kind of involvement most likely to produce that process. Attempting to trigger response involvement is a common practice in legal brief-writing. Whenever an advocate makes an argument directed at a judge's concern over public scrutiny, or that is crafted to "sound good," and is likely to be one that easily transfers into the opinion, that is directed (in part) toward response involvement. The key here is that the reasoning offered in the brief might *not* be the reasoning that formed the basis of the actual decision in the advocate's favor; it is, rather, the reason that the judge is most likely to proffer publicly. That is not to say that the reasons proffered in the opinion are not sometimes (even frequently) identical to the "real" reasons, but only that sometimes, whether consciously or unconsciously on the part of the judicial audience, they are not identical.<sup>139</sup> Because of our system of

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139. See, e.g., Frank, *supra* note 3, at 47 (noting that judicial opinions do not lay out all the stimuli or influences that led a judge to decide a certain way). The difference between what actually persuades judges to decide a certain way and what they write in their opinions

requiring judges to report the reasons for their decisions publicly, it is important both to *actually* persuade the judge and provide reasons that the judge is willing to put in the opinion for public scrutiny.

For the advocate, pitching an argument to response involvement is a way of triggering the desire of the audience to *be perceived* as a certain kind of person. Most judges, like most people, want to look fair, just, sensitive, egalitarian, and nondiscriminatory.<sup>140</sup> Arguments pitched toward response involvement are less about trying to make the judge change her core beliefs, and more about convincing the judge that decision in the advocate's favor is the most publicly acceptable and puts the judge in the best public light.

Many different types of arguments can trigger response involvement. For example, when a plaintiff gives great detail about a defendant's bad behavior in the facts, that is a way of attempting to trigger (among other reactions) response involvement. Those facts are part of the public record, and can cause the judicial audience to be acutely aware of the potential public response to the decision. More traditional doctrinal arguments are also part of response involvement because they are what the legal public will scrutinize when evaluating the opinion. Lawyers, law professors, and other judges will expect conventional, sound, doctrinal reasons to be detailed in the opinion and will test those reasons, sometimes publicly, in the press, in law journal articles, or in other decisions.

In contrast to response involvement, arguments pitched toward value or outcome involvement are pitched toward the core beliefs and experiences of the audience.<sup>141</sup> They target the actual beliefs of the judicial audience, and are not to simply influence the perception of how the decision will be received by the public. It is rare, however, that lawyers think about different kinds of motivation when they craft their arguments. Mostly, when persuasive writers craft motivating or policy arguments, they are thinking about judicial values. For example, when advocates argue that a proposed rule or outcome leads to undesirable social results (e.g., by rewarding wrongdoing or leaving it unpunished, by restricting cherished freedoms, or by punishing an innocent), they are seeking to increase the connection between the message recipient's values or beliefs and the issue in the case.<sup>142</sup>

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is a foundation of the critical legal studies movement. See HUHNS, *supra* note 92, at 61 n.163 (referring to PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998)).

140. REARDON, *supra* note 33, at 67.

141. O'KEEFE, *supra* note 8, at 116 n.19. Response involvement is said to be extrinsic because it relies on externals, whereas outcome and value involvement are said to be intrinsic, because they reflect the internal beliefs of the decisionmaker.

142. HUHNS, *supra* note 92, at 51–53 (noting that policy arguments construe the law “by reference to the values that the law is intended to serve”); SMITH, *supra* note 4, at 96–97 (noting that motivating arguments stimulate feelings such as patriotism, hope, and love for animals or the environment).

Legal advocates do not give a great deal of thought to outcome involvement, in large part because full outcome involvement is not a practical goal. No legal argument can construct real outcome involvement, and even if it could, judges who have a personal stake in an issue—like the college students who were considering their own graduation requirements—would almost certainly have to recuse themselves from the decisionmaking process. But, there is a significant grey area between “pure” abstract value involvement and “pure” outcome involvement. Advocates seeking a more central decisionmaking process need to move the audience toward more concrete outcome involvement.

For example, some readers will have a greater personal connection to some issues and more abstract “value” feelings about other issues. This is similar to the idea that people prioritize their values in a kind of “value hierarchy,” and that one of the goals of persuasive writing is to “activate” values on which the audience places the greater priority.<sup>143</sup> The information about involvement, however, adds several critical pieces of information neglected by the value hierarchy concept. First, the difference between outcome and value involvement suggests to the advocate what kinds of values may be higher on a reader’s hierarchy—that is, those with which the reader feels a more personal connection. For example, a judge can oppose racial profiling even if she has no personal connection with profiling. She may fervently believe that profiling is wrong, but the belief is based in a more distant, abstract value involvement. At the other end of the spectrum, the defendant in a case challenging racial profiling has “pure” outcome involvement; the decision in the case will affect her directly. Somewhere in between, however, are people who feel more personally involved with the issue, even if they will not be directly affected by the case in any concrete way.

For example, a judge who is Arab-American, and is deciding a case involving the racial profiling of Arab-Americans, will not have the same level of “outcome relevance” as the actual defendant in the case, but her involvement may lean more toward outcome relevance than the involvement of a judge who has never feared being profiled. Other judges might have a more distant connection, but still one that is less abstract or hypothetical; maybe they have family or friends who have experienced profiling. Or maybe the judge has been singled out for unfair treatment based on a personal characteristic, or has had some other experience that can be connected to the issues raised by profiling. The different levels of involvement can be illustrated by the following chart:

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143. See *Smith*, *supra* note 92 and accompanying text.

<i>Outcome Involvement</i>	-----A-----	B-----	C-----	<i>Value Involvement</i>
Personal Stake Victim in Case	Profiled in past	Never profiled but member of group often profiled	Never profiled but stereotyped in other ways	Decision implicates values Abstract belief against profiling
<i>Central Process</i>	-----			<i>Peripheral Process</i>

The second critical piece of information added by the involvement “spectrum” is that movement on the spectrum does not just affect the substantive decision, but affects the type of process the reader will use to evaluate the message. Arguments can be framed to stimulate a more general value involvement, which means a more superficial process, or to stimulate more personal outcome involvement, which would propel the audience toward a more considered, central process. Although advocates cannot count on knowing the personal experiences of their audience, considering outcome and value involvement can still help them make a more conscious choice about argument strategy.

Most lawyers know how to stimulate general value involvement. Often, the kind of policy arguments made by advocates will stimulate value involvement because they simply point out the social good or evil likely to follow from a given decision or rule. This can make a judge aware of the ramifications of a particular decision, but it is not necessarily going to make a judge care more about the issue or pay more attention to the arguments, unless she is already close to outcome involvement, in which case she is likely already aware of the connection.

It is those readers for whom the “outcome” connection is less obvious, but who nevertheless can be influenced to feel a more personal involvement in the issue (like the ones in category C, above), who create the greatest potential for persuasion and who represent the best reason for lawyers to understand the difference between outcome and value involvement. The people in this category have the potential for higher involvement in the issue, but may not be aware of their connection to the issue or the strength of that connection. This is the third, and perhaps most important, piece of information suggested by the involvement “spectrum”: that the advocate can influence the reader’s perception of where a particular value or belief falls on the hierarchy by pushing the reader toward or away from greater outcome involvement.

That is where the skillful legal writer comes in. A legal advocate can highlight the connections for an audience who may see some connection to the legal issue but not realize its strength, or even reveal connections that the audience would never have seen. Lawyers must take great care with outcome involvement, however. While most legal advocates have a sense

of the power of putting the audience “in the shoes” of the client, a strategy that uses this power can easily backfire. Legal culture embraces an ideal of pure judicial objectivity and tends to deny that personal values—or worse, personal experience with an issue—can make a difference in judicial decisionmaking.<sup>144</sup> Appellate judges, in particular, are reputed to be repelled by arguments that are overly emotional and personal.<sup>145</sup>

Moreover, direct appeals using the second person are often considered disrespectful and aggressive; lawyers cannot simply argue that the judges should imagine themselves in the shoes of the aggrieved party.<sup>146</sup> Thus, it is rare to see a direct appeal to outcome involvement in a brief. Lawyers do not generally argue, for example, by asking the judge to imagine herself routinely stopped by police because of her race.<sup>147</sup> Moreover, such an open appeal is unlikely to work if the judge is probably not ever going to find herself in those shoes. Finally, any advocate would be wise to tread carefully when presenting the judicial audience with a guilt or hypocrisy induction, which is the form some appeals to involvement can take.<sup>148</sup>

Nevertheless, there are a number of ways that lawyers can stimulate greater outcome involvement, some more direct than others, and all potentially powerful and fully acceptable in legal writing. The more direct methods are slightly riskier, and, as a result, tend to take up less space in the brief. Nevertheless, they appear with some frequency.

For example, in *Oncale v. Sundowner Offshore Services, Inc.*, the question before the Supreme Court was whether sexual harassment perpetrated by men against men is actionable under Title VII.<sup>149</sup> In his brief, the petitioner attempted to persuade the Justices that the harassment of him by a group of his male colleagues occurred because of his sex, even though there was no evidence that his colleagues’ treatment of him stemmed from either

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144. The idea of pure judicial objectivity has been critiqued by, among others, the legal realists, *cf.* Frank, *supra* note 3, and by critical legal theorists, *cf.* Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991), two very different jurisprudential movements.

145. GLASER ET AL., *supra* note 92, at 314–15; ALDISERT, *supra* note 6, at 5–6 (noting one difference between trial and appellate advocacy is the level of “shameless emotional matters” permissible in the former). *See generally* Kathryn Stanchi, *Feminist Legal Writing*, 39 SAN DIEGO L. REV. 387, 397 n.40 (2002) (listing sources that urge appellate advocates to eschew overt emotion).

146. Stanchi, *supra* note 145, at 396 (inviting judges or jury to put themselves in the shoes of the client violates “Golden Rule”) (citing Timothy J. Connor, *What You May Not Say to the Jury*, LITIG., Spring 2001, at 36, 37).

147. *See id.*

148. *See infra* notes 166–70 and accompanying text (Singer hypothetical as subtle hypocrisy induction).

149. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998).

sexual desire or from hostility to males.<sup>150</sup> Petitioner had to prove that the harassers treated him the way they did because of his maleness. In particular, petitioner had to contend with respondents' suggestion that the conduct, while it might be considered uncivil and even offensive in the "outside" world, was typical day-to-day life on an isolated all-male oil rig, where the male employees routinely engaged in aggressive rough-housing when establishing the male pecking order.<sup>151</sup>

In their briefs, respondents tried to establish distance—i.e., lack of connection—between the judicial audience and the experience of oil rig employees. Respondents sought to push the judges away from personal involvement in a case where the behavior was egregious and shocking; essentially, respondents argued "this could never happen to you."<sup>152</sup> So, a repeated "theme" in respondents' briefs is that an oil rig is different from law offices or judicial chambers, and different norms and behavior govern the different places, and the Justices should not draw conclusions about what is appropriate for an oil rig by imagining the same behavior in a law office or their own chambers.<sup>153</sup>

Petitioner, on the other hand, tried to emphasize the common ground between the Justices and the harassed employee. One of petitioner's themes was the common ground of manhood (Justices O'Connor and Ginsburg notwithstanding), and what behavior is acceptable (or not) within male norms. To do so, petitioner's brief—twice within a span of ten pages or so—comes very close to asking the Justices directly to imagine themselves in the shoes of the petitioner. In the first reference, petitioner argued:

The gender of Mr. Oncale's harasser neither defines nor detracts from the sexually harassing nature of the defendants' conduct. To the contrary, one can assert with some confidence that there is no type of conduct more repulsive to the non-consenting heterosexual male and more certain to drive him from the work place than that engaged in by the defendants in this case. Why is this conduct so degrading and humiliating? Because Joseph Oncale is a man.<sup>154</sup>

The second reference is also quite direct:

Can there be any treatment more demeaning and objectively harassing to a married, heterosexual male with two children than to be subjected to sexual taunts, sexual touching and physical, sexual assault by other men with whom he must work in a closely confined work space . . . ?<sup>155</sup>

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150. See generally Brief of Petitioner, *Oncale*, 523 U.S. 75 (No. 96-568), 1997 WL 458826 [hereinafter *Oncale* Petitioner's Brief].

151. Brief of Respondent at 3, 33-38, *Oncale*, 523 U.S. 75 (No. 96-568), 1997 WL 634147 [hereinafter *Oncale* Respondent's Brief].

152. *Id.* at 33-40.

153. *Id.* at 20.

154. *Oncale* Petitioner's Brief, *supra* note 150, at 18-19.

155. *Id.* at 27-28.



These two passages explode with strategic persuasive content, not all of it honorable.<sup>156</sup> However, in terms of influencing audience involvement, these two clearly are meant to induce greater personal involvement with the issue. By inviting the Justices to imagine how they would feel if they were required to endure similar harassment, the rhetoric moves the audience from an abstract level of involvement to a greater personal one. Although direct, the rhetoric is carefully tempered in a number of ways. First, neither passage appears in a position of emphasis in the brief. Rather, one is buried in the middle section and the other appears toward the end.<sup>157</sup> In terms of language, both examples use a generalized third-person term (“heterosexual male”) instead of speaking in the second person or about petitioner specifically. This syntax invites connection while simultaneously keeping a respectful distance. There is also considerable qualification and weakening language and syntax in both examples.<sup>158</sup> All of these maneuvers serve the

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156. First of all, the two examples only “work” to increase outcome involvement if one presumes the audience is comprised of heterosexual males. The strategy certainly presumes a universality in the feelings of heterosexual men. Nevertheless, I believe that is partly what petitioner was trying to do: he either did not think about the possibility of a non-heterosexual audience or aimed the strategy at only heterosexual men, presuming that they comprised the majority of his audience. The two examples can also be read as an unfortunate play toward the presumed homophobia of the Supreme Court Justices. Nowhere in the facts of petitioner’s brief is it stated that petitioner Oncale is a married heterosexual man with two children, but this is the implication of the two sentences. This oblique reference to Oncale’s sexuality seems an attempt to “reassure” the Justices that the case is *not* about a homosexual who is harassed because of his homosexuality—the presumption being that such a case would somehow be less egregious, or unworthy of serious attention. In part, the law of Title VII would support such a homophobic strategy, in that it expressly does not cover discrimination against homosexuals. This peculiar disingenuous glitch in the law has spawned some conflict in the federal circuits over whether the sexual orientation of a plaintiff could potentially defeat a sexual harassment claim under Title VII. See *e.g.*, *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264-65 (3d Cir. 2001); *Doe v. City of Belleville*, 119 F.3d 563, 592-94 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).

Perhaps more disturbingly, however, in an echo of Catharine MacKinnon’s theory of rape and female sexuality, the rhetoric also seems to imply that the conduct alleged would be less injurious or demeaning to a gay man, who apparently could have conceivably welcomed such behavior, whereas a heterosexual man would never welcome it. In this way, the strategy is also a “fear appeal,” a persuasive strategy that can be very effective but, in some contexts, of dubious morality. Mark A. deTurck, *Persuasive Effects of Product Warning Labels*, in *THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE* 345, 347-48 (James Price Dillard & Michael Pfau eds., 2002); O’KEEFE, *supra* note 8, at 165-69. See generally Elizabeth Fajans & Mary R. Falk, *Shooting from the Lip: United States v. Dickerson, Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. HAW. L. REV. 1 (2000) (criticizing certain rhetorical strategies as unethical and immoral).

157. The first passage appears on pages 18-19 of Oncale’s thirty-four-page brief, and the second passage appears on pages 27-28. *Oncale* Petitioner’s Brief, *supra* note 150, at 18-19, 27-28.

158. For example, the key sentence of the first example uses the qualifying filler “one can assert with some confidence,” a piece of linguistic flab that would ordinarily be cut to

important function of making a direct appeal to judicial personal involvement appear less aggressive and direct, to the end of making the target audience more likely to process it centrally, and be less likely to boomerang.

Another interesting example of a subtle appeal to involvement appears in *Harris v. Forklift Systems, Inc.*, which, like *Oncale*, was a Title VII sexual harassment case.<sup>159</sup> The primary issue in the case was whether a sexual harassment plaintiff must prove severe psychological injury to prevail in a hostile work environment case.<sup>160</sup> At the heart of the case was the definition of what is “abusive” in a work environment, and what a “reasonable person” might find offensive.<sup>161</sup> Twice in the plaintiff-petitioner’s (Harris’s) brief, she notes that both the perpetrator of the harassment and an employee of Forklift (the defendant-respondent) stated that they would be angered and offended if men spoke to their wives or daughters the way the perpetrator spoke to her.<sup>162</sup> As in the *Oncale* petitioner’s brief, the point is not structurally highlighted, although it is mentioned twice; it is first raised in the middle of the “Statement of the Case,” and then again in a footnote in the “Argument” section.<sup>163</sup>

The argument seems directly pitched toward those men on the Supreme Court who have close familial relationships with women. For example, the footnote in the Argument section reads, “neither [defendant nor the Forklift employee] *would allow* their wives to be subjected to the behavior that [the defendant] imposed on [petitioner] at Forklift.”<sup>164</sup> Although the

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increase the strength of the substantive statement. *Id.* at 18–19. The second reference is phrased as a rhetorical question, a form less direct and confrontational than a bald statement. It is also a form that increases the reader’s interaction with the text, since most readers will be inclined to answer the question.

159. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 17 (1993).

160. *Id.* at 20.

161. *Id.* at 21.

162. Brief of Petitioner at 6, 40 n.21, *Harris*, 510 U.S. 17 (No. 92-1168), 1993 WL 302216.

163. *Id.* The example in the statement of facts reads:

Both Mr. Hardy [the harasser] and David Thompson, a former Forklift employee, acknowledged the offensiveness of Mr. Hardy’s behavior. Ms. Harris’ undisputed testimony is that Mr. Hardy acknowledged that he would not like men to talk to his wife or daughter the way he (Hardy) spoke to Ms. Harris. David Thompson acknowledged that he wouldn’t put up with a man talking to his wife in the sexually demeaning manner that Mr. Hardy spoke to Ms. Harris.

*Id.* at 6 (citation omitted).

164. *Id.* at 40 n.21 (emphasis added). The use of “would allow” in this footnote is quite interesting rhetorically. It is the reason I believe that the strategy—even when it speaks of daughters and not wives—is pitched toward the male judges. The phrase calls up a patriarchal and somewhat primitive protective feeling associated with manhood. It also supports the idea that this argument, at least in part, is pitched toward inducing greater personal involvement in the married Justices who are fathers of daughters, and is a subtle hypocrisy induction. If the Justices agree that they “would not allow” someone to talk to their female relatives in this way, how can they “allow” someone to talk to petitioner this way?

testimony is of some relevance to the point that reasonable people can agree about the offensiveness of the conduct in the case (even the perpetrator agrees!), the relevance is tangential at best and was probably included for its emotional power. But the argument also has the added benefit of ratcheting up the level of outcome involvement of the Justices at whom it is directed (married and/or fathers of daughters), moving them from a more abstract value involvement toward a greater personal investment in the outcome of the case.

The less direct methods of targeting outcome involvement are somewhat rarer in appellate briefs. To awaken a reader's perception of the connection between her experiences and the issues in the case, hypotheticals and analogies represent the most effective options. An excellent example of a tactic that succeeded in moving an audience from abstract value involvement (and a more superficial, "knee-jerk" process) to a more outcome-relevant involvement (and a more considered process) appears in an article by Professor Joseph Singer. In the article, Professor Singer describes how he persuaded his first-year property students to see both sides of a case about plant closings.<sup>165</sup> In the case, a company that has operated in a town for over fifty years decides to close a plant, in spite of the devastating impact this decision has on its employees and the town, both of whom had come to rely on the company.<sup>166</sup>

Most of Professor Singer's students saw the case from the corporation's perspective, and had difficulty understanding and articulating the legal justifications for judicial intervention on behalf of the betrayed plant employees.<sup>167</sup> Even the students sympathetic to the employees had difficulty explaining or arguing their position. Professor Singer tried any number of tactics to inspire deeper comprehension, including having students read a law review article that laid out the arguments for judicial intervention and pointing out the parts of the judicial opinions in which the judges described "in poignant rhetoric the painful dilemma the case presented."<sup>168</sup> Both these methods failed to create deeper understanding on the part of the students.

There are, of course, multiple potential reasons why the students remained "stuck" in their perspectives. But, in terms of their involvement, a possible contributing reason is that the students felt only an abstract value involvement and, consequently, processed the message peripherally. For mostly middle-class students at law school, there were only abstract values at stake, and no obvious connection to the issues in the case, so the students processed the issue in a way that circumvented a deep consideration of ar-

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165. Joseph Singer, *Persuasion*, 87 MICH. L. REV. 2442, 2445 (1988).

166. *Id.* at 2445.

167. *Id.* at 2446-47.

168. *Id.* at 2447.

gument merits. More superficial value involvement would, in part, explain the failure to fully process substantive argument merits, as evidenced by the pro-corporation students' inability to comprehend with any depth the arguments counter to their position. It would also explain the failure of the students sympathetic to the employees to have confidence in their position; decisions reached through peripheral processes are usually held with shaky confidence and are highly vulnerable to counterargument.

Finally, a value-involved process is also indicated by the failure of central cues like the arguments in the law review article and the opinions to induce any budge in attitude from the pro-corporation students. For those students, who likely experienced a value-protective reaction to the plant closing case, the strong merits arguments would serve only to stimulate fervent counter-arguing. The students who experienced value affirmation are a bit more of a mystery. As we would expect with value affirmation, the pro-employee students did not change their position. But they also seemed unable to defend their position, and it is unclear why Singer's merits arguments did not fortify their beliefs so that they held them with greater confidence. Part of this may be that even the students experiencing value affirmation did not have strongly held beliefs about the issues in the case; they had value involvement, but it was not a very high level of involvement.

Another wrinkle is that Professor Singer also tried to convince the students by using a narrative, which the studies suggest would have the best chance of inducing attitude change in a value-protective audience. Professor Singer describes telling a rich, detailed ("thick") narrative about the situation of the plant workers.<sup>169</sup> Nevertheless, by his account, the narrative had no effect on either the value-protective or the value-affirmative students. It is possible that the students failed to respond to the anecdote because the story was simply too remote. Using a narrative about plant closings to convince an audience of law students is quite different from telling a college student a story about the dangerous consequences of alcohol abuse for a fellow student. It is easier for the college student to see the connection between the story and his own experiences. Singer's students had a lesser level of involvement in the plant closing case, so a story about a plant closing would not have great influence on their processing. Singer's experience suggests that knowing that narrative "works" to persuade value-protective message recipients is only a small piece of a larger puzzle; it begs the question of what *kind* of narrative works.<sup>170</sup>

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169. *Id.* at 2447, 2455.

170. This explanation casts some significant doubt on the effectiveness of narrative-based advocacy, for example the "voices" brief in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), even for value-protective audiences. It seems that it is still important to stimulate something closer to outcome involvement. Interestingly, Singer's approach gives some clues about how to do this.

The tactic that eventually worked to inspire a deeper understanding for Singer's students was an elaborate analogy that moved the students toward a more connected "outcome" level of involvement. Singer gave the students a hypothetical in which a law school radically changes its grading policy, in the middle of the semester, to require failing grades for the bottom third of the class.<sup>171</sup> The law school, much like the corporation in the plant closing case, argues that it made no promises and should be permitted to run its "business" of training lawyers as it sees fit, without judicial intervention.<sup>172</sup> This hypothetical worked a dramatic change in the class dynamic. The majority of students, who had been unable to see the validity of any arguments other than corporate autonomy and freedom of contract, came to a greater understanding of the compelling arguments based in reliance, unequal bargaining power, and fairness.<sup>173</sup>

The plant closing hypothetical illustrates how an understanding of audience involvement can influence persuasive writing strategy. By using analogy to move the students along the spectrum of involvement, away from a more abstract "value-relevant" involvement and toward a more personal, concrete "outcome-relevant" involvement, Singer inspired students to process the case in a deeper, more comprehensive way. As Singer noted, the analogy did not inspire students to change their values; instead, it allowed them to see that the values at stake in the plant closing case were values of high personal importance.<sup>174</sup> The analogy moved the students to process more centrally, which allowed them to understand and appreciate more fully the merits of the case.<sup>175</sup>

Although lawyers cannot translate Singer's strategy exactly into their legal briefs, his success should inspire legal writers to use analogy to move the audience toward greater outcome involvement. It also shows advocates

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171. Singer, *supra* note 165, at 2449.

172. *Id.* at 2449–50.

173. *Id.* at 2450–56.

174. Professor Singer put it this way: the hypothetical was effective not because it convinced the students to change their values, but because it made the students "aware of values they already ha[d] which they simply had not initially thought were relevant." *Id.* at 2456 (emphasis removed). I would put it another way: prior to the hypothetical, the students simply did not see their own stake in the issues of the case and they were not motivated to strive for a deep understanding of the issues; instead, prior to the hypothetical, the students were experiencing a "knee-jerk" response.

175. By changing the level of involvement, Professor Singer's more personalized hypothetical also served as a subtle hypocrisy induction. See *supra* notes 64–68 and accompanying text (explaining door-in-the-face reaction). Involvement is closely related to the human propensity toward consistency and congruity. The students, consciously or subconsciously, realized at some point the inconsistency and hypocrisy of advocating one way for themselves in the hypothetical context and against the workers in the plant closing case. Professor Singer's analogy created dissonance; to resolve it, the students had to change either their values or their decision.

something about how to use narrative to get at a value-protective audience—as Singer surmises, a “thick” story, no matter how poignant and evocative, may not be enough to move an audience. Rather, using analogy (or an analogous or hypothetical narrative) to inspire readers to connect more fully to an issue allows the advocate to have it both ways: it gives all the arguments the power and resonance of a personal appeal, but sidesteps most of the problems with a more direct appeal. Even if appellate lawyers do not know details about the experiences of our audience, any number of common human experiences can be grounds for an analogy: marital, sibling, or parental relationships (as in *Harris*); friendships, education, cultural notions of masculinity and femininity (as in *Oncale*); and even law school.

Moreover, the analogy or hypothetical does not have to be as elaborate as Singer’s. Simply saying that the case is “akin to” or making a comparison that runs throughout the brief can be effective. Creative use of precedent is yet another way to make a connection between the issues in the case and issues with greater “outcome” resonance for the audience.<sup>176</sup>

The purpose of exploring the persuasive potential of involvement is not to convince lawyers to make openly personalized arguments to appellate judges, a strategy which would undoubtedly backfire. Rather, the purpose of learning about involvement is to help advocates do more effectively what they are already doing with motivational arguments. Lawyers attempt to influence involvement all the time. They may not, however, always know that the technique that seems “right” to them is really about involvement. More important, they are not always using it in the most effective way. A greater understanding of involvement and the ways to influence it are the keys to using the techniques most effectively and skillfully. This means understanding the different kinds of involvement and the persuasive power of involvement, and understanding how to influence reader involvement in ways that are powerful, yet ethical and acceptable to the audience.

## CONCLUSION

In persuasive legal writing, audience is paramount. There is simply no such thing as “too much information” about the audience to whom a persuasive message is directed. Yet the concept of the legal audience has re-

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176. A possible example of this is the common use of race and ethnic discrimination cases as analogies in sex discrimination cases. Although this would represent a small movement on the spectrum of involvement for white, male judges, it is possible that ethnic and race discrimination would stimulate greater outcome involvement than examples based on sex. See, e.g., *Meritor* Respondent’s Brief, *supra* note 81, at 31 (responding to argument that sexual harassers are “uniquely unlikely” to disclose their behavior by noting that “[a] supervisor who requires only his Black employees to clean his personal residence is unlikely to report it to the company”) (citing *Slack v. Havens*, No. 72-59-GT, 1973 WL 339 (S.D. Cal. 1973)); see also *id.* at 13 (comparing sexual epithets to racial and ethnic epithets).

mained somewhat two-dimensional in the conventional wisdom. This two-dimensionality is neither necessary nor advisable. There is a wealth of data and theory outside law that can help flesh out the identity of the legal audience beyond the amorphous figure of the busy judge who is unfamiliar with the facts and law of the case.<sup>177</sup>

This Article argues that information about the psychology of human decisionmaking is one path to greater knowledge about the legal audience. Sequential request strategies and audience involvement represent the first steps in the process of using the information about human decisionmaking to predict audience strategic preferences. Every small piece of information helps to fill in another part of the picture of who that elusive legal audience is and what makes her react.

The argument that information about human decisionmaking should be incorporated into legal advocacy is not to say that the audience can be defined exactly and accurately. Persuasive legal writing is, and remains, an art, not a science. Nevertheless, science can be a part of art. The best persuasive legal writers already try to predict how their audiences will react to certain arguments, syntax, analogies, or vocabulary. On the simplest level, this Article argues that if you are going to do it, you should do it right. The data about human decisionmaking will not give lawyers all the answers, but it can show us strategies that we might never have known about or considered, and it can put a fresh spin on other, more familiar strategies.

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177. See, e.g., NEUMANN, *supra* note 24, at 317; BEAZLEY, *supra* note 10, at 3-4; ALDISERT, *supra* note 6, at 18-19.