

POLS 660: Public Law and Judicial Systems (spring 2013)
Mondays 9:30 a.m. – noon in Saunders 624

Law, Equality and the Politics of Rights

Professor: Katharina Heyer
E-mail: heyer@hawaii.edu (best way to contact me)
Office: Saunders 614, phone: 956-7512
Office Hours: TBA

Course Description:

This course examines the significance, application, and reach of the equality principle in American law and social movements and its extension into international human rights doctrine. How do social movements use the law as a tool for social change and how does the law change social movements? What is gained and what is lost when movements deploy notions of rights and equal treatment in their legal and political work? We will read the work of central scholars the law and society field that investigate the role of the law in either promoting or hindering social change; and the ways that power relations shape and are shaped by legal institutions, processes and meanings. Our focus is both national and global.

The course is divided into three parts. The first part examines the use of equal treatment analogy in American social movements, using race, sex, and sexual orientation as examples. We look at the political and legal development of the equal treatment mandate and antidiscrimination law and then investigate the ways identity-based social movements have used legal analogies in their legal and political activism. How do these movements appropriate and modify legal frames of equal treatment and equal opportunities first shaped by the civil rights movement of the 1950s? Where has the analogy to race-based equal treatment been effective, and where has it failed?

The second part analyzes movements that deploy equal rights while simultaneously pointing to the weaknesses of the civil rights analogies. Here we will focus on disability rights and animal rights; two movements that problematize the use of the equal rights frame and that point to the politics of vulnerability as alternative frames. This section also considers the neoconservative turn to rights talk as a way to respond to the perceived threat of the proliferation of rights discourse. This politics of rights and resentment closely monitors the legitimate and illegitimate uses of the civil rights frame.

The final section of the course follows the ways the equality doctrine is represented in international human rights law. How does international law conceptualize notions of equality and equal treatment that promise to transcend some of the limitations of the American application? We will examine the construction of global norms of equal treatment and substantial equality and then follow the ways that global norms become active in local contexts? We will look at gender violence, inclusive education rights, the sustainable food movement, and indigenous rights as case studies.

The course will contribute to your professionalization in two ways. First, you will learn some of the basics of legal research and legal interpretation. This is a useful analytical and research tool even for those students who may not consider their work as based in law. Second, we will use different forms of writing assignments to practice submitting

abstracts, peer reviewing drafts, and presenting papers at professional conferences. Our final project as a class will be a “mock conference” in which you will act as presenters, panel chairs, and discussants.

This course counts as an elective for the **International Cultural Studies Graduate Certificate** (<http://manoa.hawaii.edu/internationalculture/>)

Required Readings: All required readings are posted on the class *Laulima* website.

Course Requirements:

1. Attendance and Participation (10%)

The success of this course depends on your timely attendance and participation in class discussion. Please read all assigned materials and come to class prepared to discuss them. You may have two free absences. Each additional absence will result in a 5-point deduction of your participation grade. Please let me know in advance of any circumstances that may prevent you from coming to class on time.

2. Discussion Leader (15%)

Students will work in teams to “teach a class” and lead the discussion once over the course of the semester. You may use any technique you wish, but your goal for this assignment is to lead the class in a discussion of the reading materials. This includes information about the authors, their research agenda, and a summary of the central arguments of the readings.

3. Reading Reactions (20%)

Each student will write 10 one-page reaction papers on selected readings. These are to summarize the most important points of the readings and link it to the larger theme of the class. The papers need to address the following questions:

- (1) what is the research question?
- (2) why is the question important?
- (3) how has the literature grappled with this question?
- 4) how does the author seek to answer the question?
- (4) what have you learned?

I will grade these on a simple plus-minus system. To receive full credit, you must post the reaction papers on the class *Laulima* website by midnight of the day before that particular reading is assigned.

4. Memo of Intent (5%)

By September 9th you will write a one-page memo to me explaining what your goal for this semester is. This cannot just be, “to learn something about law and politics”. Instead, I want you to think about how you might connect law, legal research, and an attention to the politics of right with your larger research agenda. Ask yourself how learning about the law might inform the issues you are interested in without necessarily requiring you to change your current research project. In order to do this, you need to briefly explain what your research interests are, and pose a question that you’d like to think about over the course of the semester. Take a look at the syllabus, look through some of the assigned readings, and do a little digging at the library – are there books or articles you’d

like to take a look at over the course of the semester? If so, tell me about them. The aim of this memo is to set some goals for you that you and I agree upon. This means that we must begin a dialogue about your work as soon as possible. This dialogue will continue over the course of the semester.

5. Final Paper and Mock Conference (50%)

You will write a 15-20 page analytic paper on a topic of your choice, based on the readings and discussions we have had in class, and focused around your memo of intent. We will simulate the process you would go through to if you were to present a paper at an academic conference: you will first submit a paper proposal, outlining your question and ways you seek to answer it. Then you will compile a list of sources used for your thesis, with a brief description of each source. I will place you in writing groups in which you will comment on each others' first drafts. You will revise your paper and present it at our mock conference. After your discussant's feedback you have the option to revise the paper again before you hand in your final copy

- a. Paper Proposal (5%): due
- b. Annotated Bibliography (10%): due
- c. First Draft (20%): due
- d. Peer Feedback in writing groups (5%): due
- e. Conference Presentation (10%): due
- f. Final Paper (50%): due

Plagiarism Policy: Plagiarism is taking another person's words or ideas without crediting them. Anything cut and pasted from a website without quotation marks and proper citation is plagiarism. Copying anything from a book or journal without quotation marks and proper citation is plagiarism. Submitting a paper (or significant parts of a paper) to two different courses is considered plagiarism as well. Plagiarism is cheating, the equivalent of academic theft. Because trust and attribution are central to the current nature of the academic profession, there is no excuse for plagiarism. Turning in a paper with plagiarized parts will result in a failing grade for the course.

Disability Access: This class is open to all students. If you are a student with a documented disability, please talk to me about ways to make the class accessible to you. You should also contact the KOKUA office at 956-7511. It is located on the ground floor of the Student Services Center.

Reading Schedule:

Week 1 (August 26): Introduction to the Course and to Each Other

- Between now and September 9th you must decide who your partner will be in the class presentations, and submit three dates to me (in the order your choice), via email (along with the name of your partner). Presentations will begin on September 16. While I cannot guarantee that everyone will get their first choice in dates for the presentation, I will do my best to accommodate everyone.

- Over the next two weeks, you will write your Memo of Intent (see description above). It will be due at class time on September 9th

Week 2 (September 2): Labor Day no class

Week 3 (September 9): Theorizing Equality: positive rights, the dilemma of difference, American exceptionalism, and the role of the state

- Martha Minow. *Making All the Difference: Inclusion, Exclusion and American Law* Introduction and Chapters 1-2
- Susan Bandes. "The Negative Constitution: A Critique" 1990 *Michigan Law Review*
- Somers and Roberts. "Towards a New Sociology of Rights: A Genealogy of Buried Bodies of Citizenship and Human Rights" 2998 *Annual Review of Law and Social Science*
- Linda Keller. "The American Rejection of Economic Rights as Human Rights and the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?" 2003 *New York Law School Journal of Human Rights* 557
- **Memo of Intent** is due today

Week 4 (September 16): Rights Talk and Social Movements: how have sociolegal theorized the relationship between rights and social movements? What is the role of rights talk and rights consciousness in these movements?

- Peter Gabel, "The Phenomenology of Right-Consciousness and the Pact of the Withdrawn Selves," 62 *Texas Law Review* 1984: 1563-1599
- Patricia J. Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights."
- Matha Minow. "Law and Social Change" 62 *UMKC Law Review* 1993
- Michael McCann. "How Does Law Matter for Social Movements?" in Garth & Sarat, eds. *How Does Law Matter* (1998)
- Wendy Brown. "Suffering the Paradoxes of Rights" in Brown and Halley, eds. *Left Legalism/Left Critique*. 2002 Duke University Press

Suggested Readings:

- Marshall, Anna-Maria. "A Spectrum of Oppositional Consciousness: Sexual Harassment Plaintiffs and Their Lawyers." In Jane Mansbridge and Aldon Morris, eds. *Oppositional Consciousness*. University of Chicago Press, 2001.
- Paul Burstein, "Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity," *American Journal of Sociology* 96 (1991): 1201-25.
- Mark Kessler, "Legal Mobilization for Social Reform: Power and the Politics of Agenda Setting," *Law and Society Rev.* 24 (1990): 121-143.

Week 4 (September 16): Civil Rights in Context: Equal Treatment, Nondiscrimination, and the Civil Rights Movement. We begin with the scholarly debate on the significance of *Brown v. Board of Education* (1954) and then trace the role of legal strategies in the civil rights movement.

- Michael J. Klarman. "Brown, Racial Change, and the Civil Rights Movement." *Virginia Law Review* 136-37 (1994). (note: is the central article of the special edition in VA Law Review that Tushnet, along with other scholars, is responding to. It is lengthy, so I don't recommend printing)
- Mark Tushnet. "The Significance of Brown v Board of Education" 1994 *Virginia Law Review*
- Francesca Poletta (2000). "The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-1966." 34 *Law and Society Review*, 367-406
- Christopher Coleman, Laurence D. Nee, and Leonard S. Rubinowitz, "Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest" 30 *Law and Social Inquiry* 663 (2005)

Week 5 (September 23): Sex Discrimination and the Race-Sex analogy: How have early attempts to frame a legal response to sex discrimination deployed analogies to the race-based civil rights, and how has this response evolved?

- Nicholas Pedriana. "From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s." 2006 *Am. Journal of Sociology*
- Serena Mayeri. *Reasoning From Race* 2011 Harvard University Press, Introduction and Chapter 1. Available as e-book at UHM (LC Call Number: KF4758.M39 2011eb)
- Serena Mayeri. "Reconstructing the race-sex analogy." 2008 *William and Mary Law Review*
- "Tina Grillo. "Obscuring the Importance of Race: the Implication of Making Comparisons Between Racism and Sexism (or other -isms)." 1991 *Duke Law Journal*

Suggested Readings:

- Serena Mayeri. "Constitutional Choices: Legal Feminism and the Historical Dynamics of Change" 2004 *California Law Review*
- Elizabeth Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Rights Movement," *New York Univ. Law Rev.* 61(1986): 589-652.
- Wendy Williams. "Equality's Riddle: Pregnancy and the Equal Treatment, Special Treatment Debate." 1984 *N.Y.U. Review of Law and Social Change*.

Week 6 (September 30) Gay Rights and Analogies to Race, Sex, and Religion

- David Meyer and Steven Boutcher. "Signals and Spillover: Brown v Board of Education and Other Social Movements." 2007 *Perspectives on Politics*
- Jon Goldberg Hiller. "Do Civil Rights have a Face? Reading the Iconography of Special Rights" (in *Queer Mobilizations*)
- Nicholas Pedrina. "Intimate Equality: The Lesbian, Gay, Bisexual and Transgender Movement's Legal Framing of Sodomy Laws in Lawrence v Texas" (in *Queer Mobilizations*)
- Chai Feldblum. "Moral Conflict and Conflicting Liberties" in Laycock, Picarello, and Fretwell, eds. *Same Sex Marriage and Religious Liberty: Emerging Conflicts*, 2008

Suggested Readings:

- David Richards. *Identity and the Case for Gay Rights: Race, Gender, Religion as Analogies* 1999 University of Chicago Press

PART TWO: Troubling the Analogy: Disability Rights, Animal Rights, and the Neoconservative Backlash

Week 7 (October 7): Disability Rights, Equality Frames, and the Power of Analogies to other social movements

- Cass Sunstein. "On Analogical Reasoning" 1993 *Harvard Law Review*
- Robert D. Benford, David A. Snow. "Framing Processes and Social Movements: An Overview and Assessment" 26 *Annual Review of Sociology*, 2000
- Richard Scotch. *From Good Will to Civil Rights*, 2001 Temple U Press (Ch. 3 "The Genesis of Section 504")
- Katharina Heyer. "Disability Rights as Civil Rights" in *Rights Enabled: The Disability Revolution* (forthcoming, U Michigan Press)

Suggested Readings:

- Anita Silvers and Michael Stein. "Disability, Equal Protection and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Interpretation" 2002 *University of Michigan Journal of Law Reform*
- Michael Stein. "Same Struggle Different Difference: ADA Accommodations as Antidiscrimination" 2004 *University of Penn Law Review*
- Kay Schriener and Richard Scotch. "The ADA and Meaning of Disability" in Linda Krieger, ed. *Backlash Against the ADA: Reinterpreting Disability Rights* (University of Michigan Press, 2003)
- Mathew Diller. "Judicial Backlash, the ADA, and the Civil Rights Model of Disability" in Linda Krieger, ed. *Backlash Against the ADA: Reinterpreting Disability Rights* (University of Michigan Press, 2003)

Week 8 (October 14): Animal Rights and Vulnerable Subjects: How does the

animal rights movement deploy legal analogies? What is gained and what is lost in the attempts to declare legal personhood for animals?

- Martha Fineman. *The Vulnerable Subject: Anchoring Equality in the Human Condition*. 2008 *Yale Journal of Law and Feminism*
- Ani Satz. "Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property." 2009 *Animal Law*
- Taimie Bryant. "Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans." 2008 *Rutgers Law Journal*
- David MacDonald. "Pushing the Limits of Humanity? Reinterpreting Animal Rights and "Personhood" through the Prism of the Holocaust" 2006 *Journal of Human Rights*
- **Paper proposal due**

Suggested Readings:

- Cass Sunstein and Martha Nussbaum. *Animal Rights*. 2004 Oxford University Press
- Swedlow, Brendon. "Reason for Hope? The Spotted Owl Injunctions and Policy Change." *Law & Social Inquiry* 34.4 (2009): 825-867.
- Julian Groves, "Animal Rights and the Politics of Emotion: Folk Constructs of Emotion in the Animal Rights Movement," in Goodwin, Jasper, and Polletta, *Passionate Politics* (2001)

Week 9 (October 21): The Neoconservative Turn to Rights: Rights and the Politics of Resentment

- Michael McCann and Stuart Scheingold. "Rights, Community and Democracy: a Sociolegal Critique of the Neoconservative Case Against Rights" 2012 *Studies in Law, Politics and Society*
- Jeffrey Dudas (2005), "In the name of equal rights: 'Special rights' and the politics of resentment in post-civil rights America", *Law & Society Review*, Vol. 39 pp.723 - 757.
- Daniel Tagliarina. "It Gets Better?: The New Right's Countermobilization of Religious Rights Contra LGBT Rights" 2012 unpublished APSA paper
- Charles Hersch, "Five Tellings of an Abortion Clinic Protest - *Madsen v. Women's Health Center* and the Limits of Legal Narrative" 1995 *Legal Studies Forum*

Additional Readings (Pro-life Movement):

- Woliver, Laura R. "Social movements and abortion law." *Social Movements and American Political Institutions* (1998): 233-247.
- Van Dyk, Robert. "The Pro-Choice Legal Mobilization and Decline of Clinic Blockades." *Leveraging the Law: Using the Courts to Achieve Social Change*. New York: Peter Lang.[Links] (1998).

- Wilder, Marcy J. "The Rule of Law, the Rise of Violence, and the Role of Morality: Reframing America's Abortion Debate." *Abortion Wars: A Half Century of Struggle, 1950-2000* (1998): 73-94.

PART THREE: Applications of Equal Rights Doctrines in Comparative and International Law

Week 10 (October 28): Law, Culture and the Difficulties of Comparing

- Engel, "Globalization and the Decline of Legal Consciousness: Torts, Ghosts, and Karma in Thailand," 30 *Law and Social Inquiry* (2005).
- Wagatsuma and Roset, "The Implication of Apology: Law and Culture in Japan and the United States," 20 *Law and Society Review* (1986)
- Lee, Ilyhung. 2005. "The Law and Culture of Apology in Korean Dispute Settlement," 27 *Michigan Journal of International Law*.
- David Kennedy, "The International Human Rights Movement: Part of the Problem?" (2002) 15 *Harvard Human Rights Journal* 101-25.
- <http://www.law.harvard.edu/faculty/dkennedy/publications/humanrights.pdf>
- **Annotated Bibliography Due**

Week 11 (November 4): Theorizing Human Rights: making rights work in global settings; using human rights frames in US activism:

- Alexandra Bonazoli. "Human Rights Frames in Grassroots Organizing: CADRE and the Effort to Stop School Pushout." 2012 *Northeastern University Law Journal*
- Claire Moon. "How One Files Seeing: Human Rights Reporting, Representation, and Action" 2012 *Sociology*
- Kate Nash. "Human Rights, Movements, and Law: On Not Researching Legitimacy" 2012 *Sociology*
- Sally Merry, Mihaela Rosen, Peggy Levitt, and Diana Yoon. "Law From Below: Women's Human Rights and Social Movements in New York City." 2010 *Law & Society Review*

Suggested Readings:

- Amy Bartholomew, "Empire's Law and the Contradictory Politics of Human Rights" in Amy Bartholomew Ed. Empire's Law: The American Imperial Project and the 'War to Remake the World' (Toronto: Between the Lines, 2006), 161-89.

Week 12 (November 11): Veteran's Day

Week 13 (November 18): Transnational Human Rights: Translating Global Norms into Local Settings

- Sally Merry, (2006) "Transnational Human Rights and Local Activism: Mapping the Middle" *American Anthropologist* Vol. 108, Issue 1, pp. 38-51
- Sally Merry. "Constructing a Global Law-Violence against Women and the Human Rights System." *Law & Social Inquiry* 28.4 (2003): 941-977.
- Zvika Orr. "The Adaptation of Human Rights Norms in Local Settings: Intersections of Local and Bureaucratic Knowledge in an Israeli NGO" 2012 *Journal of Human Rights*
- Kiyoteru Tsutsui, Claire Whitlinger, and Alwyn Lim. "International Human Rights Law and Social Movements: States' Resistance and Civil Society's Insistence" 2012 *Annual Review of Law and Social Science*
- Katharina Heyer. "Disability Rights Going Global: The UN Convention on the Rights of Disabled Persons and the Right to Inclusive Education" (in Rights Enabled)

Suggested Readings:

- Sally Merry. Human Rights and Gender Violence: Translating International Law into Local Justice.
- Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds. *The Power of Human Rights: International Norms and Domestic Change*. Cambridge, UK: Cambridge University Press, 1999, chapters 1, and 8

Week 14 (November 25): Transnational Human Rights: Case studies

- Priscilla Claeys. "The Creation of New Rights by the Food Sovereignty Movement: the Challenge of Institutional Subversion" 2012 *Sociology*
- Resnik, Judith. "Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry." *The Yale Law Journal* (2006): 1564-1670.
- Bernstein, Elizabeth. "Militarized humanitarianism meets carceral feminism: the politics of sex, rights, and freedom in contemporary antitrafficking campaigns." *Signs* 36.1 (2010): 45-71.
- Halley, Janet, et al. "From the international to the local in feminist legal responses to rape, prostitution/sex work, and sex trafficking: Four studies in contemporary governance feminism." *Harvard Journal of Law & Gender* 29 (2006): 335.

First Draft due

Peer Review due

Weeks 15 and 16 (December 2 & December 9):

CONFERENCE PANEL PRESENTATIONS

Final paper due December 16, 2013, 4 pm