Decisive Utterance

Opening Argument Newsletter for September, 2015

Message From Student Bar Association President

By Daniel Hernandez

Fellow students,

Welcome and welcome back to John Marshall! I am Daniel Hernandez, the president of your Student Bar Association. I hope the first couple of weeks of classes have been great for everyone and you are ready for an exciting and constructive year.

The SBA has been hard at work this summer planning some great upcoming events, so be sure to mark your calendars! Be sure to come out to **student organization day** on *September 8th* to find out how you can get involved in groups that identify with your professional and cultural backgrounds. Representatives from each student organization will be there to give you details about their organization as well as how to get involved. Also, you will definitely want to make an appearance at the **Student-Alumni Exchange** on *October 7th* where you can network with John Marshall alumni practicing in Chicago. This is a great chance to chat with lawyers in different practice areas and get some advice from professionals that were once former students right here at John Marshall. These events are great opportunities to meet students and practicing attorneys that are sure to be great resources throughout law school. Additionally, **Thanksgiving dinner** will be on *November 19th*. Be sure to be there for some good eats and to wind down with your fellow students before you start on the finals grind. And speaking of

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The Activist Originalist

A Look at the Left Leaning Roberts Court

Photo from Wikimedia.org

Chief Justice John Roberts in 2005.

By John Giokaris

Popular belief among many circles is that the United States Supreme Court, under the tenure of Chief Justice John Roberts is a solidly "conservative" court.

But the numbers say otherwise.

As a recent *New York Times* feature illustrated, the Roberts Court issued liberal decisions in 56 percent of cases over this last term, according to the Supreme Court Database using a widely accepted standard developed by political scientists. That is the third consecutive term it has come down on the left side of the argument in the majority of the cases before the Court and the highest since the era of the notably liberal bench of the 1950s and 1960s led by Chief Justice Earl Warren – indeed the most progressive court in U.S. history (70 percent of decisions).

Most notably, the Roberts Court upheld the Affordable Care Act (ACA) once again from

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finals, the SBA is planning to **provide lunch** on a few days *during finals* period to give you one less thing to worry about while you try to beat the curve. Last but not least, **Barrister's Ball** is set for *April 1, 2016*.

Save the date now because we have some exciting plans in the works and you won't want to miss it!

As you get back into the swing of things this semester, be sure to reach out to me and the rest of the SBA Board with any questions or concerns. We are always eager to hear from you so we can create an academic environment that caters to you. 1Ls, this is your school too! The transition into law school is trying, but we are here to help. Please don't hesitate to send an email or drop by the SBA office (on the second floor, across from Miss. Criss' office) to address any concerns, ask how to get involved, or just introduce yourself. This is your school and it should reflect your needs and values, and nothing helps to do so better than your feedback.

Lastly, SBA **Representative Elections** are coming this *September*. The SBA representatives will be made up of 18 total students. Be on the lookout for more information. This is the best way to get involved!

I look forward to seeing you all around school and at all of the great events coming up this fall!

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Who we are

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another legal challenge, upheld grounds for housing discrimination claims based off evidence of unintentional disparate impact, and legalized same sex marriage in all 50 states, among other anti-discrimination rulings.

The *New York Times* pointed out that "on campaign finance, gun rights, voting laws, race and abortion, the justices have delivered strongly conservative rulings" since Roberts became chief justice. "But the court does seem to have drifted slightly to the left" since then, "in part because of rulings on gay rights, health care and the environment."

Justice Anthony Kennedy noticeably remains the swing vote on the Roberts court after the departure of Justice Sandra Day O'Conner in 2006, siding with the four liberal justices in the most prolific 5-4 cases this past term.

Indeed, while Roberts may be chastised in conservative circles for his rulings on the ACA, he's been consistently conservative on almost every other decision he's handed down on the court. Even Justice Clarence Thomas, regarded by most as a solid conservative justice, sided with the liberal justices over the last few terms in slightly more cases than Roberts, such as *Walker v. Texas Division,* (576 U.S. 144 (2015).) and *Zivotofsky v. Kerry,* (576 U.S. 628 (2015).). The former case involved whether specialty license plate designs constitute government speech, while the latter decided if a federal statute that directs the Secretary of State to record the birthplace of an American citizen born in Jerusalem as "Israel," if requested to do so, impermissibly infringed on the President's power to recognize foreign states.

While Antonin Scalia has long been regarded as the most conservative justice on the court since his appointment nearly 30 years ago – which was vividly illustrated by some colorful dissents over the last term – Justice Samuel Alito has delivered some solidly right-of-center opinions since joining the court in 2006. The libertarian CATO Institute described Alito as "a conservative jurist with a libertarian streak."

It's also worth noting that the four liberal justices on the Supreme Court – Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan and Sonia

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To Plagiarize, or Not to Plagiarize?

What's the Difference? That's the Question.: An Inquiry of Academic Code Violations in the Lawyer Skills Program

By: Sean Thomas

You are a plagiarism detective and you just learned that Shakespeare plagiarized *Hamlet*. Originally written by Saxo Grammaticus, the story of *Amleth* (phonetically and hereafter "*Omelet*") follows the titular medieval prince as he witnesses the king's murder and later avenges Fader with some satisfying Danish drama. You dig deeper into Wikipedia and realize that Grammaticus himself may have stolen *Omelet* from even earlier Scandinavian tales. But either way, the English bard did alter *Omelet's* transition to *Hamlet* – and for the better: nothing dulls a murder mystery more than overlong monologues by breakfast food, right? But as you walk away from your ethical sleuthing, you remember John Marshall's code of ethics and you realize: "I was forced to read Hamlet a long time ago, but why am I just now hearing about Grammaticus?" And suddenly your investigation expands to your detective contemporaries and you wonder how fictional is Jessica Fletcher's pulp? The question repeats: did Shakespeare plagiarize *Hamlet*?

Plagiarism is nothing new to academia, but an email to the John Marshall student body in April 2015 caused a brief stir: a number of students plagiarized in their Lawyering Skills classes.

One of the accused was a Herzog participant who wishes to remain anonymous (hereafter "Participant"). "I was sent an email with a copy of a letter. Half a week later I got the actual hard copy of that letter and the relevant portion of the code of conduct from the student handbook through the actual mail," Participant explained, who competed in the Spring 2015 semester of Herzog. "It said *your brief contains quotations that lack quotation marks in proper attribution*," Participant read from the actual letter, "and then it said *this violation of the student code of conduct…may include sending a notice to the board of bar examiners*."

Initially, Participant did not know how to respond. "I was angry. Reporting to the bar examiners is not something I would take lightly. At this point, I still had no idea what exactly I had done wrong."

The Herzog competition ended three weeks prior to the letter in the mail, but students had already been introduced to the school's

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"... there is certainly no doubt Kennedy remains the swing vote on the bench to watch for in closely held 5-4 decisions."

Sotomayor – have all voted on the left in nearly every major decision like an unbreakable block. In fact, according to statistics kept by SCOTUSblog, the four left-leaning judges on the bench agreed with each other an average 93 percent of the time in last term's cases.

By contrast, the other five justices agreed with each other 75 percent of the time during the last term and only rises to 79 percent if you exclude Kennedy.

Indeed, over all the cases taken by the Court during the 2014-2015 term, Kennedy ended up agreeing with his conservative colleagues in just 69 percent of decisions vs. 80 percent of decisions from the liberal justices.

Going forward, there is certainly no doubt Kennedy remains the swing vote on the bench to watch for in closely held 5-4 decisions.

The Court will definitely be in the news again next term as it has agreed to take on highly controversial cases involving Texas' new abortion law which mandates that all abortion clinics must upgrade their facilities to hospital-like standards; another affirmative action challenge that could eliminate or strongly limit racial preferences in higher education; and whether mandatory "fair share" union dues that state workers in 25 states must comply with are constitutional violations of First Amendment rights. Kennedy historically has a right-leaning decision record in these areas of law.

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policy on plagiarism. "It's on the Moodle site for each of your LS classes," says Dean Niedwiecki, who also teaches a Lawyering Skills class. In addition to online, students are also given a code of ethics sheet in LS1. "In the first semester, we're trying to get students to learn how to read and communicate the law," he continued. Avoiding plagiarism is one such lesson.

However, the school's handbook details two forms of plagiarism: ideas and direct quotes. Direct quotes are language taken from the author, but not identified with quotation marks. Ideas, on the other hand, are the author's thoughts. The handbook mentions that for both types of plagiarism "[i]ntent is not required." Furthermore, attribution must be made to the author of that quote or idea in the form of an applicable citation.

Participant knew this already, but felt the punishment didn't fit the alleged crime. "We're taught how to do citations and things like that," Participant says, "[but] I'm thinking, 'you're calling this mistake a code of conduct violation that I now have to report to the bar? The accusation was a missing quotation mark." Did the school react appropriately?

"Plagiarism either is or it isn't," says Professor Hamann, Director of the Moot Court program. Hamann believes there is a fundamental problem with how some students view plagiarism. "There's an assumption that plagiarism is one of style. I agree that there is subjectivity in writing, but there is only subjectivity in plagiarism around the edges. If you use five words in a row, is that plagiarism? I would say yes. Maybe somebody else would say six words. Somebody else might say four words." The student handbook attempts to solidify a general outlook. "Is there some line drawn by the legal writing gods saying where that line is? No, [but] we have to have a rule of thumb somewhere."

The administration realizes the distinction. "When students cite to a source, but don't necessarily use quote marks, then that's a lesson to be learned…that's different [from intentional plagiarism]," says Niedwiecki, recognizing how much first year law students have to absorb. "There is information overload. I'd rather the students make mistakes at school than make them in practice."

Participant discovered this distinction the hard way. After meeting

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Prehistoric Patents

A Larger Than Life Problem 65 Million Years in the Making.

By: Colleen Ferguson and Michael Reed

In the summer of 2015, Jurassic Park fans were treated to a new installment of the dino-disaster franchise with Jurassic World. The latest installment in the series clearly aims to expand and reestablish the Jurassic fan base by introducing a bigger, faster, and toothier retelling of the original story. It trades the tense, but constrained, moments of suspense and unsettling plot re-

— Wikimedia Commons

veals of the original film, for vivid high definition CGI, prolonged and highly improbable action sequences, quipy exposition, and yes, shameless winking callbacks to the original film.

The presentation of the now classic story of genetically engineered theme park attractions running amuck is not the only aspect of the franchise which has been given a 21st century face lift. The message that the new film hopes audiences will sink their teeth into is an important one for our present age of rapid technological advancement. While the original Jurassic Park warned us about how tinkering with genetic codes can go too far, the

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with a school administrator, "I was told this was a scare tactic because clearly this wasn't intentional on my part. This would not be disclosed to the bar." The professors at John Marshall understand that varying forms of plagiarism, although wrong, should result in varying forms of discipline. "I don't want to penalize a student for a mistake the same way as someone who did it intentionally," notes Professor Hamann, "which is why we treat them differently."

Yet the fact remains that the student body does not have a collective voice on plagiarism. One student's reaction to unintentional plagiarism is succinct. "Surprise," said the student, a moot court counsel member wishing to remain anonymous. "Surprise that people are either doing it intentionally or that they don't realize they're doing it. That [students] do it and don't realize it, that's more surprising to me. I can see the motivation when it's late at night – I can see a person's mind going 'oh, I'll just put this in here and see how it goes.' That's worse, but I can understand it better."

Ultimately, Dean Niedwiecki wants students to understand what plagiarism is, rather than simply penalize a brief score. "Receiving a note from me and deducting the points was the penalty. Just deducting the points wouldn't have been enough; students wouldn't have known [without the note]. In law school, this is part of the writing and learning process," Niediecki said. "This was a lesson on proper attribution."

Yet four months later, Participant remains frustrated by the email and its potential future repercussions. "To this day, I don't know if I should personally disclose [to the bar]. If somehow the school disclosed this to the bar for some reason, I'm screwed essentially."

Dean Niedwiecki emphasizes that his email was meant to bring awareness, nothing more. "It wasn't meant to be antagonistic," he says, "I know it's scary getting a note from the Associate Dean. If students ever have a question about this, my door [on the second floor of State] is always open."

Did the April 2015 email clarify plagiarism? Legal writing should be about confidence in your brief, but how is that exacerbated by confusion over plagiarism? Direct quotes? Inadequate paraphrasing? Ideas?

Perhaps the better inquiry into plagiarism is the perceived value of what's stolen and the agency of the work in which it is shown. In other words: to whom are you catering? *Hamlet* and *Omelet* are (intended) to entertain; a legal brief persuades (and rarely entertains). The latter is distinct in that it has instrumental value for its readers; it hopes to achieve something beyond the written product itself. Therefore, the facts are more relevant to the reader being proselytized into making a real-life decision as opposed to the writer merely persuading an audience.

So think of what is important for your reader to know. In the words of the musician/comedian Tom Lehrer: "Let no one else's work evade your eyes!; Remember why the Good Lord made your eyes!; So don't shade your eyes!; Plagiarize Plagiarize Plagiarize!" The question is not whether Tom Lehrer would appreciate that attribution, but rather: do you, the reader?

Worried About Finals? Professional Instructor Offers Personal Coaching

By: Staff

Would you like to receive constructive, in-depth feedback, to help you prepare for law school exams and the bar exam? Does the idea of personalized and guided assistance appeal to you?

Former JMLS professor and the former Director of JMLS Academic Counseling, Eileen Halpin, is now offering private tutoring services for law students.

As a long-time Director of Academic Counseling for The John Marshall Law School, Eileen worked directly with hundreds of students in an effort to help them cultivate and refine their academic skills to get the edge on the 1L curve. Through her direct work with students, she gained insight into the frequent missteps that students make in law school. Often working with students that found themselves in academic peril, she helped to rescue many academic careers at John Marshall.

For over fourteen years, Eileen worked with JMLS students both in the classroom, and individually, to help them to succeed in law school and on their law exams. Now, using her vast knowledge and experience, she will develop a personalized plan for you!

Tutoring of the substantive law is an exciting area of service that Eileen can now offer to law students. Since law school academic support does not include tutoring services, law students are generally at a loss regarding this much needed area of support. Not anymore!

To arrange for a free initial consultation, please email Eileen at: ehalpin44@gmail.com or telephone her at 312-330-1634.

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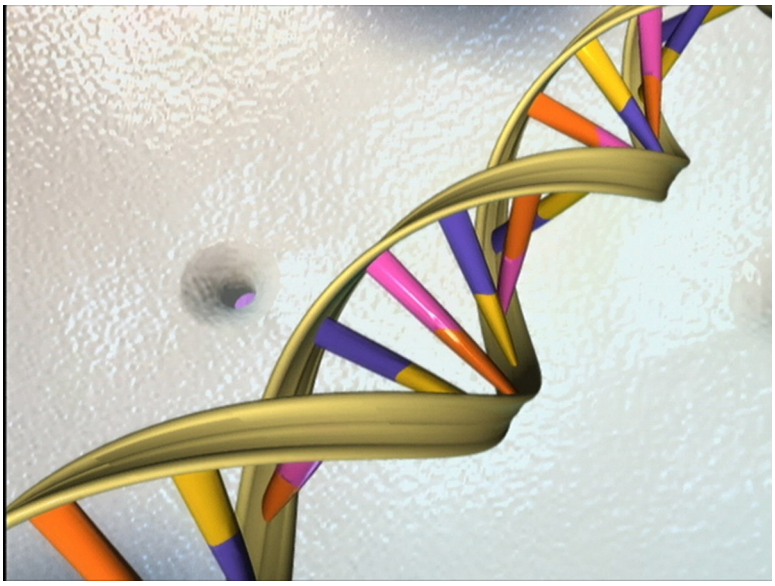
message of Jurassic World is more nuanced. It asks not whether humankind SHOULD use advanced technology to create new forms of life, but rather WHEN advanced technology is used to create new forms of life, what responsibilities should be taken for the resulting organism?

We now know the prospects of creating new organisms in the lab is not just science fiction. A great deal of research has gone into developing new organisms for use in commerce and scientific research. So far, the impacts on humanity, and our sense of responsibility for these organisms, have been minimal. Although this may, and likely should, change as scientific progress permits more complex and sophisticated organisms to be created wholly in a laboratory. This progress is spurred by patents, which grant an exclusive license to an inventor to exploit a scientific work for a statutorily designated 20 years from the date the patent was first applied for under 35 USC § 154. Because a patent holder is the only one permitted to make use of their patented invention during the statutory period, they profit exclusively from its use and exploitation. The question, could something as sophisticated as a dinosaur, or the process of creating a dinosaur, be patented? Could something as complex as a dinosaur be considered an invention and therefore exploited for profit?



- Wikimedia Commons

A central concept of the Jurassic Park franchise has always been that the dinosaurs at the park are not the same ones that existed 65 million years ago. These organisms are a aaproduct, created from dinosaur DNA extracted from prehistoric mosquitos preserved in amber. The extracted DNA is then combined with the DNA of frogs and other present day animals to fill in the portions of the genetic code which had degraded over time. This process creates a brand new animal, never before seen on Earth.

The short answer to whether "Dino DNA" could be patentable, is yes. Scientists could legally patent the fictional "Dino DNA" depicted throughout the Jurassic Park series. It has long been established that a product of nature cannot be patented; this includes any biological substances found in their natural state like DNA. However, man-made products are not similarly restricted. The U.S. Supreme Court decision in *Diamond v. Chakrabarty*, 447 U.S. 303 (1980), found that a bacterium, genetically engineered to consume oil, was considered patentable. The Court cited in its decision to the Congressional record that "anything under the sun that is *made by man*" is patentable. S Rep. No 1979, 82d Cong., 2d Sess., 5 (1952). This ruling set the stage for the patenting of any organism which owes its origin to a laboratory rather than nature. This includes genetically-engineered animals with a higher probability of developing certain forms of cancer (the famous "Harvard Mouse", discussed in the Canadian Supreme Court's decision in *Harvard College v Canada (Commissioner of Patents)*, 2002 SCC 76 (2002) and Complimentary DNA*See Association for Molecular Pathology v. Myriad Genetics*, 569 U. S. 398 (2013) (Synthetic DNA derived from RNA is considered patentable, but not the original DNA extracted from a natural source).

In addition to DNA sequences, methods for extracting and splicing DNA, such as the methods used in Jurassic Park, are also patentable. "Ancient Microorganisms" (U.S. Patent No. 5,593,883) involves the "recovery of ancient organisms from sources such as amber and methods of isolating and culturing such ancient organisms. The invention reveals for the first time that fossilized organisms may be recovered and cultured to present viability." "A Method of Reconstituting Nucleic Acid Molecules" (U.S. Patent No. 6,872,552 (patent '552)) involves recovering degraded DNA by using "a template for reconstituting

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"However, what responsibility would an inventor have for a living invention?"

degraded nucleic acids in a biological sample, nucleic acids from a genetically related or identical organism having a sequence homologous to the degraded nucleic acids."

Dr. Ensley, the holder of patent '552 and the chairman of MatrixDesign, believes the first use of this method will be recovering degraded DNA samples from crime scenes or cold cases. However, this method was patented while studying DNA recovered from of ancient organic remains which included extinct animals such as the marsupial wolf and ground sloth. So far, dinosaur DNA has not been recovered from any insects fossilized in amber, but if that day comes, the technology and the patents exist to possibly bring Michael Crichton's inspired idea for a prehistoric theme park to life.

However, what responsibility would an inventor have for a living invention? In Jurassic World a lack of socialization with other dinosaurs and sensory deprivation caused the genetically engineered, antagonist of the film (Indominus Rex or "iRex" sponsored by Verizon Wireless…seriously) to become erratic, uncontrollable, and highly dangerous. The same can happen to any wild animal under similar circumstances (as seen in the recent documentary, *Black Fish* (CNN Films, 2013). If an orca becomes agitated by its captivity and injures or kills a guest, the person charged with that animal's care, (in that case, likely Sea World), could be held accountable for the animal's actions. Wouldn't the same be true for the patent holder of a genetically engineered organism which causes harm or injury to others due to its neglect or improper care? What responsibility does the creator of a wholly new organism have for the care of that creature, and what, if any, duty does that inventor owe to the public if something were to go wrong?

New organisms created in the laboratory are undeniably a hot source of revenue for those who put the time and resources into engineering them. But do the inventors of these organisms realize the consequences of creating something new, with a set of instincts and motivations that may seem foreign not only to them, but to the organism itself? Can scientists and inventors take responsibility for the life that they create, and what will those responsibilities entail? These are questions which will need to be answered as technology improves and more sophisticated organisms are developed and become patent eligible. What the answers will be are unclear for now. In the meantime, aspiring geneticists might want to make a stop at their local theater before they head back into the lab.

Save the Date!: Law Review's Student Symposium is Just Around the Corner

By: Christian Blume

The John Marshall Law Review: Student Symposium – Volume 49 - Issues 1 & 2.

Prosecutors Reading Inmate Emails? Rape Shield Laws and Social Media? Arson Dogs? Law Enforcement Using Cell Cite Location and the 4th Amendment? Professional Video Gaming? A Fair Day's Pay? The NCAA and its Exploitive Amateur Model?

Want to learn more about these legal topics? Come listen to students who have devoted substantial time and effort, researching and writing about these legal issues.

The John Marshall Law Review will be hosting its Student Symposium on October 15th. Listen to students present their research and publications to the legal community. Learn more about the John Marshall Law Review and the work it takes to publish a scholarly article.

The John Marshall Law Review is one of the oldest and most respected honors programs at The John Marshall Law School. Membership enhances research, writing and editing skills and provides excellent training for the practice of law. *The John Marshall Law Review*'s objective is to publish scholarly works on a broad range of legal topics in four issues each year. The publication includes works written by judges, legal scholars, noted practitioners and John Marshall students.

The student speakers will include: Sydney Janzen, Danielle Burkhardt, Andrew Scott, Lyndsey Duncan, Elizabeth Brusa, Christopher Sweeney, Claire Mattlin and Tyler Duff. The event will allow students the opportunity to present their research and field questions from the attendees. The event is free to students, faculty and staff. Refreshments and food will be served.

Date: October 22nd, 2015

Time: 4:30PM-7:30PM

Location: The John Marshall Law School, 3East

Be on the look-out for a follow-up invitation with details to RSVP