SYLLABUS -- Sex Discrimination Law

Professor Yolanda Wu
Fall 2006
Thursdays, 4:05-5:55, Furman 118

How should equality on the basis of sex be defined? Can equality between men and women be achieved, and if so, how? This seminar explores a wide range of legal theories, strategies and doctrines that have been developed in an effort to answer those questions. We will study constitutional equal protection, due process and privacy doctrine, as well as topics in family law, employment discrimination, educational equity, reproductive rights and violence against women. This seminar also examines how sex discrimination intersects with discrimination based on race, class, and sexual orientation. In a two-unit course, it is impossible to give you a thorough exposure to the issues in sex discrimination law. Instead, this class will provide you with an overview of the field loosely referred to as "Sex Discrimination Law," including an introduction to key issues, cases and literature in the area, an opportunity to analyze competing legal philosophies and strategies, and a familiarity with issues currently facing the courts and legislatures.

Group discussion is a valuable component of the seminar experience. Your grade will be based on class attendance, the quality of your class participation, as well as your performance on either a 48-hour take-home exam or a final paper. If you choose the paper option, you may receive either “A” or “B” writing credit. Please note that this course may not be taken on a pass-fail basis.

The casebook is Katherine Bartlett and Deborah Rhode, Gender and Law: Theory, Doctrine, Commentary (4th ed. 2006).

Outside of class, the best way to reach me is by email: yw10@nyu.edu. My home office phone is 718-788-0410. I'm happy to schedule meetings with students before or after class, to discuss papers, issues in the course, or career questions you may have.
Class 1 – August 31 – Formal equality: historical background; equal protection doctrine

Text: 1-2; 4-20; 964-66; 973 n.1-974
Equal protection handout

The historical foundation of the women’s movement. In what ways did the practices described in the readings subordinate women? To what extent did these practices differentiate among women? What were the historic roots of the relationship between sexism and racism and homophobia? Development of a constitutional standard for sex equality as an exercise in formal equality.

Class 2 – September 7 – Equal protection continued; substantive equality: sex-linked differences in education and insurance

Text: 24-42; 151-52; 253-86

What should be the appropriate level of scrutiny under the equal protection clause to remedy sex discrimination? Why did the Supreme Court restrict equal protection to intentional discrimination? What, if any, “inherent differences” are there between the sexes? What are the advantages and disadvantages of single sex schools? Which, if any, single sex schools are constitutionally permissible after VMI? Can statistically true differences between the sexes ever justify different treatment? Do statistically true generalizations (such as women’s greater longevity) justify differential insurance rates?

Class 3 – September 14 – Substantive equality continued: affirmative action; difference theory: women in legal education and practice

Text: 167 n.1-170 (end n.2); 177-92; 637; 682-701; 711-21; problem 2-1 (p. 193)

What should be the constitutional standard to evaluate affirmative action programs for women? Should there be a different affirmative action standard for women of color? How should law schools assess their affirmative action programs in light of Grutter? Are there gender-based differences in learning, lawyering or judging? Would an all-women’s law school, based on data about women’s comparative performance disadvantage, be constitutional? How does gender bias manifest itself in the courtroom?
Class 4 – September 21- Nonsubordination: domestic violence and legal reform

Text: 399-400; 466-83; 490-502; 505 n.9-525

How has the legal system responded to what has been termed the "epidemic" of violence against women? How has the law defined domestic violence? To what extent is domestic violence fueled by gender-based stereotypes? What role can the law play in regulating this traditionally private sphere of conduct? How have advocates shaped the legal system's response?

Class 5 – September 28 - Autonomy: consent, force and sexual assault and strategies for systemic change

Text: 765-66; 782-95; 797-99; 807-21; 525-40; problem 5-2 (p. 821)

What elements should define sexual assault? How should the law recognize consent or the lack of it? What are the limits of legal remedies for women who have survived domestic violence and rape? Is there a need for a civil rights remedy for crimes of violence committed with gender based animus? What are the implications of the U.S. Supreme Court striking down such a remedy?

Students choosing paper option must have met individually with professor and received approval of paper topic before this date.

Class 6 – October 5 – Reproductive choice I: the right to abortion

Text: 861-900; 903-06; problem 5-11 (p.907)

To what extent may the state regulate the sexual lives and choices of its citizens? Does the Casey joint opinion resolve the question of whether abortion is a fundamental right? Is equal protection a stronger legal basis for reproductive rights than privacy? How have federal and state courts differed in their analysis of state-funded abortions? What legal strategies can be used to ensure access to abortions for all women?
Class 7 – October 12 – Reproductive choice II: control of contraception; pregnancy and contractual autonomy; pregnant women and fetuses as adversaries

Text: 849-61; 907-40

Do women benefit from being the ones primarily responsible for birth control? Should infertility treatments be covered by insurance? How should the law treat assisted reproduction? How should women’s autonomy be assessed with respect to surrogacy contracts? How should the law treat frozen embryos? How should the law address drug abuse by pregnant women? To what extent can women’s interests be limited in order to reduce health risks to fetuses?

Class 8 – October 19 – Equality in the Workplace

Text: 57-80; 83 n.5-84; 87-100; 124-36

What is employment discrimination and how is it proved? Title VII and its models of proof: disparate impact, disparate treatment, sex-plus analysis. When is discrimination a “bona fide occupational qualification?” What is the business necessity defense?

Class 9 – October 26 -- Title VII applications: pregnancy and parenting

Text: 208-28; 232-52; problem 2-4 (p. 252)

What are formal and substantive equality approaches to addressing pregnancy? How can law address women’s issues in the workplace without reinforcing sex-based stereotypes? What are some of the discrimination problems in the workplace that Title VII cannot solve? Can other legal strategies be used? What are the limitations in the current parental leave law?

Class 10 --November 2 – Sexual harassment

Text: 406-50; problem 3-1 (p. 450)

How did courts come to recognize the problem of sexual harassment in the workplace? Is the definition adopted by the Supreme Court workable? Why is sexual harassment a form of sex discrimination? Is it about power or sex or both? How should we apply the “based on sex” element of sexual harassment? How does the analysis change, if at all, for same sex harassment cases and cases involving male targets?
Class 11 – November 9 – Equality in the family

Text: 314-37; 342-64

What can we learn about gender and equality from historical treatment of women's traditional roles as wives and mothers? How should resources be allocated within marriage and after its dissolution? What factors should courts consider in awarding custody and visitation to couples that have separated or divorced? What legal significance should biology have in these decisions? How would you recreate custody laws that don't reinforce traditional roles and facilitate adequate parenting opportunities for both men and women? How could family and market institutions be reformed in order to take traditional “women’s work,” especially care work, seriously?

For students choosing paper option, first draft due today.

Class 12 – November 16 – Sexual identity discrimination; gay marriage; lesbian parents; employment discrimination based on sexual orientation

Text: 571-593; 594-604; 605-21

How does the law treat gay marriage? How useful is sex discrimination law in analyzing gay marriage? How does the law treat nontraditional family structures, particularly those created by lesbians? Does the law discriminate based on sex? How would you redefine families to eliminate gender stereotypes and discrimination? How should employment law treat discrimination against gays and lesbians? If the law were to protect gays and lesbians from employment discrimination, would it be based on a history of discrimination, immutable characteristics, or both?

November 23-- Thanksgiving – No class

Class 13 – November 30 – Caretaking: traditional women’s work; welfare reform

Text: 665-77; 942-60; supplement (to be distributed)

How can the law promote changing visions of women's roles without reinforcing stereotypic and historically limiting roles for women? Is caretaking a public good? Is employment law or family law a better place to reform the law to value caretaking? What does the history of welfare reform teach us about society’s valuing of caretaking? What are the pros and cons of using marriage promotion to reduce poverty?
Class 14 – December 7 - New frontiers of feminism; sex work; the role of men; transgender and the law; intersectionality

Text: 821-35; 967-73; 974 n.2-83; 1005-1020; 1028-34; 1036-37

How should women’s rights law respond to changing conceptions of women's lives? How should the legal system balance competing arguments about women's ownership of their sexuality and the exploitation of prostitution? What role should men play in feminism? How does the law regarding transgendered individuals challenge feminist notions of sex and gender? What are the biggest challenges facing the feminist movement today?