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Book Review: Legal Persuasion: A Rhetorical Approach to the Science

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BOOK REVIEW:
LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE
LINDA L. BERGER AND KATHRYN M. STANCHI,
ROUTLEDGE 2017, 170 PAGES

Lori D. Johnson* and Sarah Morath⁺

Having previously collaborated on the celebrated Feminist Judgments series,¹ Professor Berger and Professor Stanchi now turn to a theoretical examination of the skills of legal persuasion. In this ambitious and synergistic book, the authors seek to help lawyers choose persuasive tactics “more wisely by explaining in more depth why some tactics are effective and others are not.”² The authors achieve this goal by providing deep and nuanced examinations of both the social scientific and rhetorical bases of persuasion, as well as concrete examples and instruction in composing legal argument. Engaging, readable, and yet sufficiently intricate to explain and illustrate complex concepts and skills, the book will be a helpful addition to the shelves of both practitioners and professors of legal persuasion as well as students and judges.

Through three main sections, divided into twenty chapters, the book seamlessly melds Stanchi’s expertise in persuasion science, with Berger’s formidable knowledge of classical and contemporary rhetoric. The book begins with an overview of the processes of thinking and decision-making, moves into a brief discussion of the setting for legal persuasion (including examining the characteristics of judges), and finally, deeply examines three discrete processes

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¹ FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger, and Bridget J. Crawford, eds. 2016).

² LINDA L. BERGER & KATHRYN M. STANCHI, LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE 9 (2017). This re-writing of 25 influential U.S. Supreme Court cases through a feminist lens has been lauded ushering in a “new kind of academic discourse” by Time Magazine, and referred to as an “immediate classic” and a “tour de force” by experts in feminist legal theory. See *The U.S. Feminists Judgment Project*, TEMPLE UNIV. SCH. OF LAW, <https://sites.temple.edu/usfeministjudgments/> (last visited Jan. 17, 2018). The initial publication has spawned various conferences, and an entire series of re-written feminist judgments across various legal disciplines. *Id.*

through which persuasive arguments are crafted. This final section, composing the bulk of the text, instructs readers in employing the rhetorical skills of invention, arrangement, and tone through the use of examples from appellate briefing and judicial opinions.

The briefs and opinions selected for inclusion in the book include seminal U.S. Supreme Court and federal appellate court cases ranging from the late 19th century to the present day. Each example or “case study” is followed by a detailed explanation of the persuasive technique being used. While the authors have relied on their expertise as feminism and constitutional law scholars for many of the examples, the examples span a variety of legal issues. The breadth of the cases studied demonstrates the time-tested efficacy of the rhetorical strategies discussed. However, Berger and Stanchi go further, supporting the techniques demonstrated in the case studies with research from sources as diverse as Kenneth Burke and Daniel Kahneman. Thus, the authors effectively provide the “why” and not just the “how” of persuasion. The ability of the authors to combine useful, compelling examples from real cases with nuanced, yet understandable, discussion of the science that makes them effective is the true triumph of this very engaging work.

Readers will welcome new explorations of established topics like judicial decision-making, kairos, and storytelling through the use of *National Federal of Independent Business v. Seblius* (2012), *Burwell v. Hobby Lobby Stores, Inc.* (2014), and *Whole Woman’s Health v. Hellerstedt* (2016).³ In addition to U.S. Supreme Court decisions, readers are exposed to persuasion in the courtroom (the prosecution’s description George Zimmerman’s initial profiling of Trayvon Martin), in speech writing (comparing Senator Edward Kennedy’s speech about a young woman who drowned in Chappaquick to President Clinton’s speech during the Monica Lewinsky trial), and in jury studies (jurors discounted negative information when disclosed voluntarily by the defendant).⁴ The scope of these examples makes this book appealing to not only students but also judges and practitioners seeking a better understanding of legal persuasion.

However, two complexities concerning the audience of the book are worth noting. First, while acknowledging that the audience for legal advocacy can vary, for purposes of this book, the authors considered the legal audience “collectively

³ *Id.* at 27, 33, 61.

⁴ *Id.* at 36, 44, 151

and somewhat monolithically,” making a general distinction between the “law-trained” and “non-law-trained” reader.⁵ As a result, Berger and Stanchi do not discuss how a law-trained reader’s occupation or personal experience might influence her response to the various legal persuasion techniques described in the book.

Second, although the authors describe the text as a “general primer” on legal persuasion,⁶ the book is not designed as a standalone text for a first-year legal writing class. Most first-year legal writing courses are “genre-driven,” designed around the particular documents lawyers produce—a complaint, a motion, a brief, a memo, or an email, for example.⁷ While many of the techniques described in *Legal Persuasion* could be incorporated into persuasive genres like an appellate brief, this text is not organized by genre and does not provide the nuts and bolts of drafting these documents. The text is, therefore, better suited for those with prior experience drafting or studying different persuasive genres and those who are familiar with the terminology used in rhetorical theory. Consequently, *Legal Persuasion* is an excellent text for an advanced advocacy or rhetoric course, or an appellate clinic or moot court program.

Legal writing professors will still benefit from reading *Legal Persuasion* and the many useful examples could be incorporated into the first-year classroom when discussing persuasive writing techniques. For example, the authors use the petitioner’s brief from *Lawrence v. Texas* to illustrate one type of priming strategy: repetition of vivid words;⁸ the briefs from *Redding v. Safford United School District* to illustrate the importance of telling stories from different points of view;⁹ and the dissenting opinion from *Utah v. Strieff* to show the effectiveness of adjusting the plot presented by facts.¹⁰

In conclusion, Berger and Stanchi’s book is an ambitious blend of persuasion theory and cognitive science. While the topics are complex, the book’s short chapters and vivid examples guide the reader throughout. While the complex

⁵ *Id.* at 9.

⁶ *Id.* at 10.

⁷ Katie Rose Guest Pryal, *The Genre Discovery Approach: Preparing Law Students to Write Any Legal Document*, 59 WAYNE L. REV. 351, 355 (2013) (“Legal genres include all of the documents that lawyers produce (e.g., a complaint or a motion to suppress) following specific conventions called for by certain rhetorical situations (e.g., the beginning of a lawsuit or the defense of a client).”).

⁸ *Supra* note 2, at 120. In this example, the word was “brand.”

⁹ *Id.* at 68.

¹⁰ *Id.* at 54, 53-64.

nature of the topics may be too advanced for first-year law students, upper-level students, professors, judges, and legal practitioners with some basic knowledge of rhetoric and persuasion will find this book engaging and will finish this book with new examples and a greater understanding of established theories.