

THE WRITTEN JUDICIAL OPINION

Writing 43 – Spring 2013

Professor Jennifer B. Sargent

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THE WRITTEN JUDICIAL OPINION

Judges write legal opinions with goals and purposes in mind. They use words, phrases, voice and structure to convey their messages and their decisions. We will primarily study the three most important factors in judicial opinion writing: decision-making, defining legal terms, and persuasion. All writing assignments will require the students to demonstrate their understanding of these writing concepts and analyze how the writing methods inform the written opinion. Students will also become accustomed to writing with the very specific citation style used in legal writing.

Assigned reading:

1. Jeffrey Toobin, *The Oath*, Doubleday (September 18, 2012)
2. *The Bluebook: A Uniform System of Citation* (Eighteenth Edition) (Spiral-bound), Harvard Law Review Assn. (2005);
3. *The Declaration of Independence and Constitution of the United States* (*Signet Classics*), Floyd G. Cullop (Editor, Introduction) (June 30, 2009);
4. *Lawrence v. Texas*, 539 U.S. 558 (2003);
5. *Kelo v. City of New London*, 545 U.S. 469 (2005);
6. *District of Columbia v. Heller*, 554 U.S. 570 (2008);
7. Various Law Review Articles and transcripts (assigned in syllabus)

NOTE: ALL CASES AND LAW REVIEW ARTICLES ARE AVAILABLE ON “CANVAS” (our version of Blackboard).

UNIT I – OVERVIEW OF COURTS AND JUDICIAL OPINION WRITING

Monday, March 25 – Introduction

Wednesday, March 27 – Overview: The United States Supreme Court (and lower court system)

- Assigned reading for this class: Voldemort 1

Friday, March 29 – The Justices and judicial selection process

- assigned reading for this class: Voldemort 2

Monday, April 1 – The Cases -- how they get to the courts

- assigned reading for this class: Voldemort 3

Wednesday, April 3 – The basic construction of a written judicial opinion (and what IRAC is)

- assigned reading for this class: Gerald Lebovits, *Ethical Judicial Opinion Writing*, bepress Legal Series, paper 1743 (2006); <http://law.bepress.com/expresso/eps/1743>

NO CLASS Friday, April 5

Monday, April 8 through Friday, April 12– the “pure” and “impure” methods of legal opinion writing (Judge Posner vs. Judge Wald)

- assigned reading for these classes:
 - (1) Richard A. Posner, *Judges’ Writing Styles* (and do they matter), 62 U. Chi. L Rev 142 (1995)(23 PAGES);
 - (2) Patricia M. Wald, *A Reply to Judge Posner*, 62 U. Chi. L. Rev 451 (1995)(6 PAGES);
 - (3) Robert F. Blomquist, *Playing on Words: Judge Richard A. Posner’s Appellate Opinions*, 1981-82 – Ruminations on Sexy Judicial Opinion Style During an Extraordinary Rookie Season, 68 U. Cin. L. Rev 651 (2000) (41 PAGES).

UNIT II – DECISION-MAKING: Case study: *Lawrence v. Texas*

ASSIGNED READING FOR THE UNIT: *Lawrence v. Texas*, 539 U.S. 558 (2003) (read entire opinion by Monday, April 15)

Synopsis: LAWRENCE V. TEXAS (49 pages):

This case teaches us how judges write to move a sensitive social concept in a direction that better fits the social norms of the times. Judges are not legislators, and yet they often write with the goal of creating social policy. Lawrence v. Texas held that a Texas statute making it a crime for two people of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause of the United States Constitution. The Supreme Court decided this case in 2003. The case is a prime example of how courts grapple with the legality of social issues, and how written legal opinions may be crafted to legalize the most sensitive social issues. We begin the course with this case for several reasons. It is, first and foremost, one of the best examples of the power and fluidity of *stare decisis*. This case actually overruled a long-standing case, Bowers v. Hardwick. The Lawrence case focuses on the concept of liberty as a constitutionally guaranteed right. Lawrence is perhaps the best example of how the Supreme Court can alter its judicial decision-making process to expand and protect a constitutional liberty that was previously (and amongst some circles, still is) socially unpopular. In this sense, we see the Court, through its writing, shift its allegiance not from one group to another, but to all groups that share the liberty interest. The case demonstrates that the Constitution is a living document. The case also serves as an excellent example of the reasoning and rationale behind overturning a previous case – something the Supreme Court and other lower courts heartily strive not to do. The opinion traces the history of the liberty interest under the Due Process Clause, guiding us through how courts have dealt with homosexuality and “morality.”

Monday, April 15 – The components of judicial decision-making – judging (and *stare decisis*) vs. legislating

Wednesday, April 17 – Deconstructing *Lawrence v. Texas* – nuts and bolts of the opinion’s construction

Friday, April 19 - analyzing *Lawrence v. Texas*’ content: forwarding a social goal with strategically managed precedent

Monday, April 22 – oral argument as part of the decision-making process

- assigned for this class: listening to the oral argument in *Lawrence v. Texas* (streamed online – www.oyez.org) and reviewing the oral argument transcript

Wednesday, April 24 and Friday April 26 – *United States v. Windsor*

-- 4/24 – DOMA and the standard of review in *Windsor*

- assigned for this class: *Windsor/Perry* SCOTUS Legal Solutions blog (5 links on Blackboard)

-- 4/26 – Did *Lawrence v. Texas* play any part in the *Windsor* arguments?

- assigned for this class: : listening to the oral argument in *United States v. Windsor* (streamed online – www.oyez.org) and reviewing the oral argument transcript

UNIT III: DEFINING LEGAL TERMS: Case study: *Kelo v. City of New London*

ASSIGNED READING FOR THE UNIT: *Kelo v. City of New London*, 545 U.S. 469 (2005)(read entire opinion by Wednesday, May 1)

Synopsis: KELO V. CITY OF NEW LONDON (58 pages):

Kelo v. City of New London focuses on a deceptively simple writing concept: defining legal terms. Kelo v. City of New London involves the Takings Clause of the Fifth Amendment of the U.S. Constitution. The Takings Clause enables the power of eminent domain, which is the inherent power of the government to seize a private citizen's property (with compensation) for public use. Over the years, courts have all but tortured the definition of "public use." This case takes us through the various trials and tribulations of judicial attempts at writing definitions of highly significant legal terms. Everyday, courts around the country have to define the terms they are using to craft their analysis vis-à-vis the facts of the case. Judges will utilize previous definitions if those definitions forward the desired legal analysis. However judges will just as often redefine legal terms to suit their analysis. Kelo strikes at the very core of a major political and financial issue – the power of government to divest citizens of their property without their permission. As such, the Kelo Court had to be both circumspect and deliberate in explaining their definition of "public use" for the purposes of this case. This case will introduce such concepts as activist judging and the art of written dissent in drafting the very basic elements of an opinion.

Wednesday, May 1 - How a written judicial opinion's defined legal terms can cause external impact and responses

Friday, May 3 - Deconstructing *Kelo v. City of New London* – nuts and bolts of the opinion's construction

Monday, May 6 –

- assigned for this class: : listening to the oral argument in *United States v. Windsor* (streamed online – www.oyez.org) and reviewing the oral argument transcript

Wednesday, May 8- analyzing *Kelo v. City of New London*'s content: writing to make an illogical social concept appear legally logical (though not necessarily fair)

Friday, May 10 – predicting the future: how can defining terms in particular ways drive policy and the resulting legal opinion?

UNIT IV –WRITTEN PERSUASION: Case study: *United States v. Heller*

ASSIGNED READING FOR THE UNIT: *United States v. Heller*, 554 U.S. 570 (2008) (read entire opinion by Monday, May 13)

Synopsis: UNITED STATES V. HELLER (157 PAGES):

In this case, the Supreme Court concluded that, “The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” The opinion and its dissents illustrate the art of persuasion through the craft of expository writing and analysis. Many experts predicted the 5-4 split long before the Court wrote the opinion and dissents. It was no secret that the majority would hold what it held. Even those who fundamentally disagreed with Justice Scalia, most notably the dissenting justices, could not debunk the majority opinion without offering completely different and extremely compelling persuasive arguments in return. Some would argue, probably rightfully so, that the justices had their minds made up, and the opinion and dissents had to lead to their results. Is the opinion in *Heller* an excruciatingly eloquent siren song to an intended result? You decide.

Monday, May 13 – Why did the justices grant the *writ of certiorari* in *Heller*?

Wednesday, May 15 – Deconstructing *Heller*– nuts and bolts of the opinion’s construction

Friday, May 17 – The ideological split

Monday, May 20 – double duty: making the argument and simultaneously refuting another

Wednesday, May 22 – NO CLASS -- prep for final research paper

Friday, May 24 – open hours for research paper questions (from 12:00-5:00 p.m.)

Monday, May 27 - no class – Memorial Day

Wednesday, May 29– wrap up

Writing Assignments

You shall type the essays in Times New Roman or Arial font, double-spaced with standard margins. Double-sided printing is fine. Staple all pages, please. I do not accept late papers. Write simply, clearly and concisely. Use standard legal citations (The Bluebook: A Uniform System of Citation (Eighteenth Edition) (Spiral-bound), Harvard Law Review Assn. (2005))

1. UNIT II – Decision-making

Overruling a case is serious business and the Supreme Court does not do such a thing lightly. *Lawrence v. Texas* expressly overruled the long-standing case of *Bowers v. Hardwick*. The Court claimed that *Bowers*' analysis was faulty, and thus should not stand. Answer the following question: what was it about societal norms and values in 2003 that made it socially acceptable for the Court to overrule *Bowers* and create the legal holding it did in *Lawrence*? Do not speculate. Use only evidentiary points and examples from the *Lawrence* case. Length = 5 pages.

- May 1 – first draft due to critique partners, May 6 – critique partners hand back papers, May 10 – final draft due

2. UNIT III – Defining Legal Terms

The public outcry after *Kelo v. City of New London* was enormous. The public assumed the holding in the case gave the state government carte blanche to take private property from the citizenry. Write an essay for a literary periodical (such as The New Yorker) explaining *Kelo*'s holding and reasoning in a reassuring way for the public at large. Explain how the Kelo Court's definition of "public use" does not endanger the majority of citizens and their private property. Length = 5 pages.

- May 13 – first draft due to critique partners, May 17 – critique partners hand back papers, May 22 – final draft due

3. Final research paper –Paper assignment details to be distributed in class at the mid-term point. Length --10 pages. Due by Monday, June 3 at 3:00 p.m.

GRADING IN THIS COURSE:

10% class participation

30% first two papers (total 60%)

30% final research paper

Regularly Graded Courses: The following guidelines offer general criteria for evaluation and grading, with 'plus' or 'minus' designations indicating that, in the opinion of the instructor, the student has performed at a level slightly higher or lower than the norm for that category.

- A:**
1. Excellent mastery of course material
 2. Student performance indicates a very high degree of originality, creativity, or both
 3. Excellent performance in analysis, synthesis, and critical expression, oral or written
 4. Student works independently with unusual effectiveness

- B:**
1. Good mastery of course material
 2. Student performance demonstrates a high degree of originality, creativity, or both
 3. Good performance in analysis, synthesis, and critical expression, oral or written
 4. Student works well independently

- C:**
1. Acceptable mastery of course material
 2. Student demonstrates some degree of originality, creativity, or both
 3. Acceptable performance in analysis, synthesis, and critical expression, oral or written
 4. Student works independently at an acceptable level

- D:**
1. Deficient in mastery of course material
 2. Originality, creativity, or both apparently absent from performance
 3. Deficient performance in analysis, synthesis, and critical expression, oral or written
 4. Ability to work independently deficient

- E:**
1. Serious deficiency in mastery of course material
 2. Originality, creativity, or both clearly lacking
 3. Seriously deficient performance in analysis, synthesis, and critical expression, oral or written
 4. Cannot work independently

The following grade point values are assigned: A, 4; A-, 3 2/3; B+, 3 1/3; B, 3; B-, 2 2/3; C+, 2 1/3; C, 2; C-, 1 2/3; D, 1; and E, 0.

ATTENDANCE POLICY

Attendance is mandatory. Students are expected to attend every class. Any unexcused absence may, at my discretion, result in grade reduction.

Unexcused absences include but are not limited to the following: oversleeping, computer failures, hangovers, road trips, and sporting events. I shall notify the student after two unexcused absences, and shall notify the student's first year dean after three unexcused absences. Five unexcused absences earn a student an automatic failure in the course. Personal illness (as opposed to a brief indisposition), family-emergency or weather-related flight delays are excused absences. I require absent students to make up all missed work. I do not normally accept late papers or grant paper extensions for any reason except a true emergency, verified by a dean.

CLASSROOM POLICIES

- Students will be in class, in their seats, ready to begin at 1:45 (or at 1:00 if x-hour); the professor may dismiss a late student for that class period at her discretion.
- Students may drink beverages in class but may not eat in class. Please plan to enjoy meals and snacks outside of class.
- Students may not turn their papers in late. Absent my prior permission or extension, I will not accept a late paper and the student will receive a zero for the late assignment;
- Students may not turn their partner critiques in late – a partner shall not accept a late critique and I will reduce the late student's final grade at my discretion.
- Students shall turn all cell phones to AIRPLANE MODE before class begins;
- Students may use laptops only for class work. No student shall have any email, browser or other application running on the laptop during class. I shall dismiss any student from class who is using any email and/or an internet browser (besides for Blackboard or at my direction for another purpose in class), or any student shopping, web surfing or otherwise communicating using his/her computer during class shall be dismissed by the professor for the remainder of that class period. I will lower the student's final grade at my discretion;
- Students shall always come to class prepared, having done the reading, and ready to participate in discussion. I will call on students to participate even if they do not raise their hand. I factor class participation into the final grade. The quality of the participation is as important as the quantity of the participation;
- Our classroom is a JFZ (judgment free zone). Students are encouraged to speak their minds and debate issues critically. Students should listen to other students' input with open minds. Students should strive to become active listeners -- actively listening to contributions with which you agree and/or disagree is extremely educational and essential to your ability to critically think and write about issues. I will be the moderator during our discussions. Students will treat each other and me with respect and decency in and out of class. The professor reserves the right to excuse any student from class for the remainder of the class period if that student is, in the professor's opinion, being disruptive, offensive, disrespectful or arrogant to the point that the student's behavior warrants dismissal.

STUDENTS WITH DISABILITIES

- I encourage students with disabilities enrolled in this course and who may need disability-related academic adjustments and services to see me privately as early as possible in the term. Students requiring disability-related academic adjustments and services must consult the Student Accessibility Services office ---- 301 Collis Student Center, 646-9900 -- Student.Accessibility.Services@Dartmouth.edu.
- Once SAS has authorized services, students must show the originally signed SAS Services and Consent Form and/or a letter on SAS letterhead to me. As a first step, if students have questions about whether they qualify to receive academic adjustments and services, they should contact the SAS office.
- All inquiries and discussions will remain confidential.
- Per the ADA, faculty may not set an absolute deadline by which students must discuss academic adjustments. I expect students to request services in a manner that is timely with respect to the action I need to take. SAS encourages students to discuss their disability- related needs with their instructors as early as relevant, hopefully at the beginning of each term.

GENERAL STUDENT SUPPORT

The Academic Skills Center is open to the entire Dartmouth Community. Here are some common reasons why you might visit the ASC:

- You're getting B's but you want to get A's
- You don't feel comfortable talking in class
- You're attending class regularly but you feel like you're missing important points
- You feel like you're a slow reader
- You're having trouble completing tests in the allotted time
- You're spending hours studying for foreign language but still not "getting it"
- You feel like you don't have enough time to get everything done
- You're not sure how to take notes
- You want to sign up for a tutor or study group
- You're not sure if you should get tested for a learning disability

The Research Center for Writing, and Information Technology (RWIT) (<http://www.dartmouth.edu/~rwit/>). The Student Center for Research, Writing, and Information Technology (RWIT) is a place where you can meet with an undergraduate tutor to discuss a paper, research project, or multi-media assignment. The RWIT tutors are trained to help you at any phase of your process. Whether you are brainstorming or planning, drafting or structuring, tweaking or polishing, the RWIT tutors can provide feedback that will help you to create final products of which you can be proud.

ACADEMIC HONOR PRINCIPLE

I expect you to abide by Dartmouth's Academic Honor Principle. If you fail to do so, I will take appropriate action. If you commit a violation, you will automatically fail the course. The Academic Honor Principle specifically prohibits a number of actions. This list of examples covers the more common violations but it is not an exhaustive list.

1. Examinations. Any student giving or receiving assistance during an examination or quiz violates the Academic Honor Principle.

2. Plagiarism. Any form of plagiarism violates the Academic Honor Principle. Plagiarism is defined as the submission or presentation of work, in any form, that is not a student's own, without acknowledgment of the source. With specific regard to papers, a simple rule dictates when it is necessary to acknowledge sources. If a student obtains information or ideas from an outside source, that source must be acknowledged. Another rule to follow is that any direct quotation must be placed in quotation marks, and the source immediately cited. Students are responsible for the information concerning plagiarism found in Sources: Their Use and Acknowledgment (otherwise known as Sources and Citation at Dartmouth College), available in the Deans' Offices or at www.dartmouth.edu/~sources/.

3. Use of the same work in more than one course. Submission of the same work in more than one course without the prior approval of all professors responsible for the courses violates the Academic Honor Principle. The intent of this rule is that a student should not receive academic credit more than once for the same work product without permission. The rule is not intended to regulate repeated use of an idea or a body of learning developed by the student, but rather the identical formulation and presentation of that idea. Thus the same paper, computer program, research project or results, or other academic work product should not be submitted in more than one course (whether in identical or rewritten form) without first obtaining the permission of all professors responsible for the courses involved. Students with questions about the application of this rule in a specific case should seek faculty advice.

4. Unauthorized Collaboration. Whether or not collaboration in course work (labs, reports, papers, homework assignments, take-home tests, or other academic work for credit) is permitted depends on expectations established in individual courses. Students are sometimes encouraged to collaborate on laboratory work, for example, but told to write their laboratory reports independently. Students should presume that collaboration on academic work is not permitted, and that submission of collaborative work would constitute a violation of the academic honor principle, unless an instructor specifically authorizes collaboration. Students should not presume that authorization in one class applies to any other class, even classes in the same subject area. Students should discuss with instructors in advance any questions or uncertainty regarding permitted collaboration. **Unless I tell you that you may collaborate, do not do so.**