Equality

Catharine A. MacKinnon

The distinction between formal and substantive equality is theorized then illustrated by sexual harassment law in the United States and in international legal developments. The convergence of sexual harassment concepts with prostitution, hence of sex discrimination law with the Nordic/Equality Model, is explained and explored.

Equality is a concept frequently vaunted and purportedly applied but infrequently genuinely interrogated. Its usual approach, what is considered its common sense meaning, is the formal equality notion used in most U.S. law and in most other jurisdictions. This conception is uncritically predicated on Aristotle's formulation that equality means treating likes alike, unlikes unalike.[1]

My observation and contention is that this approach cannot produce social equality under conditions of real social inequality.[2] Actually, it was never meant to produce equality under unequal conditions, but rather to eliminate destabilizing conflict among polis members who were already structurally a presumptively equal elite: prominent adult Greek male citizens. The failure of this model to produce equality among social unequals is therefore not, theoretically speaking, Aristotle's fault. Which is more than can be said for the theorists, societies, and legal systems that have failed to question it, while elaborating it, extending it, and applying it to real social inequalities for the past some two thousand years.

Women's inequality to men, half of humanity's inequality to the other half, with each group containing much variation and every inequality, provides a key illustration of the model's failure and of the impossibility of its success.[3] Women, rendered "different" from men socially, because or to the degree we are not "the same" as men, axiomatically may not qualify for treating "likes alike": conventionally, first-class equality. That would require masculine privileges few women have or have had. As men's "unlikes," women can be treated "unalike," and this equality is satisfied. This can include better treatment, for instance through affirmative action or special labor protections or maternity benefits. Such instances are rare, dubious, paltry, sometimes downright injurious, and often allow men successfully to claim sex discrimination, since all men have to do to be sufficiently "the same" as women who qualify for such considerations is to become comparable for this purpose, specifically, to drop to women's social status, which, seldom having been biological, is not that difficult.[4]

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More commonly, even systemically, so-called unlikes being treated unalike can mean women being treated worse than men. This is pervasive. It includes being paid less for doing work that is either different from or almost, but not exactly, the same as the work men do: that is, most work women are required or permitted to do, so-called women's work in sex-stratified and segregated labor markets.[5] Or, women can be paid less than men for doing work that generates the same amount of value as work mainly men perform, but because it is seen as different work, corresponding to women's so-called differences from men, it is not seen as equally valuable.[6] Treating unlikes unalike – again, considered equality in this approach – also includes not considering many things unequal that are almost entirely gender-defined. For instance, women are apparently considered so different from men sexually that sexual violation has not conventionally been considered an act of inequality at all, although the fact that 99 percent of documented sexual assaults against women are committed by men,[7] with 90 percent of sexual assaults total being committed against women, could be seen as documenting a major inequality based on sex.[8] Because this apparently is tacitly regarded as a sex difference, it is not generally legally seen as an inequality, for example, rape law not being subjected to constitutional sex equality standards except when facial sex discrimination occurs, most often against men.[9] So women can be impoverished, stigmatized, violated with impunity, and otherwise disadvantaged and still be considered treated equally under the "unlikes unalike" formal equality rubric.

What are widely regarded as the aforementioned "differences" – considered ontological essences or natural statuses rather than epistemic and imposed ascribed attributions – actually are socially determined, largely by inequality itself. The idea that sex differences are natural, their consequences biologically inevitable, is a social idea. Apart from that, men are just as "different" from women as women are from men, yet are not treated as lesser beings on that basis. In other words, whatever their origins, such differences as exist between the sexes are equal. It is the attributed treatment, status, regard, worth, credibility, power that is unequal, meaning ranked more and less. Those consequences are indisputably socially determined. The standard for comparison – who or what one needs to be the same as in order to be considered an equal, hence potentially deprived of equality when disadvantaged – is the top of existing social hierarchies. Put another way, the conventional equality approach imposes and privileges elite, white, Western, upper-class masculinity by making them the standards that equality claimants must meet, thereby building male dominance and white supremacy, among other structural hierarchies, into formal equality's calculus.[10]

The Aristotelian approach thus obscures the fact that, within it, the opposite of equality, the essence of inequality, is not difference, but hierarchy. The true inequality calculus is not one of sameness and difference, but of dominance and subordination. Once sameness and difference is unmasked as a neutral cover for

dominance and subordination, and social inequality is grasped as a hierarchy rather than an expression of "difference" – actually a creator of what is called "difference" – imposing differences and their perception, the assumption that some groups are inherently inferior, others innately superior – essentialism or natural hierarchy – is revealed as built into formal equality. The supposed tool for dismantling inequality is exposed as constructing and reinforcing it.

Substantive equality, based on recognition of the human equality of groups historically kept socially unequal, has arisen as an alternative.[11] First recognized in Canadian law, now influencing much of the world, this analysis defines inequality not in terms of sameness and difference, but in terms of historic group disadvantage based on concrete grounds that include sex, race, religion, nationality, disability, and age. Its purpose is to produce social equality.[12] Hierarchy is its central dynamic. There is no magic in the word "hierarchy," although it does seem to break through a lot of privileged ignorance and denial. A hierarchy has to be systemic, cumulative, and structural to function as the core dynamic of substantive inequality, grounded in concrete social bases. All this is relative to concrete evidence, which courts can assess. And, obviously, a hierarchy has to be vertical, a top-down arrangement, to be discriminatory in the substantive sense.

In this picture, sexual harassment law in the United States is notable for operating under the aegis of formal equality but building in substantive inequality awareness, carving itself out as something of an exception to some of formal equality's more limiting legal doctrines. Instead of seeing sexual harassment – the imposition of unwanted sexual attention and pressure on a person who is not in a position to refuse it – as part of the natural order of things, sexual harassment law sees it as discrimination on the basis of sex, a civil and human rights violation. When women are sexually aggressed against, it exposes their position not as one of feminine "difference," but as inequality based on sex and gender, persistently together with race and often age and disability in particular. Sexual harassment law, in which all the breakthrough cases were initiated by Black women plaintiffs, has always been intersectional on the level of its facts,[13] and is moving increasingly to being intersectional on the level of its doctrine as well.[14] The legal claim has proven capable of reaching social as well as institutional hierarchies. It implicitly grasps that the central impetus driving the practice is the imposition of a subordinate position within a sexualized social hierarchy of status, regard, reward, dignity, and power.

Sexual harassment law, for the first time in equality law (so far as I know, in law at all) addresses the core substance of the inequality of sex: hierarchically imposed sexuality.[15] Unequal sexuality is the substance of the substantive inequality recognized in this area. If a behavior covered by sexual harassment law that is claimed as unwelcome and damaging is sexual, it is widely and increasingly un-

derstood by U.S. courts to be gendered, hence potentially discriminatory on the basis of sex.[16] Before sexual harassment was recognized as a gender-based legal claim, gender harassment was understood as an expression of sex-based inequality, but sexually abusive acts had never been recognized as based on anything, far less as legally unequal. Sexual harassment law changed that.[17]

The hierarchy recognized in U.S. sexual harassment law can be in employment, as between boss and worker, or in education, as between teacher and student, because sexual harassment is statutorily prohibited in those contexts. Or, the hierarchy in those settings can be gender itself, as between coworkers in workplaces[18] or students on campuses.[19] Sometimes reverse formal but consistent social hierarchies, such as lower-level men workers harassing women managers or men students sexually harassing women teachers, are recognized as well. The understanding of sexual abuse as hierarchically based on sex is predicated upon, but not confined to, heterosexual interactions involving men over women, the dominant socially imposed sexual model. Same-sex sexual harassment, without regard to the sexual orientation of the parties, has been recognized as potentially sex-based discrimination as well.[20]

What makes the law against sexual harassment transformative, apart from the extent to which it grasps inequality as hierarchy and imposed sexuality as based on gender often combined with race and ethnicity, is the fact that it provides a legal claim for the vicious social imperative to exchange sex for survival, or its possibility, whether or not the survival turns out to be real. This unchosen exchange characterizes much of the substance of women's inequality worldwide. In other words, in its fundamental dynamics, sexual harassment, which requires the delivery of sex as the price for women's material survival, turns otherwise real work into a form of prostitution, the floor of women's unequal condition. Women and girls enter prostitution as a consequence of options precluded or stolen, as a result of a lack of alternatives, making consent to it, or choice of it, fraudulent and illusory, just as sexual harassment is unchosen.[21] Women who supposedly have human rights, including equality rights in employment and education, are reduced to this same floor of women's status when tolerance of sexual harassment with impunity – or sexual delivery in any form, from objectification to rape – becomes a requirement of participation in the paid labor force or material survival in any form. This includes paid housework, where it is widespread, and educational or career advancement, where it is rife.[22]

If requiring sexual use as the price of survival violates equality rights when combined with a real job or other entitlement, they are certainly violated when it is the only thing for which a woman is valued. Yet buying a person for sexual use is not effectively illegal; certainly it is not seen as a violation of equality rights in most places. The only difference between sexually harassed women and prostituted women is the social class, or class image, of many of the women affected. A sub-

stantive equality approach to prostitution, as embodied in the abolitionist Nordic Model, extends the core sexual harassment concept to the decriminalization of anyone being bought and sold for sex, and penalizes sellers (pimps and sex traffickers) and, most importantly, buyers, disproportionately white and upper-class men, whose demand drives the sex industry. Because it lowers the status of the privileged and raises that of the disempowered, it is also termed the Equality Model.

Jurisdictions and authorities around the world are pioneering recognitions of substantive equality in various areas of violence against women. Under the European Convention on Human Rights, a new sex equality jurisprudence is developing with specific application to rape and, most stunningly, to domestic violence.[23] In international criminal law, substantive sex equality concepts are fielded in prosecutions for gender crime, including in the ad hoc tribunals for genocidal rape[24] and in the International Criminal Court's (ICC) statute[25] and in a case for recruitment and use of child soldiers,[26] bringing together equality concepts from human rights with the prohibitions of international criminal and humanitarian law. In the prostitution and sex trafficking field, one of the fastest and most promising areas of law moving toward equality around the globe, Sweden's criminalization of sex purchasers and pimps and decriminalization of prostituted people, is, in effect and in legislative introduction, a substantive sex equality law.[27] It has been adopted in various forms in Norway, Iceland, the Republic of Ireland, Northern Ireland, Canada, France, and Israel.

Perhaps the most striking illustration of the contrast between formal and substantive equality analysis in the constitutional domain can be found in South Africa's decision in *Jordan v. State*, in which the dissent argued that criminalizing prostituted people and not criminalizing their customers constituted unfair discrimination on the basis of sex.[28] The Palermo Protocol to the Transnational Organized Crime Convention, defining sex trafficking to include sexual exploitation through "abuse of power or position of vulnerability," as well as through force, fraud, and coercion, is also a de facto substantive equality law.[29] The UN Secretary-General's Report of 2006 recognized sexual violence explicitly as a form of gender-based inequality, as did the dual resolutions on the same day in 2013, one by the Committee on the Elimination of Discrimination against Women (CEDAW), the other by the Security Council, converging human rights with humanitarian law, both recognizing gender-based violence as at once a substantive form of sex inequality and a threat to international peace and security.[30] Appropriately, it is principally in the law of sex-based abuse that the substantive equality action is.

Where sexual harassment law is recognized as an equality claim, where women are guaranteed equality rights, many social sectors and organizational entities are beginning to recognize an obligation to foster environments free from sexual objectification, pressure, or aggression, to welcome rather than punish reporting

of sexual abuse, to encourage accountability not impunity for individuals or institutions that engage in or enable it, and to operate on rules of excellence and inclusion rather than hierarchy and fear. These apprehensions and standards are driving the #MeToo movement, and with it women's (and some men's) rejection of prostitution's standards for their lives. Together they begin to embody what a real change toward equality for women could look like. An Equal Rights Amendment, interpreted to promote substantive equality, parallel to the vital international recognitions mentioned, is the one domestic legal change that could impel these advances on a scale that approaches the need and call for them.[31]

ABOUT THE AUTHOR

Catharine A. MacKinnon, a Fellow of the American Academy since 2005, is the Elizabeth A. Long Professor of Law at the University of Michigan Law School and the long-term James Barr Ames Visiting Professor of Law at Harvard Law School. She practices and consults widely on sex equality issues under international and domestic law. Her recent scholarly books include *Butterfly Politics* (2017), *Sex Equality* (3rd ed., 2016), and *Are Women Human?* (2006).

ENDNOTES

1 See Aristotle, *The Politics*, trans. Benjamin Jowett (New York: Modern Library, 1943), 307 ("Equality consists in the same treatment of similar persons"); and Aristotle, *The Nicomachean Ethics*, ed. J. L. Ackrill and J. O. Urmson, trans. David Ross, rev. ed. (Oxford: Oxford University Press, 1980), 1131a–1131b, 112–117.

2 This analysis is fully presented in Catharine A. MacKinnon, *Sex Equality*, 3rd ed. (New York: Foundation Press, 2016).

3 It is also my view that the gender-based inequality described here characterizes much of some men's inequality over other men, making sexual politics politics unmodified.

4 A splendid example is *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975), which held that a surviving husband of a working mother who died in childbirth was entitled to survivorship benefits previously reserved for surviving mothers married to decedent working men.

5 Crucially, "most employed women still do the work that mostly women have traditionally done; at least, they predominate in traditionally female occupations and remain minorities in other pursuits." For example, "service and caretaking occupations, such as nursing (90.1 percent of registered nurses and 91.8 percent of nurse practitioners), secretarial and administrative support (94.4 percent), teaching young children (97.8 percent of preschool and kindergarten teachers and 81 percent of elementary school and middle school teachers), and waiting tables (70.4 percent)" are predominantly female. "Men predominate everywhere else, including in the better paying professional and

blue-collar sectors" where, for instance, they constitute 80 percent of software developers and 69 percent of lawyers. MacKinnon, *Sex Equality*, 171.

[6] See *Lemons v. City of Denver*, 17 Fair Empl. Prac. Cas. 906 (D. Colo. 1978), *affirmed* 620 F.2d 228 (10th Cir. 1980); and *AFSCME v. State of Washington*, 578 F. Supp. 846 (W.D. Wash. 1983), *reversed* 770 F.2d 1401 (9th Cir. 1985).

[7] Matthew J. Breiding, Sharon G. Smith, Kathleen C. Basile, et al., "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization–National Intimate Partner and Sexual Violence Survey, United States, 2011," *Morbidity and Mortality Weekly Report Surveillance Summaries* 63 (SS08) (2014): 5. "For female rape victims, an estimated 99.0% had only male perpetrators. In addition, an estimated 94.7% of female victims of sexual violence other than rape had only male perpetrators. . . . The majority of male rape victims (an estimated 79.3%) had only male perpetrators."

[8] Howard N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, 2000), 4. "The female proportion of sexual assault victims reached 90% at age 13 and 95% at age 19. . . . In general, across all specific [sexual] offense categories, the proportion of female victims increased with the age of the victim."

[9] See, for instance, *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

[10] *Black* is capitalized in recognition of the authentic ethnicity and culture created by and imposed upon African Americans in the United States, as one term of pride and identity chosen by Black people. "White" is not capitalized as it is not an ethnicity but a garbage category of skin privilege that is really a designation of status and power, the only purpose of which is to elevate so-called white people over and at the expense of peoples not regarded as white.

[11] Substantive equality as such was first publicly proposed as a legal theory in a talk by that name delivered in Ottawa, Canada, in 1989, and published for the first time in a recent collection. See Catharine A. MacKinnon, "Substantive Equality," in *Butterfly Politics* (Cambridge, Mass.: Harvard University Press, 2017), 110–125. This equality theory originated in Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Cambridge, Mass.: Harvard University Press, 1979), 106–141; was further developed in Catharine A. MacKinnon, "Difference and Dominance: On Sex Discrimination," in *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987), 32–45; and was presented in the aforementioned speech, on file with author, to the National Meeting of Equality-Seeking Groups in Ottawa, Canada, January 13–16, 1989 ("the alternate view that could change things is best pursued . . . through a substantive analysis of each particular inequality"). For an analysis of my legal work in Canada, see Sheila McIntyre, "Timely Interventions: MacKinnon's Contribution to Canadian Equality Jurisprudence," *Tulsa Law Review* 46 (1) (2010): 81–106.

[12] See Catharine A. MacKinnon, "Substantive Equality Past and Future: The Canadian Charter Experience," in *Canada in the World: Comparative Perspectives on the Canadian Constitution*, ed. Richard Albert and David R. Cameron (Cambridge: Cambridge University Press, 2018), 227–244.

[13] See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); and *Alexander v. Yale University*,

631 F.2d 178 (2d Cir. 1980). For discussion, see MacKinnon, *Sexual Harassment of Working Women*, 53–54.

[14] See, for example, *Baloch v. Kempthorne*, 550 F.3d 1191 (D.C. Cir. 2008); *Rogers v. Equal Employment Opportunity Commission*, 454 F.2d 234 (5th Cir. 1972); *Ferguson v. Pipefitters Association Local 597*, 334 F.3d 656 (7th Cir. 2005); *Hicks v. Gates Rubber Company*, 833 F.2d 1406 (10th Cir. 1987); *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982); and *Anthony v. County of Sacramento*, 898 F. Supp. 1435 (E.D. Cal. 1995). See also *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994). For further analysis, see Sumi K. Cho, "Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong," *Journal of Gender, Race & Justice* 1 (1997): 177–212; and Antuan M. Johnson, "Title IX Narratives, Intersectionality, and Male-Biased Conceptions of Racism," *Georgetown Journal of Law & Modern Critical Race Perspectives* 9 (57) (2018): 57–75.

[15] This proposition is argued at length in Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989).

[16] This argument is made in MacKinnon, *Sexual Harassment of Working Women*. In considering what is "based on sex," many courts have gone no further than Judge Reinhart's observation that "sexual harassment is *ordinarily* based on sex. What else could it be based on?" *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994).

[17] *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985).

[18] See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); and *Intlekofer v. Turnage*, 973 F.2d 773 (9th Cir. 1992).

[19] Peer sexual harassment is the main content of "campus sexual assault" as widely reported and litigated in the last decade or so.

[20] *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998); and *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002). See also *Miles v. New York University*, 979 F. Supp. 248 (S.D.N.Y. 1997). Consolidating three appellate cases, the U.S. Supreme Court has accepted review on the question of whether same-sex and transgender discrimination are sex-based.

[21] See Catharine A. MacKinnon, "Trafficking, Prostitution, and Inequality," *Harvard Civil Rights-Civil Liberties Law Review* 46 (2011): 271–309. On consent, see Catharine A. MacKinnon, "Rape Redefined," *Harvard Law & Policy Review* 10 (2016): 431–477.

[22] A fuller analysis of sexual harassment in these terms may be found in MacKinnon, *Sexual Harassment of Working Women*, and in the preface to the 2019 paperback edition of *Butterfly Politics*.

[23] As applied to rape, see *M.C. v. Bulgaria*, App. No. 39272/98, European Court of Human Rights (2003); and *Vertido v. The Philippines*, views under art. 7, para. 3, of the Optional Protocol, CEDAW/C/46/D/18/2008 (September 1, 2010). On domestic violence, see *Opuz v. Turkey*, App. No. 33401/02 European Court of Human Rights, para. 153 (2009); and *Gonzales v. United States*, Case 12.626, Inter-American Commission on Human Rights, Report No. 80/11 (2011).

[24] The legal recognition of rape in a genocide originated in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), and was first applied by an international authority in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, para. 731–734 (1998).

[25] See Rome Statute of the International Criminal Court, art. 7, para. 1(g), July 17, 1998, 2187 U.N.T.S. 3 (defining "crime against humanity" to include "[r]ape, sexual slavery,

enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity"); art. 7, para. 1(h) (recognizing persecution based on gender as a "crime against humanity"); art. 8, para. 2(b)(xxii) (defining "war crimes" perpetrated during international armed conflicts to include "rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions"); art. 8, para. 2(e)(vi) (extending definition to encompass non-international armed conflicts); and art. 6(b) (defining "genocide" to include "causing serious bodily or mental harm to members of [a] group," which has been interpreted to apply to sexual atrocities in genocides).

[26] Almost all the first cases prosecuted at the ICC include gender crimes in some form. A particularly useful example can be found in the prosecutor's opening statement in *Lubanga*, gendering the claim for violating the prohibition on child soldiers. See the prosecutor's opening statement in *Case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 (January 26, 2009), 8–9, https://www.icc-cpi.int/NR/rdonlyres/89E8515B-DD8F-4251-AB08-6B60CB76017F/279630/ICCOTPSTLMO20090126ENG2.pdf.

[27] See Brottsbalken [BrB] (Criminal Code) 6:1 (Sweden); and Max Waltman, "The Politics of Legal Challenges to Pornography: Canada, Sweden, and the United States" (Ph.D. diss., University of Stockholm, 2014), 277–286, 294–298 (recounting sex equality dimensions surrounding the passage of Swedish law against prostitution).

[28] *Jordan v. State*, 2002 (6) SA 642 (CC) at para. 69 (South Africa).

[29] United Nations General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, art. 3(a), G.A. Res. 55/25, UN Doc. A/55/383 (November 15, 2000).

[30] See United Nations Secretary-General, *In-Depth Study on All Forms of Violence against Women*, UN Doc. A/61/122/Add. 1 (July 6, 2006); Committee on the Elimination of Discrimination against Women, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, UN Doc. CEDAW/C/GC/30 (November 1, 2013); and United Nations Security Council, Resolution 2122, UN Doc. S/RES/2122 (October 18, 2013).

[31] For further discussion of some animating notions of a substantive Equal Rights Amendment, see Catharine A. MacKinnon, "Toward a Renewed Equal Rights Amendment: Now More Than Ever," *Harvard Journal of Law & Gender* 37 (2014): 569–579, collected in MacKinnon, *Butterfly Politics*, 295–304; and Catharine A. MacKinnon and Kimberlé W. Crenshaw, "Reconstituting the Future: The Equality Amendment," *Yale Law Journal Forum* 129 (2019).