Gender, Sexuality and the Law
Law 752 – Spring 2012

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Office Hours: Tuesdays from 2:00 to 4:00 in Room G560 Gambrell Hall. To book an appointment during my office hours or at any other mutually convenient time please contact me by email via your Emory account. Please note that grades may not be discussed via email.

Class Times: Thursdays 4:15-6:15 in Gambrell Hall Room 5D.

Students with Disabilities: Emory University provides all persons an equal opportunity to participate in and benefit from programs and services afforded to others. The Office of Disability Services (ODS) assists qualified students in obtaining a variety of services (i.e., alternative testing, notetaking, interpreting, advocacy, mobility/transportation, etc.) and ensures that all matters of equal access, reasonable accommodation, and compliance are properly addressed. Students with disabilities requiring accommodation in the classroom or in the examination or evaluation process are encouraged to identify themselves to the ODS Office (Suite #110 of the Administration Building or (404) 727-9877 ) as soon as possible. All requests for accommodation will be kept confidential.

Course goals:

Students will learn to:
1) Analyze the logic and assumptions of a variety of perspectives on the question of law’s relationship to sex, class, gender, sexuality, and race.
2) Learn to situate definitions of sexuality and gender identity within a sociohistorical perspective.
3) Develop effective and persuasive legal reasoning through comparative judicial analysis.
4) Expand critical thinking skills and learn to evaluate complex theoretical arguments.
5) Develop and practice writing and presentation skills as well as a critical perspective on legal advocacy.

Learning Objectives:

This seminar aims to explore the socially constructed norms and frameworks enabling the legal regulation of human sexuality. The seminar will offer students a comparative law perspective on issues of sexual orientation, gender identity and justice, while providing the critical tools required to evaluate a host of legislative and judicial responses to gender and sexuality. We will look at emerging case law from common and civil law jurisdictions around the world to analyze how certain types of sexual behavior and gender identity are regulated (including freedom of assembly, association and expression, freedom of religion and non-discrimination, asylum and immigration and universality and equality), while also examining the judicial response to ‘deviant’ sexual bodies in action (including transgender identities,
intersex bodies, same-sex marriage, new family forms, and the decriminalization of sodomy).

A central question will be: How do we situate cultural, geographical and historical understandings of sexuality while remaining attentive to local state and individual practices? We will also pay close attention to the methodology of comparative law itself, and track the politics of comparison as we explore various judicial approaches toward sexuality and gender identity. How have histories of colonialism and imperialism shaped modern understandings of nation, gender and sexuality? How are new complexities being created across these historical entanglements? We will move beyond U.S. jurisprudence to a global setting as we seek to understand how different structural conditions produce particular legal outcomes.

In looking at case law, international rights norms and legal precedent from other common and civil law jurisdictions, we can begin to unpack the multiple ways that legal regulation operates. Throughout these classroom discussions we will pay close attention to the variety of social forces and discourses that operate to regulate sexual subjects. As a whole, the seminar will offer students a strong theoretical and doctrinal analysis, and provide the critical tools required to evaluate a host of legislative and judicial responses to human sexuality.

Evaluation:
Your grade in the seminar will be calculated on the basis of:

1. seminar attendance and engagement (10%);
2. one critical reflection and presentation on readings (10%);
3. conference paper and presentation (10%);
4. draft paper peer review (10%); and
5. your term paper (60%).

Seminar attendance and engagement (10%)
This seminar is designed to promote discussion and consideration of the ethical, moral, legal and sociological questions raised by each week’s readings and jurisprudence. Each class will not be conducted in lecture style but moderated as a shared analysis and discussion of the readings assigned. For this reason it is essential that you complete the assigned readings each week. I will assign a manageable amount of course material and you will need to have read all assigned texts to contribute adequately to class discussion. Students not in a position to devote regular weekly periods of time to this course (as opposed to a large chunk of time at the end) should take this design feature of the course into consideration.

I will be taking attendance and brief notes of your contributions to seminar discussions. If possible, please let me know ahead of time if you will be unable to attend a class. Regular attendance does not ensure a strong participation grade, but unexplained absences will ensure a weak grade. Students should prepare for each week’s seminar by reading the assigned materials and thinking of at least one thought or question to contribute to our discussion.

Given the personal, and sometimes very sensitive or emotional nature of the subject-matter covered in the course, it is especially important in this seminar to choose one’s words thoughtfully and to engage with each other’s views respectfully. It is also important that we treat our discussions as private. You should never repeat outside of the seminar, absent
consent, any personal opinions or disclosures made by students inside the seminar.

If you are having difficulty contributing regularly to class discussions, or if you miss a number of classes, you should discuss with me some other way that you can demonstrate engagement with the materials (e.g., commenting in writing on the readings, discussing issues in my office hours). Students who attend the seminar regularly, explain any absences, and show some evidence of consistent engagement, will receive at least a 'B' grade for seminar attendance and engagement.

**One critical reflection and presentation on readings (10%)**

Each student will prepare and present one critical reflection on the assigned readings. The purpose of this assignment is to identify key issues and promote critical analysis in our seminar discussions. The reflections should assume that everyone has read the materials – that is, do not simply summarize the readings. Instead, isolate one or two issues raised by the readings and critically engage with them. You may choose to address a small part of the assigned readings, a larger issue that cuts across the readings, or an issue that was not addressed in the readings. Critical reflections should be a minimum of two pages (double-spaced, 12 point font) and no more than five pages in length.

Please inform me of the top three dates/topics (in order of preference) you would like to comment on by the second class on Thursday, January 19th, and I will do my best to accommodate everybody’s top choices. Please review the syllabus and come to class on January 19th with a written submission indicating your preferred presentation dates. Think about alternatives as you may not get your first choice.

Each weekly topic will be assigned to one or two students, and you will all be presenting your critical reflections orally to the class. While you do not need to read directly from your written reflection and may engage through notes or bullet points, I realize that many students find making class presentations challenging. If you need to read directly from the prepared text in order to feel comfortable you are welcome to do so and your grade will not be penalized. However do keep in mind that this course is part of your legal education and is preparing you for speaking with confidence in front of others. Oral presentations should each run about 10 minutes in length.

No external research is required. Please note that your critical reflections must be forwarded to me by email (smarvel@emory.edu) by 12pm on the Wednesday before the class in question. A hard copy must also be submitted to me on the Thursday evening class at which you make your presentation.

Each reflection should:

- provide a brief overview of the arguments or positions presented in the article or judgment
- identify one or two questions/issues/debates to be discussed in the analysis
- provide a very brief outline of the principal arguments (and/or approaches) of the authors in relation to the cases/issue/debate identified
- and (most importantly) offer a critical assessment of the readings around the cases/issue/debate identified, setting out the student’s own observations, opinions,
• pose a few questions to the class that you believe will stimulate further discussion of the major themes.

Questions that students might address in their critical analyses include the following: What are the major questions being addressed by these cases? How have the courts conceived of their role vis a vis the legislature, public morality and social norms? Who has initiated the proceedings and why? What are the most important debates about these questions? How do the various authors fit into these debates? What are the important theoretical and normative assumptions underlying these questions? What are the competing methodologies employed to address these questions? What is your assessment of the authors’ success in addressing these questions? Where should the debate and future research go?

Absent a compelling explanation, students who do not submit a critical reflection on time and/or do not attend class to present their comments will not receive credit for that portion of the grade.

Draft paper peer review (10%)
A key focus of this class will be learning how to conceptualize, research, draft, critique and present a substantive work of legal scholarship. To this end, you will be responsible for producing a series of paper outlines and drafts throughout the term.

I require the submission of one or two paragraphs on your proposed paper topic on February 16th, an annotated outline on March 8th, and a 15-page draft paper by March 28th. You will not be graded on these drafts, but they are mandatory and essential to your success in the final paper.

Each student will also be assigned the task of commenting on the draft papers of two other students, for which you will receive a total mark worth 10% of your grade. Draft papers must be sent to me by email by 12pm on Wednesday, March 28th. I will copy the outlines and assign them to peer reviewers at our meeting on Thursday, March 29th. The draft papers (suggested length: about 15 pages double-spaced) should include: your name, email address, title, a description of your paper topic, the issues you intend to explore (which may include or be in the form of a preliminary outline of the structure of the paper), the primary and secondary sources you intend to review, and a short bibliography (minimum 10 sources).

Your feedback will be delivered to your colleagues in class during the Peer Review Session on April 5. Your feedback should be concise (suggested length: 300-500 words for each comment) and should give a candid appraisal and constructive suggestions to your colleagues. Does the title work? Is the paper topic well defined? Is it too narrow or too broad? Are the main issues clearly identified? Is the importance of the topic apparent? Has the author made clear what s/he aims to contribute to the literature? Can the author’s goals be accomplished in a 30-page term paper? Is the author’s research methodology appropriate for the topic? Are there important sources (cases, legislation, articles, books) not mentioned in the bibliography?

Absent a compelling explanation, students who do not attend the Peer Review Session will not
receive credit for that portion of the grade.

**Conference paper and presentation (10%)**
The grade is based on the quality of your conference paper and presentation.

Each student will present their work at a Saturday mini-conference to be held on April 14th and/or April 21st subject to class preferences and enrollment numbers. You will be organized into three- or four-person panels and expected to deliver an approximately 15-minute presentation on your draft term paper, to be followed by a Q&A session with the remainder of the class. This experience will offer a valuable opportunity to present your work orally and help you learn how to streamline a written piece for conference presentation.

All-day attendance at your Saturday session is mandatory. Please consider this requirement when deciding whether to take this course. Students who do not attend and present at a Saturday mini-conference will not receive credit for the course.

**Term Papers (60%)**
You are required to write a research paper on a topic of your choosing, which will explore an aspect of the comparative legal regulation of sexual orientation and gender identity. Papers will be graded on the quality of the research, writing and analysis.

I will expect complete and thorough research of the topic with appropriate and accurate citation to sources used. Research must include the following: Reference to (a) primary sources such as case and statutory authority, and (b) secondary materials including but not limited to legislative history materials, law review articles and other works of legal scholarship and non-legal materials where appropriate; Thorough analysis of the researched materials consistent with the logical development of an overall premise or theme; Demonstration of original analysis including identification of unresolved issues and suggestions for their resolution, conclusions based upon the analysis of the sources and suggestions for likely future developments where appropriate; Clear, well organized discussion of the topic with due regard to the fundamentals of good expository writing including grammatical rules, accurate spelling and punctuation and proper sentence and paragraph structure.

**Term papers are due on Monday, April 30th via hard copy AND email by 5pm.** Papers not submitted on time will be subject to a letter grade (10%) deduction for each week they are overdue. This is a firm deadline.

**Length and format:** Papers must be a minimum of 30 pages in length exclusive of endnotes and bibliography. Papers are not to exceed 8,500 words. Please include a word count when you submit your papers. Papers must be typed on 8 1/2 x 11" paper with one-inch margins, and Times New Roman font no larger than 12 points. Text should be double-spaced, while references and endnotes should be single-spaced (with a double-space between entries). Final submissions must use Bluebook citation form. This is not the same as ALWD, which you learned in legal writing. A bibliography of sources must be attached to the paper. Make a cover page and have an original title, print with black ink (except for pictures, figures and so on) and make sure all cited work appears in the bibliography and is properly endnoted. I need not remind you that plagiarism results in an automatic failure.
Approval of topic and submission of outline: To conduct successful research, you need a clear purpose or set of questions to explore, and a realistic, achievable research agenda. To write a successful paper, you need a clearly articulated thesis (i.e., you need to clearly define the contribution you are seeking to make) and a well-organized design for the unfolding of your analysis and argument. All of this requires as much advance planning as possible. Settling on a topic early in the semester is a must. To this end, I encourage you to speak to me as soon as possible to discuss your proposed paper topic.

Again, I require the submission of one or two paragraphs on your proposed paper topic by February 16th, an annotated outline on March 8th, and a 15-page draft by March 28th. You will not be graded on these drafts, but they are mandatory and essential to your success in the final paper.

Possible Paper Topics: Selecting a topic can be a challenge. You should choose a topic that you care about in which you are interested in learning more. Your topic should be tailored to the themes of the course described in the course objectives (although it need not overlap with the assigned readings). It should be sufficiently focused and capable of being adequately researched, given time and length constraint. For additional information on the writing requirement: [http://www.law.emory.edu/academics/registrar/writing-requirement.html](http://www.law.emory.edu/academics/registrar/writing-requirement.html)

Key Dates and Deadlines:

January 19 – Top three choices for critical reflection due in class

February 16 – One-two paragraphs on proposed paper topic due in class

March 8 – Annotated outline due in class (2-5 pages)

March 28 – 15 page draft paper due via email

March 29 – Peer reviewers assigned in class

April 5 – Peer Review Session in class (hard copy of comments due to me)

April 14 – Saturday Sexuality, Gender and the Law Conference I (date to be confirmed)

April 21 – Saturday Sexuality, Gender and the Law Conference II (date to be confirmed)

April 30 – Final papers due

Readings:

Supplementary readings for this course consist of cases, statutes, ordinances, and articles that I will upload onto Blackboard. We will use the following primary text:

Gender, Sexuality and the Law Course Schedule  
(subject to revision)

January 12 – Seminar Introduction  
Class introductions, review of syllabus, explanation of seminar evaluation and deadlines.

January 19 – Doing Comparative Law About Sexuality and Gender Identity  
How does comparative law move across time and cultural frameworks? Exploring structural models of justice, equality, rights and dignity. Understanding positionality, cultural essentialism and the project of comparison.

- ICJ Casebook - Foreword & Intro, Pgs xix-xxiii; 1-4  
- Amr Shalakany, “The Origins of Comparative Law in the Arab World, or how sometimes losing your Asalah can be good for you”, (Chapter from Riles’ edited volume). Pgs 152-188.  

January 26 – Thinking Through Sexual Identity and Globalization  
How do ideas of sexuality and gender identity take hold in different locations at different points of history? What is the relationship between sexuality, race, capital and national belonging? How can we undertake a transnational study of sexuality? Exploring individualism, identity, privacy and the policing of deviance.

- Eskridge and Hunter, *Sexuality, Gender and the Law*, Pgs 537-545; 551-560 (read before Foucault); 584-593 Postmodern Theory (read after Foucault).  
- Michel Foucault, 'We Other Victorians', *History of Sexuality, Vol. 1: An Introduction*. Pgs 3-13  
February 2 – NO CLASS – Essay Writing and Analysis of Yogyakarta Principles

Read articles on writing student legal research papers, review ICJ casebook chapters not covered in class, read through list of sample topics and consider how to apply theoretical models to judicial analysis. Familiarize yourself with Yogyakarta Principles and read three analyses. How do the authors approach the Principles differently? How do they analyze the foundational concepts of 'Sexual Orientation' and 'Gender Identity'? What contrasting arguments are they making and why? Start your own research on possible term paper topics for submission of one to two paragraph abstract by February 16th.

- Eugene Volokh, Academic Legal Writing: Law Review Articles, Student Notes, Seminar Papers, and Getting on Law Review (excerpt on Blackboard) – emphasis on picking a topic - I suggest finding your own copy of either Volokh or Fajans & Falk)
- Yogyakarta Principles
- Michael O'Flaherty and John Fisher - Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles
- Thoreson - Queering Human Rights - The Yogyakarta Principles and the Norm that Dare Not Speak its Name
- Waites - Critique of Sexual Orientation and Gender Identity in Human Rights Discourse - Beyond Yogyakarta

For further reading:

- Craig Scott, 'Producing an Insightful Research Paper: Some Elements to Consider'
February 9 - Sexuality, the 'Gay International' and the War on Terror

Extending our analysis of the transnational, we will trace a scholarly discourse through conflicting authors in order to understand how autonomy, agency, imperialism, globalization, human rights and the war on terror might converge in our study of sexuality. Read the debates and form your own opinion, paying attention to what rationales each author uses to support their argument.

- Joseph Massad – The Intransigence of Orientalist Desires: A Reply to Schmitt (2003); Pgs 593-594
- Jasbir Puar – Mapping US Homonormativities (2006); Pgs 67-88
- Peter Tatchell – Their Multiculturalism and Ours (2007); Pgs 16-26
- Stacy Douglas et al – Liabilities of Queer Anti-Racist Critique, Feminist Legal Studies, 19 (2010); Pgs 107-118
- Rahul Rao – Queer in the Time of Terror (2011); Pgs 43-66

For further reading:

- Haritaworn, Jin, Tamsila Tauqir, and Esra Erdem, Gay Imperialism: The Role of Gender and Sexuality Discourses in the 'War on Terror'. In Out of Place: Silences in Queerness/Raciality. (2008)
- Henriette Gunkel and Ben Pitcher - Racism in the Closet - Interrogating Postcolonial Sexuality, Darkmatter
February 16 - Decriminalization

How do courts conceive their role in relation to legislatures, public morality and the criminal law? What presumptions of identity are in play? Of medical and psychological discourse? How did these come to take hold in different countries around the world?

- ICJ Casebook, Pgs 7-46
- Schlesinger – 'Legal Transplants' - pp 223-248

FOCUS ON INDIA:

- Upendra Baxi – Dignity In and With Naz, Law Like Love, Pgs 231-252
- Arvind Narrain - Queer Challenge to Sec 377
- Ratna Kapur – A Love Song to our Mongrel Selves
- Robert Wintemute- Same-Sex Love and Indian Penal Code Sec 377 - An Important Human Rights Issue for India (Skim over repetition from Kirby article)
- Bhagwati - Judicial Activism in India

For further reading:
- Douglas Sanders - 377 and the Unnatural Afterlife of British Colonialism in Asia, Asian Journal of Comparative Law Volume 4, Issue 1 2009 Article 7
- Allison Jernow, Morality Tales in Comparative Jurisprudence: What the Law Says About Sex

February 23 - Universality, Equality and Non-Discrimination

What is the principle of universality founded upon? How do these decisions distinguish between status and conduct? What does it mean to claim sexual orientation or gender identity as a human right?

- ICJ Casebook, Pgs 47-68
- UDHR, ICCPR, ICESC
- Katherine Franke - Sexual Tensions of Post-Empire
- Wendy Brown - The most that we can hope for - Human Rights and the Politics of Fatalism
- Taiwo Oloruntoba-Oju - A Name my Mother Did not Call Me: Queer Contestations in African Sexualities. Pgs 1-21

FOCUS ON UGANDA:

- David Kato: A matter of life and death: The struggle for Ugandan gay rights (Podcast), Centre for Gender Studies and the Centre of Governance and Human Rights, Cambridge, UK.
  http://www.polis.cam.ac.uk/cghr/events_2010_catouganda.html
For further reading:

- Michael Ignatieff - Human Rights as Politics and Idolatry
- Abdullahi An-Na'im, "What do we mean by universal?", Index of Censorship, 1994, 120-128.
- Kollman and Waites - Global Politics of LGBT Human Rights - An Introduction

March 1 – Freedom of Assembly, Association and Expression
What kinds of 'publics' and 'public moralities' are under discussion here? What sort of judicial balancing is happening? How are certain democratic ideals being enacted through these decisions?

- ICJ Casebook, Pgs 93 – 122

FOCUS ON POLAND:

- Sina Van den Bogaert - ECHR Rules on Illegal Ban of Warsaw Equality Parade: The Case of Bączkowski and Others v. Poland
- Adam Bodnar - Shaping the Freedom of Assembly - Counter-Productive Effects of the Polish Road towards Illiberal Democracy
- Agnieszka Graff - We are (not all) homophobes – a report from Poland
- Anna Gruszczynska – When Homo-Citizens Go Marching In: Politicization of Sexuality and the Lesbian and Gay Movement in Poland
For further reading:

TURKEY
- Michael Jones – Turkey's Gay Problem
- lawyer Yasemin Öz - Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity - Legal Report: Turkey, Pgs 3-18; 49-53.
- Amnesty International criticizes judicial harassment of LGBT association
- SiyahPembe Üçgen cannot be closed down!
  http://www.ilga-europe.org/home/guide/country_by_country/turkey/siyahpembe_ucgen_cannot_be_closed_down
- Ertetik - Coming out as Political Act in LGBT Movement in Turkey- Chapters 5 & 6.

March 8 – Asylum and Immigration
What standards govern determinations of refugee status and how does this impact sexual and gender minorities? How and why are residency rights provided (or denied) to same-sex couples? What operations of power are in circulation and what kinds of borders are the most/least porous?

- ICJ Casebook, Pgs 285-308
- Eithne Luibhéid - Sexuality, Migration, and the Shifting Line between Legal and Illegal Status

FOCUS ON UK:

- Janna Wessels -HJ (Iran) and another – Reflections on a new test for sexuality-based asylum claims in Britain
- Laurie Berg and Jenni Millibank - Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants

For Further Reading:

- Jenni Millibank – Role of Rights in LGBT Asylum Claims
- Rachel Lewis – Cultural Politics of Lesbian Asylum
March 15 – NO CLASS – READING BREAK

March 22 – Same-Sex Marriage

What claims for sexual citizenship are embodied in the marriage debate? How are these different (if at all) for transgender people? Why has this issue generated so much controversy and what rights are at stake?

- ICJ Casebook, Pgs 205-226; 339-382
- Eskridge and Hunter, Sexuality, Gender and the Law, 1015-1019; 1097- 1105

FOCUS ON USA:

- Lisa Duggan, "Holy Matrimony!," Nation, 5 March 2004, 14 - 19
- Nancy Polikoff – Law That Values All Families: Beyond (Straight and Gay) Marriage
- Croyle - Perry v Schwarzenegger - Prop 8 and the Fight for Same-Sex Marriage

For Further Reading:

- Douglas NeJaime -The Legal Mobilization Dilemma

March 29 – Parenting

Do lesbian, gay and transgender individuals have a right to be parents? If so, should they face extra evidentiary burdens? What presumptions are made about the stability and safety of the heterosexual family? How are the best interests of the child determined?

- ICJ Casebook, Pgs 253 – 284
- Ruthann Robson, Our Children: Kids of Queer Parents & Kids Who are Queer—Looking at Sexual Minority Rights from a Different Perspective, 64 A LB. L. REV. 915 (2001)
- Ronner - When Courts Let Insane Delusions Pass the Rational Basis Test - Florida’s Exclusion of Homosexuals from Adoption

FOCUS ON CANADA:

- Nicole LaViolette - Dad, Mom — and Mom: The Ontario Court of Appeal’s Decision in A.A. v. B.B.
- Susan Boyd, “Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and
• Fiona Kelly - (Re)forming Parenthood : The Assignment of Legal Parentage Within Planned Lesbian Families

For further reading:

- Nancy Pollikoff – A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century

April 5 – Peer Review Session
No additional reading. Substantial drafts due to be exchanged by March 29.

April 12 – Preparation for 'Gender, Sexuality and the Law' Conference I
To be held April 14 and/or 21, subject to class vote and enrollment numbers. No additional reading.

April 19 – Preparation for 'Gender, Sexuality and the Law' Conference II/ Work on Final Papers
I will be available in extended office hours all week for feedback and essay help as you prepare your final papers. No additional reading.

Term Paper Due by 5pm on April 30th via hard copy format AND email. Papers may be handed in to my office or to Emily Hlavaty in the FLT Suite, G500.