

JUSTICE AND GENDER

Deborah L.
RHODE



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Sex Discrimination and the Law

Deborah L. Rhode



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For Ralph

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Justice and Gender



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Introduction

It is ironic that gender discrimination has become more obvious in a society seeking to make it less so. This book explores the law's responses to such discrimination within their broader cultural context. A primary objective is to reorient legal doctrine from its traditional focus on sex-based difference toward a concern with sex-based disadvantage. By examining how the law reflects, reinforces, or challenges persistent patterns of inequality, we may gain a better understanding of both the cultural construction of gender and the most promising strategies for cultural change.

Throughout the last century, the dominant strategy of the women's rights movement has been to emphasize gender difference in order to reduce its importance. Yet this strategy points up central tensions in feminist theory and practice. The dominant ideals of the women's rights movement have built on liberal individualist values; sex should play no role in constraining personal opportunities. However, by definition, feminism presupposes some recognition of women's common interests and concerns. In that sense, liberal feminism assumes the very sense of shared identity it seeks in large measure to transcend.

Related tensions involve the nature of that common identity. Feminist theory derives its coherence from an understanding of women's collective experience. Yet such an understanding presupposes sensitivity to variations in this experience across class, race, ethnicity, age, religion, and sexual preference. The more adequate the acknowledgment of differences

among women, the more difficult it is to represent common perspectives or concerns. These tensions became increasingly visible during the 1970s and 1980s as critics from all points on the political spectrum began reexamining fundamental questions about the meaning of gender equality and the strategies needed to attain it. The radical left and New Right found themselves in curious agreement about the importance, if not the consequences, of sex-based differences—an importance that liberals had often challenged. An equally eclectic constituency began raising doubts about the effectiveness of conventional legal strategies in achieving equality for women.

The reasons for that skepticism were clear. Although the last quarter-century witnessed considerable changes in gender roles, certain patterns of gender inequality remained evident. In some respects, this was a period of extraordinary achievement in areas including education, employment, reproductive freedom, and political representation. However, substantial disparities between the sexes persisted. Women were still dramatically underrepresented in the highest positions of economic and political power, and equally dramatically overrepresented in the lowest socioeconomic sectors. In the late 1980s over 85 percent of all elective officeholders were male and over two-thirds of indigent adults were female. Full-time women workers earned less than two-thirds of the annual salary of men, and fewer than half of all women employees held full-time positions. Sexual violence remained common, and reproductive freedom was by no means secure. Women of color were doubly disadvantaged; they constituted a grossly disproportionate share of those experiencing poverty, unemployment, sexual violence, and restrictions on reproductive liberty. Yet few minority women were in positions that shaped public policy in these areas. So too, whatever our progress in gaining women access to roles traditionally occupied by men, we have been less successful in encouraging men's access to roles traditionally occupied by women.¹

This book seeks to expand our understanding of such inequalities. Law is an important social text, which illumines as well as influences the cultural construction of gender. To provide a fuller account of this process, the chapters that follow place legal issues within broader historical, philosophical, and socioeconomic frameworks. Analysis focuses on the law's role in both institutionalizing and challenging inequality. Much of the difficulty in conventional frameworks stems from two fundamental limitations: the law's traditional preoccupation with gender difference rather than with gender disadvantage; and its focus on abstract rights rather than the social context that constrains them. To challenge these limitations, we need a better sense of legal development in various historical and substantive settings.

The law's conventional approach to gender issues has focused on gender

difference. American equal-protection doctrine has drawn heavily on Aristotelian traditions, which define equality as similar treatment for those similarly situated. Within this framework, sex-based discrimination remains justifiable if the sexes are different in some sense that is related to valid regulatory objectives. For example, women's distinctive reproductive capacities have served to validate a wide array of restrictions in employment, family, and educational settings. However, this difference-oriented approach has proven inadequate in both theory and practice. As a theoretical matter, it tends toward tautology. It permits different treatment for those who differ with respect to legitimate purposes but provides no standards for determining what differences are relevant and what counts as legitimate. As a practical matter, this approach has both over- and undervalued gender differences. In some instances, biology has determined destiny, while in other contexts, women's particular needs have gone unacknowledged or unaddressed. Too often courts have treated gender as a matter of immutable difference rather than as a cultural construct open to legal challenge and social change. Reliance on "real difference" has deflected attention from the process by which differences have been attributed and from the groups that are underrepresented in that process. Such an approach has often done more to reflect sex-based inequalities than to challenge them.²

Related problems stem from the focus on individual rights that has dominated both gender discrimination law and the liberal feminist traditions from which it draws. Such a focus has, to be sure, played a crucial role in gaining women access to existing educational, employment, and political institutions. However, it has been less successful in making those institutions change in ways necessary to accommodate women's interests, values, and concerns. Formal mandates of similar treatment for individuals similarly situated have failed to confront the social forces underlying women's dissimilar and disadvantaged status. Debates over rights often simply restate rather than resolve fundamental tensions in cultural ideals; reliance on formal entitlements may obscure the broader institutional structure that constrains them. So too, the concept of an autonomous, self-interested individual that is paramount in liberal legal ideology is at odds with the more caring notion of personhood underpinning much contemporary feminist theory.

The alternative proposed here is not to abandon rights discourse, but to reimagine its content and recognize its limitations. The central strategy is to shift emphasis from gender difference to gender disadvantage. A determination that the sexes are not "similarly situated" only begins the discussion. Analysis turns on whether legal recognition of sex-based differences is more likely to reduce or to reinforce sex-based disparities in political power, social status, and economic diversity. Such an approach

entails a more searching review than has been customary in cases involving gender. Its focus extends beyond the rationality of means, the legitimacy of ends, and the guarantee of rights. Rather, this alternative requires that governmental objectives include a substantive commitment to gender equality—to a society in which women as a group are not disadvantaged in controlling their own destiny.

That commitment presupposes a better understanding of the harms of sex-based classifications and the complexity of strategies designed to address them. It assumes greater sensitivity to the diversity of women's interests and the tradeoffs that may be required among them. To take a representative example, protective legislation that makes it more expensive to hire female employees may benefit one group of women at the cost of preempting opportunities for another. Preferential policies that offer concrete advantages to women in the short term may carry a less obvious price in the long term. Sex-based classifications often reinforce sex-based stereotypes, and thus help perpetuate sex-based inequalities. In these cases, any adequate legal analysis will require close attention to context. Shifting focus from gender difference to gender disadvantage will not always supply definitive answers, but it can at least suggest the right questions: which women benefit, by how much, and at what cost. Reframing the issue in these terms also points up the limitations of traditional rights-oriented strategies, which have too often promised equality in form but not in fact.

This book explores such traditional legal approaches within their broader social context. Part I provides a brief historical synthesis, beginning with the political and legal efforts of an emerging women's movement to challenge the sexes' "separate spheres." Discussion then centers on the postsuffrage period, roughly 1920–1960, with special attention to disputes surrounding gender difference and protective legislation that provide illuminating parallels to contemporary debate. These debates are the remaining focus of the book. Part II continues the chronological account by describing the emergence of the contemporary women's movement, the campaign for an Equal Rights Amendment to the United States Constitution, and the general evolution of sex-discrimination doctrine during the 1970s and 1980s. Part III explores critical contemporary issues, including welfare policies, family law, employment discrimination, reproductive rights, sexual exploitation and violence, and single-sex schools and clubs. The concluding chapter places these issues in the context of broader trends in feminist theory and their implications for cultural ideals and legal ideology.

Any discussion that relies on concepts such as feminism and gender confronts problems of definition. The term "feminism" did not come into common use until the early part of this century, and its meaning remains inconsistent and imprecise. Conventional definitions encompass any theory or activity on behalf of women's equality. However, in particular historical and cultural contexts the term has been more or less inclusive and has carried different connotations. This analysis seeks to avoid semantic tangles by using the term in its most general sense, and by distinguishing where appropriate among distinctive strands of feminist thought or activity.³

The concept of gender presents similar definitional problems. Many contemporary feminist theorists use the term "sex" to refer to biological differences between men and women and "gender" to refer to culturally constructed differences. Although for some purposes it is useful to distinguish between attributes that seem more related to culture than chromosomes, this distinction is not common in legal discourse. Jurisprudential discussions of sexual differences have typically encompassed social as well as physiological characteristics, and have used the term "gender," if at all, interchangeably with "sex." Moreover, as recent feminist theory has emphasized, the two concepts have been inextricably linked. Sexuality as commonly understood has been dependent on social relations, while gender has been grounded in biological differentiation. Where possible, this book attempts to avoid confusion by using "gender" when referring to predominantly cultural dynamics and "sex" when referring to clear biological classifications. However, in areas where the law has employed the terms synonymously, that usage should be understood to encompass the interlocking patterns of biological and cultural differences between men and women.⁴

Those patterns demand greater attention from individuals concerned with legal policy. Given the centrality of gender differences in American society, it is striking to find so little consensus or clarity on certain fundamental issues. Are any sex-linked roles or attributes important to preserve? How might such roles coexist with egalitarian ideals? What legal strategies are most likely to challenge the difference gender difference makes?

In exploring such questions, this book reflects the limitations inherent in any broad-scale survey. It cannot capture the full diversity of women's experience or the complexity of any particular topic. However, it can offer some sense of the continuities of gender disadvantage over time, and illumine the relation between legal doctrine and social change. To that end, the analysis shares the commitment to contextual analysis explicit in most feminist methodology. By focusing on particular legal issues within

their broader historical, social, and economic settings, the following discussion seeks to build a theoretical framework from the ground up. The objective is to strengthen the connections between theory and practice, between our understandings of gender and the legal implications that should follow from it. Through that process, we may deepen our perceptions of justice and the strategies for achieving it.

Part One



HISTORICAL FRAMEWORKS

