

DEVELOPING A LANGUAGE OF
JUSTICE: DESIGNING LEGAL WRITING
ASSIGNMENTS ACROSS GENDER AND
RACIAL DIFFERENCES AS A CRITICAL
COMPONENT OF SOCIAL-JUSTICE
LAWYERING

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WHAT ARE SOME ATTRIBUTES OF A LANGUAGE OF JUSTICE?

- Precise
- Intentional
- Accessible
- Capacity to move variety of audiences
 - Evocative
 - Empathetic

WHAT DOES A LANGUAGE OF JUSTICE DO?

- **Form and framing:**
- Shines light on way language of law may be unclear, vague, or otherwise masks unfair process or outcomes
- Offers new ways of describing social dilemmas and defining legal standards
- Uses narrative to trace trajectory of law
- Uses narrative to develop factual underpinnings of doctrine

WHAT DOES A LANGUAGE OF JUSTICE DO?

- **Engaging the substance of law:**
- Challenges assumptions on which laws are based
- Draws attention to disparity between the way law is framed and the way it is applied
- Tests capacity of existing legal formulations to achieve just outcomes
- Examines and, where needed, revises law's narratives

WHAT *PROJECTS AND PEDAGOGIES* TEST THE CAPACITY OF LANGUAGE TO SERVE THE ENDS OF SOCIAL –JUSTICE LAWYERING?

- **Simulation-based assignments:**
- Situate legal writing and lawyering assignments in ***contexts that reflect real obstacles*** encountered in achieving access to justice. Intentionally and explicitly ***embed issues of gender, race, ability/disability, privilege*** to help students recognize the human and justice dimensions of professional legal writing
- **Writing rooted in actual cases:**
Shadowing SCOTUS: ***immerse students in pending case via the judicial role***, leading to drafting opinion

INCORPORATING SOCIAL JUSTICE IN OPINION DRAFTING: WRITING FROM A JUDICIAL PERSPECTIVE

- What would we lose if we no longer had the benefit of a court's **written analysis of the reasons** for its rulings?
- What would be the effects on the **development of legal doctrine**?
- How would litigants and their advocates gain **access to the basis for judicial decision making**?
- How does judicial opinion writing reflect on the **judicial role**?
- How can **the "practice" of judicial writing**, via bench memo and opinion writing assignments, foreground social justice perspectives?

HOW JUDICIAL WRITING ENGAGES SOCIAL- JUSTICE PERSPECTIVES: SEMINAR THEMES

- how considerations of audience shape judicial writing
- applying precedent/revisiting stare decisis
- the implications of courts' drafting "unpublished" opinions
- judicial response to amicus curiae briefs
- the use of social science evidence
- the role of empathy in judging
- the function of dissent and separate opinions in U.S. jurisprudence

HOW JUDICIAL WRITING ENGAGES SOCIAL-JUSTICE PERSPECTIVES: ANALYZING THE JUSTICE POTENTIAL OF THE GENRE OF THE JUDICIAL OPINION

- **Judicial opinion attributes**
- Authoritative and justifying
- Persuasive jurisprudentially
- Explanatory and analytic
- **Opinion sub-genres**
- ***Per curiam*** (*Bush v. Gore* --purports to mask deeply fractured court)
- ***Multiple-authored*** (*Planned Parenthood v. Casey* -- multiple authors with differently modulated voices)
- ***Dissent/concurrence*** (*DeShaney v. Winnebago Cty. Dep't of Soc. Servs.* (formalist, category-centered opinion with dissents offering situation-centered interpretive framework))

ANALYZING HOW JUDICIAL WRITING ENGAGES SOCIAL- JUSTICE PERSPECTIVES: CHOOSING A SCOTUS CASE

- **Public law**

 - constitutional

 - statutory

- **Address justice-embedded issues:**

 - equal protection (*United States v. Windsor*: Defense of Marriage Act)

 - equity/fairness/remedy for disparate impact (*Texas Dep't of Housing & Community Affairs v. The Inclusive Communities Project, Inc.*: Fair Housing Act)

 - other constitutional claims (*National Federation of Independent Business v. Sebelius*: Affordable Care Act)

 - constitutionally informed statutory claim (*Sebelius v. Hobby Lobby Stores, Inc.*: Religious Freedom Restoration Act)

 - identity-based claims in statutory/administrative law context (*Gloucester County School Board v. G.G.*: Title IX/Dep't of Education regulations)

USING **FEMINIST JUDGMENTS** IN A JUDICIAL WRITING SEMINAR: WHAT MAKES AN OPINION FEMINIST? WHAT MAKES IT JUSTICE-SERVING?

- Rewritten opinions as **exemplars**
- **Reimagining**/expanding writing possibilities
- Canvassing **author's choices**
 - Intentional framing/re-framing** law or facts
 - Use of **feminist theory** to support analysis
 - formal/substantive equality
 - anti-subordination
 - sex stereotyping
 - intersectionality
 - autonomy/agency
 - Use of **feminist methodology**
 - practical “outsider” reasoning
 - narrative method
 - unconventional rhetoric

USING FEMINIST JUDGMENTS (FJ) TO ADDRESS OPINION WRITING IN *GLOUCESTER COUNTY SCHOOL BOARD V. G.G.*

- Issue in *Gloucester County School Board v. G.G.*:
- Whether Dep't of Education (DOE) guidance was entitled to controlling weight *Auer* deference in interpreting its own regulation to conclude that sex-segregated educational facilities covered by Title IX should afford students access to communal bathrooms in accord with their gender identity
- **Rationale for FJ opinions chosen:**
- illuminating the concept of gender and gender identity
- effective use of social science evidence
- incorporating feminist narrative methods
- attention to audience, voice, and rhetoric

PRICE WATERHOUSE V. HOPKINS: ILLUMINATING GENDER AS SEX-BASED DISCRIMINATION

PRICE WATERHOUSE V. HOPKINS (ORIGINAL):

- Court construed Title VII's ban on discrimination "because of sex" to include sex-based considerations such as sex stereotyping:
- "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." [*Id.* at 250.](#)

REWRITTEN "CONCURRENCE" BY MARTHA CHAMALLAS:

- Opinion makes social science evidence central to its reasoning
- Conceptual approach connecting stereotyping to gender discrimination
- Unpacking stereotypes via social science
- Focus on context: workplace culture
- Subjective vs. objective assessment standards

GEBSER V. LAGO VISTA IND. SCH. DIST.: USING NARRATIVE TO REFRAME THE ANALYSIS

GEBSER (ORIGINAL):

- Implied private right of action for damages under Title IX would not lie where teacher engaged in sexual relationship with student unless district had actual notice to which it was deliberately indifferent

FEMINIST JUDGMENTS: REWRITTEN “DISSENT” BY ANN BARTOW:

- Uses narrative to reframe “relationship” as sexual abuse
- Focuses on vulnerability of victim of sexual abuse and makes Title IX consistent with Title VII workplace protections
- Uses amicus brief to support vulnerability/power differential argument
- “standard of liability that does not encourage school officials to affirmatively look for signs of child sexual abuse is such an appalling travesty of justice”

LAWRENCE V. TEXAS: ATTENDING TO IMPACT AND AUDIENCE

LAWRENCE V. TEXAS (ORIGINAL):

- Overrules *Bowers v. Hardwick*:
- “The case does involve two adults who ... engaged in[consensual] sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”

REWRITTEN MAJORITY OPINION BY RUTHANN ROBSON:

- Opinion centers the concepts of sexual autonomy (in preference to privacy or dignity) and sexual equality
- In overruling *Bowers v. Hardwick*, apologizes for the “devastating” consequences of criminalizing same-sex activity
- Court must take “responsibility for justice”

STUDENTS' *WRITER'S MEMO* RESPONSES TO GENERAL PROMPTS

- Referred to **Feminist Judgments** as resource they considered:
- voice
- empathy
- elaboration of facts
- effect of ruling
- interdisciplinary material

STUDENTS' *WRITER'S MEMO* RESPONSES TO GENERAL PROMPTS

- “I also really enjoyed the pieces we read in Feminist Judgments because it reminded me that legal writing can incorporate interdisciplinary material, and it may even be necessary in times when the writer has little knowledge on the subject. For instance, how does one write about access to bathrooms for transgender students without knowledge of gender dysphoria and what it does to transgender students? I think that the law leaves out or simply does not understand the struggles of the most marginalized members of our society (sometimes intentionally and other times inadvertently) and incorporating empathy and interdisciplinary material may help bridge this gap.”

WRITING FROM A JUDICIAL PERSPECTIVE/**FEMINIST JUDGMENTS 2.0:** PROPOSED SPECIFIC *WRITER'S MEMO* PROMPT

- *Opinion first draft:*
- *Describe how you used one (or more) of the rewritten opinions we studied in **Feminist Judgments** in your own opinion drafting process:*
 - *identify the opinion*
 - *in what way(s) could it claim to be a feminist opinion*
 - *why was the opinion useful to you?*
 - *what writing methods did you draw from the opinion (use of context-based reasoning, use of narrative, distinctive rhetoric, other)?*
 - *what course theme did the opinion engage (e.g., demonstration of empathy, attention to audience)?*

WRITING FROM A JUDICIAL PERSPECTIVE/**FEMINIST JUDGMENTS 2.0:** PROPOSED SPECIFIC *WRITER'S MEMO* PROMPT

- **Revised opinion:**
- *Address here in what ways one (or more) of the **Feminist Judgments** opinions we discussed helped you to see the social-justice dimensions of judicial opinion writing.*
- *What features of the opinion(s) (structure, rhetoric, analytic approach) highlighted that dimension for you?*
- *Did you draw on any of those features in your own opinion, directly or indirectly? Briefly identify how you used or adapted a **Feminist Judgments** opinion in your work.*