

Introduction to Law, Gender and Sexuality

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This course focuses on the legal regulation of sexuality, and the social and historical norms and frameworks that affect its intersection with sex, gender, race, disability, class, and other categories. This course also critically examines how the law, both as a set of abstract principles as well as a formal set of rules, shapes sexuality, and in turn, and how sexuality shapes the law. Our subject matter is mostly constitutional, and we will cover sexuality's intersection with privacy, freedom of expression, gender identity and expression, equal protection, reproduction, kinship, and family formation, among other subjects. Within each topic, we pay close attention to how the law defines and draws distinctions between certain modes of intimacies, over others, and how it regulates and differentiates between sex, gender and sexuality in both private and public contexts. Throughout, we will study case law, legal articles, and other texts (including visual works) 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 lenses (both domestically and internationally) that construct definitions of sexuality and gender identity. We will spend a great deal of time discussing the ways in which the law both regulates, constructs, and protects sexuality, paying special attention to both 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 its intersection with other identity-based categories, such as race, ethnicity, class, nationality, religion, geography, disability, and age, among others;
- Develop legal reasoning skills through analysis of case law, law review articles, and related texts;
- Practice legal writing, research, and oral presentation skills through engagement with the Socratic teaching method;
- Articulate scholarly and activist theories regarding the regulation of law and sexuality, and recognize how scholarship, social norms, public culture, private intimacies, and legal decisions affect the social world that we live in;
- Identify and respond to key points and arguments in scholarly articles, integrating current news events regarding law, gender and sexuality;

- Bring together a wide variety of texts, cases, images, ideas, and both theoretical and practical approaches in order to respond to social, intellectual and political issues

Required Texts

Sexuality, Gender and the Law, by Eskridge & Hunter, 3rd Edition (and additional readings)

Course readings, posted on bcourses

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. There is a fair bit of reading in this class, and so you should organize your time accordingly. I have also built in some flexibility in the syllabus to account for the variation in reading length and difficulty of topics. 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. At some point in the semester, I will ask each of you to prepare an oral summary of the assigned readings, respond to questions, and help facilitate class discussion for the following week. Students should always bring assigned texts to class. Your lecture attendance and participation grade may be reduced if you use electronic devices for other purposes during lecture. Students found texting, Facebooking, or emailing in class will be asked to leave. Participation is worth 10% of your final grade.

Reaction Papers: Students will be required to turn in 3 reaction papers that are 3-5 pages each in length that critically engage their reading of one (or more, if necessary) assigned texts and cases assigned for the preceding part of the course. These papers should conform to page length, use 12 point font, one inch margins, and use double spacing.

Each response may focus on a single text or idea, or any combination of texts and ideas. These papers should avoid just summarizing the key arguments of the assigned reading, but instead should focus on critically analyzing and reacting to the implications of the arguments and conclusions drawn in the reading. In each paper, you should identify an issue, question, idea or thesis, and then provide your own critical opinion, along with supporting arguments and evidence for your reaction. Questions to explore include: Do you agree or disagree with the arguments and conclusions drawn by the author or judge, and why? What questions does the reading raise in relation to the topic of the course? How have the courts conceived of their role, relative to other institutions that affect sexuality, like the legislature, executive branch, or social norms and customs? 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? What are some of the normative and theoretical presumptions made within the assigned readings, and do you agree or disagree with them? What methodologies are used, and why? If you choose to analyze a specific case or two, describe some of the results that the outcome will have on future cases, specifically, and the regulation of sexuality overall. What incentives does the outcome produce, and for whom? What are the outcome's costs and its benefits? Who gets advantaged, and who is

disadvantaged, by the outcome, and why? How does the reading build on or contradict prior readings? Each paper is worth 10 % of your final grade.

Papers must be uploaded and emailed to Professor Katyal by 10 am the day that they are due, and will be graded on the basis of (1) originality, creativity, insight and critical analysis; (2) understanding and engagement with the assigned reading; and (3) the quality of the overall presentation, including organization, structure, logic, style, clarity, tone, and depth.

Midterm: Students will take a midterm exam that will be composed of short essay questions that are based on the reading presented and our in-class discussions. This midterm is worth 20% of your final grade.

Final: Students will take an in-class final exam that will consist of identifying and defining terms, and answering essay questions. Exams will cover lecture, readings, and discussion from throughout the semester, primarily focusing on materials presented since the midterm. This exam is worth 30% of your final grade.

Portfolio: Students will hand in, at the end of class, a project that consists of news clippings, web sites, advertisements, poetry, magazine articles, or related media related to a subject that directly engages law and sexuality. This portfolio should be accompanied by a narrative that explains your selection of the topic and supporting evidence, and how the materials have been organized in connection, specifically, with our readings and class discussion. What is being contested and why? How have various categories been represented, and how do they relate to the case law and other assigned readings covered in this class? You should discuss how the portfolio demonstrates, or responds to, contemporary cultural understandings about sexuality, using specific references to our course readings. Like your response papers, try to ensure that you have a specific thesis and subject matter in mind, and that you offer specific arguments and support for your perspective that is drawn from your portfolio and/or our readings. This portfolio is worth 10% of your final grade.

Course Policies

Attendance and Participation: Students are expected to attend all lectures having already completed any assigned readings. When in class, please turn your cell phone off. If your laptop has wireless access, you may use it to access information relevant to the discussion, but please do not read emails or other non-class related material during class. If you are unable to attend due to illness of yourself or a dependent, please email me.

Course content: This course contains content that deals with sexuality. 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.

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 who prefer to be referred to by a name or gender that is not reflected in the official university roster should feel free to contact me.

Missed Exams: If you should find that you must miss a midterm or final exam due to serious illness or a comparable circumstance, you must email Professor Katyal before the testing period to notify her of the situation, and we will make an effort to accommodate your situation. However, any student who misses a test and only contacts the professor after the testing date is not likely to be allowed to sit for a make-up test – except in very rare cases.

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 documentation is submitted, there will be no penalty. Make sure to email your paper to skatyal@berkeley.edu and [upload to bcourse] to ensure a time stamp.

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 and 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 to, not only the Professor, but to community members and to each other.

Email: Emails will be answered within 72 hours, please plan accordingly.

Note that this syllabus is subject to change.

Assigned Readings

Class 1: January 25, 2016

Introduction to the Course and Theories of Sexuality

Natural Law Theories: pp. 411-419, Notes 1 and 2; 425-28 Notes 1, 2

Liberal Theories: pp. 431-39

Feminist Theories: pp. 445-460, 462-67

Critical Race Theory: pp. 467-473

Historical Approaches, 476-480, 483-88

Post-Liberal Theories: 489-96, 504-515, 521-33; *Rowland*, 533-36, 536-42

AIDS as a Social Construction, 515-21, and

Nico Lang, *Trans People do Not Endanger Society the Way Society Endangers Trans People*, at

<http://jezebel.com/trans-people-do-not-endanger-society-the-way-society-en-1751194043>

Case Briefs, What to look for:

- 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, eg strict or intermediate scrutiny, etc.]
- Analysis [why did the court reach the conclusion that it did? What facts and prior case law led to this conclusion?]

Class 2: February 1, 2016

The Right to Privacy, the Era of Sodomy Law, and Watershed Moments

The emergence of the right to privacy, pp. 1-9; *Griswold*, 12-19;

The Right to Choose Abortion, *Roe*, 25-29

The Era of Sodomy Law, 30-33; *Boutier*, 33-37; *Bowers*, 37-49

Watershed Cases, *Casey*, 175-88; *Lawrence*, 197-221

Ratna Kapur, excerpt.

William Rubenstein, My Harvard Law School, Excerpt

Class 3: February 8, 2016

Equal Protection, Gender and Family Formation

Sex and Sexual Orientation Discrimination, pp. 66-68; *Frontiero*, 68-73;

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];

VMI, 77-86

Equal Protection, 90-100, including *Norton*, *Watkins*;

Romer, 100-114

The road to marriage, p. 114 (first two paragraphs in Part C), 118-21; *Loving*,

311-19; *Goodridge*, 320-26; *Parker*, 326-30; *In re Marriage Cases*, 337-54

Perry, 365-76

[No Class February 15, 2016]

PAPER 1 DUE

Class 4: February 22, 2016

Marriage Equality and its Discontents

Windsor, supplement (posted)

Obergefell, supplement (posted)

Marriage Equality and its discontents, pp. 369-76

Katherine Franke article, The Politics of Same-Sex Marriage Politics, at http://www2.law.columbia.edu/faculty_franke/SS%20Marriage%20Essay%20Final.pdf

Murray excerpt (posted)

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

<http://sfoonline.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

Class 5: February 29, 2016
Speech and Expressive Association

From Obscenity to Political Speech, pp. 122-32

From Obscenity to Indecency, pp. 132-47

Identity, Viewpoint, and Expressive Association, pp. 151-57; 158-73

Additional readings (posted)

Class 6: March 7, 2016
Religious Liberty and Speech

Religious Liberty vs. LGBT Equality, pp. 377-405, including *Gay Rights Coalition*, *Christian Legal Society*, and *Tyler Chase Harper*

Mixing Religion and Sexuality in the Workplace, pp. 595-606, including *Leigh Cline*, *Glynda Hall*, and *Sandra Bruff*;

Excerpt on Same-Sex Couples and Public Accommodation Laws (supplement, handed out in class, including *Keeton* and *Elane Photography*)

Additional readings (posted)

Class 7: March 14, 2016
Midterm Examination

Class 8: March 28, 2016
Families We Choose: Privatization and Plurality in Family Law

The Privatization of Family Law, pp. 663-686; *Marvin, Braschi, Kowalski*, and *Vasquez*, 686-700;

The Emerging Menu of Relationship Options, 713-733

Excerpts on Alternatives to Marriage and Kinship (posted)

PAPER 2 DUE

Class 9: April 4, 2016

Families of Choice

Polyparenting and Families of Choice, 761-766

Surrogacy, Custody and Visitation, pp. 761-808, including *Baby M*; *Palmore*,
Bottoms; *Daly*

Polikoff,

<http://beyondstraightandgaymarriage.blogspot.com/search/label/transgender%2Fintersex>

Additional Readings (posted)

Class 10: April 11, 2016

Adoption, Parenthood by Estoppel, and DeFacto Parenting

Including *In Re Adoption of Charles B, Lofton, V.C.*, *In Re M.M.D, Jenkins*, and excerpt
on *Arkansas Department of Human Services*, pp. 809-845, supplement (to be posted)
Polyparenting, pp. 846-858, including *In re Thomas S.*

Class 11: April 18, 2016

Regulating Expression of Sexuality and Gender in Education

Inculcation, Critical Thinking, and the First Amendment, pp. 859-879, including
Bethel School District

Academic Freedom and Issues of Gender and Sexuality, 879-96, including *Solmitz*,
Rowland, *Tyler Chase Harper*, and *Rumsfeld*

Title IX, including *Nabozny*, 897-902

No Promo Homo Policies, 961-969 and supplement (posted)

Class 12: April 25, 2016

Transgender Subjectivities

Eskridge and Hunter, pp. 542-553

Eskridge and Hunter, pp. 54-65, including *City of Chicago*

Gender Rebels, 622-644, including *Jespersen*, *Schroer*, *Etsitty* and *Goins*, also read
supplement, including *Dawson*

Eskridge and Hunter, pp. 653-61, including *MGM Grand*, *Prowel*, *Complainant v. Foxx*,
Glenn, *Macy*, and *Complainant v. Army* in Supplement (posted)

PAPER 3 DUE

