

Sex, Reproduction and the Law
Professor: Mark Leinauer

Syllabus¹

Lectures. Lectures will be held on Tuesdays and Thursdays from 5:00 p.m. to 6:30 p.m. (Pacific Time) in room 170 of the Social Sciences Building.

Email contact. To contact Mark Leinauer, please simply email Mark through the course webpage (there is an “email / inbox” tab for within course messaging). Please note that messages to other email addresses may not be received. I aim to answer all emails within 48 hours. Substantive questions are best addressed in office hours.

Office Hours. I will hold office hours every Wednesday from 10 a.m. to 12:00 p.m. (Pacific time) via zoom. A general invite for office hours will be released to the entire class as an announcement about 5 minutes before 10 a.m. Your GSI, Nikila Lakshmanan, will hold office hours as well. Please consult her syllabus for that information.

GSI. Your G.S.I. will be Nikila Lakshmanan. Nikila is currently a doctoral student in the Jurisprudence and Social Policy department. Needless to say she is extremely knowledgeable. If you are struggling with any aspect of the material you are strongly encourage to use Nikila as a resource.

Attendance & Participation. I will not take attendance but I *highly recommend* attending lectures live. This material is best presented in a conversational format, with students asking questions in real time. Each lecture will also conclude (time allowing) with a question and answer period designed to address lingering confusion. That process, obviously, requires live attendance.

One final note, if this class has a waitlist then we will take attendance during the first week to determine if anyone has dropped the class. It behooves you, therefore, to attend the first week live. If you cannot attend the first week live and yet intend to remain in the course, please contact Nikila Lakshmanan via email to let her know.

Materials. This course requires no external materials (you do not need to buy anything). All readings will be provided via the course website (you will find them in the “files” section).

Prerequisites. No previous course work is required.

Grading. There are two in-class exams and a final exam (three exams total). Each exam will count for 30% of your final grade and participation will count for the remaining 10%. The final exam will be inclusive (it will cover the entire semester).

¹ This syllabus may be adjusted slightly to accommodate topics of students’ interest and other circumstances.

Accommodations. If you need disability-related accommodations in this class, if you have emergency medical information you wish to share with me, or if you need other special arrangements, **please inform me immediately**. Please see me privately after class or in office hours. You may also email me.

Excused absences from an exam: If you believe that you will not be able to attend an exam please note that such absences will be excused only in cases of *extreme* hardship (a death in the family, hospitalization, severe [documented] illness, etc.). Do not assume that you will be excused from an exam, it is best to contact me before the exam to discuss the matter if possible.

Incompletes: If you believe that you will be seeking an incomplete please contact me as soon as possible during the semester (incompletes will almost never be granted *after* the final exam). You should not assume that you will receive an incomplete in any event.

Help Available. And finally, I know that dealing with post-pandemic instruction (and dealing with college life in general) can be very difficult. There are, however, some resources available.

Confidential counseling: <https://uhs.berkeley.edu/caps>

LGBTQ+ & gender equity support: <https://cejce.berkeley.edu/geneq>

Guide to Campus Wellness Resources: <https://recalibrate.berkeley.edu/home>

Sequence by Week

Week of January 16th (Tu & Th Class):

January 18th: Introduction (The Enlightenment, Limited Government and Natural Rights)

Read for class:

Beccaria, *On Crimes and Punishments*, Chapters 1, 2, & 3

“Declaration of the Rights of Man and Citizen [DMRC]”

January 20th: Introduction Continued (The U.S. Solution)

Read for class:

U.S. Constitution, The Bill of Rights (Amendments 1 – 10)

Legal Theory Lexicon: The Counter-Majoritarian Difficulty

Challenging Laws, Three Levels of Scrutiny Explained

United States v. Carolene Products Co., 58 S. Ct. 778 (1938) (read footnote four, highlighted).

Part One: Individual Liberties vs. State Interests

Week of January 23rd (Tu & Th Class)

January 25th: Eugenics and Justifications for Sterilizing the “Feebleminded”

For class, read:

Buck v. Bell, 274 U.S. 200 (1927)

Stephen Jay Gould, *Carrie Buck's Daughter* (1985)

Stanley M. Aronson, *The State's Right to Sterilize* (2006)

E.Cohen & J.Bonifield, *California's Dark Legacy of Forced Sterilizations* (2012)

January 27th: Sterilization as Punishment, Sterilization to “Protect.”

Read for class:

Skinner v. Oklahoma, 316 U.S. 535 (1942)

Edmunds v. Edwards, 287 N.W.2d 420 (Neb. 1980)

Conservatorship of Valerie N., 40 Cal.3d 143 (1985) [read the red portion]

Conservatorship of Angela D., 70 Cal. App.4th (1999)

Week of January 30th (Tu & Th Class):**February 1st: Early Legal Regulation of Contraception and the Nascent Right to Privacy**

For class, read:

Selected Excerpts (the red portions) From:

Union Pacific Ry. v. Botsford, 141 U.S. 250, 251 (1891)

Mugler v. Kansas, 123 U.S. 623, 661 (1897)

Meyer v. Nebraska, 262 U.S. 390 (1923)

Read whole article:

The Right to Privacy, 4 Harv. L. Rev. 193 (1890)

Contraception in the Pre-Pill Era (Connell)

February 3rd: Birth Control, the Right to Privacy and the Pushback

Read for class:

Griswald v. Connecticut, 381 U.S. 479 (1965) [read the highlighted portion]

Eisenstadt v. Baird, 405 U.S. 438 (1972) [Read the highlighted red portions]

Read page 2 - 11 from the Bork article below (the beginning and end of the excerpt have been highlighted): Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Indiana Law Journal 1, 8–9 (1971).

Week of February 6th (Tu & Th Class)**February 8th: Abortion and the Right to Privacy**

Read for class:

Roe v. Wade, 410 U.S. 113 (1973) [Red portion, Page 12 – 23, starting and ending at the red text]

Reva Siegal, *Reasoning from the Body: A Historical Perspective on Abortion*

Regulation and Equal Protection, Stanford L. Rev. (1992)[pages 273 – 280]

February 10th: Limiting the Abortion Right (questioning the right to privacy)

Read for class:

Roe v. Wade, 410 U.S. 113 (1973) (Rehnquist dissenting) [Red portion, Page 26 - 29, starting and ending at the red text]

Planned Parenthood of Southeastern Pa. V. Casey (U.S. 1992) [excerpts in red]

Dalton Conley, *A Man's Right to Choose*, NY Times op-ed, 2005

*Depending on outcome, *Dobbs v. Jackson Women's Health Organization* (pending) may be added

Week of February 13th (Tu & Th Class)

February 15th: The State's Interest in Restricting "Deviant" Sex.

Read for class:

Rubin, G. (1984). *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*.

February 17th: Statutory Rape

Read for class:

Michael M. v. Superior Court of Sonoma Co., 450 U.S. 464 (1981)

Patricia Donovan, *Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy?* Family Planning Perspectives (1997)

Week of February 20th (Tu & Th Class)

February 22nd: Same-Sex Sex / Sodomy (and sex toys)

Read for class:

Bowers v. Hardwick, 478 U.S. 186 (1986) (majority opinion, pages 3 – 5)

Lawrence v. Texas, 123 S.Ct. 2472 (2003) (majority opinion, pages 4 – 11)

Williams v Attorney General of Ala, (2004) (the highlighted portions)

Reliable Consultants, Inc., v. Earle, 517 F.3d 738 (2008) (the highlighted portions)

Optional (you will not be tested on this, nor will it be discussed):

Robert C. Post, *Fashioning The Legal Constitution: Culture, Courts, And Law*, 117 Harv L Rev 4 (2003), parts III and IV

February 24th: Does the State have a Legitimate Interest in Heteronormativity?

Read for Class:

Eskridge, W. (2000). No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review. *New York University Law Review*, 75, 1327. (pages 1338 - 1353)

Herek, G. M. (1991). Myths about Sexual Orientation: A Lawyer's Guide to Social Science Research. *Law & Sexuality: A Review of Lesbian and Gay Legal Issues*, 1, 133. (pages 138 – 172 [finish as much as you can but be sure to have the reading completed by next class])

Week of February 27th (Tu & Th Class)

March 1st: Does the State have a Legitimate Interest in Moral Cohesion?

Read for class:

Dworkin, R. (1996). Lord Devlin and the Enforcement of Morals. *Yale Law Journal*, 75(6), 986–1005.

Part Two: Equal Protection of the Law (Impermissible Discrimination)

March 3rd: Introduction to Equal Protection Analysis.

Read for class:

No assigned readings but I will be covering new material.

Week of March 6th (Tu & Th Class)

March 8th: FIRST EXAM (in class)

March 10th: Discrimination Based on Sex

Read for class:

Goesaert v Cleary, 69 S.Ct. 198 (1948) (the highlighted portions)

Hoyt v. State of Florida, 82 S.Ct. 159 (1961) (the highlighted portions)

Women's rights and the Civil Rights Act of 1964. *National Archives*. [PDF]

Frontiero v. Richardson, 93 S.Ct. 1764 (1973) (the highlighted portions)

Week of March 13th (Tu & Th Class)

March 15th: Establishing Heightened Scrutiny

Read for class:

Craig v. Boren, 97 S.Ct. 451 (1976) (the highlighted portions)

Mississippi University for Women v Hogan, 102 S.Ct. 3331 (1982) (the highlighted portions)

United States v. Virginia, 116 S.Ct. 2264 (1996) (the highlighted portions)

What 'Because of Sex' Really Means - The Atlantic (discussing Bostock v. Clayton County, 139 S.Ct. 2049 (2019)).

March 17th: Critiques of Sex Discrimination Jurisprudence

Read for class:

Franke, K. (1995). Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender. *University of Pennsylvania Law Review*, 144(1), 1.

Week of March 20th (Tu & Th Class)

March 22nd: Spring Break (No Instruction)

March 24th: Spring Break (No Instruction)

Week of March 27th (Tu & Th Class)

March 29th : Discrimination Based on Sexual Orientation

Read for class:

Statement of Professor William N. Eskridge (to the House Committee on Education and Labor) (2009). Pages 13 – 74.

Watch: Boy's Beware! (1961). <https://www.youtube.com/watch?v=fTn7ALbLYPI>

Romer v. Evans, 517 U.S. 620 (1996): read highlighted sections

March 31st: Marriage Equality

Read for class:

Defense of Marriage Act, Wikipedia (for background). Read pages 1 – 6.

United States v. Edith Windsor, 570 U.S. 744 (2013) (read the highlighted portions)

Obergefell v. Hodges, 576 U.S. 644 (2015) (read the majority opinion, pages 11 -24).

Week of April 3rd (Tu & Th Class)**April 5th: Marriage Equality and Beyond**

Read for class:

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

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

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

Optional (will not be discussed, nor will you be tested on it):

Eskridge, W. (2013). Marriage Equality: An Idea Whose Time Is Coming. *New York University Review of Law & Social Change*, 37, 245.

April 7th: The Opposition to Marriage Equality

Read for class:

Girgis, S., George, R. P., & Anderson, R. T. (2011). What is Marriage. *Harvard Journal of Law & Public Policy*, 34(1), 245–288.

Obergefell v. Hodges, 576 U.S. 644 (2015) (read Robert's dissent, pages 30 – 45).

George, R. P. (2009, August 3). Gay Marriage, Democracy, and the Courts. *Wall Street Journal*.

Optional (will not be discussed, nor will you be tested on it):

Macedo, S. (1995). Homosexuality and the Conservative Mind. *Georgetown Law Journal*, 84, 261.

Week of April 10th (Tu & Th Class)**April 12th: Second Exam (In Class)****April 14th: Discrimination against Gay Male and Lesbian Parents**

NOTE: This class may occur online at another time. Updates will be provided.

Read for class:

Chicoine v. Chicoine, 479 N.W.2d 891, 897 (S.D. 1992) (read Justice Henderson's dissent, pages 7 – 10).

Shapiro, J. (1995). Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children. *Indiana Law Journal*, 71, 623. (read introduction to page 642).

Leinauer, M. (2021). The Moral Sex: How Policing the Moral Development of Daughters Harms Gay Parents in Custody Disputes. *Berkeley Journal of Gender, Law & Justice*, 36(1), 1. (Read highlighted portions [highlights indicate where to stop and start]).

Week of April 17th (Tu & Th Class)

April 19th: The “No Difference” Debate

Read for class:

Stacey, J., & Biblarz, T. J. (2001). (How) Does the Sexual Orientation of Parents Matter? *American Sociological Review*, 66(2), 159–183.

Optional (will not be discussed, nor will you be tested on it):

Wardle, L. (1997). The Potential Impact of Homosexual Parenting on Children. *University of Illinois Law Review*, 833.

Ball, C. A., & Pea, J. F. (1998). Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents. *University of Illinois Law Review*, 1998, 253–340

Regnerus, M. (2012). How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study. *Social Science Research*, 41(4), 752–770.

Bartlett, T. (2012). Controversial gay-parenting study is severely flawed, journal’s audit finds. *The Chronicle of Higher Education*.

April 21st: Do Children Have a Right to be Non-Heterosexual?

Read for class:

Rosky, C. J. (2013). No Promo Hetero: Children’s Right to Be Queer. *Cardozo Law Review*, 35, 425. (read pages 427 - 431 of the introduction and Part III [465 – 478])

Week of April 24th (Tu & Th Class)

April 26th: In class review of Part One

Read for class:

No readings assigned, but come prepared with questions regarding part one of this course. This is your opportunity to clarify matters before the test.

April 28th: In class review of Part Two

Read for class:

No readings assigned, but come prepared with questions regarding part two of this course. This is your opportunity to clarify matters before the test.

Week of May 1st (Reading Week. No class)

Review classes may be held if the class desires.

Week of May 8th (Exam Week. No class)

FINAL EXAM: May 13th. 11:30 a.m. to 2:30 p.m. (check for room)