STUDENT ESSAYS

Rhetorical Stratagems in Judicial Opinions

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On June 12, 1942, Toyosaburo Korematsu was arrested in a California Military Area for violating an Army order that all persons of Japanese ancestry be removed.[1] The United States Supreme Court affirmed his conviction.[2] Responding to charges that the Court was sentencing Korematsu to a concentration camp solely because of his race, Justice Black replied that the Court's task would be clear if Korematsu had been imprisoned in a concentration camp because of racial prejudice. He did not believe that to be the case, however: "Regardless of the true nature of the assembly and relocation centers — and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies — we are dealing specifically with nothing but an exclusion order."[3]

Justice Black's disclaimer is remarkable for its rhetoric. He packed at least three rhetorical devices into one sentence. First, he used a euphemism, *assembly and relocation centers*, to avoid the "ugly connotations" of *concentration camps*. Second, he framed the issue in a way that avoided the pressing constitutional issue: whether the Army could intern American citizens in prison camps solely because of their race. Instead, he presented it as a question whether the Army could exclude persons from a military area.

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[1] Korematsu v. United States, 140 F.2d 289, 289 (1943), *aff'd*, 323 U.S. 214 (1944).

[2] Korematsu v. United States, 323 U.S. 214, 223-24 (1944).

[3] *Id.* at 223.

Finally, by characterizing the Army directive as "nothing but an exclusion order," Justice Black whitewashed the inevitable result — Korematsu's internment.

Although rhetoric does not always conceal so cleverly, it is a powerful tool of persuasion. Aristotle defined it as "the faculty of observing in any given case the available means of persuasion."[4] The very best opinions, and in particular dissenting opinions,[5] contain splendid legal and moral arguments phrased in powerful rhetoric. Judges have long known the power of language to persuade. They have used rhetorical devices to influence the law.

The judicial craft is inevitably rhetorical for three reasons.[6] First, "some cases cannot be resolved otherwise than by an 'aggressive assertion on one side'"[7] — that is, rhetorical skills may carry the day when judges cannot resolve legal questions by legal or empirical demonstration. Second, judges must sometimes resort to rhetoric because legal arguments are often difficult to grasp, especially for those who are not lawyers. The more difficult or controversial the case, the more significant is the rhetoric. Third, judges often answer questions that have as much to do with policy as with law. Therefore, the questions are political in nature, and the judges must be politicians when legal doctrines cannot answer the questions presented.

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[4] 2 ARISTOTLE, *Rhetoric*, in THE COMPLETE WORKS OF ARISTOTLE 2152, 2155 (Jonathan Barnes ed. & W. Rhys Roberts trans., 1984).

[5] See BENJAMIN N. CARDOZO, LAW AND LITERATURE 34 (1931), for a discussion of the freedom of the dissenter, which leads to the dignified and elevated style of the best dissenting opinions.

[6] RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 292 (1988).

[7] *Id.*

In the end, Supreme Court Justices and other judges make law only by persuading through reason and rhetoric.[8] Courts cannot rally troops and tanks — or appropriate money — to enforce their commands. Because they cannot coerce, courts must compel by the force of their opinions. In an important case it is not enough that an opinion produce a just result and provide a clear precedent. The opinion must also persuade its audience that its rationale is sound and that the results are in the nation's best interests. As Justice Cardozo put it, "The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of proverb and maxim. Neglect the help of these allies, and it may never win its way."[9]

Judges employ several rhetorical devices to persuade their colleagues and the public. It is no accident, then, that the most influential judges have been effective stylists, and the greatest of all, Justice Holmes, is the one judge who ranks among the great American writers.[10] Though Holmes towers above other judges in his skillful rhetoric, all judges persuade through rhetoric. The pages that follow catalogue some common rhetorical stratagems.

SELECTIVE RECITATION

A common rhetorical tactic is to manipulate facts or frame issues in ways that predispose readers to agree with the judge's conclusion. Although these devices violate no ethical canons, they

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[8] *See* Robert A. Prentice, *Supreme Court Rhetoric*, 25 ARIZ. L. REV. 85, 88 (1983).

[9] CARDOZO, *supra* note 5, at 9.

[10] POSNER, *supra* note 6, at 296. Judge Posner says that Holmes's masterpiece, the dissenting opinion in Lochner v. New York, 198 U.S. 45, 74 (1905), "is not . . . a good judicial opinion. It is merely the greatest judicial opinion of the last hundred years." *Id.* at 285. This anomaly reflects the power of rhetoric in judicial writing.

may undermine an opinion's integrity for two reasons. First, selectively reciting the facts implies that the reasoning would not stand if all the material facts were revealed. Second, a judge who asks the wrong question may diminish the opinion's precedential value if the answer fails to address the difficult legal issue.

1. Manipulating the Facts

Judges often color facts. For example, the judge who intends to uphold a finding of guilt or civil liability describes the crime or negligence in graphic detail, emphasizing the most heinous acts or omissions by the defendant.[11]

Just as important as the facts mentioned, however, are the facts omitted. A judge who intends to find for the defendant may describe the facts in a bland, detached manner, often implying that events were beyond anyone's control. In *United Zinc & Chemical Co. v. Britt*, Justice Holmes presented the relevant facts matter-of-factly: "On July 27, 1916, the children, who were eight and eleven years old, came upon the petitioner's land, went into the water, were poisoned and died."[12] The Court exonerated the defendant company for the children's deaths. Holmes described the children's actions in a flat, colorless way. They did not "jump" or "dive" into the water; they "went." He portrayed the children as trespassers, saying that the landowner had no duty to protect the children unless they had been invited onto the land. Acknowledging that "to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation,"[13] Holmes declared there was no invitation here because he doubted the children could see the pool from the road.

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[11] *See* Stanford v. Kentucky, 109 S. Ct. 2969, 2972-73 (1989).

[12] 258 U.S. 268, 274 (1922).

[13] *Id.* at 275.

Dissenting from that view, Justice Clarke provided the missing details. He noted that photographs showed that the deadly pool looked like a swimming pool, with brick sides and bright clear water. It was not fenced and had no warning signs, though it contained a lethal mixture of sulfuric acid and zinc sulfate. Furthermore, several paths crossed the property near the pool. Clarke also supplied poignant details: One child perished in the water, the other lingered a day or two before dying. Finally, the men who pulled the boys from the water suffered serious injuries from the chemicals.[14]

2. *Framing the Issue*

A judge can predispose readers to agree with a result by framing the issue in a way that leads to the judge's conclusion. A result may appear correct if the question is posed one way, but may ring false if the question is presented differently. In *Griswold v. Connecticut*, the Supreme Court struck down a law forbidding the sale of contraceptives to married persons.[15] In arguing against the law, the Court implied that the prohibition was an attack on the institution of marriage. Had the Court posed the question as whether it had the discretion to invalidate a law that it thought silly,[16] the answer might have been different. Since that analysis would have led to troubling substantive due process issues, the Court wisely decided not to pursue it.

In a similar case, *Eisenstadt v. Baird*, the plaintiff attacked a state law prohibiting the sale of contraceptives to single persons.[17] The Court announced, "If the right of privacy means anything, it is the

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[14] *Id.* at 278.

[15] 381 U.S. 479, 485-86 (1965).

[16] *See id.* at 527 (Stewart, J., dissenting).

[17] 405 U.S. 438, 440-41 (1972).

right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[18] The decision might not have seemed so clear-cut had the Court not focused on the individual. If, instead, the Court had presented the question as "whether a state is constitutionally obligated to allow the sale of goods that facilitate fornication and adultery by making these practices less costly,"[19] the outcome might have been different.

AVOIDANCE DEVICES

Judges sometimes use rhetorical devices to avoid examining all the legal issues presented. Rather than carefully analyzing the facts and the law, judges may simply make unsupported assertions or deny responsibility for their decisions.

1. The Ipse Dixit Statement

One common rhetorical device is to assert a position so strongly as to forestall questioning and to deny the existence of competing arguments.[20] The aim is to intimidate the reader into agreeing with the judge's view.

Justice Holmes used this technique in many opinions. He made bold assertions as if there were no conceivable alternatives, rather than admitting that he had chosen from a range of possible

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[18] *Id.* at 453.

[19] POSNER, *supra* note 6, at 305.

[20] *See* Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 861 (1986); *see also* Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915, 924 (1961) (suggesting that judges may assert their arguments most emphatically when they are unsure whether they are reaching the correct result).

interpretations. In *Buck v. Bell*, a case in which the Court approved a retarded woman's forced sterilization, Holmes blessed the Virginia sterilization statute by asserting that "there can be no doubt" that the plaintiff received adequate procedural safeguards.[21] Though this was by no means a foregone conclusion, Holmes declared the matter settled and went on with his argument. Apparently, no other Justice wished to point out that due process was one ground of appeal.

In *Lochner v. New York*, Holmes began his argument by asserting: "This case is decided upon an economic theory which a large part of the country does not entertain."[22] He did not explain what that theory was or how he came to know the nation's views on it. He just asserted it and went on to his next point. It is not altogether clear what economic theory he was alluding to, but he wrote with such assurance that most readers would probably not stop with doubt.

2. *The "It's-Out-of-My-Hands" Approach*

Judges sometimes avoid confronting difficult legal issues by professing no control over the outcome. They assert that they have little or no discretion because precedent, a statute, or the Constitution forecloses other options. Of course, the judge usually has various interpretations or factual distinctions at hand, as dissenters are happy to point out. This device, however, purports to immunize the judge from personal responsibility.

In *Chase v. Quick*, a prisoner filed a pro se petition alleging that a Rhode Island prison compelled him and other Muslims to eat pork despite their religious beliefs.[23] Judge Selya declared that his court was "impelled" to dismiss the action and was "constrained"

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[21] 274 U.S. 200, 207 (1927).

[22] 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[23] 596 F. Supp. 33, 34 (D.R.I. 1984).

to find for the state.[24] But the result he reached was not inevitable: He offhandedly dismissed the petitioner's First Amendment arguments, though many would find a colorable issue that the state was violating the prisoners' religious tenets.

Claims of judicial impotence, though, ring hollow after decades of legal realism.[25] Realists observe that laws and rules lend themselves to varying interpretations, and judges often have wide latitude in applying those laws.[26] Few statutes are so well drafted and few precedents are so clear that reasonable persons could not disagree on their meanings and applications.

3. Aphorisms

A judge can sometimes deflect hard legal analysis by writing aphoristically. Justice Holmes is famous (or infamous) for using this technique. In one case already discussed — *United Zinc & Chemical Co. v. Britt* — the parties disputed whether the children were lured onto the land by an attractive nuisance.[27] Considering a road within 100 feet of the pool, Holmes declared: "A road is not an invitation to leave it elsewhere than at its end."[28] Whatever this cryptic remark means, it does not explain why the deadly pool was not an attractive nuisance.

Justice Black, too, sometimes used platitudes to avoid thorny legal issues. In *Korematsu*, he admitted that the Court was "not unmindful of the hardships imposed by [the internment order]

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[24] *Id.*

[25] *See* Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986)).

[26] *Id.* at 470.

[27] 258 U.S. 268, 274 (1922).

[28] *Id.* at 276.

upon a large group of American citizens."[29] He added, however, that "hardships are part of war, and war is an aggregation of hardships."[30] Not content with that hollow pronouncement, he continued: "Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier."[31] He did not explain, however, why some citizens had to bear a far heavier burden than others.

But aphorism is not always a cause for despair. A judge may turn a phrase so well that the point becomes clearer rather than murkier. In *Brown v. Allen*, Justice Jackson disagreed with his colleagues' decision that the Supreme Court has unfettered discretion to overturn state supreme court decisions:

> [R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.[32]

The aphorism's truth and simplicity strike at the core of the legal issue, and the reader cannot help believing that Justice Jackson is right, at least on that point.

EMOTIONAL OUTBURSTS

The opinion that produces more heat than light comes in two types: first, the opinion that assails another judge or another

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[29] Korematsu v. United States, 323 U.S. 214, 219 (1944).

[30] *Id.*

[31] *Id.*

[32] 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

judge's reasoning; second, the opinion that assails a party or a doctrine advanced by a party.

1. The Ad Hominem Attack

Though not unknown in earlier times, the opinion attacking another judge has become increasingly common in the past decade. Judges often keep their sniping behind conference doors, but some vent their frustrations in opinions. A remarkable example occurred in the Supreme Court's 1989 opinion *Webster v. Reproductive Health Services*,[33] a watershed in the Supreme Court's retreat from public civility.

Webster presented the spectacle of Justice Scalia describing Justice O'Connor's position as "irrational"[34] and one that "cannot be taken seriously."[35] Incredibly, those two Justices were on the same side. Just as harsh was Justice Blackmun's blistering dissent, which described the plurality opinion as "unadulterated nonsense"[36] deserving charges of "cowardice and illegitimacy."[37] For good measure he added, "Never in my memory has a plurality announced a judgment of this Court that so foments disregard for the law and for our standing decisions. Nor in my memory has a plurality gone about its business in such a deceptive fashion."[38]

In another recent case, Justice Kennedy upbraided Justice Blackmun for the latter's "latent hostility" and "callous indiffer-

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[33] 109 S. Ct. 3040 (1989).

[34] *Id.* at 3066 n.*.

[35] *Id.* at 3064.

[36] *Id.* at 3077 n.11.

[37] *Id.* at 3079.

[38] *Id.* at 3067.

ence" toward religion.[39] Blackmun countered that the charges are "as offensive as they are absurd."[40] A discrimination case found Blackmun wondering "sadly" whether the majority believes that race discrimination is a problem "or even remembers that it ever was."[41]

The most savage attacks occur, predictably, in the controversial and emotional cases, yet such attacks are not inevitable. Barely a generation ago, controversial opinions showed disagreement without finger-pointing. In *Roe v. Wade*, Justice Rehnquist began his dissenting opinion by writing, "The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent."[42] *Roe v. Wade* was surely a controversial opinion, but Justice Rehnquist disagreed without being disagreeable.

Personal attacks on other judges rarely serve any useful purpose. The inflammatory rhetoric leads the public to believe that those in the best position to know, the judges themselves, believe the Court "is composed of crooks and dunces."[43] When judges question each other's common sense and good faith, they

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[39] County of Allegheny v. American Civil Liberties Greater Pittsburgh Chapter, 109 S. Ct. 2086, 3135, 3138 (1989).

[40] *Id.* at 3110.

[41] Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2136 (1989).

[42] 410 U.S. 113, 171 (1973).

[43] *See* Louis Schwartz, *The Chief Fails to Lead Rebellious Colleagues*, MANHATTAN LAW., Aug. 8, 1989, at 11.

deplete the reservoir of popular goodwill that they enjoy in American life.[44]

2. *The Tantrum*

Another type of vituperative opinion is the purely emotional opinion that functions primarily to allow a judge to express rage or frustration. Recording his dissent from the majority's opinion that Henry Miller's *Tropic of Cancer* was not obscene, Justice Musmanno responded with this diatribe:

> *Cancer* is not a book. It is a cesspool, an open sewer, a pit of putrefaction, a slimy gathering of all that is rotten in the debris of human depravity. And in the center of all this waste and stench, besmearing himself with its foulest defilement, splashes, leaps, cavorts and wallows a bifurcated specimen that responds to the name of Henry Miller. One wonders how the human species could have produced so lecherous, blasphemous, disgusting and amoral a human being as Henry Miller. . . .
> . . . Henry Miller [is one] who shuns a bath of clean words, as the devil avoids holy water, who reduces human beings to animals, home standards to the pigsty, and dwells in a land of his own fit only for lice, bedbugs, cockroaches and tapeworms.[45]

Although Justice Musmanno discussed the prevailing law on obscenity, his legal analysis all but disappeared in the torrential abuse directed at Henry Miller.

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[44] *See* Stuart Taylor, Jr., *The Brawling on the Bench by Justices Who Must Decide the Law of the Land*, L.A. TIMES, March 25, 1990, at 3.

[45] Commonwealth v. Robin, 218 A.2d 546, 556 (Pa. 1966).

USING COMPARISONS

1. Analogy

Judges may explain complicated legal concepts or point out fallacies in existing legal doctrines by using analogies. In *Schenck v. United States*, the defendants had been convicted of conspiracy to violate espionage acts for distributing leaflets urging men to avoid conscription during World War I.[46] The defendants argued that the charges violated the First Amendment's protection of free speech. In his opinion for the Court, Justice Holmes conceded that "in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights."[47] He added, however, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[48] This analogy points out in a clear, easily understood image why free speech rights must sometimes be circumscribed.

In *Sierra Club v. Morton*, the Court ruled that the Sierra Club lacked standing to challenge a proposed development in California's Mineral King Valley.[49] Dissenting, Justice Douglas proposed a novel approach that would allow the trees, rocks, and valleys to pursue litigation in their own right.[50] Though this approach appears absurd at first glance, Justice Douglas compared it to legal doctrines that allow other inanimate objects, such as ships and

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[46] 249 U.S. 47, 49 (1919).

[47] *Id.* at 52.

[48] *Id.*

[49] 405 U.S. 727, 741 (1972).

[50] *Id.* at 742-43.

corporations, to sue on their own behalf.[51] By analogy, then, it seems more plausible to extend standing to trees and meadows.

2. *Metaphor*

Metaphors can also make a judge's reasoning more persuasive. In *Flagiello v. Pennsylvania Hospital*, the Pennsylvania Supreme Court abrogated the common-law rule that charitable hospitals enjoy immunity from negligence actions.[52] Justice Musmanno explained his decision with a comparison:

> [I]t becomes almost a matter of fantasy that a person should enter a hospital to be cured of an ailment and to have a broken body made whole, just as a ship enters dry-dock for repairs, and then emerge, because of the fault of those charged with repairing the ship, in worse shape to sail the sea of life than before. And, in addition, be required to pay for the work of the faulty mechanics.[53]

Sometimes metaphors can obstruct judicial clarity, however. For example, in *Flagiello* Justice Musmanno did not stop his metaphor in time. In explaining why the court would not follow precedent on hospital immunity, he wrote:

> Stare Decisis channels the law. It erects lighthouses and flys [sic] the signals of safety. The ships of jurisprudence must follow that well-defined channel which, over the years, has been proved to be secure and trustworthy. But it would not comport with wisdom to insist that, should shoals rise in a heretofore safe course and rocks emerge to encumber the passage, the ship should nonetheless pursue the original course, merely because it

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[51] *Id.*

[52] 208 A.2d 193, 206-08 (Pa. 1965).

[53] *Id.* at 204-05.

> presented no hazard in the past. The principle of *stare decisis* does not demand that we follow precedents which shipwreck justice.[54]

The metaphor is a creative one, but after a while the reader begins wondering whether Justice Musmanno would not rather be sailing. It also illustrates a problem with comparisons: If they become ends in themselves, the legal analysis may become secondary to the literary effort. Comparisons used to clarify, however, are among the most effective rhetorical devices.[55]

IDENTIFICATION ARGUMENTS

A judge may enlist support by inviting the reader to join an inner circle that shares certain beliefs. Such an opinion appeals to the reader's sense of belonging and well-being, thereby implying that any change in the status quo will threaten the reader. Identification arguments are usually innocuous and persuasive, but they are potentially harmful. Courts have a special duty to protect those outside the mainstream, and when the courts cast their lot with the majority, the outcasts become powerless.

1. The "Us-Against-Them" Device

Judges use the us-against-them method to gain acceptance by creating an exclusionary relationship with the reader.[56] Justice Holmes's opinions often implied that he and the reader shared a belief that irrational outsiders could not or would not understand. In *Buck v. Bell* — the case about coerced sterilization — Holmes

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[54] *Id.* at 205.

[55] For other examples, see BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE §§ 6.1–6.3, at 148-52 (1991).

[56] *See* Dudziak, *supra* note 20, at 861.

wrote: "We have seen more than once that the public welfare may call upon the best citizens for their lives."[57] His *we* extended beyond the Court to include all those patriots who understood that wars had claimed the lives of people more deserving of citizenship than Carrie Buck. The non sequitur is palpable: The need to sacrifice lives in wartime is irrelevant to the perceived need to prevent retarded citizens from having babies.

To have such a *we* there must be an *other*.[58] The judge's rhetoric requires a foil, a nonbeliever who refuses to acknowledge reason and reality. Holmes often set up the *other* as irrational and slightly silly. For example, in *Lochner v. New York*, he remarked: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[59] This remark implies that some *other* had absurdly suggested that the Constitution enacted the book, and Holmes was available to refute such nonsense.[60]

It is easiest, and most deplorable, for a judge to criticize those already denied the rights that others enjoy. In *Doe v. Commonwealth's Attorney for Richmond*, the plaintiffs sought a finding that Virginia's sodomy statute was unconstitutional.[61] Not content merely to deny the relief sought, Judge Bryan explained that no authority forbade outlawing homosexuality "since it is obviously no portion of marriage, home or family life."[62] He also justified his decision by relating the sordid facts of a completely unrelated case dealing with "just such a sexual orgy as the statute was

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[57] 274 U.S. 200, 207 (1927).

[58] *See* Dudziak, *supra* note 20, at 862.

[59] 198 U.S. 45, 75 (1905).

[60] *See* POSNER, *supra* note 6, at 284.

[61] 403 F. Supp. 1199 (E.D. Va. 1975).

[62] *Id.* at 1202.

evidently intended to punish."[63] Had Judge Bryan discussed merely a federal court's power to set aside state laws, his opinion would have been unobjectionable. Instead, he strained to express disgust for the plaintiffs' sexual preference.

2. *Danger Warnings*

A judge can sometimes muster support by warning of calamity resulting from opposing views.[64] Threats of danger stifle disagreement by making it appear that naysayers are simply willing to disregard the public good. In *Buck v. Bell*, Holmes warned that citizens like Carrie Buck could "sap the strength of the state" and swamp the country with incompetence if allowed to propagate.[65] He added: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."[66] The concrete words such as *starve*, *execute*, and *crime* add to the emotional impact because they warn of what will happen if the Court strikes down the statute.

A common objection to judges' rhetoric is that it is manipulative and thus immoral. Rhetoric is typically considered a way to deal with people instrumentally or manipulatively in an attempt to get them to do what the speaker wants.[67] According to this view,

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[63] *Id.* (citing Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973)).

[64] *See* Dudziak, *supra* note 20, at 863.

[65] 274 U.S. 200, 207 (1927).

[66] *Id.*

[67] JAMES B. WHITE, HERACLES' BOW 32 (1982).

rhetoric is equivalent to propaganda and may be false or misleading. Those who oppose rhetorical devices might point to *Buck v. Bell* to show how rhetoric can go wrong. It is a well-written opinion. It engages the reader's emotions and justifies reformers' beliefs through its sense of rightness and purpose. If it fails to convince, the reason lies not in flawed logic, but in the reader's distaste for Holmes's enthusiasm for eugenics. The rhetoric is elegant writing, but the result is vicious and narrow-minded.

Rhetoric by itself has no inherent moral or ethical value, however. It can as easily be used for good as for ill. One of the great dissents in American jurisprudence is Justice Harlan's opinion in *Plessy v. Ferguson*.[68] Disagreeing that Louisiana could forcibly separate the races, Justice Harlan wrote:

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.
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> We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead anyone, or atone for the wrong this day done.[69]

Justice Harlan remains close to the discussion — interpreting what equality as defined by the Fourteenth Amendment means — yet

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[68] 163 U.S. 537, 552 (1896).

[69] *Id.* at 559, 562.

this dissent has great emotional force. If he had engaged in an academic analysis of the text, he would not have conveyed the injustice and outrage involved in the case. Instead, he used a well-chosen aphorism ("Our constitution is color-blind"), an appeal to American egalitarianism ("all citizens are equal before the law"), and an appeal to readers' patriotism ("We boast of the freedom enjoyed by our people above all other peoples"). These aspirational statements are not readily distinguishable from political rhetoric. Yet had Justice Harlan restricted himself to legal precedent and the framers' intent, his dissent would never have laid the foundation for the great desegregation decisions in which his ideals became law.

The value of rhetoric in judicial writing flows largely from its power to portray the judge as a person with integrity and compassion. Dry, logical analysis cannot do that. Aristotle maintained that the reader's or listener's perception of the speaker's integrity is often the most important factor in persuasion. Justice Harlan's dissent in *Plessy* stamps him as a judge willing to overcome blind prejudices to ensure rights according to constitutional promises.

Rhetoric persuades in a way that logical analysis cannot. The test of effective rhetoric should not simply be whether it is persuasive, however. Justice Holmes used a rhetorical flourish in support of the Supreme Court's decision that Virginia's forced sterilization of retarded people was constitutional. The result was a shameful opinion.

Judges improve both their legal analysis and the quality of justice if they examine their reasons for using rhetorical tools. A judge should ask whether the device is a way to make the point clearer and to explain the legal analysis or whether the rhetoric is a substitute for careful reasoning. A judge who cannot arrive at a desired conclusion without an avoidance strategy or a distorted factual recitation should perhaps reconsider the result. Rhetoric should stir the reader's emotion or explain a novel legal approach. It should do so without concealing slipshod analysis or allowing the judge to evade responsibility for deciding difficult legal issues.