Course Description

Course Title: LEGAL HISTORY SEMINAR: GENDER AND SEXUALITY

Instructor: Charles Paul Hoffman

Description: This course is designed to introduce students to the interdisciplinary field of legal history, including the methodologies of legal history, legal history versus “law office history,” the application of legal theory to history, and the comparative analysis of legal history across multiple jurisdictions. This year, the course will focus on questions of gender and sexuality, including the nature and makeup of marriage and family law; the regulation of sexuality by the state; sexual crimes and crimes against women; specialized courts for women; and the battle for legal equality. Readings primarily focus on 19th- and 20th-Century United States, but other times and places will also be covered (especially Canada and the United Kingdom). With the skills learned during the course, students will research and develop 20-25 page papers focusing on one aspect of legal history related to gender or sexuality. Students will also write a 4-5 page midterm essay and participate in peer reviews of each other’s research papers. Students will also be expected to participate in class discussions.

Prerequisites: None, but prior course in legal history or gender or sexuality and the law helpful.

Method of Evaluation: Paper (50%); Peer Review (10%); Midterm Essay (15%); Participation (25%)
Legal History: Gender and Sexuality

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Introduction to the Course

Welcome to Legal History: Gender and Sexuality! Over the course of the semester, we will consider scholarship on legal history in the realms of gender and sexuality. While you have no doubt encountered writing on the history of the law in the past (e.g., the feudal origins of property law, the development of constitutional norms, or the requirement of resistance to prove rape at common law), it was likely to provide context to the present, rather than a systematic analysis of the law in the past. In this course, we will approach legal history for its own sake—not necessarily to support a contemporary legal argument, but to understand the past. Although we will at times critique the past, our goal is to consider it on its own terms.

In order to examine one aspect of legal history in depth, we will be focusing on issues of gender and sexuality. This is not to say that gender and sexuality can (or should) be separated from other aspects of the law—recent scholarship has demonstrated, for instance, the role of gender in the development of negligence law in the 19th-Century—but rather to acknowledge that we can only consider so many topics within the course of a semester. By limiting our focus to gender and sexuality, we are able to look at these issues in greater depth than is possible in a broad survey in legal history.

Over the course of the semester, we will focus on: methodologies in legal history; theories of sexuality and gender; marriage and divorce; the property rights of the married woman; the state regulation of permissible sexuality; sexual crimes; courts created exclusively for women; and the fight for legal equality. Because these issues are not limited to any one country, we will be looking at these issues from several legal jurisdictions. Though most of our readings will be from the United States, many will come from Canada or the United Kingdom, and some from further afield.

Because one of the major goals of this course is to teach you to approach legal history as history, rather than as a tool to form a legal argument, the bulk of our readings will be articles on legal history, rather than primary sources such as cases and statutes. This is because it is easy to fall into the “history as argument” (or “law office history”) approach to legal history when dealing exclusively with primary sources. By reading and critiquing secondary literature, you will see have ample opportunities to learn what makes the thought process involved in academic legal history distinct.

What this course is not

For starters, this is not a course in constitutional history as relates to gender and sexuality. While we be discussing an occasional constitutional issue or Supreme Court case, our focus will not be on the evolution of constitutional protections for women and sexual minorities. This is covered fairly well in the faculty’s constitutional law course offerings.
Likewise, this is not a course in contemporary feminist jurisprudence. We will certainly be reading some theoretical works, but our focus in reading them will be what we can learn about legal history, not what we can learn about the law as it is today.

Similarly, this course is not designed to help you form arguments about contemporary legal problems by resorting to how something was done in the past. We will instead spend time critiquing “law office history,” in which history is made slave to legal arguments, as opposed to legal history for legal history’s sake. This is not to say that legal histories cannot have an argument, but rather that the argument should be based on the materials, not the materials selected to fit the argument.

Finally, this is not a course in the “progressive evolutionary functionalist” tradition. Our readings will not necessarily show a nice, orderly projection from the unenlightened past to the (relatively) enlightened present. Legal history is not so orderly or ideological. Certainly some trends will become clear, but presupposing them is simply bad history. Our question is what was done and why, not how past events led us to our glorious present. We may even find in some circumstances that the present is not so glorious in comparison to the past . . .

Goals

By the end of the term, you should be able to think of legal history as a legal historian rather than as a lawyer (or law student). You should also be able to approach questions of gender and sexuality from a legal historical perspective. In reaching these goals, you should be able to:

(a) Distinguish between history as used by lawyers (“law office history”) and legal history;
(b) Identify the methodologies used by the authors of legal history and evaluate the suitability of those methodologies to the issue at hand;
(c) Critically engage the questions raised by works of legal history;
(d) Apply critical and theoretical approaches to gender and sexuality to legal history;
(e) Research questions of legal history, including locating primary sources, finding and evaluating reliable secondary sources, and synthesizing them together; and
(f) Participate in a peer review process, both as a reviewer and a reviewee.

Teaching Methodology

This class will be taught primarily in a discussion format, with most classes dedicated to discussing critically the readings for the day. In many classes, we will also break out into small groups to discuss specific issues, sources, etc. Where appropriate (e.g., where the material is more difficult to approach or where background information is required), I will also deliver lectures, although I do not anticipate this taking up more than a small portion of most class sessions. I also intend to integrate audio-visual material into our discussions where doing so facilitates an understanding of the material or otherwise adds something to our discussion.
Method of Evaluation

Evaluation will be by a combination of final paper (20-25 pages), short midterm essay (4-5 pages), peer review of another’s draft final paper, and participation. In addition, you will also be required to submit a paper proposal and a rough draft for peer review by other students.

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<tr>
<th>Assignment</th>
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<tr>
<td>Participation</td>
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<tr>
<td>Midterm Essay</td>
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<td>Paper Proposal</td>
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**Midterm Essay:** Questions will be posted to WebCT one week before the essay is due. Three questions will be provided; you need only write on one of them. The goal is to synthesize the readings we have done up to that point. While your answer may focus on one or two of the articles we have read, the essay should demonstrate an understanding of the methods and theories we are investigating, rather than merely regurgitate the arguments made by the original authors. That said, the essay need not make an original argument. I plan to spend five minutes discussing and answering any questions relating to the Midterm Essay in Class 12.

**Final Paper:** This paper, which should be no more than 25 pages unless you talk with me in advance, should be the result of research into a topic in legal history relating to gender and/or sexuality (however, exceptions may be made in limited circumstances for topics sufficiently related to the course content, but which do not directly touch upon gender or sexuality). The paper should demonstrate: your understanding of the concept of legal history as history; comfort with at least one of the methodologies or theoretical approaches discussed; command of the materials; ability to create and present a coherent argument; and ability to relate your research topic to the course readings (where applicable). This paper should rely upon at least one primary source, defined broadly to include historical legal decisions, newspaper and journal reports from the time, debates and other legislative materials, autobiographies, archival materials, etc. If you have a question as to whether something qualifies as a primary source, feel free to talk to me. Regardless, you may use the sorts of sources used by the authors we read as a guide for what qualifies as a “primary source.”

Note: your final essay may be in an alternative format (e.g., a graphic novel, screenplay, etc.), but please speak with me before deciding to do this so that I can provide advice for escaping pitfalls.

The final paper is due during the pre-appointed time during finals period.

**Paper Proposal:** On or before Class 15, you should submit a short (1-2 page) proposal of your final paper topic. The proposal should explain what the issue is that you want to explore and what methodology you intend to use. This proposal is not binding, however, so if you feel that you want to shift your focus or methodology later, that is fine – just speak with me so that I can provide any updated feedback/advice.
Paper Rough Draft: On or before Class 23, you should submit a rough draft of your final paper for the peer review process. While this draft need not be complete, the peer review process works best if at least something is there for each section, so that the peer reviewers can give some sort of substantive feedback (e.g., how does this section relate to the paper as a whole?). I plan to discuss the rough drafts several times in class, but will allot time during class 20 specifically to discussing the drafts.

Peer Reviews: Our last three classes will be peer review writing workshops, in which you will have the opportunity to present your draft papers to your peers and receive their feedback. For two of these classes, you will review the draft paper of a fellow student and provide substantive comments, but in writing and during the small group discussion during class. For the third class, your own draft will be reviewed by two students.

Participation: You will be expected to have done the required readings and participate in class discussions.

Grading

I intend to follow the faculty’s general policy on grading, with the average grade falling in the B+ range. However, I will not follow this policy slavishly in the event that the papers submitted are, on a whole, exemplary. That is, I will deviate from the general policy in the event that you, as students, present me with a reason to do so.

Readings

The bulk of readings are available on WebCT. In the event that there is demand, we can also arrange to have physical course packets of the readings printed.

In addition to the articles and chapters on WebCT, we will also be reading Michel Foucault’s History of Sexuality, Volume 1 (see bibliography for details). While this will be available from the Bookstore and will also be placed on reserve at the Library, you should also feel free to order the book online (e.g., a used copy from abebooks.com). In addition, any French speakers should feel free to read the book in the original French.
The Course: Class by Class

Part I: Introduction and Methodologies

Day 1  What is Legal History? What is Gender? What is Sexuality?
R Blake Brown, "A Taxonomy of Methodological Approaches in Recent Canadian Legal History"
Margot Canaday, "Heterosexuality as a Legal Regime"

Day 2  Methodology: The Uses of Legal History
Larry D Kramer, "When Lawyers Do History"
Daniel Hurewitz, "Sexuality Scholarship as a Foundation for Change: Lawrence v. Texas and the Impact of the Historians' Brief"
Optional: George Chauncey, "What Gay Studies Taught the Court": The Historians' Amicus Brief in Lawrence v. Texas"

Day 3  Methodology: Histories of Sexualities
Michel Foucault, *The History of Sexuality: An Introduction*, Parts I-III

Day 4  Methodology: Histories of Sexualities, cont.
Michel Foucault, *The History of Sexuality: An Introduction*, Parts IV-V

Day 5  Defining Gender and Defining Sexuality
Eva Cantarella, "The Androgynous and Bisexuality in Ancient Legal Codes"
Martha C Nussbaum, "Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies"
Joan Scott, "Gender: A Useful Category of Historical Analysis"

Part II: Love, Marriage, and Property

Day 6  What is Love? What is Marriage?
Amy Dru Stanley, "Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation"
Joan Kelly-Gadol, "Did Women Have a Renaissance?"
George Chauncey, "Why Marriage Became a Goal"

Day 7  Coverture
Marylynn Salmon, "The Legal Status of Women in Early America: A Reappraisal"
Amy Louise Erickson, "Coverture and Capitalism"
Recommended: Elizabeth Bowles Warbasse, "American Law and the Married Woman, 1780-1825"
Day 8  Married Women’s Property Acts: An End to Coverture?
 Either: Mary Beth Combs, "Cui Bono? The 1870 British Married Women’s Property Act, Bargaining Power, and the Distribution of Resources within Marriage"
 Or: Constance B. Backhouse, "Married Women’s Property Law in Nineteenth-Century Canada"

Day 9  The End of the Affair: Divorce
Marylynn Salmon, "Divorce and Separation"
Elizabeth B Clark, "Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America"
Glenda Riley, "Legislative Divorce in Virginia, 1803-1850"

Day 10  Child Custody
Daniel Rivers, "In the Best Interests of the Child: Lesbian and Gay Parenting Custody Cases, 1967-1985"

Part III: Regulating Sex and Sexuality

Day 11  Protecting Racial Purity
Rachel F Moran, "Antimiscegenation Laws and Norms of Sexual and Marital Propriety"
Constance Backhouse, "The White Women’s Labor Laws: Anti-Chinese Racism in Early Twentieth-Century Canada"

Day 12  Plural Marriage
Cheshire Calhoun, "Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy"
Sarah Barringer Gordon, "The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America"
Mélanie Méthot, "Bigamy in the Northern Alberta Judicial District, 1886-1969: A Socially Constructed Crime that Failed to Impose Gender Barriers"
Day 13  
Seduction  
Stephen Robertson, "Seduction, Sexual Violence, and Marriage in New York City, 1886-1955"  
Terri L. Snyder, "Sexual Stories: Narratives of Consent and Coercion"  
*Either:* Constance Backhouse, "The Tort of Seduction: Fathers and Daughters in Nineteenth Century Canada"  
*Or:* Patrick Brode, "Fiction of the Law" and "Women of Quality and Lewd Mothers"  
*Note:* Our discussions of Robertson and Snyder will spill over into next class.

Part IV: Crime and Punishment

Day 14  
Sexual Assault  
Susan Brownmiller, "The Mass Psychology of Rape: An Introduction" and "In the Beginning Was the Law"  
Constance Backhouse, "Canada’s First Capital ‘L’ Lesbian Sexual Assault: Yellowknife, 1955"  
*Optional:* Stephen Robertson, "The Crime against Nature"  
*Note:* Please review Robertson and Snyder from Class 13.

Day 15  
The Crime Against Nature  
Retha M. Warnicke, "Sexual Heresy at the Court of Henry VIII"  
Rictor Norton, "Recovering Gay History from the Old Bailey"  
William N Eskridge, "From the Sodomite to the Homosexual, 1881-1935"  
*Optional:* Michael Goodich, "Sodomy in Ecclesiastical Law and Theory"

Day 16  
Domestic Violence  
Scott M Gaffield, "Justice Not Done: The Hanging of Elizabeth Workman"  

Day 17  
Prostitution  
Thomas C Mackey, "‘Mamma, them sure is nasty ladies in that house’: Districting and Segregating Prostitution in Houston, 1907-1909"  
Timothy J. Gilfoyle, "Prostitutes in the Archives: Problems and Possibilities in Documenting the History of Sexuality"

Day 18  
Abortion and Infanticide  
Cath Quinn, "Images and Impulses: Representations of Puerperal Insanity and Infanticide in Late Victorian England"  
James C Mohr, "The First Wave of Abortion Legislation, 1821-1841"  
*Either:* Angus McLaren, "‘Barrenness against Nature’: Recourse to Abortion in Pre-Industrial England"  
*Or:* Constance Backhouse, "Abortion"
Day 19  Women's Courts  
Beverly Blair Cook, "Moral Authority and Gender Difference: Georgia Bullock and the Los Angeles Women's Court"
Amanda Glasbeek, "The Toronto Women's Police Court as an Institution" and "'Can her justice be just?' Margaret Patterson, Male Critics, and Female Criminals, 1922-34"

Day 20  Obscenity  
Joan Hoff, 'Pornography as Liberation, Not Emancipation'
Lindsay Campbell, 'A Slub in the Cloth: R. v. St. Clair and the Pursuit of a "Clean Theatre" in Toronto, 1912-13'
Adam Parkes, "Suppressed Randiness': Orlando and The Well of Loneliness"

Part V: (In)Equality

Day 21  The Workplace  
Constance Backhouse & Leah Cohen, "The History of Sexual Harassment"  
Carrie Crenshaw, "The 'Protection' of 'Woman': A History of Legal Attitudes toward Women's Workplace Freedom"

Day 22  Personhood  
Jan Lewis, "Representation of Women in the Constitution"  
Mary Jane Mossman, "Women Lawyers in Canada: Becoming Lawyers 'On the Same Terms as Men'"

Day 23  Towards Formal Equality  
Cynthia Harrison, "'Heightened Scrutiny': An Alternative Route to Constitutional Equality for U.S. Women"  
Catharine A MacKinnon, "Unthinking ERA Thinking"  
Miriam Smith, "Social Movements and Equality Seeking: The Case of Gay Liberation in Canada"

Part VI: Writing Workshops

Day 24  Writing Workshop
Day 25  Writing Workshop
Day 26  Writing Workshop
Bibliography


Eva Cantarella, "The Androgynous and Bisexuality in Ancient Legal Codes" (2005) 52:4 Diogenes 5.


Elizabeth B Clark, "Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America" (1990) 8:1 Law and History Review 25.


Beverly Blair Cook, "Moral Authority and Gender Difference: Georgia Bullock and the Los Angeles Women’s Court" (1993) 77:3 Judicature 144.


Amanda Glasbeek, "‘Can her justice be just?’ Margaret Patterson, Male Critics, and Female Criminals, 1922-34", Feminized Justice: The Toronto Women’s Court, 1913-34 (Vancouver: University of British Columbia Press, 2009) 143-170.


Marylynn Salmon, "The Legal Status of Women in Early America: A Reappraisal" (1983) 1 Law and History Review 129.


Joan Scott, 'Gender: A Useful Category of Historical Analysis" (1986) 91:5 The American Historical Review 1053.


Midterm Questions

Select one of the questions below and write a 4-5 page essay that synthesizes the readings we have done up to this point. While the essay need not make an original argument, it should demonstrate an understanding of the methods and theories we have discussed rather than simply repeating the arguments made by the authors we have read. Your answer may focus on as many or as few articles as you like. Citing more articles will not raise your grade and citing fewer will not lower it—I am looking to verify your grasp of the material, not your ability to cite as many articles as possible.

You need write on only one question.

Question 1

To what extent was marriage comparable to slavery prior to the enactment of the Married Women’s Property Acts? Did the MWPAs change the situation so that a wife was no longer comparable to a slave?

Question 2

Which of Brown’s methodologies of legal history is most appropriate or inappropriate to the exploration of gender and sexuality? Why or why not?

Question 3

How did the discourse of heteronormativity impact the regulation of the family? Feel free to focus on one aspect of regulation.