

# Legal Communication & Rhetoric: JALWD

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## BOOK REVIEWS

***Making the Case:  
Advocacy and Judgment in Public Argument***

(Kathryn M. Olson, Michael William Pfau, Benjamin Ponder & Kirt Wilson eds.,  
Mich. State U. Press 2012) (Jason Cohen, rev'r)

Book Review

## More on the Intersection of Law and Rhetoric

A review of *Making the Case: Advocacy and Judgment in Public Argument* (Kathryn M. Olson, Michael William Pfau, Benjamin Ponder & Kirt Wilson eds., Mich. State U. Press 2012), 260 pages.

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*Making the Case*<sup>1</sup> is a collection of essays by nine scholars of rhetoric and communication. At first blush, the book seems written solely for the elite club of PhDs in rhetoric, not for those with mere cross-disciplinary or passing interests. But if the reader begins with David Zarefsky's *Reflections on Making the Case*, the book's first essay, it is easy to see why the study of rhetoric makes sense for anyone connected to the practice of law.<sup>2</sup>

For Aristotle, rhetoric involves, among other things, "the faculty of observing in any given case the available means of persuasion."<sup>3</sup> This definition serves as the foundation for modern day, rhetorical "case studies," which "examine how, and how well, people deployed rhetorical resources in a historical moment that called for them."<sup>4</sup> The case studies in this collection involve *public* argument and all analyze events in the past as "a series of rhetorical problems—situations that call for public persuasion to advance a cause or to overcome an impasse."<sup>5</sup> More specifically, the book

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<sup>1</sup> *Making the Case: Advocacy and Judgment in Public Argument* (Kathryn M. Olson, Michael William Pfau, Benjamin Ponder & Kirt Wilson eds., Mich. State U. Press 2012)

<sup>2</sup> To learn more about the intersection of rhetoric and law, see Linda L. Berger, Linda H. Edwards & Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 *Leg. Writing* 521 (2010); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 *Sw. L.J.* 1089 (1986); Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 *J. ALWD* 129 (2006).

<sup>3</sup> Aristotle, *Rhetorica*, in *The Works of Aristotle* 1355b (W.D. Ross ed., W. Rhys Roberts trans., Random House 1941).

<sup>4</sup> David Zarefsky, *Reflections on Making the Case*, in *Making the Case: Advocacy and Judgment in Public Argument*, *supra* n. 1, at 12.

<sup>5</sup> *Id.*

studies “moments in the rhetorical history”<sup>6</sup> of America in which an individual *rhetor* attempted through public argument to build a case, to advance a cause, and to persuade an audience. The case studies thus focus on rhetorical choices and how they shape public opinion.

Despite the number and diversity of the essays, the collection is surprisingly cohesive. Five of the essays concern rhetorical efforts of U.S. presidents, such as Franklin Delano Roosevelt’s pitch to change the American isolationist perspective.<sup>7</sup> Some essays expand beyond presidential rhetorical analysis and examine a *rhetor’s* life as a public figure in general. For example, one essay explores Andrew Johnson’s rhetorical transformation from respected politician to failed American leader.<sup>8</sup> Selected topics include human rights, war and peace, foreign and economic policy, and leadership.<sup>9</sup>

As fascinating as the individual case studies are, the book is also useful as a tool for learning or for reinforcing how general rhetoric principles apply to everyday communication and persuasion. Importantly, the book is helpful to the practicing attorney, who will inherently understand the importance of “making a case.”

Perhaps the most useful essay in the collection is by Zarefsky himself.<sup>10</sup> Zarefsky is not a lawyer, but teaches in the Department of Communication Studies at Northwestern University and is a recognized expert in the field of rhetoric and communication.<sup>11</sup> One of his strengths is his ability to explain classical scholarly concepts in a pragmatic, example-driven way. Too often, scholarly writers presume that only similar experts make up the audience. This self-perpetuating, scholarly elitism functions as a “Keep Out” sign to the rest of the reading world. Zarefsky, on the

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6 *Id.*

7 See John M. Murphy, *No End Save Victory: FDR and the End of Isolationism, 1936-1941*, in *Making the Case: Advocacy and Judgment in Public Argument*, *supra* n. 1, at 127.

8 See Karlyn Kohrs Campbell, *Andrew Johnson’s Fight for States’ Rights on the Battlements of the Constitution*, in *Making the Case: Advocacy and Judgment in Public Argument*, *supra* n. 1, at 95.

9 Each essay examines the rhetorical situation surrounding the public speech or discourse. According to Lloyd Bitzer, a rhetorical situation can consist of “a complex of persons, events, objects, and relations presenting an actual or potential exigence that can be completely or partially removed [by] discourse . . .” Lloyd F. Bitzer, *The Rhetorical Situation*, 1 *Phil. & Rhetoric* 1, 6 (1968). Put another way, “a speech needs an audience, a reason that the speech should be made (the exigence) based upon that audience, and the speech must also adhere to certain conventional and societal rules or constraints.” See Jason K. Cohen, *Attorneys at the Podium: A Plain-Language Approach to Using the Rhetorical Situation in Public Speaking Outside the Courtroom*, 8 *Legal Comm. & Rhetoric: JALWD* 73, 76 (2011).

10 Zarefsky, *supra* n. 4, at 1.

11 He has published more than 70 scholarly articles and was president of the Rhetoric Society of America and the National Communication Association. Northwestern School of Communication, *Meet the Faculty*, <http://www.communication.northwestern.edu/faculty/?PID=DavidZarefsky> (accessed May 6, 2013). Zarefsky wrote the textbook I use in my Public Speaking for Lawyers class. See David Zarefsky, *Public Speaking Strategies for Success* (5th ed., Pearson Educ. Inc. 2008).

other hand, doesn't function in this manner. He wants the readers to understand him and writes to ensure that they do.<sup>12</sup>

One reason Zarefsky's work is so valuable is that it gives the reader the tools to critique the critiquers. For example, he suggests that the reader of any example of rhetorical analysis or criticism ask (1) whether the analysis meets appropriate tests of evidence and inference and (2) whether there is a competing explanation that is stronger or more convincing. With this set up, any attorney should be able to see the *Venn Diagram* overlap between the study of rhetoric and the practice of law, since these are the exact questions lawyers and judges ask themselves to weigh the strength of any given case.

Aside from Zarefsky's essay, others in the collection may have special interest for those who work in law or politics. For example, Karlyn Khors Campbell's essay on Andrew Johnson reminds the reader that with politics, the more things change, the more they stay the same.<sup>13</sup> Perhaps best read in conjunction with the Lincoln essay in the book,<sup>14</sup> Campbell's piece analyzes a series of Johnson's addresses as early examples of the conservative perspective on limited federal power and expansive states' rights, a perspective that should seem ideologically familiar to the modern reader.

Also noteworthy is the piece by John M. Murphy on Franklin Delano Roosevelt and the end of the era of American Isolationism—my favorite.<sup>15</sup> Murphy tells the story of FDR as a cosmopolitan man of the world so effectively that his rhetorical analysis sneaks into the reader's psyche.<sup>16</sup> Murphy depicts FDR as a man who becomes increasingly concerned with international affairs, in stark contrast to the American public's growing isolationist beliefs. He demonstrates how FDR, through public discourse, sought to change opinion, to effect action, and to overcome ideological apathy by making the case for war. In Murphy's view, one of FDR's most

12 Moreover, after defining concepts, he makes observations about the concepts that encourage the reader to pause, digest, and reflect, like, "A culture's store of [its own *enthymemes*] is an index of its values and hence of what its members deem to be persuasive." Zarefsky, *supra* n. 4, at 4. True enough. Don't know what an enthymeme is? Read Zarefsky's paragraph preceding this statement, and you will, with ease.

13 Karlyn Khors Campbell, *supra*, n. 8. Historians rank Johnson as among our most ineffective presidents. *Id.* at 96.

14 Michael Leff, *Kind Persuasion: Lincoln's Temperance Address and the Ethos of Civic Friendship*, in *Making the Case: Advocacy and Judgment in Public Argument*, *supra* n. 1, at 75.

15 John M. Murphy, *supra* n. 7, at 127.

16 The charm of Murphy's essay stems from his use of storytelling. The chapter begins,

Franklin D. Roosevelt loved stamps. He began collecting them as a boy and the hobby never left him . . . . One suspects this hobby made the world come alive in his ever-curious mind.

In fact, Roosevelt was, apart from cousin Theodore, "the most cosmopolitan American to enter the White House since John Quincy Adams in 1825."

*Id.* at 127–28 (citations omitted).

effective speeches was his 1936 State of the Union address in which he made the world's dangers "present" by employing analogy, imagery, and perspective to create a framework consistent with where he wanted American opinion to be.<sup>17</sup>

Changing American public opinion is also at the core of the two essays analyzing Barack Obama's rhetoric that are especially interesting to read in tandem.<sup>18</sup> Both essays analyze Obama's criticism of the Iraq war from a rhetorical rather than an ideological standpoint. Both describe how Obama's speeches, consistent with a 2008 campaign rhetoric of "Hope," optimistically convert crises into points of unification for the American people.

In her piece, Denise M. Bostdorff focuses on a single speech, candidate Obama's address on the fifth anniversary of the Iraq War, and its use to deflect controversial issues dogging his first campaign. Bostdorff argues that this speech served to create a "representative anecdote"<sup>19</sup> for the leadership skills Obama displayed as a senator, and would display as the President. Bostdorff begins by setting the rhetorical situation for the speech. As a candidate without much foreign-policy experience, Obama was vulnerable to attacks by Hillary Clinton and John McCain, who insinuated that Obama was not ready to be commander-in-chief.<sup>20</sup> Moreover, with the controversy over his connection to the Reverend Jeremiah Wright, voters were beginning to question Obama's loyalty or judgment.

However, unlike McCain or Clinton, Obama had opposed the unpopular Iraq war in a little-known speech he made in 2002 as a state senator.<sup>21</sup> As Bostdorff notes, in Obama's March 19, 2008, speech, he referred to his 2002 position, harping on this crucial difference, and turned it into a sign of his leadership on international issues and his good judgment.<sup>22</sup> Although the rhetorical strategies that Bostdorff explains are

<sup>17</sup> *Id.* at 137.

<sup>18</sup> See Denis M. Bostdorff, *Iraq as a Representative Anecdote for Leadership: Barak Obama's Address on the Fifth Anniversary of the Iraq War*, in *Making the Case: Advocacy and Judgment in Public Argument*, *supra* n. 1, at 161; Martin J. Medhurst, *Barack Obama's 2009 Inaugural Address: Narrative Signature and Interpretation*, in *Making the Case: Advocacy and Judgment in Public Argument*, *supra* n. 1, at 191.

<sup>19</sup> A representative anecdote is a story that provides a summary of human motivation. See Bostdorff, *supra* n. 18, at 162–63 (citing Kenneth Burke, *A Grammar of Motives* 59, 60–61 (U. Cal. Press 1969)).

<sup>20</sup> Bostdorff, *supra* n. 18, at 163–64.

<sup>21</sup> In 2002, Obama told an antiwar rally, "I don't oppose all wars. I know that in this crowd today, there is no shortage of patriots, or of patriotism. What I am opposed to is a dumb war." *Morning Edition*, Radio Broad., "Obama Still Stumps on 2002 Anti-War Declaration" (Natl. Pub. Radio March 25, 2008) (available at <http://www.npr.org/templates/story/story.php?storyId=88988093>).

<sup>22</sup> And in a nod to the fun stuff rhetorical analysts do, Bostdorff supports her analysis, in part, by analyzing the nitty-gritty of the speech: "In an address consisting of 4,658 words . . . the senator devoted 2,065 words—or 44.3 percent of his speech—to policy exposition. Obama not only emphasized that he had made the right judgment on Iraq, but also demonstrated that he had policy proposals to bring the war to an end." Bostdorff, *supra* n. 18, at 175.

rooted in politics, these strategies also highlight for attorneys the importance of strategically framing legal discourse.

Medhurst's piece similarly analyzes a single speech, Obama's 2009 Inaugural Address, but is more global in scope. The essay examines Obama's "Narrative Signature," a phrase coined by the author to explain the "unique way in which a person—any person—tells his or her story."<sup>23</sup> This concept is the lynchpin of the Medhurst essay, and may be one of the most important concepts in the entire collection. Narrative Signature is premised on the idea that everyone has a story to tell, but that each person tells it in his or her own way:

A Narrative Signature emerges over time and across genres. Once established, however, it does not change. Like the signature of one's name, it is a unique form of identity that only the narrator can perform with complete fidelity. . . . To understand a rhetor's Narrative Signature is to understand the power or motivation that drives the narrator to employ the signature in all types of situations . . . .<sup>24</sup>

In this sense, Medhurst functions as both a theorist and an analyst: a theorist, by coining the concept of Narrative Signature, and an analyst, by directly and exhaustively applying it to President Obama's rhetoric. The common-sense nature of Narrative Signature resonated with me as a lawyer and professor of persuasion. I instantly likened the concept of a speaker's Narrative Signature to the individual, and life-experience-based approach a judge may bring to a decisionmaking process. Any lawyer tasked with persuading a judge knows the value of tapping into this perspective, and framing the *logos* or logic of an argument within the *pathos* of the judge's individual perspective to maximize the potential for persuasion.

Take for example the controversy surrounding Supreme Court Justice Sonya Sotomayor's confirmation hearings. Sotomayor was one of the first jurists to publicly acknowledge that her decisions, while based on the letter of law, were influenced by her perspective as a Latina female.<sup>25</sup> Practicing lawyers understand that in any human endeavor, even one involving legal decisionmaking, one's life experiences influence both the

23 Medhurst, *supra* n. 18, at 194.

24 A Narrative Signature "is thus composed of the ideas, vocabulary, strategic design, forms of appeal and modes of logical justification that are characteristically . . . employed [by the speaker]." *Id.* at 195.

25 In 2001, as an appeals-court judge, Sotomayor gave a speech declaring that the ethnicity and sex of a judge "may and will make a difference in our judging," specifically saying that "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." Charlie Savage, *A Judge's View of Judging Is on the Record*, N.Y. Times A21 (May 15, 2009) (available at [http://www.nytimes.com/2009/05/15/us/15judge.html?\\_r=0](http://www.nytimes.com/2009/05/15/us/15judge.html?_r=0)).

process and result. The concept of Narrative Signature reminds us that as “scientific” as the law sometimes purports to be, in the end, it still consists of human beings making decisions. Both a judge’s decisions and an individual’s rhetorical modes involve “life experiences”; “conversion stor[ies] of insight and enlightenment”; “survival stor[ies] of life from death”; or “any other kind of story whose telling is definitive of one’s life or mission.”<sup>26</sup> Given the controversy in the interpretation of Sotomayor’s statements, one can’t help but think that her ideas would have been better presented simply as her *judicial* “Narrative Signature.”

Aside from these examples, the book also offers four other case studies not explored here. These include essays on Lincoln’s views about temperance and slavery;<sup>27</sup> Lysander Spooner’s constitutional arguments against slavery;<sup>28</sup> and Alan Greenspan’s “market talk” and its connection to the American economic crisis.<sup>29</sup> Even the piece on Homer’s *Odyssey*, and its relationship with classical Greek rhetoric, though somewhat out of place in a book focusing on American public discourse, offers the reader interesting perspectives on modern rhetorical practice.<sup>30</sup>

In the end, *Making the Case* is a good read for those interested in public argument, persuasion, history, language, word choice, metaphor, and the fluidity of meaning. Or, in a word—for those interested in rhetoric.

26 Medhurst, *supra* n. 18, at 194.

27 Michael Leff, *Kind Persuasion: Lincoln’s Temperance Address and the Ethos of Civic Friendship*, in *Making the Case: Advocacy and Judgment in Public Argument*, *supra* n. 1, at 75.

28 James Jasinski, *Lysander Spooner’s The Unconstitutionality of Slavery: A case Study in Constitutional Hermeneutics, Ethical Argument, and Practical Reason*, in *Making the Case: Advocacy and Judgment in Public Argument*, *supra* n. 1, at 45.

29 Robert Asen, *To Exist, You Need an Ideology: Alan Greenspan on Markets, Crisis, and Democracy*, in *Making the Case: Advocacy and Judgment in Public Argument*, *supra* n. 1, at 231.

30 G. Thomas Goodnight, *The Beginnings of Oratorical Consciousness: Restarting Time in Homer’s Odyssey, The Telemachy*, in *Making the Case: Advocacy and Judgment in Public Argument*, *supra* n. 1, at 17.