Phil 324: Law and Morality

Module 8 Reading Guide

# Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics”

1. What are Crenshaw’s goals in this essay?

## The Antidiscrimination Framework

1. **For the three cases that Crenshaw discusses, please try to summarize (1) what each case was about, (2) what the respective court’s ruling was, and (3) what Crenshaw thinks is wrong with it.**
2. What is Crenshaw’s response to the objection that Black women can’t be harmed by being treated as both different and the same as Black men/white women?
3. **What view underlies the dominant conception of discrimination?**
4. **What is the but-for analysis?**
5. **Why does Crenshaw find the dominant approach inadequate?**
6. Skip Sections II and III.

## Expanding Feminist Theory and Antiracist Politics by Embracing the Intersection

1. **What does Crenshaw think feminism and antiracism must do so they can embrace intersectionality?**
2. Why does Crenshaw think centering the experiences of Black women can help resist, rather than further exacerbate, the compartmentalization of experiences?

# Catharine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979), chapter 5

1. We are finally getting to our assigned book! For this module, we will read chapter 5, which starts on p. 101.
2. MacKinnon uses the deeply-entangled tension between nature and culture to motivate an alternative way of looking at the reality of women’s inequality—a reality obscured by “the ideology of biological fiat,” a reality whose most salient feature is not women’s sameness or difference relative to men, but women’s social *subordination*.
3. **MacKinnon then argues that the approach the Supreme Court uses is the first approach, that is, the *differences* approach (or simply the *difference* approach, as she calls it in her later works). How does the differences approach understand what it means to prohibit sex discrimination?**
4. **How about the inequality approach?**
5. What are some examples of existing legal doctrines/cases that can be read as reflecting the inequality approach?
6. How might the Ginsburg quote illustrate the disagreement between the inequality approach and the differences approach?
7. MacKinnon offers another way of characterizing the disagreement the inequality approach has with the differences approach: irrational *and rational* sex-based classifications can both imply the social inferiority of women.
8. How do the two approaches understand pregnancy discrimination?
9. MacKinnon next previews her inequality-based argument for sexual harassment as sex discrimination.
10. What is the difficult case? Why makes it difficult? What are some examples? How does the differences approach handle such cases? How about the inequality approach?
11. **What is the insight of the inequality approach that the differences approach fails to appreciate?**
12. MacKinnon concludes the introduction with more questions on which the two approaches differ.

## Two Theories of Sex Discrimination

1. Please skim this section.

## Sex Differences

1. **What is this “usually unarticulated” assumption of the differences approach?**
2. How does the differences approach understand the demands of the Equal Protection Clause and Title VII?
3. How would a proponent of the differences approach read *Reed*? How would a proponent of the inequality approach?
4. On what grounds does MacKinnon argue sex is not as natural a division as it might appear?
5. At the end of the same paragraph, MacKinnon makes the stronger argument that even if sex is a natural division, it cannot be used to justify *social* hierarchy.
6. How might *Plessy* be read in a way that reflects the differences approach?
7. How might *Brown* be read in a way that reflects the inequality approach?
8. **What role does biology play in the differences approach’s conception of sex discrimination? How does pregnancy discrimination illustrate this role?**
9. Skim the rest of the section.

## Sex Inequality

1. How might the *Manhart* majority be interpreted as being sensitive to the inequality approach?
2. Skim the next paragraph.
3. **In assessing whether a rule or practice is sex discriminatory, what does the inequality approach look to?**

## The Two Approaches Compared

1. Why does MacKinnon think justifying affirmative action within the conceptual framework of the differences approach is “analytically uncomfortable to the point of collapse”?
2. **How does the inequality approach view affirmative action?**
3. What is the fundamental problem with the differences logic?
4. **Which group functions as the standard against which the relevance of a sex difference is judged?**
5. Are women similarly situated in a sexist society? If not, what problem does this fact create for the differences approach?
6. What is the fundamental assumption that underlies the differences approach?
7. How might the social be “assimilat[ed]” into the natural and be disguised as natural?
8. What is the fundamental assumption of the inequality approach?
9. How might the social image of women as inferior become a self-fulfilling prophecy?
10. For which two reasons does MacKinnon find the sex stereotyping conception of sex discrimination inadequate?
11. **Why, according to the inequality approach, does pregnancy discrimination constitute sex discrimination?**
12. What does Chief Justice Burger fail to see?
13. **In what sense might women be better at feminine-typed jobs as a result of social structural effects misconstrued as real sex differences?**
14. In what sense can socially constructed traits be as deep and real as biological ones?
15. What does it mean to say stereotypes are not “distortion[s] in the eye of the beholder” but the “distortion of the reality of the beheld”?
16. Who does the differences approach really protect?
17. What roles does the idea of neutrality play in the differences approach’s conception of sex discrimination?
18. How do the differences approach and the inequality approach disagree on just what kind of problem sex discrimination is and what remedy is called for?

## The Two Approaches Applied: Race and Sex

1. What do judges succeed in seeing with respect to racial differences but fail to see with respect to sex differences?
2. In what respects might sex discrimination parallel racial discrimination?
3. Why does Justice Powell think sex discrimination is not “inherently odious” as racial discrimination is? What is MacKinnon’s response?
4. How might the invisibility of the wrongs that women experience as women translate into acceptability, which in turn legitimizes those wrongs?
5. How are racial discrimination and sex discrimination approached differently by courts?
6. What, according to MacKinnon, are courts doing *right* in these racial discrimination cases?
7. In what sense is *Washington v. Davis* a retreat from the *Brown* and *Loving* series of cases?
8. How might the use of racial differences for justifying racial inequality shed light on the use of sex differences for justifying sex inequality?
9. What is a bona fide occupational qualification (BFOQ)? (See the asterisk.)
10. In which two ways is sex seen as a BFOQ? What is MacKinnon’s critique of each?
11. Then, MacKinnon argues that while disparities between racialized groups are presumed to be evidence for *inequality*, disparities between sexed groups are presumed to be evidence for *valid differences*. As a result, the court’s approach to racial inequality is especially sensitive to the inequalities experienced by racial minorities who fall into racial generalizations precisely because of these inequalities, whereas the court’s approach to sex inequality can only see the inequalities experienced by those who are exceptional to sex generalizations.
12. **What does it mean to say “it is the social meaning attributed to the differences that is at stake and determines the social position of the group, not the differences themselves”?**
13. What is Wechsler trying to say? What is MacKinnon’s response?