CHILDREN AND THE LAW

Law 851A
Golden Gate University School of Law

Fall 2008
Mondays, 6:30 pm – 9:10 pm
Room TBA

Instructors

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Course Description and Objectives

Children and the Law is a course that examines the unique status of children under our legal system, and explores the fundamental question of how the law allocates decision-making power and responsibility for children among the child, the family and the State. The course will focus on both the theory underpinning the child welfare and delinquency systems as well as the function of those systems in practice. Topics we will cover include delinquency and juvenile justice; abuse and neglect; foster care and adoption; and the rights of children within the family. Unlike a course in family law, we will not be focusing on marriage, divorce, or reproductive rights.

Using an interactive, seminar format, we will base the course on the study of federal and state cases and statutes, supplemented by selected scholarly articles, government reports, and other source materials. We also will read popular media accounts of contemporary family phenomena, consider sociological, psychological, and historical perspectives on children’s rights and the family, and, as time permits, view some videotaped and documentary depictions of children’s legal issues. We will also host guest speakers to get practitioners’ perspectives on the issues raised. We also will schedule a time to visit a juvenile correctional facility, at a time that is convenient to students.

It is expected that students will reach an understanding of the current practice of juvenile law, with particular attention paid to the ethical considerations implicated in representing children. We will also focus on how the interplay of race, ethnicity, socioeconomic class, gender and sexual identity affect and inform this body of law as it continues to evolve.

Previous study in Constitutional law, civil procedure, and criminal law or procedure is recommended but not required.
Course Requirements, Important Dates, and Grading Process

Students are expected to read the appropriate assignments and come to the seminar fully prepared to participate meaningfully in class. We anticipate lively discussions stimulated by hypothetical questions and real-life scenarios. This class is a seminar, not a lecture. Do not expect your instructors to do most of the talking. If you are not prepared, please inform the instructors at the beginning of class.

The course grade will be based primarily on a research paper of at least 30 pages, due at the end of the semester. Each student will develop the paper topic in consultation with the professors, but it should be an issue of interest related to children and the law. The style of the research paper will be that of a law review article with supporting research and citations in “Blue Book” format. Your paper will be graded based upon the quality of your legal research and writing, the degree of originality, and its persuasiveness. Bench memos that merely recite the state of the law or policy on a particular issue are discouraged and will receive an average grade. As a baseline to receive an above average or excellent grade, you should take a position on the issue or legal question, and articulate a persuasive justification for your position.

The topic is to be discussed with the instructors and approved either in person or via email by no later than September 15, 2008. A detailed outline of the paper is due to the instructors by October 6, 2008. A final draft of your paper is due November 3, 2008, which we will review and provide you with feedback. The completed paper is due on or before November 24, 2008. When submitting your papers and outlines to us, please provide an electronic and paper copy.

Your final grade will be based primarily on your paper (80%), though class participation—attendance, preparation, and quality of contribution to the discussion—will contribute to 20% of your final grade. If you are going to miss a class, please notify an instructor by phone or email prior to class. Excessive absences without good cause will be penalized.

Course Materials

There is no casebook for the class. Most of the readings and materials will be available from a course reader from the Faculty Services office, or you can download them through Westlaw and the Internet. In addition, two books are required: Jennifer L. Renne, Legal Ethics in Child Welfare Cases (American Bar Association 2004) ISBN: 1-59031-407-7; and Sarah Gerstenzang, Another Mother: Co-Parenting With the Foster Care System (Vanderbilt University Press 2007) ISBN-13: 978-0-8265-1459-0.

Throughout the syllabus you will see additional suggested readings which may be useful if a topic is of particular interest to you, or you want to use these materials as a starting point for your paper. These books can be found on Powell’s or Amazon (or even at the library) and may be helpful if relevant to your paper topic.
COURSE SYLLABUS

1. **AUGUST 18, 2008: Course Introduction; The Role of the Attorney in Representing Children.**

   Introduction to the Course, Faculty and Students
   Review of Syllabus, Expectations for the Semester

   Read before Class 1:

2. **AUGUST 25, 2008: Who Speaks for a Child?**

   Who speaks for a child? On what basis do they purport to speak for the child? When does a parent not speak for his child? Can the child speak for herself? Does the venue matter?

   *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (read opinion & Frankfurter dissent)

   Recommended Additional Reading for Research on the Role of Counsel:
   Martin Guggenheim, *What’s Wrong With Children’s Rights*, Chapter 8
SEPTEMBER 1, 2008
NO CLASS – LABOR DAY

3. SEPTEMBER 8, 2008: Children, Families and the State: What is a Family and When Can the State Regulate It?

How does the law define a family? How should the law define a family? What rights, if any, does a child have within a family?

When reading these seminal Supreme Court cases, focus on the point of view of the child. Building off of last week’s readings, who is asserting that they are speaking for the child or the child’s best interest? Do the facts or characteristics of the families affect the Court’s decisions? When and how can the State regulate how parents raise their children?

Uniform Parentage Act, Cal. Fam. C. §§7600-7602, 7610-7614, 7620, 7630-7650
Meyer v. Nebraska, 262 U.S. 390 (1923) (read all)
Pierce v. Society of Sisters, 268 U.S. 510 (1925) (read all)
Prince v. Massachusetts, 321 U.S. 158 (1944) (read all)
Stanley v. Illinois, 405 U.S. 645 (1972) (read all)
Wisconsin v. Yoder, 406 U.S. 205 (1972) (Read Parts I-IV of opinion, White concurrence, and Douglas Dissent [esp. part II])
Moore v. City of East Cleveland, 431 U.S. 494 (1977) (read Parts II & III of opinion, and Brennan concurrence)

Recommended Additional Reading on State Intervention:
Martin Guggenheim, WHAT’S WRONG WITH CHILDREN’S RIGHTS, Ch. 2

4. SEPTEMBER 15, 2008: Dependency – Part One: What is Child Abuse and Neglect?

Deadline to discuss paper topic with instructors and to have approved

What is abuse and neglect? When should the state intervene in a family? How and why should the state do so? What is the purpose of a foster care system and what should be the reasons for entering the system? What responsibility does the state have to a child who may be abused or
neglected? Read DeShaney closely, especially footnote 9 of the opinion and Blackmun’s dissent. When reading these materials, consider the roles of race, socioeconomic class, and education of the parties involved.

In re Texas Dep’t of Family and Protective Servs., 255 S.W.3d 613 (Tex. 2008)
Annette R. Appell, Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay], 48 S.C.L.Rev. 577 (1997)
Selected articles on Texas FLDS case

Recommended Additional Reading on What is Abuse and Neglect:
Michele Miller, Revisiting Poor Joshua: State-Created Danger Theory in the Foster Care Context, 11 HASTINGS WOMEN’S L.J. 243 (2000)
Marie Ashe, Bad Mothers, Good Lawyers, and Legal Ethics, 81 GEO. L.J. 2533 (1993) (read only Parts II and III and p. 2566)

5. SEPTEMBER 22, 2008: Dependency – Part Two: The Foster Care System

What is the foster care system? How is it structured? What are the laws that establish child welfare systems? Who are the children that end up in foster care?

Guest Speaker (Week 5 or 6) on the foster care system.

“Understanding the Child Welfare System in California” California Center for Research on Women and Families

Sarah Gerstenzang, Another Mother: Co-Parenting With the Foster Care System, pp. 50-58, and Ch. 3
Lipscomb v. Simmons, 962 F.2d 1374 (9th Cir. 1992) (read opinion and dissent)
San Francisco Chronicle articles at http://sfgate.com/opinion/chroniclecampaigns/ (read editorials from 9/11/05, 9/12/05, 9/28/05, 2/3/06, 2/5/06, 2/12/06, 3/22/06, 7/14/06, 9/22/06, 2/25/07, 5/23/07, 5/29/07)

Recommended Additional Readings on the Foster Care System:
Duncan Lindsey, The WELFARE OF CHILDREN (1999)
Martin Guggenheim, The Foster Care Dilemma and What to Do About It: Is the Problem That Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care, 2 U. PA. J. Const. L. 141 (1999).

6. SEPTEMBER 29, 2008: Dependency – Part Three: Accountability and Systemic Change of the Foster Care System

Can systemic reform of the child welfare system be achieved? Think back to the Matthews and Dunn articles from the fourth week when examining systemic reform. Compare and contrast the complaints in Olivia Y. and Susan C. in light of Blasi’s article. Is federal oversight of states’ foster care systems (or the State of California’s oversight of county systems) enough to prevent the need for litigation? Do children have standing to enforce federal and state requirements? How does the Kristof column relate to systemic reform of a foster care system with hundreds of thousands of children in it?

Susan C. v. Florida Department of Children and Families, writ of mandamus (to be distributed)

Recommended Additional Readings on Systemic Reform:


7. **OCTOBER 6, 2008: Dependency – Part Four: Permanency Planning, Reunification, Emancipation, and Termination of Parental Rights**

**Detailed outline of final paper due today.**

Foster care is designed to be a temporary placement for children. Who decides, and by what standard, when it is time for a child to return to her parent, or alternatively, to legally sever the relationship between parent and child? Compare *Lassiter* with *Kenny A.* (from Week 1) and each case’s approach to the right to counsel. If the child is not returning home, what happens to her next?

Guest Speaker on Emancipation of Foster Youth


Cal. Welf. & Inst. C. §§366-366.4
Cal. Fam. C. §§7660-7670

Adoption & Safe Families Act (from federal laws compilation)


San Francisco Chronicle articles at [http://sfgate.com/opinion/chroniclecampaigns/](http://sfgate.com/opinion/chroniclecampaigns/) (read editorials from 12/22/05, 8/13/06, 9/21/06, 11/2/06, 1/28/07, 4/22/07)


Additional Suggested Reading on Permanency for Foster Youth:


8. **OCTOBER 13, 2008: Adoption**

One way that children can exit the foster care system is through adoption. Often these adoptions are by parents of a different race or ethnicity than the child. In addition, every year the number of children adopted privately from foreign countries continues to grow, in part due to perceived difficulties in adopting from the child welfare system. What are the implications of interracial and transcultural adoptions?

Note the back and forth between Rick Banks and Elizabeth Bartholet in their articles. Focus on Gerstenzang’s reflections upon race and class, and her struggle with whether she and her husband would be the “best” parents for Cecilia. Also think back to the cases from earlier in the semester about “what is a family”? Is it possible to avoid essentialist and occasionally cross-cutting assumptions of race, ethnicity, or class when evaluating the “best interest” of a child in finding an adoptive home?

Multiethnic Placement Act (MEPA), 42 U.S.C. §1996b
Sarah Gerstenzang, _ANOTHER MOTHER: CO-PARENTING WITH THE FOSTER CARE SYSTEM_, Ch. 4 and Epilogue
Richard Banks, _A Response to Elizabeth Bartholet_, 107 YALE L.J. 2357 (1998)

_Suggested Additional Reading on Adoption:
Sarah Gerstenzang, _ANOTHER MOTHER: CO-PARENTING WITH THE FOSTER CARE SYSTEM_, Ch. 6 and 7
Adoption History Project, http://darkwing.uoregon.edu/~adoption/topics/index.html
9. **OCTOBER 20, 2008: Juvenile Delinquency – Part One: The Principles and Objectives of the Juvenile Delinquency Court System**

The juvenile justice system was established to provide children with a less punitive and more rehabilitation-oriented penal system than that for adults. Is this an appropriate objective? Why do children merit a separate justice system? Does the juvenile justice system provide the same rights to juvenile offenders as an adult would receive? Should juvenile offenders be treated more leniently than adult offenders? Does today’s juvenile justice system still adhere to the principles responsible for its creation?

How should a juvenile defender respond to a child who wishes to make decisions regarding the child’s representation that the attorney believes are not in the child’s best interests? How can an attorney work with family members who wish to exert control over the attorney’s representation of the child? What should the attorney do when the family’s advice is contrary to that of the attorney? How can a defense attorney effectively represent a client who has limited ability to assist in the defense due to his or her young age, developmental disabilities, mental health problems or other cognitive immaturity? Should an attorney ever advise a client to plead guilty if the child, or the family, claims the child is innocent?

Cal. Welf & Inst C. §§ 202, 602, 634, 634.6, 679, 700
Cal. Rules of Ct., Rule 5.663

*In re Daedler*, 194 Cal. 320 (1924)

*In re Gault*, 387 U.S. 1 (1967)


United Nations Convention on the Rights of the Child (excerpts, to be distributed)


**Additional Suggested Reading:**


10. **OCTOBER 27, 2008: Juvenile Delinquency – Part Two: The Children in the Juvenile Delinquency System**

The children who end up in the juvenile justice system are overwhelmingly low-income and from communities of color. Many are current or past clients of the child welfare system. In addition, many are developmentally immature, have significant mental health needs, and / or suffer from developmental disabilities. Why do these children end up in the juvenile justice system? How are they treated once they are there? Has our juvenile justice system become the final dumping ground for the failure of society to address children’s needs?

Guest Speaker on Children in the Juvenile Justice System


Additional recommended reading:


**Final draft of paper due today**

*Two competing trends are in tension within the California and national juvenile justice systems. On the one hand, there is a movement, often driven by litigation or budgetary concerns, to improve the often poor quality of treatment and rehabilitation programs for youth, and to limit the number of children who are removed from their homes and placed in youth prisons, juvenile halls, and group homes. On the other hand, the past 20 years has seen a dramatic increase in the number of children who are removed from the juvenile justice system entirely and transferred to the adult system, where punishment is far steeper and rehabilitation programs rare.*

*During the next two weeks, we will consider the following questions: What should the juvenile justice system offer to juvenile offenders? How should it be reformed? What type of juvenile justice system serves the public best? When, if ever, should children be punished as adults, and what type of punishment should they receive in those cases?*

*Kent v. United States, 383 U.S. 541 (1966)*  
*Roper v. Simmons, 543 U.S. 551 (2005)*  
*Excerpts from Farrell v. Hickman lawsuit alleging inhumane conditions at the California Youth Authority (now known as the Division of Juvenile Justice, “DJJ”)*  
*Materials on Senate Bill 81 - realignment of California Division of Juvenile Justice (to be distributed)*  
*Materials on Proposition 6, the Safe Neighborhoods Act, November 4, 2008 General Election (to be distributed)*

**Additional suggested reading:**  

12. **NOVEMBER 10, 2008: Juvenile Delinquency – Part Four: Reform Under the Microscope**

*This week’s readings and discussion continue last week’s conversation, with a focus on two principal areas: the transfer of youthful offenders to adult court, and the practice of sentencing youth to life without parole.*
“The Rest of Their Lives: Life Without Parole for Child Offenders in the United States,”
Human Rights Watch and Amnesty International (2005) (available at
“When I Die, They’ll Send Me Home: Youth Sentenced to Life Without Parole in California”
“A Shameful Record,” New York Times, February 6, 2008 (available online at
http://www.nytimes.com/2008/02/06/opinion/06wed5.html)
“Family Members of Murder Victims Killed by ‘Juvenile Lifers’ Cite Flaws in Report
Advocating for Release from Prison,” Press Release, Illinoisvictims.org, February 13,
“Kids Who Kill,” Editorial, Chicago Tribune, February 24, 2008 (available online at
http://www.willsworld.com/hb_1695_resolved.htm)
“Real Victims of Child Killers Will Never Get Early Release,” John Kass, Chicago Tribune,
February 20, 2008 (available online at http://www.willsworld.com/hb_1695_resolved.htm)
“Bill to Free Young Killers Suffers Fatal Shot of Its Own,” John Kass, Chicago Tribune, March
5, 2008 (available online at http://www.willsworld.com/hb_1695_resolved.htm)
Coalition for Juvenile Justice, Childhood on Trial: The Failure of Trying and Sentencing Youth
in Adult Criminal Court (2005) (abstract and excerpts, to be distributed)
ABA Letter to the Senate Committee on the Judiciary (July 5, 2005) (available online at
http://www.abanet.org/poladv/letters/crimlaw/050706letter_gangs.pdf)
“States Rethink Charging Kids As Adults,” Associated Press, December 2, 2007 (available
online at http://abcnews.go.com/US/wireStory?id=3940830)
the Adult Criminal Court (available online at http://www.adjj.org/downloads/3582issue_brief_5.pdf)

13. NOVEMBER 17, 2008: Children’s Rights in the Schoolhouse

Students’ rights to free speech and protection against searches and seizures differ markedly
from the constitutional protections afforded adults. Should schools limit the content of student
speech? If so, why? In what contexts should they be able to do so? What rights should
students have against the search of their person or property on school grounds?

Morse v. Frederick, 127 S.Ct. 2618 (2007)
Redding v. Safford Unified Sch. Dist. #1, ___ F.3d ___, 2008 WL 2698101 (9th Cir. July 11,
2008) (en banc)
Matthew I. Pinzur, Banned Books Ordered Back on Shelves, Miami Herald, Jul. 25, 2006,
available at http://www.miami.com/ml/d/miamiherald/15114360.htm

Recommended additional reading:
Anna Boksenbaum, Shedding Your Soul at the Schoolhouse Gate: The Chilling of Student Artistic Speech in the Post-Columbine Era, 8 N.Y. CITY L. REV. 123 (2005)

14. NOVEMBER 24, 2008: LAST DAY OF CLASS – PRESENTATIONS

Final paper due today.

Students will provide a short presentation on the topic of their research paper.