

Sex, Reproduction and the Law
Summer Session 2022
Professor: Mark Leinauer

Syllabus¹

Lectures. Lectures will be held on Monday, Tuesday, Wednesday and Thursday from 4:00 p.m. to 6:00 p.m. (Pacific Time) in room 155 of the Anthro/Art Practices 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 12 p.m. to 1:00 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 noon. Your GSI, Rafael Henriquez, will hold office hours as well. Please consult his syllabus for that information.

GSI. Your G.S.I. will be Rafael Henriquez. Needless to say he is extremely knowledgeable. If you are struggling with any aspect of the material you are strongly encourage to use Rafael 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.

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 Rafael Henriquez via email to let him know.

One final note, course capture is not available during the summer. That means that there will be no recordings of my lectures available. I will be posting post lecture notes, but this makes attendance all the more critical.

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.

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

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 class). At present the exams are expected to be in-person, meaning that you will have to physically attend to take them. I may elect to change to online exams, however, if Covid concerns arise.

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/geneg>

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

Sequence by Week

Week of May 22nd

May 23rd: Introduction (The Counter-Majoritarian Difficulty and the U.S. Solution)

Read for class (these are all *very* short):

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

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

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

State Control of Sex, Reproduction and the Rise of Substantive Due Process

May 24th: 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)

May 25th: 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)

May 26th: 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)
Meyer v. Nebraska, 262 U.S. 390 (1923)
Olmstead v. United States, 48 S.Ct. 564 (1928) (The highlighted portions; Brandeis and Holmes dissenting).
Pierce v. Society of Sisters, 268 U.S. 510 (1925) (the highlighted portions).
Poe v. Ullman, 367 U.S. 497 (1961) (Read the highlighted portions).

Week of May 29th

May 30th: NO CLASS (Memorial Day)

May 31st: Birth Control, the Right to Privacy and the Pushback

Read for class:

Contraception in the Pre-Pill Era (Connell)
Griswold 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).

June 1st: 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 – 304]

June 2nd: 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

Week of June 5th

June 6th: 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

June 7th: 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*.

June 8th: 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])

June 9th: 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.

(if time allows) Short Review for Exam

Week of June 12th

June 13th: First Exam (To be Given Online)

Part Two Discrimination based on Sex, Gender and Sexual Orientation

June 14th: 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)

June 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)).

June 16th: Critiques of Sex Discrimination Jurisprudence; Gender Discrimination

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.
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (the highlighted portion)

Week of June 19th

June 20th: NO CLASS (Juneteenth Holiday) – NOTE! Make-up Class on Friday!

June 21st: 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

June 22nd: Discrimination against Gay Male and Lesbian Parents

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]).

(if time allows) Short Review for Exam

June 23rd: 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).
(if time allows) Short Review for Exam

***Material for Second Exam Ends Here.**

Part Three
Upsetting the Established Order

June 24th [Make Up Class – ONLINE]: Taking Marriage Equality Further / Opposing Marriage Equality

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.

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).

An Argument Against Same-Sex Marriage: An Interview with Rick Santorum

The Conservative Case for Gay Marriage, by Ted Olson.

Week of June 26th

June 27th: Second Exam (To Be Given Online).

Covering Material from First Exam through June 23rd

June 28th: 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 [464 – 478])(all portions highlighted).

June 29th: Overturning the Established Order?

Read for class:

Dobbs v. Jackson Women’s Health (draft opinion) (Read highlighted portions)

Or (if published before today) Dobbs v. Jackson Women’s Health (published opinion) (Read highlighted portions)

Justice Alito Somberly Ties The Noose, The Onion.

(if time allows) Review for exam

June 30th: Final Exam (to be given online)

Covering Material from the Entire Course

