

GENDER, CHILDHOOD AND THE CONSTITUTION

Seminar in Interdisciplinary Studies

S Y L L A B U S

Fall 2008
Room 240A
Monday, 9-10:50 a.m.

Professor Marie A. Failing
Dean's office (651) 523-2124
mfailing@hamline.edu

Scope: This seminar will focus on several key issues surrounding the socially constructed ideas of gender and childhood, and how the law, particularly constitutional law, utilizes, modifies, and reacts to these ideas. Some of the “big picture” questions we will explore, as they arise from our conversation, are as follows:

- (1) Do the ideas of “gender” and “childhood” have a core of meaning in contemporary American society? What is that core of meaning?
- (2) How do legal institutions utilize the notions of “gender” and “childhood” in shaping and interpreting law? What legal rights, responsibilities and other rules flow out of those notions?
- (3) To what extent should the law, particularly the courts, identify and utilize that social meaning in making important decisions affecting men, women and children? How should the courts identify what those terms mean? Is it important that the courts describe these ideas in their holdings?

LEARNING OUTCOMES:

1. Practice engaging in deep reflection about how social understandings of human nature embedded in categories such as gender and childhood influence law, particularly case law;
2. Improve oral discussion skills in a peer-like setting with other law students;
3. Develop expertise on a particular topic through research, reflection and writing;
4. Practice legal academic writing and presentation skills.

Classroom Activity:

Part One: Discussion of readings. For the first part of the course, you will have assigned readings that raise a variety of different concerns about law utilizing or responding to the categories of gender or childhood. Each week, you will have to apply theoretical writing to one or more concrete legal controversies that require that practical decisions be made about how theory should be applied in legal disputes. The case study or problem will generally be embedded in the reading. Each meeting of the seminar will be devoted to the effort of *fostering a conversation* within the seminar on the issues raised by the readings (see attached Vogel explanation.) This format enables students to take an active leadership role in thinking and preparing material, and fosters a more egalitarian and participatory classroom setting.

Each week, class will begin with a presentation and at least one response from a member of the class on the week's readings. Each member of the class is expected to sign up for a minimum of two (2) of these roles in the semester.

Presenter: The Presenter prepares a written reflection (about 1-2 pp) which describes and critiques the reading or a portion of the reading assigned for the week suggesting how it sheds light on the theme of our ongoing conversation. This presentation may draw on the presenter's (or respondent's) close reading of the text, expertise in this or related academic work he/she has done in the past, personal or professional experience, etc. **The Presenter and Respondent in any one week can make arrangements between themselves about the time and method of delivery so long as the Respondent has sufficient time to prepare a response for the Monday class. However, if no other arrangement is made, the Presenter has the responsibility for delivering a copy of the presentation to the Respondent by email or hand NOT LATER than Thursday, 5 p.m. before the Presenter's Monday presentation.** The Presenter will distribute copies of his/her paper to the entire class at the beginning of class and read the paper aloud to open the discussion.

Respondent: The respondent will comment on the presenter's view of the reading and comment on parts of the reading that the presenter chose not to discuss or present different insights on the same material. Written responses should be about 1 pp plus. and will be read by the respondent to the class directly after the presentation.

After that, the class will be open for general discussion among the members. Everyone in the class is responsible for reading and thinking about the materials assigned, initiating and keeping the discussion going. The issues explored in the class will be those raised by members of the class. Part of the reason for having written discussion papers is to permit class members to identify and raise continuing questions or themes that tie the particular problems of the class together as a whole and to help develop their own theories about the subject matter.

Presenters and respondents should either bring enough copies of their written presentation to class or email a copy to Prof. Failing no later than Friday noon before the class in which the paper is to be presented so she can get copies made on Friday.

Part Two: Paper Presentations This part of the course will focus on students' ongoing research into their own paper topics. Each student will have approximately 30 minutes to teach the class something about his or her topic, which should include some opportunity for class participation or discussion. Students with similar topics may work on a joint presentation. Students are encouraged to select a format that will engage other students in the class in an intellectually sound manner. Creativity is also encouraged—in past seminars, students have done panel discussions, debates, videotaped interviews of individuals with views related to the paper, class surveys/comments, “games” on the reading, etc. in lieu of a stand-up reading of their papers. Assignments of presentation slots will be made when topics are chosen.

Required Reading Materials:

Photocopied course supplement of edited law review and other journal articles. REMINDER: This course meets once a week only, so the reading assignments will be substantial.

NOTE: As of the date this syllabus was posted to the web, the list of proposed readings in the course supplement is tentative pending approval by authors and journals for reprinting. Other

materials may be substituted if permission is denied.

The required reading materials for the course will serve as the common texts for our discussion in the weekly meetings of the seminar. They should not, however, be viewed as limiting the range of our discussion. Collateral reading from other sources chosen by members of the seminar as an additional aid in preparation of presentations is fine.

SOME OPTIONAL TEXTS IN FEMINIST LEGAL THEORY

Introduction to Feminist Legal Theory by Martha Chamallas

Feminist Legal Theory: A Primer by Nancy Levit, Robert Verchick

Feminist Legal Theory: Readings in law and Gender, by Katherine Bartlett, Roseanne Kennedy

COURSE REQUIREMENTS

CLASSROOM ATTENDANCE: Class attendance is critical for this course and attendance is required for satisfactory completion of the course. Students who miss more than two full class periods are potentially subject to withdrawal, depending on circumstances.

SEMINAR PAPER: Students will write a paper in which they critically examine a subject, scholarly work, or line of argument of their choice related to the subject matter of the course, though they need not follow any particular topic or text or case study. Sample papers will be on reserve in the library around the second week of the semester. Paper formats have varied in the past, including traditional law-review type papers, essay-format papers, and occasionally even story-style reflections. Papers must be word-processed and double-spaced, between 20-40 pages in length. (Length is not a factor in grading.) To get Hamline **seminar credit**, you **MUST** minimally submit an outline, a first draft (which will be critiqued and returned); and a re-written final draft. If you do not need seminar credit and do not wish to submit the outline and first draft (though you are strongly encouraged to do so), please inform Prof. Failing.

COMPUTER USE POLICY: Because the value of this class is highly dependent upon intensive interaction among the participants, computer use should be limited to taking notes on those few occasions where you want to remember a thought or reference mentioned by a class member.

TOPIC and OUTLINE OR THESIS STATEMENT due September 29 in class. The outline or thesis statement need not be of any particular length or format, but should be specific enough to enable the instructor to understand your initial thesis (what you think you might be trying to learn or show in the paper) and a sense of the scope of your paper (what issues or subareas you are planning to cover). (The better your outline, the easier the next step.)

FIRST DRAFT of the paper due to Prof. Failing's office **NOT LATER THAN** October 27, end of day, to Prof. Failing. A written critique will be returned to you within approximately ten (10) days, and you may schedule a conference with the instructor to discuss the first draft at your option.

FINAL DRAFT of the paper to the instructor on Monday, December 8 (first day of exams).

GRADE: Your grade will be based on your seminar paper (80%) and presentation (20%) No grade will be given on the outline or first draft, and they will not be considered in the final grade, but they must be completed for seminar credit. You are invited to turn in your own assessment of your oral and written work as a part of this process.

READING ASSIGNMENTS: (note: approximate number of pages of reading listed in parentheses)

Session 1: August 25 Gender, childhood and education

Case studies: sex-segregated education and sports

Galen Sherwin, *Single-Sex Schools and the Anti-Segregation Principle*, 30 N.Y.U. Rev. L. & Soc. Change 35 (2005) (28)

Dana Robinson, *A League of their Own: Do Women Want Sex-Segregated Sports?* 9 J. Contemp. Legal Issues 321 (1998) (19)

September 1---LABOR DAY—NO CLASS

Session 2: September 8 Gender and sexuality

Case study: pornography

James Weinstein, *Democracy, Sex and the First Amendment*, 31 N.Y.U. Rev. L. & Soc. Change 865 (2007) (ASU) (16)

Andrew M. Jacobs, *Rhetoric and the Creation of Rights: Mackinnon and the Civil Right to Freedom from Pornography*, 42 U. Kan. L. Rev. 785 (1994) (19)

Rae Langton, *Pornography: A Liberal's Unfinished Business*, 12 Can. J. L. & Juris. 109 (1999)(21)

Session 3: September 15 Gender, the Private and the Public

**Case studies: balancing work and family responsibilities
Immigrant workers in the home**

Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations* 2001 Wis. L. Rev. 1443 (2001)(21)

Mary Romero, *Nanny Diaries and Other Stories: Imagining Immigrant Women's Labor in the Social Reproduction of American Families*, 52 DePaul L. Rev. 809 (2003) (19)

Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. Rev. 1037 (1996) (26)

Session 4: September 22 Gender, theories of marriage and the family

Case studies: Polygamy, polyamory, same-sex marriage

Baehr v. Lewin (6 pp)

Maura Strassberg, *The Crime of Polygamy*, 12 Temp. Pol. & Civ. Rts. L. Rev. 353 (39)

David L Chambers, *Polygamy and Same-Sex Marriage* 26 Hofstra L. Rev. 53 (1997) (11)

Session 5: September 29 Gender, intersectionality and international law

Case studies: violence against women and religious displays in public under international law

Jennifer C. Nash, *Lavender to Purple: Privacy, Black Women, and Feminist Theory*, 11 Cardozo Women's L.J. 303 (2005)

Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 Emory L. J. 71 (2003)

Ellen Wiles, *Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality*, 41 Law & Soc'y Rev. 699 (2007)

Session 6 October 6 Parents' rights, religion and the state

Case studies: child custody, parents' vs. children's religious rights

Stephen G. Gilles, *Hey Christians, Leave Your Kids Alone!* 16 Const. Comment. 149 (1999) (26)

David M. Smolin, *Praying for Baby Rena: Religious Liberty, Medical Futility, and Miracles*, 25 Seton Hall L. Rev. 960 (1995) (19)

Marci Hamilton, *A Modest Proposal for the 21st Century*, The Huffington Post, June 10, 2008 (2)

Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. Rev. 1037 (1996) (2)

Stephen R. Arnott, *Autonomy, Standing and Children's Rights*, 33 Wm. Mitchell L. Rev. 807 (2007) (8)

Session 7: October 13 Childhood and education

Case Studies: children's speech and religious rights in school

Emily Buss, *Constitutional Fidelity through Children's Rights*, 2004 Supreme Court Review 355 (17)

Harper v. Poway Unified School Dist. 445 F.3d 1166 C.A.9 (Cal.),2006 (14)

Richard W. Garnett, *Can There Really be "Free Speech" in Public Schools?* 12 Lewis & Clark L. Rev. 45 (2008) (10)

Session 8: October 20 Childhood, responsibility and crime

Case study: The juvenile court system, the death penalty

Jane Rutherford, *Juvenile Justice Caught between the Exorcist and a Clockwork Orange*, 51 DePaul L. Rev. 715 (2002) (18)

Donald L. Beschle, *Cognitive Dissonance Revisited: Roper v. Simmons and the Issue of Adolescent Decision-making Competence*, 52 Wayne L. Rev. 1 (2006) (14)

Rayna Hardee Bomar, *The Incarceration of the Status Offender*, 18 Mem. St. U. L. Rev. 713

Session 9: October 27 Childhood, maturity, sexuality, exploitation

Case study: children's sexual/reproductive rights

Donald L. Beschle, *Cognitive Dissonance Revisited: Roper v. Simmons and the Issue of Adolescent Decision-making Competence*, 52 Wayne L. Rev. 1 (2006) (6)

Naomi K. Seiler, *Abstinence-Only Education and Privacy*, 24 Women's Rts. L. Rep. 27 (2002) (12)

Teresa Stanton Collett, *Seeking Solomon's Wisdom: Judicial Bypass of Parental Involvement in a Minor's Abortion Decision*, 52 Baylor L. Rev. 513 (2000) (12)

Vivian E. Hamilton, *Religious vs. Secular Ideologies and Sex Education: A Response to Professors Cahn and Carbone*, 110 W. Va. L. Rev. 501 (2007) (9)

Session 10: November 3 PAPERS PRESENTED

Session 11: November 10 PAPERS PRESENTED

Session 12: November 17 PAPERS PRESENTED

Session 13: November 24 PAPERS PRESENTED

Session 14: December 1 PAPERS PRESENTED

Description of the Classroom Process by Prof. Howard Vogel

The establishment and maintenance of an extended conversation with each other within the seminar will be an important task in each of our weekly meetings. To accomplish this, members of the seminar will share equally in the responsibility of leading and maintaining our conversation. Through this means, the course provides a first-hand opportunity to explore and develop an understanding of the "public" and "private" dimensions of human experience, and the relationship of these dimensions to individual participation in community life.

Each meeting of the seminar will be devoted to the effort of *fostering a conversation* within the seminar. To say that the primary effort of each session is to foster a conversation may seem odd. Yet, as our very first meetings will demonstrate, the establishment and maintenance of a conversation in which the conversation partners actually *engage* each other in *committed argument* is one of the most difficult tasks in modern American life. Acquiring skill in doing this, however, is critical for those who intend to work at the heart of our public life as lawyers and citizens. The goal is to maintain a disciplined conversation.

- A. *Conversation*: Engaged with the Other in a shared activity - speaking in one's own voice and listening with an attentiveness and openness to the other in a way that includes the willingness to being changed by what one hears. This involves risking change in one's self and views while remaining committed to the value of this process. This is a collaborative rather than an adversarial process. It departs from the typical law school version of the Socratic model.
- B. *Exploratory*: A journey, not a destination - searching the avenues of inquiry open to us without demanding "answers" that are necessarily "right" or even "plausible", yet open to the emergence of novelty both within the conversation and within ourselves. This involves entering the conversation with an air of expectancy but open to leaving with continuing doubts.
- C. *Disciplined*: Purposeful continuity - not simply and casually declaring our views but engaging others in their response to our views. The purpose here is to move the conversation forward, moving from where it has been and toward where it seems to be going, by contributing to the determination of where it goes. We are seeking freedom within discipline in our conversation like a concert pianist who works within the limits of the instrument and the composition and tries to realize them in a new way that speaks to the experience of both the performer and the audience.

KEY ASSUMPTION: This view of the conversation on which we are about to embark is one in which the activity of conversation is viewed as valuable in and of itself - it is how we constitute a community among ourselves. We may come to some settled judgments along the way, some of which are surprising to us in terms of who we have been, but that is not the primary purpose of our activity.