CHILDREN AND THE LAW

Law 851A
Golden Gate University School of Law

Fall 2010
Mondays, 6:30 pm – 9:10 pm
Room 3209

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. If you are not prepared, please inform the instructors at the beginning of 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. To ensure participation and to show consideration to others, students may not access the Internet or engage in emailing/instant messaging during class.

Attendance is required. Any student who misses more than three class meetings or whose absence and unpreparedness together total more than three, may have his or her final grade reduced by one step/grade level (e.g., from “A-“ to “B+”).

The course grade will be based primarily on a research paper of 25 to 30 pages, due at the end of the semester. Each student will develop the paper topic in consultation with the professors, but you are free to choose any topic, so long as it is 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, analysis 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. Students will present their paper to the class on the last day of the semester.

The topic is to be discussed with the instructors and approved either in person or via email by no later than September 13, 2010. A detailed outline of the paper is due to the instructors by October 4, 2010. A final draft of your paper is due November 1, 2010, which we will review and provide you with feedback. The completed paper is due on or before November 22, 2010. 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%), but since this is a seminar, 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


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.
COURSE SYLLABUS

1. AUGUST 16, 2010: Course Introduction; The Role of the Attorney in Representing Children.

Jennifer L. Renne, LEGAL ETHICS IN CHILD WELFARE CASES, Ch. 1-3

Skim

2. AUGUST 23, 2010: 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 on the Role of Counsel:
Martin Guggenheim, WHAT’S WRONG WITH CHILDREN’S RIGHTS, Chapter 8
3. **AUGUST 30, 2010: 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, 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?

_Meyer v. Nebraska_, 262 U.S. 390 (1923)
_Pierce v. Society of Sisters_, 268 U.S. 510 (1925)
_Prince v. Massachusetts_, 321 U.S. 158 (1944)
_Stanley v. Illinois_, 405 U.S. 645 (1972)
_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)
_Michael H v. Gerald D., _491 U.S. 110 (1989) (read opinion; esp. focus on Part IV, pp. 139-157 of Brennan’s dissent, and White’s dissent)


**Skim**
Uniform Parentage Act, Cal. Fam. C. §§7600-7602, 7610-7614, 7620, 7630-7650

**SEPTEMBER 6, 2010 – NO CLASS, LABOR DAY**

4. **SEPTEMBER 13, 2010: Dependency – Part One: What is Child Abuse and Neglect?**

Deadline to discuss paper topic with instructors and to have topic 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 Steed*, et al., 2008 WL 2132014 (Tex.App.-Austin 2008)

*In re Texas Dep’t of Family and Protective Servs.*, 255 S.W.3d 613 (Tex. 2008)


Selected articles on Texas FLDS case

**Recommended Additional Reading on What is Abuse and Neglect:**

Marie Ashe, *Bad Mothers, Good Lawyers, and Legal Ethics*, 81 GEO. L.J. 2533 (1993)


Martin Guggenheim, *WHAT’S WRONG WITH CHILDREN’S RIGHTS*, Ch. 2


5. **SEPTEMBER 20, 2010: 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?*

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)


**Re-Read/Skim from Week 1 - National Association of Counsel for Children, ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC Revised Version) (1999).**

**Recommended Additional Readings on the Foster Care System:**


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)

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 27, 2010: 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 second week when examining systemic reform. Compare and contrast the complaints in Olivia Y. and Susan C. in light of Blasi’s and Eviatar articles. 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 and Blasi article 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


Recommended Additional Readings on Systemic Reform:


7. **OCTOBER 4, 2010: 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 for the parent versus the child. If the child is not returning home, what happens to her next?


San Francisco Chronicle editorials on youth aging out

Skim:
Cal. Welf. & Inst. C. §§366-366.4
Cal. Fam. C. §§7660-7670
Adoption & Safe Families Act (from federal laws compilation, Week 5)

Additional Suggested Reading on Permanency for Foster Youth:


8. **OCTOBER 11, 2010: 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 intersracial 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?

Sarah Gerstenzang, ANOTHER MOTHER: CO-PARENTING WITH THE FOSTER CARE SYSTEM, Ch. 4 and Epilogue
Adoption Facts & Myths handouts
Elizabeth Bartholet, Private Race Preferences in Family Formation, 107 YALE L.J. 2351 (1998)

Skim:
Multiethnic Placement Act (MEPA), 42 U.S.C. §1996b

Suggested Additional Reading on Adoption:
Adoption History Project, http://darkwing.uoregon.edu/~adoption/topics/index.html
Sarah Gerstenzang, ANOTHER MOTHER: CO-PARENTING WITH THE FOSTER CARE SYSTEM, Ch. 6 and 7
9. **OCTOBER 18, 2010: 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?


*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)

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

**Additional Suggested Reading on the Juvenile Justice 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?

Roper v. Simmons, 543 U.S. 551 (2005)

Additional recommended reading on children in the delinquency system:

11. NOVEMBER 1, 2010: Juvenile Delinquency – Part Three: Systemic Reform and the Adultification of the System

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)

Juvenile Justice Reform: Realigning Responsibilities, Little Hoover Commission (July 2008), (read “Executive Summary”)

Excerpts from Farrell v. Hickman complaint alleging inhumane conditions at the California Youth Authority (now known as the Division of Juvenile Justice, “DJJ”)


12. NOVEMBER 8, 2010: Juvenile Delinquency – Part Four: Juvenile Sentencing and Adultification of the System

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.


Comments of Daniel Horowitz on S.B. 399.

13. NOVEMBER 15, 2010: 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, 551 U.S. 393 (2007)

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 22, 2010: Closing Thoughts and Presentations

Final paper due today.

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