


Spring 2022

## Obergefell v. Hodges—and the Use of Oral Argument and Storytelling to Reinforce Competencies in the Legal Writing Classroom

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### Repository Citation

Mika, Karin, "Obergefell v. Hodges—and the Use of Oral Argument and Storytelling to Reinforce Competencies in the Legal Writing Classroom" (2022). *Law Faculty Articles and Essays*. 1231.  
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# Perspectives

## Teaching Legal Research and Writing

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This Article focuses on *Obergefell v. Hodges* as a tool for teaching. It explains how the oral argument presented before the Supreme Court and the oral background story (presented on NPR's, "The Moth") told by Jim Obergefell provide useful research sources that help students better connect the structure of legal analysis with the passion of advocacy.

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This Article advocates for embracing pathos as an integral component of teaching and contributing to students' development as lawyers and offers concrete ways to infuse pathos into the legal research and writing classroom. The Authors use the term "pathos" in a broad sense to refer to engaging more compassionately and emotionally with students, recognizing the fullness of the student experience, and responding to students from a place of empathy.

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With the increase in the number of J.D. and LL.M. students in U.S. law schools over the last two decades, schools have the chance to implement creative ideas for integrating these students. This Article discusses how to integrate international students and why integration will help all students better understand U.S. legal culture and will foster increased global cultural awareness.

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90 [Painting with "Canvas"](#)

This Article touches upon some of the features that the Author found makes Canvas the superior LMS to TWEN for teaching legal research and writing courses and has turned the Author into a wholly committed Canvas user.

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### Why Write for *Perspectives*?

*Perspectives* is for anyone who teaches legal research or legal writing, broadly defined to include the first-year and advanced LRW courses, transactional drafting courses, academic support methodologies, and courses on the American Legal system for international lawyers—in law schools, libraries, courts, and law offices. *Perspectives* articles are short, readable, and explore a broad array of teaching theories, techniques, and tools. The idea can be large or small but if it provides a fresh and creative way to teach or learn about legal research or legal writing skills, *Perspectives* editors would like to publish it. Writing for *Perspectives* allows you to add to your resume and get published quickly while reaching the people who share your passion for this area of the law.

*Perspectives* appears twice yearly. Most articles average between 4,000 and 7,000 words and are lightly footnoted and highly readable. They may focus on curricular design, goals, teaching methods, assessments, etc.

### [Author Guidelines](#)

### In Our Next Issue

The next issue will be published in 2023, as volume 30, issue

1. If you have ideas about how to teach either legal writing, broadly defined to include most types of law school writing, or legal research, broadly defined to include both introductory and advanced classes, please consider turning those ideas into an article for *Perspectives* that can be shared with our readers.

Published by Thomson Reuters as a service to the legal community.

Cite as: Karin Mika, *Obergefell v. Hodges—and the Use of Oral Argument and Storytelling to Reinforce Competencies in the Legal Writing Classroom*, 29 PERSPS. 36 (2022).

## Obergefell v. Hodges—and the Use of Oral Argument and Storytelling to Reinforce Competencies in the Legal Writing Classroom

By Karin Mika

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Student engagement is always an issue in the legal writing classroom. Most of the first semester is spent teaching the basics of legal analysis, as well as the structure of legal writing (along with research and citation).<sup>1</sup> Consequently, the level of discourse one is able to have in the classroom is often frustrating. Students come in with great passion, but legal writing professors often must diminish that passion in favor of teaching students how to look at cases from both sides, anticipate opposing arguments, and structure writing in an extremely technical way that is often unfamiliar to first-year students.<sup>2</sup> This writing often reads mechanically, and students respond by regarding legal writing as mechanical rather than as a vehicle for advocacy.<sup>3</sup>

All of us aspire to construct fact patterns that engage students in the art of legal writing and that evoke passion. However, we must often trade that aspiration for fact patterns that evoke competency skills in legal writing.<sup>4</sup> This often means that we will assign straightforward fact situations with distinct elements (such as a tort or a basic criminal law statute).<sup>5</sup> We will often assign research that enables the

student to find very concrete answers, or cases that have very limited issues with a very clear application of the law. Our object is, for the most part, to teach students how to use specific research tools and to construct cogent legal analysis rather than to strategize about how to advocate for a particular client through the research process or the written presentation.<sup>6</sup>

The second semester brings the opportunity to get into some of the weightier issues, but by that time, legal writing professors are often confronted with two realities: First, students have often become too literal in learning legal structure. They have often gone from thinking about cases in terms of what they feel to thinking only about finding the “right” cases to plug into a sequence of paragraphs we have taught them. Students tend to stop thinking about the law as being about people seeking justice, and instead start thinking about it as precedent and how it fits into the structure of legal analysis. A second reality that legal writing professors confront is that we begin to run out of time to bring the course full circle—to teach the students how the structure of legal analysis is used to develop or change law for a more humane society.

Jim Obergefell’s case and the quest to legalize same-sex marriage presents an opportunity to engage the students on various levels while also reinforcing the skills they learn throughout the first year. Most students entering law school today do not give same-sex relationships a second thought, and many are unaware that the right for same sex couples to marry is relatively new.<sup>7</sup> Most do not appreciate the legal background of *Obergefell* and how it reached the highest court

<sup>1</sup> Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 98–99 (1994).

<sup>2</sup> Miriam E. Felsenberg & Laura P. Graham, *Beginning Legal Writers in Their Own Words: Why the First Weeks of Legal Writing Are So Tough and What We Can Do About It*, 19 LEGAL WRITING 223, 258–60 (2010).

<sup>3</sup> Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 CLINICAL L. REV. 501, 502–03 (2006).

<sup>4</sup> Shelley Kierstead & Erika Abner, *Textwork as Identity Work for Legal Writers: How Writing Texts Contribute to the Construction of a Professional Identity*, 9 LEGAL COMM’N & RHETORIC 327, 332–35 (2012).

<sup>5</sup> Suzanne Rowe, *Gaining Lawyering Skills: Legal Research, Legal Writing, Legal Analysis: Putting Law School into Practice*, 29 STETSON L. REV. 1193, 1202 (2010); see also Lucia Ann Silecchia, *Designing and Teaching Advanced Legal Research and Writing Courses*, 33 DUQ. L. REV. 203, 229 n.81 (1995).

<sup>6</sup> See Sherri L. Keene, *Are We There Yet? Aligning the Expectations and Realities of Gaining Competency in Legal Writing*, 53 DUQ. L. REV. 99, 100–01 (2015).

<sup>7</sup> *Obergefell* was decided on June 26, 2015.

“All of us aspire to construct fact patterns that engage students in the art of legal writing and that evoke passion.”

because of the conflict between federalism and states' rights.<sup>8</sup> Most students do not appreciate the level of advocacy necessary to have achieved the milestone, and most are unaware of an integral part—the stories, and especially Jim Obergefell's story—that brought all of the legal components together.<sup>9</sup>

Various materials related to the *Obergefell* case are available to better assist students in understanding quality advocacy. Many of these are traditional materials. There are close to 400 filings available for students to see, including numerous amicus briefs filed on behalf of both parties. Nonetheless, there are also two nonstandard sources that can connect the students to the bigger picture.

The first is not so much a nonstandard source, but is material not frequently used in our first year advocacy courses. It is using the Obergefell oral argument before the Supreme Court, part of which students can listen to using Oyez database.<sup>10 11</sup> The second source is the personal story of Jim Obergefell as told on *The Moth Radio Hour* podcast.<sup>12</sup>

The Oyez database dates back to 1955 and includes recorded oral arguments from the Supreme Court. It includes information about the justices, the cases, and the breakdown of who sided with

whom in an opinion. As the recording of the arguments plays, the site provides a rolling transcript and highlights which justices are speaking.

The Supreme Court arguments not only provide a primer for how to do oral argument, but they also provide another research tool for students to access. By listening to the advocates talk about the cases they have researched, the students are better able to understand how their research translates into the arguments they are trying to make rather than being a class exercise about finding the “right” cases. The arguments also provide an opportunity to hear about how the advocates use cases in ways students might not have considered. The arguments also allow students to understand how justices view the nature of the case and the questions they would like the advocates to address.

But the *Obergefell* oral argument presents an even greater opportunity to understand the intertwined nature of the law and see the application of the skills learned throughout the year. The case itself was about changing a culture that had been the norm since the creation of the country. That culture was then consistently solidified and maintained as the legal norm. The advocates on behalf of change needed something more than cases that supported them; in fact, other than the decision in *Windsor* in 2013, no case law supported the advocates seeking change.

By listening to the oral argument, students can understand the passion that the attorneys for the petitioners brought to the matter, and how that passion was used to explain why, legally, the prohibition against same-sex marriage could not be maintained. By comparing what the petitioners' counsel argues with what the respondents' counsel argues, the students can begin to judge for themselves what distinguishes an argument that is both believable and well-supported from one that is flawed both legally and practically. The students are better able to see how all the pieces of their own learning can and should ultimately come together.

The second nonstandard tool available to learn about the backdrop of the *Obergefell* case is through Jim Obergefell's own story, which he published

“But the *Obergefell* oral argument presents an even greater opportunity to understand the intertwined nature of the law and see the application of the skills learned throughout the year.”

<sup>8</sup> Congress enacted the Defense of Marriage Act (DOMA) in 1996 (1 U.S.C. § 7), which provided,

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

The Defense of Marriage Act was passed in response to the trend of various states to allow for same-sex marriage while other states did not. It enabled states that did not recognize same-sex unions to discriminate against those legally married elsewhere.

<sup>9</sup> Elizabeth Windsor's story is also compelling and led to the decision in *United States v. Windsor*, 570 U.S. 744 (2013), which invalidated one portion of the Defense Against Marriage Act. Windsor and her spouse (Thea Spyer) married in Canada and lived in New York. *Id.* at 749-50. The litigation arose when Spyer passed away, and Windsor attempted to claim the federal estate tax exemption for surviving spouses; however, she was barred from doing by the Defense of Marriage Act. *Id.* at 750-51. *Windsor* set the stage for the complete invalidation of DOMA.

<sup>10</sup> The Oyez database is located at <https://www.oyez.org/>.

<sup>11</sup> The *Obergefell* case is located at <https://www.oyez.org/cases/2014/14-556>.

<sup>12</sup> Jim Obergefell, *Love Wins*, THE MOTHS (2018), <https://themoth.org/stories/love-wins>.

“Both the oral argument and the background story in Obergefell’s own words put all the pieces in place—how the law is constructed, and what must be achieved through advocacy to move society toward justice and equality.”

on *The Moth Radio Hour* in 2018.<sup>13</sup> The story is an emotional one, in which Obergefell explains what brought him to court in the first place. He describes the procedural aspects of the case from a layperson’s perspective and how the law as it stood had very real-life consequences for his own life. Obergefell’s story is the linchpin for bringing everything full circle—it enables students to return to their original mindset and should reinforce the reasons they came to law school in the first place. Both the oral argument and the background story in Obergefell’s own words put all the pieces in place—how the law is constructed, and what must be achieved through advocacy to move society toward justice and equality.

Legal writing professors struggle with trying to balance learning skills with the bigger picture of learning that law is ultimately about having the power to change lives. Often, learning the skills becomes completely separated from the human aspect of the law. Although we all work toward unifying the two concepts, it is not always done by having discussions about the bigger issues, or even having the students look at more traditional sources such as briefs or even law review articles. Oyez and the oral tradition of storytelling presented by radio (or other similar resources) have the potential of more fully connecting students to their passion while also enabling them to see the bigger picture of legal structure and legal argument. The case of Jim Obergefell in particular provides the opportunity to access resources that help students understand how the various aspects of what we teach in Legal Writing connect together.

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<sup>13</sup> *Id.*