

More commonly, even systemically, so-called unlikes being treated unlike 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 unlike—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 impover-

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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 workplaces¹⁸ 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 under-
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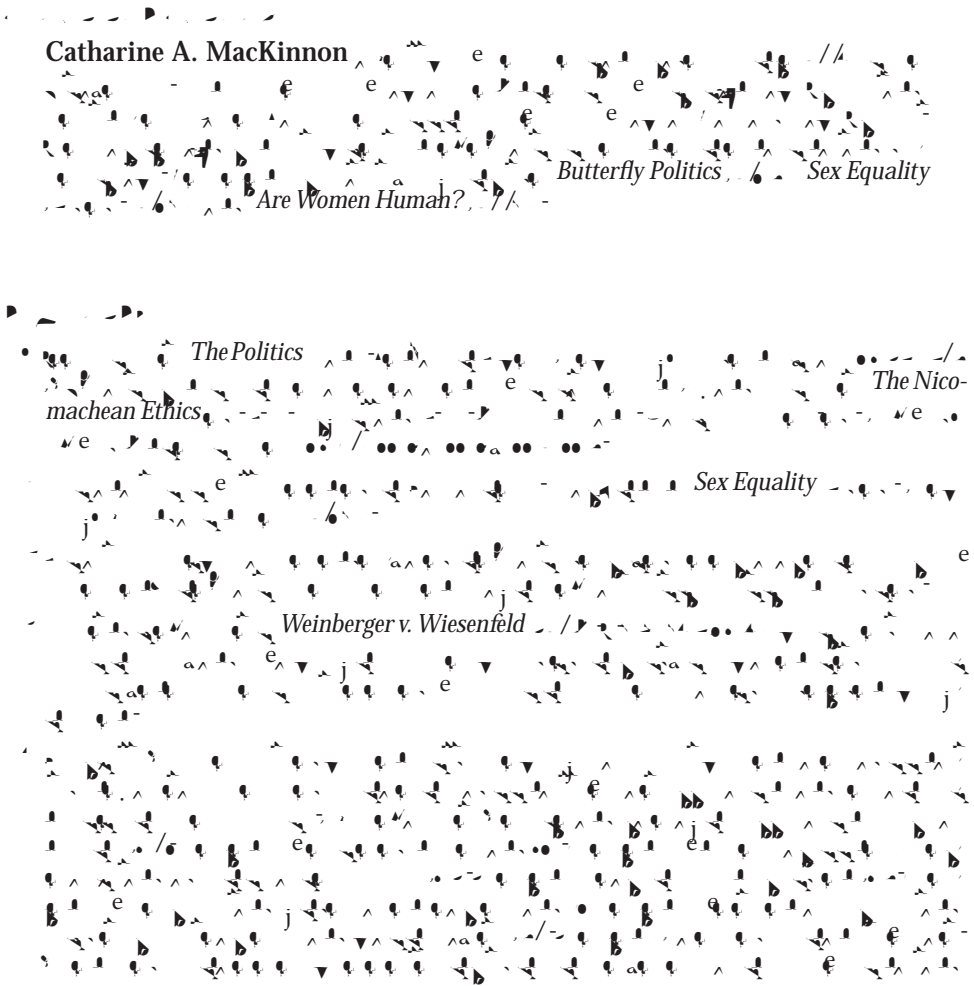
stantive equality approach to prostitution, as embodied in the abolitionist Nordic Model, extends the core sexual harassment concept to the decriminalization of anyone being bought and sold for sex, and penalizes sellers (pimps and sex traffickers) and, most importantly, buyers, disproportionately white 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 rape²⁴ and in the International Criminal Court's (ICC) statute²⁵ 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 *Minister of Education v. Gay and Lesbian Education Support Group*, 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



Sex Equality

Lemons v. City of Denver affirmed

AFSCME v. State of Washington reversed

Morbidity and Mortality Weekly Report Surveillance Summaries

Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics

Equality

