

## SEXUALITY & THE LAW

WGST 5930/WGST4930/LAW 8740/POLS 4126

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“Sex, sexuality, and reproduction are ‘political’ and the traditional public/private distinction is untenable.” –*Marilyn Frye*

**Textbook:** Ball, Schacter, NeJaime & Rubenstein, *Sexuality, Gender Identity, and the Law*, 6th edition.

### Course Description:

This seminar explores the relationship between law and sexuality—how they reflect and impact each other. Law forms a backdrop to our own negotiations about our sexualities and our sexed and gendered identities, producing and regulating our sexual subjectivities and gendered selves as good/bad, healthy/harmful, or natural/unnatural. Interestingly, to find the legal norms and frameworks that regulate sexual behavior and gender identity, we have to study cases involving not only the “right to privacy” or “don’t ask don’t tell,” but cases raising questions about freedom of assembly, association, and expression; freedom of religion; immigration; and employment policies. That is to say, ideas about gender and sexuality pervade our whole system of law. As a result, we trace *themes* throughout the semester, giving us broad exposure to the legal system. Finally, we also read legal decisions not only as judicial documents but also as political and theoretical ones that give expression to ideas about human nature, social goods, normalcy and deviancy, socially appropriate and constructive behavior, the relationships between private and public, and how gender, sexuality, disability and race interact. These approaches complement but do not replicate those in other disciplines.

### Learning goals:

Students will

- Analyze the logic and assumptions of law’s varying relationships to the private and public aspects of sex roles, sexual orientations, and sexual practices.
- Explore the broad impacts of legal decisions—personal, political, economic, etc.
- Learn to employ an intersectional analysis of identity and oppression in interpreting legal cases—a framework that explores how one’s sex, gender and sexuality cannot be divorced from other axes of identity, such as race, class, and dis/ability.
- Develop and use legal reasoning and critical thinking skills to understand debates and diverse positions over legal questions that take place in courtrooms and beyond. Our expectation is that we will all approach controversial issues, theories and texts with both a critical lens and an open mind.
- Grasp (often evolving) definitions/uses of key legal and social terms, including: right to privacy, transgender, sodomy, Equal Protection classification of sexual orientation,

human nature, social welfare, Title VII discrimination, legal regulation of sexual conduct, consent, social construction, and marriage equality.

- Improve skills in reading, writing, and presenting and, ultimately, expand their knowledge of law, sexuality, gender, and society.

### **Course requirements & grade determination**

1. **Class attendance** (20 points) and regular, constructive, thoughtful, and civil **participation** (20 points).
2. In pairs, one **oral case presentation** (15 points), material (outlined is fine) handed in.
3. Two **case “follow-ups.”** Oral presentation only (10 points each = 20 points).
4. Write-up of the **field trip** of your choice, taken with at least one other student (25). Write-up should contain a) short summary of the event, b) connections to aspects of 2-3 cases (depending on depth of connection), and c) reflections. Turn in the write-up within a week of your trip.
5. **Midterm: in class** portion (50 points: focus is primarily on usage of terms, evolution of cases, and application) and **take-home** portion (50 points: focus is primarily on connections between cases and conversation between the classroom and the world outside of it).
6. Final (ditto). 50 + 50 = 100.
7. Extra Credit: Attend one campus talk related to class (check WGST website calendar) and submit a short write-up relating it to any 2 cases (10 points). Due one week post-talk.

**TOTAL = 300 points**

**292 - 300 = A+**

**281 - 291 = A**

**270 - 280 = A- etc.**

## **PART I: INTRODUCTORY MATERIAL**

### **M 1/14: INTRODUCTIONS TO THE COURSE AND EACH OTHER**

- Feminist citizenship in the classroom
- “The Lawes Resolutions of Women’s Rights” (1632)

### **W1/16: SOME STARTING POINTS IN LAW REGARDING GENDER & SEXUALITY**

- Comstock Law (1873) <http://law.jrank.org/pages/5508/Comstock-Law-1873.html>
- IN RE GOODELL (1875) (BB)
- BOUTILIER V I.N.S. (1967) (Click “case”)  
<http://supreme.justia.com/cases/federal/us/387/118/case.html>

### **M 1/21 MLK DAY**

### **SOME USEFUL THEORETICAL FRAMES TO BRING TO THE CASES**

*As you read these pieces, consider 1) what practices or institutions the author is praising or criticizing, and why; 2) how current practices are both embedded in a history we often forget and attempting to redirect it; and 3) what you find most novel, surprising, exciting, suspicious, confusing, etc. in these papers? Bring those questions to class.*

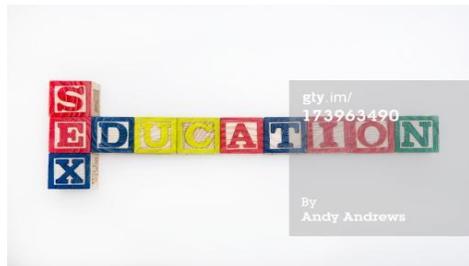
### **W 1/23:**

- Catherine MacKinnon, “Feminism, Marxism, Method, and the State: An Agenda for Theory,” excerpt (BB)
- Gayle Rubin, “Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality.” (<http://sites.middlebury.edu/sexandsociety/files/2015/01/Rubin-Thinking-Sex.pdf>)

### **W 1/28:**

- Anne Fausto-Sterling, “The Five Sexes Revisited”  
<https://pdfs.semanticscholar.org/21a4/4d10b40354a974c8d1d3a9a0e66fef731e75.pdf>
- J. Jack Halberstam, “An Introduction to Female Masculinity” (BB)
- Laumann et al, “The Social Organization of Sexuality” p 31

## PART II. SEXUALITY & THE LAW ESP. RELEVANT TO YOUNG PEOPLE



*What should schools teach about sex and sexuality? What is the role of families in sex education? What community groups should be granted government funds for such education? What is at stake, for whom (children, adults, families, the state, etc.)? What do students need to know? How can sex education be made age appropriate? What makes sex education so controversial? How does sex education fit with the public/private divide? How much variety is there among state approaches? How has sex education evolved, why, and with what consequences? Note the changing messages about biology, sexuality, and social relationships in the readings, and consider their appeals to science and social norms. Does the language used to express these messages change?*

### W 1/30: IN THE CLASSROOMS: Sex Ed

- National Sexuality Education Standards: Core Content and Skills, K-12” (2011)  
<http://www.futureofsexed.org/documents/josh-fose-standards-web.pdf>
  - This document covers what should be taught about sexuality to youth in every grade, and why. Look at the ends, or goals, this educational project is intended to accomplish. What do you think of them? Do you think the recommended programs have a reasonable chance of meeting those goals? What is assumed about youth and about sexuality in this document?
- “ACLU Lawsuit is the First of its Kind in California”
  - <http://www.aclusandiego.org/parents-and-doctors-sue-clovis-unified-school-district-over-sex-education>
  - Complaint filed in Superior Court of California (2012)  
[https://www.aclu.org/files/assets/clovis\\_legal\\_complaint\\_0.pdf](https://www.aclu.org/files/assets/clovis_legal_complaint_0.pdf)

### M 2/4: IN THE COURTROOMS

- Sexting: MILLER v MITCHELL (2010)  
<https://www.courtlistener.com/opinion/259/miller-v-mitchell/>
- KEETON v ANDERSON-WILEY (2011) <https://caselaw.findlaw.com/us-11th-circuit/1588822.html>
- Smith and Kercher, “Adolescent Sexual Behavior and the Law” (2011). p 1-17  
[http://www.crimevictimsinstitute.org/documents/Adolescent\\_Behavior\\_3.1.11.pdf](http://www.crimevictimsinstitute.org/documents/Adolescent_Behavior_3.1.11.pdf)

### W 2/6: FREE SPEECH AND SCHOOLS (WE NEED TO SELECT FROM THESE!)

- FRICKE v LYNCH (1980) p 778
- HARPER v POWAY UNIFIED SCHOOL DISTRICT (2006) p 800

### M 2/11: SEX EQUALITY IN EDUCATION & TITLE IX

- US v VIRGINIA (1996) p 239

- PETRIE v ILLINOIS HIGH SCHOOL ASS'N (Ill. App. 1979), <https://www.courtlistener.com/opinion/2045848/petrie-v-illinois-high-school-assn/>
- COHEN v BROWN UNIVERSITY (1st Cir. 1996), [https://scholar.google.com/scholar\\_case?case=7931563980578497860&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholarr](https://scholar.google.com/scholar_case?case=7931563980578497860&hl=en&as_sdt=6&as_vis=1&oi=scholarr)

## **PART III: REPRODUCTION, SEXUALITY, AND THE EVOLUTION OF “PRIVACY”**

### **W 2/13**

#### **Sterilization**

- BUCK v BELL (1927) 274 U.S. 200  
<http://www.law.cornell.edu/supremecourt/text/274/200>
- SKINNER v OKLAHOMA (1942) 316 U.S. 535  
<https://supreme.justia.com/cases/federal/us/316/535/>
- WALKER v PIERCE (1977) 560 F.2D 609  
[http://www.leagle.com/decision/19771169560F2d609\\_11072.xml/WALKER%20v.%20PIERCE](http://www.leagle.com/decision/19771169560F2d609_11072.xml/WALKER%20v.%20PIERCE)

### **M 2/18 Birth Control**

- GRISWOLD v CONNECTICUT (1965) p 79
- EISENSTADT v BAIRD (1972) p 84

### **W 2/20**

- BURWELL v HOBBY LOBBY AND CONESTOGA WOOD (2014) p 877

### **M 2/25 Abortion**

- ROE v WADE (1973) p 89
- PLANNED PARENTHOOD v CASEY (1992) p 93

### **W 2/27 Reproductive Technology**

- DMT v DMH (2013) p 689
- RAFTOPOL v RAMEY (2011) p 763
- Radhika Viswanathan, *3 Biological Parents, 1 Child, and an International Controversy*, VOX (July 28, 2018), <https://www.vox.com/2018/7/24/17596354/mitochondrial-replacement-therapy-three-parent-baby-controversy>

### **M 3/4 Attend the Bridge Lecture (Readings by Imani Perry TBD)**

### **W 3/6 MIDTERM (Take-home portion due at the beginning of class)**

## **SPRING BREAK**

## **PART IV: Gay Marriage, Polygamy, etc.**

### **M 3/18 The Sodomy Cases**

BOWERS v HARDWICK (1986) p 110

LAWRENCE v TEXAS (2003) p 122

**W 3/20 Marriage Equality**

US v WINDSOR (2013) p 318

OBERGEFELL v HODGES (2015) p 321

**M 3/25 Non-Judicial Readings on Marriage Equality**

Acklesberg & Plaskow, “Why We’re Not Getting Married”

“Gay Marriage: Pros and Cons” (2014) <http://gaymarriage.procon.org>

“Same-Sex Marriage Is a Radical Feminist Idea” (2012) <http://prospect.org/article/same-sex-marriage-radical-feminist-idea>

**W 3/27 Polygamy**

- STATE v HOLM (2006) p 164
- BROWN v BUHMAN (2013) p 172
- Ann Tweedy, “Polyamory as a Sexual Orientation.” p 46

**M 4/1 Post-Obergefell**

- PIGEON v TURNER, <https://law.justia.com/cases/texas/supreme-court/2017/15-0688.html>
- PAVAN v SMITH (2017), supp. pp. 19-21
- MASTERPIECE CAKESHOP (2018), supp. pp. 24-31

**PART V: WORKPLACE ISSUES AND MORE**

**GENDER & SEXUALLY APPROPRIATE BEHAVIOR, DRESS, ETC., & EMPLOYMENT**

**W 4/3 & M 4/8:**

- DIAZ v PAN AM. WORLD AIRWAYS (1971), [https://scholar.google.com/scholar\\_case?case=16459524217577963657&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=16459524217577963657&hl=en&as_sdt=6&as_vis=1&oi=scholar)
- CHAMBERS v OMAHA GIRLS CLUB (1987), <https://law.justia.com/cases/federal/appellate-courts/F2/834/697/33005/>
- PRICE WATERHOUSE v HOPKINS (1989) p 339
- JESPERSEN v HARRAH’S OPERATING CO., INC. (2006) p. 344
- PROWEL v WISE BUSINESS FORMS (2009) p. 360

**W: 4/10 & M 4/15 Transgender Issues and Possibilities**

- ULANE v EASTERN AIRLINES (1984) p. 393
- SCHROER v BILLINGTON (2008) p. 404
- GLENN v BRUMBY (2011) 263, 419
- EEOC v R.G. & G.R. HARRIS FUNERAL HOMES (2018), <http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0045p-06.pdf>
- GG v GLOUCESTER CTY. SCHOOL BOARD (BB), [https://scholar.google.com/scholar\\_case?case=8559666395330509814&q=gg+v.+gloucest+er+county+school+board&hl=en&as\\_sdt=6,26&as\\_vis=1](https://scholar.google.com/scholar_case?case=8559666395330509814&q=gg+v.+gloucest+er+county+school+board&hl=en&as_sdt=6,26&as_vis=1). This case was vacated by the

Supreme Court when the Dep't of Education rescinded guidance that required the school to allow GG to use the bathroom of the gender he identified as. Here is the decision on remand:

[https://scholar.google.com/scholar\\_case?case=5215135555693553440&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=5215135555693553440&hl=en&as_sdt=6&as_vis=1&oi=scholar)

- Emi Koyama and the Survivor Project, “Guide to Intersex and Trans Terminologies”  
<http://www.survivorproject.org/pdf/terms.pdf>

**W 4/17 & M 4/22 Sexual Orientation Issues and Possibilities**

- DAWSON v BUMBLE & BUMBLE (2005) p. 354
- VIDECKIS V. PEPPERDINE UNIVERSITY, 150 F. Supp. 3d 1151 (C.D. Cal. 2015),  
<https://www.leagle.com/decision/infdco20151215828>
- HIVELY V. IVY TECH CMTY. COLLEGE, supp. 1-18

**W: 4/29 Sexual Harassment under Title IX**

- Gebser v Lago Vista Independent School District, 524 U.S. (1998),  
<https://www.law.cornell.edu/supct/pdf/96-1866P.ZO>
- DAVIS v MONROE COUNTY BOARD OF EDUCATION (1999)  
<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=97-843>
- “Questions and Answers on Title IX and Sexual Violence” (2014)  
<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (pgs. 1-16 only)

**M: 5/1 Sexual Harassment under Title VII**

- MERITOR SAVINGS BANK v VINSON (1986), <https://caselaw.findlaw.com/us-supreme-court/477/57.html>
- ELLISON v BRADY (1991), <https://law.justia.com/cases/federal/appellate-courts/F2/924/872/224242/>
- ONCALE v SUNDOWNER OFFSHORE SERVICE, INC (1998) p.366

**W: 5/6 FINAL EXAM (take home portion due at the beginning of class)**

**DESCRIPTION OF ASSIGNMENTS FOR TAKE-HOME PORTION. CHOOSE ONE.**

**BOXERS** are our alternative to legal briefs. Boxers are looser (pleasant to write and read), functional (cover all the essentials), individualized (light blue cotton or scooby-doo flannels?), and clean (no holes in the arguments; appearance would not embarrass mom or dad). The main idea is to have one case developed in detail, and to use that detail to bring in particular aspects of other cases and events by comparison. So pick a juicy case, rich with material, for your central one.

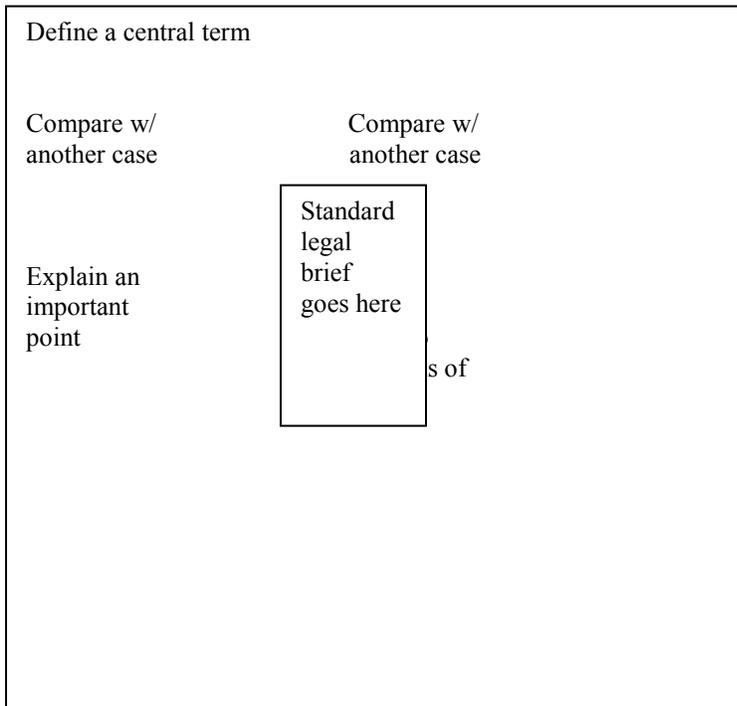
Exhibit A: The extended brief (one model)

Put the central brief in the middle of the page or on a separate sheet.

Make links, indicating with lines or numbers in the brief what you're linking with the various aspects of the case.

Some possible things to draw out:

- Define a central term
- Compare the facts with another case
- Compare the decision with another case
- Tie some aspect of the case to a current event in the news
- Compare two approaches to the framing of the case
- Other items of your choosing are welcome



**NEWS LINKS** invite you to pick a current (from this semester) news item, and develop 3 substantive connections between elements of the news story and 3 specific cases. Begin with a short summary of the news item. Then turn to connections. Be clear about (1) the subject of the comparison, (2) what the article and the cases say about it, and (3) how they differ or overlap. Conclude with a few reflections. Attach a copy of the news story.

**THE ARTS** invite you to write poetry, compose (and present!) a song, paint a picture, or use another art form to convey information and ideas about the cases. Art projects, like News Links, must include references to three specific cases, either directly or, where appropriate, in an accompanying explanation of what you are capturing in your artistic creation.