

## Words Matter

### Persuading with Classical Rhetoric in Modern Legal Writing

*Rhetoric, Persuasion, and Modern Legal Writing:*

*The Pen is Mightier*

Brian L. Porto (Lexington Books 2020), 210 pages

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It's not what you say, it's how you say it. The author of *Rhetoric, Persuasion, and Modern Legal Writing* enhances our understanding of classical rhetorical techniques through the words of five great U.S. Supreme Court justices. The justices featured ditched the style of eighteenth- and nineteenth-century opinions in favor of a modern, conversational, and more personal format. While this book is not meant to be a "how to" guide to legal writing, it certainly makes you look more closely at your own writing style. Law students, practitioners, judges, and legal academics could benefit from the opinions noted here. Rhetoric is an art of persuasion. As the author states in the book, and I must agree, "[T]he most persuasive [Supreme Court] writers are those who master the art of storytelling and the rhythm of legal prose."<sup>1</sup>

Featuring the writings of Justices Oliver Wendell Holmes Jr., Robert Jackson, Hugo Black, William Brennan, and Antonin Scalia, the opinion examples do not disappoint. The book devotes a chapter to each man's life, career, and writing on the Court. Honorable mentions go to Chief Justice John Roberts and Associate Justice Elena Kagan in the final chapter. Similar to the scholarship of Julie Oseid, which demonstrates the power of brevity, metaphors, clarity, and zeal in legal writing using examples from past presidents and other public figures,<sup>2</sup> this book shows the power of

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<sup>1</sup> BRIAN L. PORTO, RHETORIC, PERSUASION, AND MODERN LEGAL WRITING: THE PEN IS MIGHTIER 11 (2020).

<sup>2</sup> See e.g., Julie A. Oseid, *What Lawyers Can Learn from Edgar Allan Poe*, 15 LEGAL COMM. & RHETORIC 233 (2018); Julie A. Oseid, *The Power of Zeal: Teddy Roosevelt's Life and Writing*, 10 LEGAL COMM. & RHETORIC 125 (2013).

classic rhetoric using examples from these justices. The book aims to show the reader the persuasive power of rhetorical mastery through the words used by justices known for their popular writing styles in their respective legal areas of influence. It does just that.

It begins with a discussion of classical rhetoric origins and its importance to persuasion. Rhetoric is the study and production of persuasion. It is the art of effective or persuasive writing or speaking, especially using figures of speech and other compositional techniques. Style, arrangement, and invention shape the core of written advocacy. Style relates to the choice and placement of particular words. Arrangement pertains to the effective and orderly organization of arguments. Invention concerns the creation or discovery of arguments. Over time, style has changed the most in legal writing. The tone of judges and justices is no longer detached, technical, or professional. Instead, it has been replaced with a conversational voice that shows the writer is communicating with the community.

Justice Oliver Wendell Holmes was the first to showcase this new conversational tone. Often using sharp, pithy language sprinkled throughout his opinions, he intertwined informal writing with “magisterial” writing, combining traditional and modern styles. A major issue of his time was freedom of speech. Writing for the majority in *Schenck v. United States*,<sup>3</sup> instead of stating that the most stringent protection of free speech does not permit someone to say whatever they want at any time or place, he wrote, “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.”<sup>4</sup> This vivid metaphor is still used in discussions of free speech today.

Similarly, a true literary stylist, Justice Robert Jackson’s words were rarely dull and frequently memorable. The man “wrote with a golden pen,” often employing figures of speech and other rhetorical devices in his writing. In *West Virginia State Board of Education v. Barnette*,<sup>5</sup> he wrote, “Those who begin coercive elimination of dissent soon find themselves eliminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.”<sup>6</sup> This short passage is packed with rhetorical devices, using polyptoton, which is the repetition of words derived from the same root. It also contains a metaphor and figure of speech. We can look to Jackson’s writing for creative and assertive word choices.

3 249 U.S. 47 (1919).

4 PORTO, *supra* note 1, at 6 (citing *Schenck*, 249 U.S. at 52).

5 319 U.S. 624 (1943).

6 PORTO, *supra* note 1, at 78 (citing *Barnette*, 319 U.S. at 641).

A champion of criminal procedure and First Amendment law, Justice Hugo Black's opinions reflect a major lesson learned from his studies: "[T]he best way to tell any story is to tell it as simply as possible, in the simplest words possible, and in the shortest way possible."<sup>7</sup> This style is highlighted in his majority opinions in *Gideon v. Wainwright*<sup>8</sup> and *Chambers v. Florida*.<sup>9</sup> For example, in *Gideon*, Justice Black uses storytelling techniques and colloquy in the opening paragraph of the opinion when he says, "Mr. Gideon, I am sorry but I cannot appoint counsel to represent you in this case." The defendant then said, "The United States Supreme Court says I am entitled to be represented by Counsel."<sup>10</sup> This method tells the story and highlights Gideon's predicament. It goes on to vividly state the inherent difficulties of self-representation. In *Chambers*, Justice Black again uses storytelling techniques when he writes, "About nine o'clock on the night of Saturday, May 13, 1933, Robert Darcy, an elderly white man was robbed and murdered in Pompano, Florida . . . ." He continued, quoting the lower court, "It was one of those crimes that induced an enraged community . . . ."<sup>11</sup> Justice Black was an able storyteller who could persuade the reader by the way he presented the facts. Legal writers favoring a plain, straightforward style with occasional flare of figures of speech should look at the writings of Justice Black.

Like Justice Black, Justice William Brennan had a talent for arranging an opinion to tell a clear and compelling story. In *Malloy v. Hogan*,<sup>12</sup> he writes in the very first sentence of the opinion, "In this case we are asked to reconsider prior decisions holding that the privilege against self-incrimination is not safeguarded against state action by the Fourteenth Amendment."<sup>13</sup> The word "safeguarded" was a stylistic choice that showed the value he placed on this privilege. His prose should be studied by those looking to craft a clear, concise, and coherent legal argument that informs, persuades, and inspires.

Justice Antonin Scalia is remembered for his vividness and creative use of figures of speech. Writing for the majority in *Vernonia School District 47 v. Acton*,<sup>14</sup> Scalia wrote, "School sports are not for the bashful. They require 'suing up' before each practice or event and showering and

<sup>7</sup> *Id.* at 102 (citing ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 19 (1997)).

<sup>8</sup> 372 U.S. 335 (1963).

<sup>9</sup> 309 U.S. 227 (1940).

<sup>10</sup> PORTO, *supra* note 1, at 106 (citing *Gideon*, 372 U.S. at 337).

<sup>11</sup> *Chambers*, 309 U.S. at 229.

<sup>12</sup> 378 U.S. 1 (1964).

<sup>13</sup> PORTO, *supra* note 1, at 126 (citing *Malloy*, 378 U.S. at 2).

<sup>14</sup> 515 U.S. 646 (1995).

changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford.”<sup>15</sup> Using aphorism and a bit of wry humor, Scalia gets his point across—there is a reduced expectation of privacy for high school athletes.

To sum up, the author recounts the value of rhetoric to legal persuasion by comparing the unique contributions each justice made to legal writing. My one critique would be the failure to mention diverse voices on the high court, such as Justices Ruth Bader Ginsburg and Sonia Sotomayor, who have offered clear, direct language in important opinions and dissents. Nevertheless, these justices’ opinions could serve as instructional materials for legal writing professors and as models for students, practitioners, and judges. *Rhetoric, Persuasion, and Modern Legal Writing* gives us a look back and into the future. It shows us how the tools of rhetoric can still be a powerful resource in persuasive legal writing.

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<sup>15</sup> PORTO, *supra* note 1, at 159 (citing *Vernonia*, 515 U.S. at 657).