

PERSUASION

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Getting to the Other Side

JOSEPH WILLIAM SINGER



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WHAT THIS BOOK IS ABOUT

We live in a time of partisan politics where it may seem that our society has no common ground about the values that should shape our laws. The truth is that we agree about more things than most of us realize. We have common values that enable us to reason about which legal rules are just and wise. And while civil discourse may seem scarce in the political world,¹ it is the centerpiece of our court system. Lawyers have techniques to engage in civil debate about divisive issues. This book explains how persuasion from reasoned argument works, why civil discourse matters, and the tools lawyers use to argue about what the law should be.

When I told people I was writing a book on persuasion, many of them asked me how to persuade someone who is stubborn and irrational. That question gave me pause because we are—all of us—sometimes stubborn and irrational, and perhaps even for good reason. Other words for stubborn are “resolute” or “tenacious” and there is nothing wrong with holding fast to values we embrace. And research has shown that we are reluctant to change our positions even when confronted with inconvenient facts; we tend to explain those facts away to avoid cognitive dissonance. That sort of irrationality is part of human life. Nor do we come

1. Lilliana Mason, *Uncivil Agreement: How Politics Became Our Identity* 4 (2018) (“we are increasingly blind to our commonalities”).

to our views solely on the basis of cold reason; emotion and intuition affect our evaluation of questions of justice and fairness.

At the same time, it is correct that there are preconditions to rational discourse. As the quote from Plato in the epigraph to this book acknowledges, persuasion is only possible if we are willing to take ourselves and other people seriously. Persuasion requires work, both of yourself and of others. It requires willingness to think, to question, to listen, to change. If those are lacking, then no persuasion is possible, at least not by reasoned argument. This book is not about how to talk to someone who has no interest in listening or thinking about the matter at hand. It is about those occasions when rational discourse is both possible and appropriate.

I wrote this book primarily to help law students learn how to make normative arguments about what the law should be when the legal rules are unclear or outdated. This book categorizes the arguments that lawyers use in debates about ambiguous or contested legal questions. It also explains how judges justify their decisions about what the law should be when the case involves competing values and there are plausible arguments on both sides. The goal is to provide law students a toolkit to help them engage in reasoned arguments about what the law should be.

A second audience is law professors, legal writing instructors, and clinicians who teach students how to engage in advocacy for what the law should be, as well as how to write a persuasive judicial opinion justifying why one rule is better than the alternatives.

A third audience is the general public. This book is written to be accessible to anyone who is interested in the topic of civil discourse about law and social policy. In a world where civil discourse seems scarce, we can learn something from the lawyers and judges who strive to continue to engage in it and who possess useful resources for doing so. Our political system would work better if political debates adopted some of the methods of civil discourse that lawyers have developed for use in the court system, especially the norm of showing respect for the other side and willingness to acknowledge legitimate counterarguments.

An old story has two people asking a rabbi to adjudicate their dispute. The first person makes his argument, and the rabbi says, "You're right." The second person makes his argument and the rabbi says, "You're right too." An observer objects: "But they can't both be right!" and the rabbi responds, "You're right too!"

The rabbi's last response is partly wrong and partly right. It is wrong because sometimes they both are right in the sense that competing arguments have their place in our analysis of the issue. The decision maker may conclude that both sides present compelling values, interests, and arguments and that the case is hard for exactly that reason. Conversely, the rabbi's statement is right because the case needs to be decided; someone must win and someone must lose. When we decide the case, we will need a determination that one set of arguments prevails over the other in the context at hand. This book explains the arguments we make in persuading others about what the law is or should be and the justifications we can give to choose one set of arguments over another.

Part 1 introduces the topic of civil discourse and the way lawyers use it. Chapter 1 defines civil discourse and explains how persuasion through reasoned argument works. Chapter 2 explains the techniques lawyers use in making arguments about what the law is or should be.

Part 2 identifies the most important normative arguments that lawyers use. Chapter 3 focuses on arguments that assert that someone acted wrongfully or that we should act in certain ways in relation to others, such as arguments about fairness, justice, liberty, rights, and morality. Chapter 4 focuses on arguments about the consequences of competing legal rules and the ways we seek to craft rules that promote the general welfare.

Part 3 focuses on considerations specific to the rule of law with its commitments to treating like cases alike, ensuring equal protection and due process, protecting people from unfair surprise, and recognizing when values have evolved so that legal rules need to be modernized. Chapter 5 addresses the relationships between judges and legislators in the lawmaking process in a free and democratic society and the different roles played by federal and state courts. Chapter 6 discusses the practice of creating and relying on precedent while allowing the law to change as social values and conditions evolve. Chapter 7 compares the advantages and disadvantages of rules that can be applied in a relatively mechanical fashion versus standards that can only be applied by exercising contextual judgment. Chapter 8 focuses on interpretation of ambiguous contracts, statutes, and constitutional norms.

Part 4 moves from arguments (considerations we should take into account) to justifications (reasons that we give to explain why one set of arguments should prevail over another). Chapter 9 explains framing techniques

that shape background understandings, frame the question being considered, or persuade through storytelling. Chapter 10 describes how we specify what values mean in concrete cases and reconcile conflicting values by reinterpreting them, limiting their legitimate contexts, or discerning when the values do not actually conflict after all. Chapter 11 focuses on what we do when we cannot reconcile competing values by contextualizing their application to separate spheres. These methods include: balancing interests, engaging in Golden Rule or social contract reasoning, and reflecting on rules and cases to make them fit together as well as possible (reflective equilibrium).

Part 5 gives examples of normative argument in the context of three hard cases in the areas of property (Chapter 12), torts and contracts (Chapter 13), and civil rights (Chapter 14). Each chapter contains mock judicial opinions with arguments on both sides of the dispute, giving examples of how one might combine the various arguments in this book to provide justifications for alternative results.

This book includes many charts that summarize the arguments that have been presented. Those charts are collected at the end of the book in the appendix for easy reference and review.

The cover image is a photograph of the Bourne Bridge connecting Cape Cod to the mainland in Massachusetts. In the background is the Cape Cod Railroad Bridge. The two shores are within sight; they are separated, yet part of the same state. They are neighbors, not enemies. The image of the bridge suggests that it is possible to get to the other side by an act of engineering or construction. Bridges are ways to “get to the other side” in a physical world, just as persuasion offers ways to reach the other side in a debate between people. And as the image shows, there can be more than one way to get to the other side.

“But can you persuade us, if we refuse to listen to you?” said Polemarchus.

“Certainly not,” replied Glaucon.

Plato, *Republic*

Don't do to others what you would not want done to you.

Hillel, *Talmud Shabbat 31a*

To be persuasive we must be believable;
to be believable we must be credible;
to be credible we must be truthful.

Edward R. Murrow

