

Law and Sexuality Spring 2021

Instructor: Ilona Turner, ilonaturner@berkeley.edu

Lecture Tuesdays and Thursdays, 2:00-3:29pm PST, Zoom

Office Hours: Thursdays from 3:30-4:30pm PST and by appointment,
Zoom

Graduate Student Instructors:

Nikila Lakshmanan, Nikila.lakshmanan@berkeley.edu

DIS 101: Tuesday, 5:00-5:59pm PST, Zoom

DIS 102: Thursday, 11:00-11:59am PST, Zoom

Office Hours: Fridays 10:00-11am PST and by appointment, Zoom

Eli Lawliet, elawliet@berkeley.edu

DIS 103: Monday, 3:00-3:59pm PST, Zoom

DIS 104: Wednesday, 10:00-10:59am PST, Zoom

Office Hours: Mondays 4:00-5:00 pm PST and by appointment, Zoom

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

Attendance	10%	
Participation	10%	
Weekly homework	25%	
Cultural activity writing assignment		5%
Research paper (including intermediate steps)	50%	

Course Requirements and Grading Criteria

Attendance and Participation: Since this class does not have an exam, attendance and participation in both lecture and discussion section are extremely important. Students can be absent from lecture OR section twice without penalty. After that, each unexcused absence will result in 10% off the attendance grade. If you must miss class, contact your GSI. Lectures are recorded and students may be allowed, on a case-by-case basis, to make up absences by watching the lecture recording and/or completing a make-up assignment.

Students are expected to come to class and section on time having carefully read the assigned texts for that day, and should have the assigned texts with them. 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” for a particular class and should be prepared to respond to questions about all of that day’s assigned reading during class.

Weekly Homework: Students will be required to submit a response to the reading once a week during each full week of class, starting with Week 2. The response should be at least one paragraph. You may address any aspect of that week’s 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 (i.e., either Monday night for Tuesday's reading, or Wednesday night for Thursday's reading).

The reading responses will be graded on a three-point scale: 3 for a response that demonstrates that the student has both read and understood the material well; 2 for a response that shows that the student has read the material and has a basic understanding of it; and 1 for a response that indicates the student has read the material but does not sufficiently understand it. A response that does not demonstrate that the student has read the material will get zero points.

As mentioned, several times in the semester each student will be randomly assigned to be "on call" to answer questions during a class period. Those students will also be assigned a particular case or article from that day's assignment and asked to write a "case brief" or outline of that reading. Those case briefs or outlines should be posted in the Discussion area of bCourses no later than **8:00pm PST the night before the class** for which the student is on call, as an aid to your classmates in understanding the material. Those case briefs or outlines are graded and count toward the weekly homework requirement.

Participation on bCourses Discussion Board: At least four times during the semester, when NOT on call, you should post a comment to one of the case briefs or outlines posted by the on-call students with additional thoughts, clarifications, or questions relating to the reading, within one week of that reading assignment. Those contributions should be at least 50 words, and will count toward the participation grade.

Response to Cultural Activity: At some point during the semester, each student should watch a film, read a novel, or view another artistic presentation that relates to the subject matter of the course, of at least 60 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 Friday, April 2, at 11:59pm PST. This assignment is worth 5% 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 February 12, (2) a proposed bibliography with at least five sources, by March 12, and (3) a proposed outline of at least one full page, by April 16. Each of those preliminary stages is graded and 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 your GSI (either during office hours or by appointment) before March 12 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 cite at least two sources from our assigned readings during the semester (including cases, articles, or books) as well as at least five sources that were not in our assigned readings and 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 Monday, May 10, at 2:30pm PST. 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

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 for Students with Disabilities: 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, and/or talk to their GSI. Students whose name or gender is not accurately reflected in the official university roster should feel free to let me or their GSI know.

Late Papers: Assignments will be reduced by a single grade for every day that they are 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

January 19 & 21

January 19

Course Overview, Terminology, and Introduction to Reading Cases

LGBT terminology sheet (posted in bCourses)

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

Optional: Chapters 2 and 3 of Law 101 (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 the court relies on to reach its 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?

January 21

Historical Look at State Regulation of Sexual and Gender Expression

The Era of Sodomy Law: pp.29-34

History of Legal Regulation of Sexuality: pp.488-491

Regulation of Cross-Dressing: pp.106-111

Early Challenges to Employment Discrimination, *Norton v. Macy*: pp.76-80

Week 2

January 26 & 28

Theories of Sexuality and Law

January 26

Theories Part I

Natural Law Theories: pp.349-353

Liberal Theories: pp.365-372, 374-377

Post-Liberal Theories: pp.421-429

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

January 28

Theories Part II

Critical Race Theory & Intersectionality: pp.401-409

Constructing Sexuality Through Disease and Disability: pp.453-454, 460-466

Post-Liberal Theories of Identity and Empowerment: pp.466-470

Optional: Eve Kosofsky Sedgwick, p.471-478

International Perspectives: pp.484-488

Week 3

February 2 & 4

February 2

Theories Part III: Feminism

Feminist Theories: pp. 380-399

Judith Butler: pp.440-442

Social Construction and Identity: pp.449-451

Trans and Intersex People and Feminism: pp.122-123, 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>

February 4

First Amendment: Freedom of Expression

From Obscenity to Political Speech: pp.125-34

Feminist Pornography Debates: pp.138-53

Week 4
February 9 & 11

February 9

First Amendment: Freedom of Association

Dale: pp.165-181

Apilado v. NAGAAA:

Decision:

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

Prof. Russell Robinson expert report (on bCourses)

Press release re settlement:

<http://www.nclrights.org/press-room/press-release/parties-settle-case-challenging-disqualification-of-bisexual-players-team-at-2008-gay-so-ftball-world-series/>

February 11

First Amendment: Student Speech

Religious Student Groups (*CLS v. Martinez*): pp.577-586

Public School Curriculum Policies: pp.559-562; 586-591

Hate Speech in Schools (*Harper v. Poway*): pp.591-598

SUBMIT PAPER ABSTRACT/IDEA BY FEBRUARY 12

Week 5
February 16 & 18

Equal Protection

February 16

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.277-279

Race Discrimination in Prisons: pp.1156-1162

Law 101 chapter 3, p.49-51 and 55-62, posted on bCourses

February 18

Equal Protection: Rational Basis

Discrimination Based on Sexual Orientation (incl. *Romer v. Evans*):
pp.80-102

M.A.B. v. Talbot County, posted on bCourses

Week 6

February 23 & 25

February 23

Equal Protection: Intermediate Scrutiny

Sex Discrimination: pp.50-76

Introduction to Title VII: pp.709-712

February 25

Sex at Work

Sexual Harassment: pp.659-660, 669-675

Gender as a BFOQ: pp.692-696

Dress and Grooming Codes: pp.696-708

Week 7

March 2 & 4

Sexual Orientation and Gender Identity Under Title VII

March 2

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

Price Waterhouse: pp.685-691

Oncale: pp.675-679

Schroer & Macy: pp.712-719

Glenn v. Brumby: pp.117-122

March 4

Baldwin, Hively and *Evans*: pp.720-741

U.S. Supreme Court decision in *Bostock v. Clayton County* (on bCourses)

Week 8

March 9 & 11

March 9

Next Generation Trans Cases

Bathrooms and Pronouns: pp.741-749, 1004-1014

Privacy Arguments from Anti-Trans Students: *Doe v. Boyerton*, 897 F.3d 518 (3d Cir. 2018),

<http://www2.ca3.uscourts.gov/opinarch/173113ppan.pdf>

Article on healthcare access after *Bostock*:

<https://www.californialawreview.org/sex-discrimination-in-healthcare-after-bostock/>

News article & video about Ash

Whitaker: <https://abcnews.go.com/US/wisconsin-transgender-student-wins-battle-run-prom-king/story?id=38219859>

Demand letter sent by Transgender Law Center to the Kenosha Unified School District (on bCourses)

March 11

Due Process and Fundamental Rights

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

Griswold: pp.11-17

Roe: pp.22-28

SUBMIT PROPOSED BIBLIOGRAPHY BY MARCH 12

Week 9

March 16 & 18

March 16

Constitutional Challenges to Sodomy Laws

Bowers: pp.34-47

Lawrence: pp.226-250

March 18
Parenting

Overview: pp.853-855

Child Custody: pp.857-862

Trans Parents and Custody Cases: pp.868-872

Adoption: pp.877-887

SPRING RECESS MARCH 22-26

Week 10
March 30-April 1

Marriage and Beyond

March 30
Challenges to Marriage Bans

Loving and State Law Marriage Bans: pp.277-281

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

The Rise and Fall of the Defense of Marriage Act: pp.297-308

Obergefell and Beyond: pp.312-336

April 1
Beyond Marriage

Establishing Parentage after *Obergefell*: pp.897-910

Polyamory & Polygamy: pp.776, 778-86

Protection for Unmarried Partners: pp.801-06

Critiques of Marriage: pp.337-343

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

Assignment: Submit response paper to the outside-of-class cultural activity. Upload to bCourses by Friday, April 2, 11:59PM.

Week 11
April 6-8

First Amendment: Free Exercise Clause

April 6

Chapter Introduction: pp.507-512

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

April 8

Hobby Lobby, pp.513-531

Fulton v. City of Philadelphia

- Third Circuit decision:
<http://www2.ca3.uscourts.gov/opinarch/182574p.pdf>
- U.S. Supreme Court oral argument:
<https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/>

Week 12
April 13-15

Defining Gender

April 13

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

April 15
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

SUBMIT PAPER OUTLINE BY APRIL 16

Week 13
April 20-22

April 20
Eighth Amendment

Violence and Sexual Assault: pp.1163-1178

Healthcare in Prison: pp.1185-1194

Housing: pp.1178-1183

April 22
LGBT Migrants

Limitation of Entry of LGBT People & People with HIV

Immigration Detention

Asylum Law

Readings to be posted on bCourses

Week 14
April 27-29

April 27

Criminalization of LGBT People

Disproportionate Incarceration of POC and Queer People: 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

April 29

Last Day of Class

TBD

TERM PAPERS DUE MAY 10, 2:30PM PST

END OF SYLLABUS