

Law and Sexuality

Instructor: Ilona Turner, ilonaturner@berkeley.edu
Office Hours (Room 212: Thursdays from 11-12 and by appointment

Graduate Student Instructor: Brianne Felsher, brianne_felsher@berkeley.edu
GSI Office Hours (257 Boalt Hall): Mondays from 11-12, Tuesdays from 1-2, and by appointment

This course focuses on the legal regulation of sexuality and gender identity and expression, historically and up to the present day. Our subject matter is mostly constitutional, and we will look at the law's regulation of sexuality and gender through the lenses of privacy, liberty, equal protection, and freedom of expression, among others.

Throughout, we will study case law, legal articles, and other texts that critically engage issues of sexuality, citizenship, nationhood, religion, and the public and private spheres. We will also look deeply at the social, legal and historical contexts that construct definitions of sexuality and gender identity. We will examine the ways in which the law regulates, constructs, and protects sexuality, paying special attention to landmark judicial decisions as well as current political issues.

Upon completion of this course, students will be able to:

- Critically analyze and reflect upon the law's regulation of sexuality and gender and their intersection with other identity-based categories, such as race, ethnicity, class, nationality, religion, disability, and age, among others;
- Understand and articulate scholarly and activist theories regarding the regulation of sexuality and gender in law;
- Develop legal reasoning skills through analysis of case law, law review articles, and related texts; and
- Practice and apply skills of legal research, writing, and analysis through the process of preparing an original research paper.

Required Texts

Sexuality, Gender and the Law, by Eskridge, Hunter & Joslin, 4th Edition

Additional course readings, posted on bCourses

Grading Chart

Participation in lecture and section	20%
Weekly homework	20%
Response to out-of-class cultural activity	10%
Research paper (including intermediate steps)	50%

Course Requirements and Grading Criteria

Attendance and In-Class Participation: Students are expected to come to class on time having carefully read the assigned texts for that day, and should bring the assigned texts to class. Students should be prepared to respond to questions and add to the collective dialogue on the subjects that we will cover in class, because I rely, in part, on a combination of volunteer participation and the Socratic method (cold-calling).

Several times in the semester, each student will be randomly assigned to be “on call.” Students on call must write and submit a “case brief” or outline for one of the assigned readings by 11:59PM the night before the class for which the student is on call, and be prepared to respond to questions in class. Those case briefs count toward the weekly homework requirement described below.

We will also maintain a discussion board for this class in bCourses. Students should post contributions at least once during the semester.

Weekly Homework: Students will be required to submit a response to the reading once a week during each full week of class – i.e., each week other than Week 1 (the first day of class) and Week 14 (Thanksgiving holiday). The response should be at least one paragraph. You may address any aspect of the reading that interests you, but the response paper must engage with the assigned reading. The response should be uploaded to bCourses no later than 11:59PM the night before the class for which the reading is assigned. The responses will be graded on a pass/fail basis.

Response to Out-of-Class Cultural Activity: At some point during the semester, each student should view a film or artistic presentation outside of class that relates to the subject matter of the course, of at least 90 minutes in length, and write a response paper of 2-3 pages that discusses the work in light of the concepts studied in class, with citation to at least two sources from the assigned readings. Suggested activities will be posted on bCourses. Those response papers will be due Wednesday, November 27, at 11:59 PM. This assignment is worth 10% of your final grade.

Research Paper: At the end of the semester, students will be required to turn in one research paper that is 12-15 pages in length. These papers should use 12-point font, one-inch margins, and double spacing. During the semester, students will be required to submit: (1) a 1-2 paragraph abstract/idea, by September 20, (2) a proposed bibliography with at least five sources, by October 18, and (3) a proposed outline of at least one full page, by November 15. Each of those preliminary stages is worth 5% of the final grade for the course, and the final paper is worth 35%. Each student should also arrange to meet individually with either Professor Turner or Brianne Felsner (either during office hours or by appointment) before October 18 to discuss the proposed topic and get feedback. You will also have the option of turning in a draft beforehand for more extensive feedback.

Each paper should focus on a single theme, topic or idea, demonstrating original research and analysis. These papers should avoid just summarizing the key arguments of the assigned reading, but instead should focus on developing an idea or topic that is related to the course material, presenting original thought and arguments, drawn from original research.

The first step in designing a paper is to select a topic from our assigned reading, and propose an argument or method of analysis that is summarized in a 1-2 paragraph abstract. You should then

perform additional research. Your paper should engage with and cite at least five sources (including cases, articles, or books) that are not excerpted or discussed at length in the casebook.

Questions to explore include: Why is the topic important? How has it changed over time? What are the implications of the topic you have chosen for marginalized groups? Do you agree or disagree with the arguments and conclusions drawn by authors or judges and why? What are the most important debates and issues raised with respect to the topic you select, and how does the assigned reading fit into these debates? How does the reading build on or contradict other readings? What are some of the normative and theoretical presumptions made within the sources you consider, and do you agree or disagree with them? If you choose to focus on a specific case or cases, describe some of the results that the outcome will have on future cases and on various groups in the real world. What incentives does the outcome produce, and for whom? What are the outcome's costs and its benefits? Who gets advantaged or disadvantaged by the outcome?

Papers must be uploaded to bCourses by 11:59PM on Friday, December 13. They will be graded on the basis of (1) originality, creativity, insight, and critical analysis; (2) understanding and engagement with the assigned reading; (3) engagement with outside research; and (4) the quality of the overall presentation, including organization, structure, logic, style, clarity, tone, and depth.

Course Policies

Attendance and Participation: When in class, please turn your cell phone off and do not read emails or other non-class related material during class. If you are unable to attend due to illness or other extenuating circumstance, please email me.

Course content: This course contains content that deals with sexuality, including historical views of sexuality and gender that may be offensive by contemporary standards. Students will be required to read, see and discuss materials that explicitly address these issues. This class may be inappropriate, therefore, for individuals who are uncomfortable with frank discussions of bodies, genders, or sexual practices. I will also often post readings that are in addition to the syllabus, so make sure to check bCourses often.

Accommodations: I want all students to perform at their very best. Students requiring any form of academic accommodations should contact DSP, at <http://dsp.berkeley.edu/services.html> to request appropriate accommodations. Students whose name or gender is not accurately reflected in the official university roster should feel free to contact me.

Late Papers: Papers will be reduced by a single grade for every day that a paper is late, e.g. 1 day late A to B; 2 days late A to C, etc. If a doctor's note or other approved documentation is submitted, there will be no penalty.

Plagiarism: Plagiarism is not tolerated in this class. Plagiarism is defined as including representing someone else's work as your own, such as handing in another student's paper or using the words or ideas from a publication without proper attribution. According to the College of Letters and Sciences:

All written work submitted for a course, except for acknowledged quotations, must be expressed in the student's own words. It must also be constructed upon a plan

of the student's own devising. Work copied without acknowledgment from a book, from another student's paper, from the internet, or from any other source is plagiarized. Plagiarism can range from wholesale copying of passages from another's work to using the views, opinions, and insights of another without acknowledgment, to paraphrasing another person's original phrases without acknowledgment. The submission of such work will, under University rules, render the offending student subject to an F grade for the work in question or for the entire course, at the discretion of the instructor, and will also make the student liable for referral to the SJA.

In other words, always cite your sources, both direct quotes and paraphrased ideas. Plagiarism is a serious violation and can result in Academic Suspension or Dismissal.

Accommodation of Religious Creed: In conjunction with Education Code, Section 92640(a), it is the official policy of the University of California at Berkeley to permit any student to undergo a test or examination, without penalty, at a time when that activity would not violate the student's religious creed, unless administering the examination at an alternative time would impose an undue hardship that could not reasonably have been avoided. Requests to accommodate a student's religious creed by scheduling tests or examinations at alternative times should be submitted to the faculty member responsible for administering the examination by the second week of the semester.

Conflict with Extracurricular activities and Academic requirements: The UCB Academic Senate has established guidelines concerning scheduling conflicts that arise with extracurricular activities. The Senate guidelines note the following:

- *It is the student's responsibility to notify the instructor in writing by the second week of the semester of any potential conflict(s) and to recommend a solution, with the understanding that an earlier deadline or date of examination may be the most practicable solution;*
- *It is the student's responsibility to inform him/herself about class material missed due to any absence, whether or not she has been formally excused.*

Commitment to Collaboration and Accountability: Because so much of this course involves frank conversation of difficult topics, a central feature of this class involves collaborative discussions. Students need to be able to treat each other both respectfully and professionally at all times. Give each other space to learn and ask meaningful questions. If someone says something that you disagree with, try to respond to the statement that is offered, instead of the person who has made the statement or their perceived intentions. In this class, students are accountable not only to the Professor, but to community members and to each other.

Email: Emails will be answered within 48 hours. Please plan accordingly.

Note that this syllabus is subject to change.

Assigned Readings

Week 1
August 29

Course Overview, Terminology, and Introduction to Reading Cases

Terminology sheet (distributed in class and posted in bCourses)

Kerr excerpt on how to read a case (posted in bCourses)

Case Briefs - identify:

- **Facts:** Outline the basic facts that are pertinent to the holding and outcome of the case.
- **Issue:** What is the question to be answered by the judge(s)? Usually, this can be clarified by the beginning of the legal discussion (“The question we must decide in this case is whether...”).
- **Holding:** This is the answer to the question, often at the end of the legal discussion.
- **Rule:** Is there a bright line rule that emerges from the holding? Some examples might be the levels of scrutiny used by a court in reviewing certain issues, e.g., strict or intermediate scrutiny.
- **Analysis:** Why did the court reach the conclusion that it did? What facts and prior case law led to this conclusion?

Week 2
September 3 & 5

Theories of Sexuality and Law

September 3 **Theories Part I**

Natural Law Theories: pp.349-53

Liberal Theories: pp.365-77

Post-Liberal Theories: pp.421-29

Critiques of Liberalism: Bassichis, Lee, & Spade chapter (on bCourses)

September 5 **Theories Part II**

Critical Race Theory & Intersectionality: pp.401-409

Constructing Sexuality through Disease and Disability: pp.453-66

Post Liberal Theories of Identity: pp.466-78

International Perspectives: pp.484-88

Week 3
September 10 & 12

September 10

Theories Part III: Feminism

Feminist Theories: pp. 380-99

Judith Butler: pp.440-42

Social Construction and Identity: 449-51

Trans and Intersex People and Feminism: pp.122-23, 412-420

TERF wars:

PinkNewsUK article: <https://www.pinknews.co.uk/2018/07/25/what-is-terf-transgender-gender-recognition-act/>

NBC News article: <https://www.nbcnews.com/feature/nbc-out/pro-lesbian-or-trans-exclusionary-old-animosities-boil-public-view-n958456>

September 12

First Amendment: Freedom of Expression

From Obscenity to Political Speech: pp.125-34

Feminist Pornography Debates: pp.138-53

Week 4
September 17 & 19

Equal Protection

September 17

Strict Scrutiny: Suspect Classifications

Overview of Equal Protection: pp.49-50

Footnote 4 in *Carolene Products*, available at <http://caselaw.lp.findlaw.com/cgibin/getcase.pl?court=US&vol=304&invol=144>, [you need only read the footnote]

Loving: pp.277-79

Race Discrimination in Prisons: pp.1156-62

Other readings posted in bCourses

September 19

Discrimination Based on LGBT Status

Discrimination Based on Sexual Orientation: pp.76-77, 80-102

Discrimination Based on Gender Identity: other readings posted in bCourses

SUBMIT PAPER ABSTRACT/IDEA BY SEPTEMBER 20

Week 5

September 24 & 26

September 24

Equal Protection: Sex Discrimination

Sex Discrimination: pp.50-76

Introduction to Title VII: pp.709-12

September 26

Early Title VII Cases

Ulane: <http://www.transgenderlaw.org/cases/ulane.htm>

Price Waterhouse: pp.685-91

Oncale: pp.675-79

Week 6

October 1 & 3

Does “Sex” Include Gender Identity?

October 1

Recent Decisions

Schroer: pp.712-15

Brumby: pp.117-22

Macy: pp.716-19

E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018),
<http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0045p-06.pdf>

October 3

Supreme Court: R.G. & G.R. Harris Funeral Homes case (hearing October 8)

Docket and amicus briefs: <https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/>

Brief of Aimee Stephens (Counsel: ACLU):

[https://www.supremecourt.gov/DocketPDF/18/18-107/104141/20190626105814174_No%2018-](https://www.supremecourt.gov/DocketPDF/18/18-107/104141/20190626105814174_No%2018-107%20RG%20and%20GR%20Harris%20Funeral%20Homes%20v%20EEOC%20and%20Aimee%20Stephens%20Brief%20for%20Respondent%20Aimee%20Stephens.pdf)

[107%20RG%20and%20GR%20Harris%20Funeral%20Homes%20v%20EEOC%20and%20Aimee%20Stephens%20Brief%20for%20Respondent%20Aimee%20Stephens.pdf](https://www.supremecourt.gov/DocketPDF/18/18-107/104141/20190626105814174_No%2018-107%20RG%20and%20GR%20Harris%20Funeral%20Homes%20v%20EEOC%20and%20Aimee%20Stephens%20Brief%20for%20Respondent%20Aimee%20Stephens.pdf)

Brief of R.G. & G.R. Harris Funeral Homes (Counsel: Alliance Defending Freedom):
https://www.supremecourt.gov/DocketPDF/18/18-107/112573/20190816105923793_18-107%20Brief%20for%20the%20Petitioner.pdf

Brief of Trump EEOC: https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf

Week 7

October 8 & 10

Does “Sex” Include Sexual Orientation?

October 8

Recent Decisions and Supreme Court Cases

Baldwin, Hively and *Evans*: pp.720-41

Briefing on Supreme Court cases (*Bostock v. Clayton County GA* and *Altitude Express v. Zarda*, consolidated):

Docket and briefs: <https://www.scotusblog.com/case-files/cases/bostock-v-clayton-county-georgia/>

Brief of Zarda (ACLU): https://www.supremecourt.gov/DocketPDF/17/17-1618/104155/20190626114351461_17-1623bs.pdf

Brief of Altitude Express: https://www.supremecourt.gov/DocketPDF/17/17-1618/112667/20190816164240762_Brief%20for%20Petitioners%20Altitude%20Express%20Inc%20and%20Ray%20Maynard.pdf

Brief of Clayton County: https://www.supremecourt.gov/DocketPDF/17/17-1618/112668/20190816164820200_38344%20pdf%20Buechner%20Jr.pdf

Note: The oral arguments in the Supreme Court in *Harris* and *Bostock/Zarda* take place on October 8, but they are not broadcast. Hearing transcripts are available later in the day.

October 10

Review Supreme Court Oral Arguments

Read the transcripts from October 8 oral arguments in *Harris* and *Bostock/Zarda*,
https://www.supremecourt.gov/oral_arguments/argument_transcript/2018

Week 8

October 15 & 17

October 15

Next Generation Trans Cases

Bathrooms and Pronouns: pp.741-49, 1004-14

Privacy Arguments: *Doe v. Boyerton*, 897 F.3d 518 (3d Cir. 201),
<http://www2.ca3.uscourts.gov/opinarch/173113ppan.pdf>

October 17

Historical Look at State Regulation of Sexual and Gender Expression

The Era of Sodomy Law: pp.29-34

Cross-Dressing: pp.106-08

History of Legal Regulation of Sexuality: pp.488-91

Other readings as posted on bCourses

SUBMIT PROPOSED BIBLIOGRAPHY BY OCTOBER 18

Week 9

October 22 & 24

Privacy and Liberty

October 22

Due Process and Fundamental Rights

Emergence of the Right to Privacy: pp.1-8

Griswold: pp.11-17

Roe: pp.22-28

October 24

Constitutional Challenges to Sodomy Laws

Bowers: pp.34-47

Lawrence: pp.226-250

Week 10

October 29 & 31

Relationship Recognition

October 29

Challenges to Marriage Bans

State Law Marriage Exclusions: pp.277-81

California's Marriage Cases and Prop 8: pp.286-297

The Rise and Fall of the Defense of Marriage Act: pp.297-309

Obergefell and Beyond: pp.309-43

October 31

Beyond Marriage

Polyamory & Polygamy: pp.776, 778-86

Protection for Unmarried Partners: pp.801-06

Critiques of Marriage:

Katherine Franke, The Politics of Same-Sex Marriage Politics, at

http://www2.law.columbia.edu/faculty_franke/SS%20Marriage%20Essay%20Final.pdf

Lisa Duggan, Beyond Marriage: Democracy, Equality and Kinship for a New Century, at

<http://sfonline.barnard.edu/a-new-queer-agenda/beyond-marriage-democracy-equality-and-kinship-for-a-new-century/>

Christiaan Rapcewicz, Homonormativity, Homonationalism and the Other 'Other', at

http://www.huffingtonpost.com/christiaan-rapcewicz/homonormativity-homonatio_b_6889606.html

Week 11

November 5 & 7

November 5

Parenting

Overview: pp.853-55

Child Custody: pp.857-62

Trans Parents and Custody Cases: pp.868-72

Adoption: pp.877-87

Establishing Parentage: pp.897-910

November 7

LGBT Migrants

Limitation of Entry of LGBT People & People with HIV

Immigration Detention

Asylum Law

Readings to be posted on bCourses

Week 12

November 12 & 14

Prisons

November 12

Criminalization of LGBT People

Disproportionate Incarceration of POC and Queers: pp.1147-48
Criminalization of Sex Work, pp.252-67
Criminalization of HIV Transmission: additional readings on bCourses
Prison Abolition: Bassichis, Lee, & Spade chapter (again), on bCourses

November 14
Eighth Amendment

Violence and Sexual Assault: pp.1163-78
Healthcare in Prison: pp.1185-94
Housing: pp.1178-83

SUBMIT PAPER OUTLINE BY NOVEMBER 15

Week 13
November 19 & 21

Defining Gender

November 19
Approaches

Theories: pp. 491-500
“Medical Model” Debates: pp.108-117

Disability Model: Kevin Barry and Jennifer Levi, *Blatt v. Cabela’s Retail, Inc.* and a New Path for Transgender Rights, 127 Yale L.J. Forum 373 (2017):
https://www.yalelawjournal.org/pdf/BarryLevi_eza7uoro.pdf

November 21
Establishing Legal Identity

Michigan driver’s license case: *Love v. Johnson*, 2015 WL 7180471 (E.D. Mich. 2015)
Idaho birth certificate case: *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018)
Art Leonard: <http://www.artleonardobservations.com/u-s-court-orders-idaho-issue-birth-certificates-transgender-applicants/#respond>

Other readings as posted on bCourses

Week 14
November 26 & 28 - NO CLASS

Assignment: Submit response paper to the outside-of-class cultural activity you attended during the semester. Upload to bCourses by Wednesday, November 27, 11:59PM.

Week 15
December 3 & 5

December 3

First Amendment: Freedom of Association

Dale: pp.165-81

Apilado v. NAGAAA:

Decision: <https://lawyersusaonline.com/wp-files/pdfs-3/apilado-v-nagaaa.pdf>

Press release re settlement: <http://www.ncrights.org/press-room/press-release/parties-settle-case-challenging-disqualification-of-bisexual-players-team-at-2008-gay-softball-world-series/>

December 5

First Amendment: Freedom of Religious Expression

Chapter Introduction: pp.507-512

Religious Exceptions to Nondiscrimination Laws (*Hobby Lobby*, *Elane Photography*, *Masterpiece Cakeshop*): pp.539-55

Public School Policies: pp.559-564

Religious Students: pp.577-99

TERM PAPERS DUE DECEMBER 13 AT 11:59PM

END OF SYLLABUS