REVIEW


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A comprehensive legal theory is needed to prevent the persistence of sexual harassment. Although requiring sexual favors as a quid pro quo for job retention or advancement clearly is unjust, the task of translating that obvious statement into legal theory is difficult. To do so, one must define sexual harassment and decide what the law’s role in addressing harassment claims should be.

In Sexual Harassment of Working Women,† Catharine MacKinnon attempts all of this and more. In making a strong case that sexual harassment is sex discrimination and that a legal remedy should be available for it, the book proposes a new standard for evaluating all practices claimed to be discriminatory on the basis of sex. Although MacKinnon’s “inequality” theory is flawed and its implications are not considered sufficiently, her formulation of it makes the book a significant contribution to the literature of sex discrimination.

MacKinnon calls upon the law to eliminate not only sex discrimination but also most instances of sexism from society. She uses traditional theories in an admittedly strident manner, and relies upon both traditional and radical-feminist sources. The results of her effort are mixed. The book is at times fresh and challenging, at times needlessly provocative. Often it is lucid, but too often it is confusing and cumbrous. Although ostensibly addressed

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† C. MacKinnon, Sexual Harassment of Working Women (1979) [hereinafter cited without cross-reference as MacKinnon].
* The theory is set out in id. at 6, 106-27, 174-92.
* She recognizes, however, that the legal system cannot eliminate all sexism. “Few would want every passing glance to be legally actionable sex discrimination. In this sense, what is ‘sex discrimination’ will always be narrower that what is ‘sexist.’” Id. at 95.
* She speaks of the book’s “embattled tone.” Id. at xii.
* E.g., id. at 243 n.20 (traditional economic and sociological references); id. at 253 n.66, 255 n.93, 281 n.34 (less traditional sources).
both to the public and to attorneys, the book inadequately introduces much of the material, rendering it difficult for most nonlawyers to understand. Most disturbing is that despite the work’s generally heavy reliance on documentation, MacKinnon does not back up her more striking and challenging assertions—the statements that are most in need of support. This last fault, in particular, detracts from the seriousness of her work.

It may be somewhat unreasonable, however, to require full scholarly documentation and freedom from tendentiousness in expressing innovative ideas about a problem that only recently has begun to be recognized. It was not until a 1976 Redbook magazine survey, in which 90% of the respondents reported personal experiences of sexual harassment on the job, that the public became

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* Id. at xii.

7 For example, MacKinnon’s textual discussion of Washington v. Davis, 426 U.S. 229 (1976), does not mention that the case was a constitutionally based claim, brought under the fifth amendment, rather than a statutorily based claim, brought under Title VII as was Griggs v. Duke Power Co., 401 U.S. 424 (1971), a case she also discusses. MACKINNON at 134. This crucial fact is given only footnote mention, id. at 277 n.113. Moreover, MacKinnon never discusses the difference between the two types of cases.

The book is useful to an attorney familiar with the law of employment discrimination. Nonlawyers, however, will appreciate the work more for its provocative analysis of sexism than as a source of instruction in sex discrimination law.

8 MacKinnon’s research is uneven. An example is her failure to mention animal behavior studies on sexuality and aggression, some of which show that male dominance is more a result of habitat than of innate characteristics, a point that would help her position. See, e.g., Bowden, Further Implications of Cultural Surgency and Sex-Dominance, 75 AM. ANTHROPOLOGIST 176 (1973) (discussing male-dominant and equidominant societies); Brown, A Note on the Division of Labor by Sex, 72 AM. ANTHROPOLOGIST 1073 (1973) (discussing theories of why women in various cultures perform only certain types of work); Sanday, Toward a Theory of the Status of Women, 75 AM. ANTHROPOLOGIST 1682 (1973) (discussing the relation between economic production by women and female status); Williams, The Argument Against Physiological Determination of Female Roles: A Reply to Pierre L. van den Berghe’s Rejoinder to Williams’ Extension of Brown’s Article, 75 AM. ANTHROPOLOGIST 1725, 1726 (1973) (“[F]emales without children can and do participate in ‘male’ activities. For humans, however, it is often culture, not physiology, that prohibits even females without children from participating in male activities.” (emphasis in original)). MacKinnon’s main source for cross-cultural data on sex roles is Margaret Mead. See, e.g., MACKINNON at 281 n.31. Similarly, she could have expanded her references to the literature on biology and race.

The book contains technical defects as well. Although the author employs hundreds of citations, the footnotes are difficult to consult, because they are arranged by chapters, separately numbered, all at the end of the text. This is offset, in part, by an unusually good index.

9 Safran, What Men Do To Women on the Job: A Shocking Look at Sexual Harassment, REDBOOK, Nov. 1976, at 149.

10 A serious shortcoming of the survey was that the respondents were self-selected. The report nevertheless is suggestive of the problem.
interested in the subject. The popular press condemned the imposition of sexual demands in the workplace, but some courts were not persuaded that the practice constituted unlawful sex discrimination. MacKinnon’s theory is designed to overcome what she perceives as the shortcomings in the traditional theories of sex discrimination by providing a comprehensive theoretical basis for the courts to apply.

I. DEFINING SEXUAL HARASSMENT

MacKinnon defines sexual harassment as “the unwanted imposition of sexual requirements in the context of a relationship of unequal power.” She says that the problem is not the result of excessive sexual attraction of men to women; rather, sexual harassment; like rape, is “dominance eroticized.” It is the sexual expression of the economic dominance men have over women in the workplace, equivalent to the sexual and economic dominance she believes men have in the home. As MacKinnon puts it, “[e]conomic power is to sexual harassment as physical force is to rape.” She distinguishes two broad types of sexual demands in the workplace. The first is the “quid pro quo” situation, in which a

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12 Miller v. Bank of Am., 418 F. Supp. 233 (N.D. Cal. 1976), rev’d, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), vacated mem., 562 F.2d 55 (9th Cir. 1977). This undoubtedly was due at least in part to fears by courts that there would be problems of proof and frivolous lawsuits. Such supposed difficulties generally should not be accorded significant weight because they could be used to deny relief in almost all causes of action. More particularly, the concern with problems of proof may be related to an apprehension by male judges that men will be accused wrongfully, a fear explained in part because perpetrators of sexual harassment may see themselves as innocent, see Miller v. Bank of Am., 418 F. Supp. 233, 234 (N.D. Cal. 1976) (“[W]ho is to say what degree of sexual cooperation would found a Title VII claim? It is conceivable . . . that flirtations of the smallest order would give rise to liability.”), rev’d, 600 F.2d 211 (9th Cir. 1979); MacKinnon at 97. The offending men may view their activity as “normal” because many males, being able to engage in sexual intercourse only when aroused, associate sexual activity with pleasure and therefore assume that women do so as well.
13 MacKinnon at 1. She says that sexual harassment is “sufficiently pervasive . . . as to be nearly invisible.” Id.
14 Id. at 162. MacKinnon suggests that rape is not so much deviance as overconformity to the male sex role. Id. at 156. For a further discussion of the theoretical similarity of rape to sexual harassment, see id. at 215-21.
15 Id. at 217-18.
16 Although the book is concerned mainly with harassment at the workplace, MacKinnon also notes cases brought by students against university professors. Id. at 54, 68, 238, 295
person in a position of authority demands sexual attention in exchange for an employment benefit.\textsuperscript{17} The second is the "condition of work" situation, in which a person is subjected to repeated sexual insults or sexual invitations unaccompanied by an offer of employment benefit.\textsuperscript{18}

Complicating the development of a legal theory is the broad range of possible responses by the victim to the harassment, and by the perpetrator to the victim's response. A sexual invitation, for example, may elicit either compliance or defiance.\textsuperscript{19} Compliance may prompt either the fulfillment or abrogation of the promise by the perpetrator.\textsuperscript{20} Defiance may evoke overt retaliation, mere hostility, or no reaction at all.

The clearest legal case is the one in which a supervisor makes a sexual advance; the female subordinate refuses; and the supervisor retaliates by withholding an employment benefit. Most sexual harassment cases have been of this type, and the courts usually have granted relief.\textsuperscript{21} If the woman refuses and the supervisor ignores the past event, treats the employee fairly, and never bothers her again, however, it is less clear that there is a cognizable claim.\textsuperscript{22} The legal situation also is unclear if the woman complies with the sexual demand but is denied her quid pro quo.\textsuperscript{23} The "condition of work" cases likewise present difficult problems, because the perpetrator often is a coworker rather than a supervisor; the question is whether the employer has a duty to take action to prevent such harassment.\textsuperscript{24}

\begin{footnotes}
\item[17] Id. at 32-40.
\item[18] Id. at 40-47.
\item[19] Id. at 32-33.
\item[20] Id. at 36-37.
\item[21] E.g., Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Garber v. Saxon Business Prods., Inc., 552 F.2d 1032 (4th Cir. 1977) (per curiam).
\item[22] According to MacKinnon, the woman has no legal cause of action because there is no injury. "In this one turn of events, there truly is 'no harm in asking.'" MACKINNON at 33 (footnote omitted).
\item[23] Id.
\item[24] The Equal Employment Opportunity Commission ("EEOC") has issued guidelines on sexual harassment that impose liability in such situations: § 1604.11 Sexual harassment.
(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.
\end{footnotes}
With so many varieties of offending behavior and of responses to it, there may be substantially different kinds of injuries. Many cases will present questions about whether anyone actually was injured, or about whether certain conduct constituted discrimination based upon sex. There also are public policy questions for courts and theorists to consider; denying the claim of a compliant woman, for example, may encourage further harassment, whereas enforcing the promise after compliance may encourage others to comply.

MacKinnon attempts to dispel the notion that compliant employees have no right to complain. A compliant woman, she says, has suffered the injury of being forced to meet an unfair job requirement; her noncomplying competitors also are injured. Furthermore, compliance rarely works an advantage: “[T]he statistics on discrimination suggest that no fulfillment of any requirement, sexual demands included, results in job status for which women are qualified, much less undeserved advancement.”

Moreover, she says in a typically provocative digression, women's economic dependence on men for survival makes speaking of consensual compliance virtually meaningless. She argues that

Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74677 (1980) (to be codified in 29 C.F.R. § 1604.11). The condition-of-work type of sexual harassment is no less likely to impair a woman's job performance than the quid pro quo type. See MacKinnon at 51.

One of the few cases involving condition-of-work harassment is Continental Can Co. v. State, 22 Fair Empl. Prac. Cas. 1808 (Minn. July 3, 1980), which involved a state constitutional provision rather than Title VII. The court said that “[d]ifferential treatment on the basis of sex is... invidious, although less recognizable, when employment is conditioned either explicitly or implicitly on adapting to a workplace in which repeated and unwelcome sexually derogatory remarks and sexually motivated physical conduct are directed at an employee because she is female.” Id. at 1813.

MacKinnon at 33-40.

Id. at 37.

Id. at 37-39.

Under EEOC guidelines, the woman's competitors have an action against the employer in such a case:

Section 1604.11 Sexual harassment.

(g) Other related practices. Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.


MacKinnon at 38-39.

Sexual harassment perpetuates the interlocked structure by which women have been kept sexually in thrall to men and at the bottom of the labor market. Two forces of American society converge: men's control over women's sexuality and capital's control
compliance is not consent because women typically submit to sexual intercourse out of physical or economic coercion: "[M]any women's . . . participation in sexual activity, has often—historically, possibly more often than not—had little to do with their own sense of the erotic." 31 Although there may be some truth to this untested observation, it is incompatible with a scholarly attempt to develop objective legal theory. Moreover, such provocative remarks detract from the many valuable observations MacKinnon does make.

II. SEXUAL HARASSMENT AS SEX DISCRIMINATION

Although MacKinnon acknowledges that most sexual harassment constitutes sex discrimination under either the disparate treatment or the disparate impact theories of discrimination, she believes that these traditional approaches are inadequate. Therefore she proposes an expansive legal theory designed to eliminate all vestiges of sex discrimination from American society.

A. Traditional Theories

MacKinnon categorizes the disparate treatment and disparate impact theories under the single heading of the "differences" approach to sex discrimination, 32 which she contrasts with her own "inequality" approach. Under the differences approach, distinctions based on stereotypes 33 or arbitrary classifications 34 are pro-

over employees' work lives. Women historically have been required to exchange sexual services for material survival, in one form or another. Prostitution and marriage as well as sexual harassment in different ways institutionalize this arrangement.

Id. at 174-75. 31 Id. at 152 (quoting THE SEXUAL SCENE 4 (J. Gagnon & W. Simon eds. 1970)) (footnote omitted). In one of many provocative references she uses to support her theory, MacKinnon quotes a prostitute's experience:

"[My first trick] wasn't traumatic because my training had been how to be a hustler anyway. I learned it from the society around me, just as a woman. We're taught how to hustle, how to attract, hold a man, and give sexual favors in return. . . . It's a market place transaction. . . . the most important thing in life is the way men feel about you. . . . It's not too far removed from what most American women do—which is to put on a big smile and act. . . . What I did was no different from what ninety-nine per cent of American women are taught to do. I took the money from under the lamp instead of in Arpege. What would I do with 150 bottles of Arpege a week?"

MACKINNON at 217 (quoting S. TEREKEL, WORKING 58, 59, 61 (1974)) (footnote omitted).

32 MACKINNON at 107-16, 193-208. She admits that the disparate impact analysis at times incorporates elements of her inequality standard. Id. at 132.

33 Id. at 101, 179.

34 Id. at 110.
hibited. The theory states that discrimination between similarly situated (comparable) persons is unlawful, but there is no discrimination when there is different treatment if persons are differently situated, or really are different. In MacKinnon’s view, the comparability requirement of the differences approach is unrealistic because the theory

proceeds by comparing people who, because of social inequality, are simply noncomparable . . . . The approach protects primarily women who for all purposes are socially men, blacks who for all purposes are socially white, leaving untouched those whose lives will never be the same as the more privileged precisely because of race or sex.

MacKinnon also says that a problem with a theory that brands distinctions based on stereotypes as unlawful is that the stereotypes often are real. In discussing a case that held that airlines could not refuse to hire male stewards, she maintains that women really are better suited than men to be flight attendants. “Due to social conditioning, women as a group probably are more supportive toward anxious others; both sexes have learned to accept nurturance and support more readily from women than from men.”

Another problem with the differences approach is that it requires a group reference. The theory requires that to be held unlawful, “[a] detrimental differentiation must contain enough of a group reference to be arguably based on a social category, rather than a unique or individual quality, but it must be presented as an injury to an individual.” Some early cases used this requirement in holding that the harassment was a “personal proclivity”; those

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55 General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), and Geduldig v. Aiello, 417 U.S. 484 (1974), for example, approved employers’ disability plans that provided no benefits for pregnancy, holding that different treatment was acceptable when based on real differences. “[T]o be sex-based, a treatment (or classification or factor) must be universal to women but not unique to women.” MacKinnon at 150. See Geduldig v. Aiello, 417 U.S. 484, 496 & n.20, 497 (1974). See also Comment, Pregnancy and the Constitution: The Uniqueness Trap, 62 CALIF. L. REV. 1532 (1974) (discussing Geduldig).

56 MacKinnon at 126.


59 MacKinnon at 106.

60 Miller v. Bank of Am., 418 F. Supp. 233, 234 (“[The harassment was] essentially the
cases held that the treatment was based on sexuality, not sex.\textsuperscript{41}

Calling the harassment personal erroneously implies that the group reference demanded by antidiscrimination law is absent. Such a reference does exist, however, even when a sexual advance is made to only one woman. Recent cases\textsuperscript{42} have recognized that if the harassment was not or would not have been visited upon like-situated males, the imposition of the condition was sex based and thus unlawful.\textsuperscript{43}

Another theory, used in some of the early sexual harassment cases, holds that there cannot be sex discrimination if both men and women can be subject to the harassment. Rejecting it, MacKinnon argues that the spectre of bisexual harassment “takes seriously the sexual harassment of nobody”\textsuperscript{44} and that occurrences of sexual harassment by women “will probably be only slightly more common than occurrences of a man raped by a woman or incest initiated by women against male children.”\textsuperscript{45} If this theory were combined with the “comparability” requirement, relief would be

\begin{footnotesize}
\textsuperscript{41} MacKinnon examines the use of this defense and discusses the sexism underlying it. MacKinnon at 83-90.


\textsuperscript{43} MacKinnon explains how the disparate treatment theory applies to claims of sexual harassment:

As a practice, sexual harassment singles out a gender-defined group, women, for special treatment in a way which adversely affects and burdens their status as employees. Sexual harassment limits women in a way men are not limited. It deprives them of opportunities that are available to male employees without sexual conditions. In so doing, it creates two employment standards: one for women that includes sexual requirements, one for men that does not. From preliminary indications, large numbers of working women, regardless of characteristics which distinguish them from each other, report being sexually harassed. Most sexually harassed people are women. These facts indicate that the incidents are something more than “personal” and “unique” and have some connection to the female condition as a whole. MacKinnon at 193.

\textsuperscript{44} Id. at 201. MacKinnon notes that a male who is harassed by a male supervisor is in a position to ruin his supervisor’s career by publicizing the harassment. By contrast, women probably will be unable to ruin a man’s career because people are more likely to excuse the conduct: “women are widely supposed to ‘want’ heterosexual relationships which they reject.” Id. at 205.

\textsuperscript{45} Id. at 202.
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impossible in all sexual harassment cases: if only women are burdened, there is no discrimination because no males are similarly situated; where both men and women are burdened, there is no discrimination because in theory the harassment is not unique to one sex.

B. The Inequality Approach

To remedy the perceived flaws in the traditional sex discrimination theories, MacKinnon proposes an "inequality approach" designed to outlaw "all practices which subordinate women to men." The theory starts from the assumption that social conditioning is more determinative of a person’s sexual identity than the physical aspects of sex—gonads, hormones, and chromosomes. Accordingly, she says, "the legally relevant content of the term sex, understood as gender difference, should focus upon its social meaning more than upon any biological givens." Thus a challenged policy or practice is discriminatory not merely when a differentiation is arbitrarily based on physical differences, but also when it "integrally contributes to the maintenance of an underclass or a deprived position because of gender status." In her view, to hold a practice unlawful, "[a]ll that is required are comparatively unequal results."

MacKinnon provides several examples of how the inequality approach would apply in sex discrimination cases. The theory would yield an opposite result from the cases that approved the denial of pregnancy benefits in employers' disability plans. "[Such a plan] discriminates on the basis of sex because pregnancy has a direct relation to sex, and produces immediate disadvantages for employment for women only—and that is the end of the argument."

In sexual harassment cases, the argument that there is no discrimination if the practice can happen to both sexes would be

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46 Id. at 4. The theory is to be "a political strategy to guide legal intervention." Id. at 127.
47 Id. at 151-55. She employs studies of hermaphroditism, e.g., Money, Developmental Differentiation of Femininity and Masculinity Compared, in The Potential of Women 51, 56 (S. Farber & R. Wilson eds. 1963). She uses no animal behavior studies, however; one she might have used is Denham, Energy Relations and Some Basic Properties of Primate Social Organization, 73 Am. Anthropologist 77 (1971).
48 MacKinnon at 158 (emphasis in original).
49 Id. at 117.
50 Id. at 118.
51 Those cases are discussed in note 35 supra.
52 MacKinnon at 123 (emphasis in original).
inapplicable because the social significance of sex is different for men than for women. A woman is likely to consider a sexual advance by a man "intrusive, denigrating, and depotentiating," whereas a man may view a similar advance by a woman as an endorsement of his sexual potency and attractiveness.53 To draw an analogy from racial attitudes, neither skin color nor racial epithets have the same social meaning for whites as for blacks.54

Under MacKinnon's theory, the lack of comparability between the sexes would not be "a permissible basis for socially perpetuating women's disadvantages."55 Where there is no comparability because of biological differences or different social meanings, MacKinnon's theory would require a discovery and investigation of all real differences between the sexes to establish whether those differences result from sexism. She acknowledges that the sexes differ, but says that the differences connote an inferiority of women only because the standard used to judge women is that of men.56 Her theory looks at results—if they are unequal, a presumption arises that the challenged practices are sexually discriminatory.57

C. Critique of the Inequality Approach

MacKinnon's theory is ambiguous, unworkable, and unnecessary. She never adequately explains why her theory is preferable to the disparate impact analysis. The book addresses few of the substantial problems the use of the theory would present. MacKinnon never explains, for example, how sexism should be investigated, nor does she indicate possible defenses to discrimination claims under her theory. Would an investigation of the social meaning of sex conclude that questions concerning family planning are inappropriate inquiries of female job applicants?58 Would an investigation conclude that business necessity is an invalid defense? If, as she suggests, women have developed those qualities and skills corresponding to the female stereotype,59 what is an employer to do when a job demands those qualities and skills corresponding to the male stereotype, which no female applicant may command? Fur-

53 Id. at 171.
54 Id.
55 Id. at 5.
56 Id. at 127.
57 Id. at 118.
58 MacKinnon probably would prohibit such inquiries because they serve to "reinforce the traditionally disproportionate burden of parenthood on women." Id. at 225.
59 See text and notes at notes 37-38 supra.
thermore, although she approves of affirmative action, MacKinnon fails to indicate the extent to which it or other methods of improving the position of women in the workplace should play a role in eradicating sex discrimination.

The inequality approach also would impose immense evidentiary burdens on the parties and the courts. A case applying a theory that says "[a] rule or practice is discriminatory . . . if it participates in the systemic social deprivation of one sex because of sex," necessarily will be complex. In cases involving discrimination based on inequality, MacKinnon says, for example, that the inequality theory should aim to eliminate "determinate acts, however unconscious, which preserve the control, access to resources, and privilege of one group at the expense of another." How a court could ever identify such "determinate acts" is obviously problematic.

The problems of proof are complicated by several of MacKinnon's statements, such as that "[r]ational no more than irrational sex differences are legitimate reasons for perpetuating the social inequality of the sexes." Irrational differences are easy to dismiss, as the courts have done. Determining the rational sex differences, however, is a much more difficult task. Reproductive functions are one obvious difference between men and women, but what follows from that difference is uncertain. The problem of workplace exposure to substances hazardous to reproduction is a good example of a difficult problem: should all women with childbearing potential be banned from the workplace? Would the possible harm to a fetus be a legitimate difference justifying disparate treatment, or would the inequality approach label this an impermissible subordination of women? If there are differences, as in reproductive functions, perhaps differences in legal treatment based on them sometimes may be permissible or even desirable. The difficulty is in ensuring that the difference is not treated as a detriment.

"[W]hite males have long been advantaged precisely on racial and sexual grounds, differentially favored in employment and education because they were white and male. To intervene to alter this balance of advantage is not discrimination in reverse, but a chance for equal consideration for the first time." MacKinnon at 119 (emphasis in original).

Id. at 117.
Id. at 127.
Id. at 103.

Many of the questions that would be raised by investigations of sex roles do not have clear-cut answers. Some are social policy questions that cannot be answered by appeals to research or scholarship. Accordingly, one may wonder whether courts should attempt to answer such questions at all. It is difficult to imagine a court agreeing with MacKinnon that,

first, the exchange of sex for survival has historically assured women's economic dependence and inferiority as well as sexual availability to men. Second, sexual harassment expresses the male sex-role pattern of coercive sexual initiation toward women, often in vicious and unwanted ways. Third, women's sexuality largely defines women as women in this society, so violations of it are abuses of women as women.65

In addressing such important and emotional issues as real sex differences and the role of men and women in society, dispassionate inquiry may be impossible, even if a court attempts to be fair. Theories change, and many are created by people more concerned with what agrees with their ideology than with what is true. With the investigations of the type envisioned by MacKinnon, in which theories may be relied upon by courts, feminists and nonfeminists alike would stand in trembling anticipation that their instincts would be discredited by scientific research. Furthermore, if a study claimed that men or women were "inferior" in a certain respect, we would not want to give the imprimatur of the courts to such a theory, just as it would be unacceptable for a court to accept any theory of racial inferiority.

Indeed, the courts have resisted engaging in such penetrating analysis of our society. Courts have dealt with sexist practices, but rarely have they attempted to analyze sexism. The airline weight cases are examples of this cautious approach.66 Maximum weight requirements that are more stringent for female flight attendants have survived Title VII challenges. Under these weight rules, men are allowed greater deviation from national weight averages or weights recommended by health professionals.67 Courts find that

65 MacKinnon at 174.
67 See Jarrell v. Eastern Air Lines, Inc., 430 F. Supp. 884, 889 (E.D. Va. 1977), aff'd, 577 F.2d 869 (4th Cir. 1978). One case, however, has suggested that maximum weight restrictions more generous to males than to females may constitute disparate treatment. Asso-
the airlines’ rules are reasonable grooming regulations, even though
the basis of the different requirements is a cultural preference for
slim women. One opinion stated as much: “This Court is not so
naive as to fail to recognize that Eastern’s personal appearance
standards . . . perpetuates [sic] certain sex stereotypes.” Courts
have not scrutinized the social requirement that women be more
beautiful than men.

Ideology and politics do have a role in the formulation of legal
rules. Ideology is the basis for many of our laws governing mar-
riage, intestate devolution of property, taxation, and discrimina-
tion. It is deeply troubling, however, that the cause of feminism is
impeded by reliance on outrageous assertions and unprofessional
research; too many people on both sides are unmindful of complex-
ity, impatient with research, and disbelieving in science. There is
serious scholarship on the role of women in society; MacKinnon,
unfortunately, uses too little of it. She could be more persuasive
if she limited her alienating excesses and relied more on those
sources.

Application of traditional theories of disparate treatment and
disparate impact could avoid the perils of pontification and form
the basis for the prohibition of most discriminatory practices. To

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68 Id. at 1133.
F.2d 869 (4th Cir. 1978).
69 There is a long list, but for a good beginning see A. SCHLEGEL, SEXUAL STRATIFICA-
tion: A CROSS-CULTURAL VIEW (1977); WOMEN AND SOCIETY: AN ANTHROPOLOGICAL READER
(S. Tiffany ed. 1979); M. WHYTE, THE STATUS OF WOMEN IN PREINDUSTRIAL SOCIETIES (1978).
70 For examples of her alienating remarks, see text at notes 31, 65 supra; notes 30-31
supra.
71 One of MacKinnon’s most glaring instances of neglect of research and failure to con-
sider her statements carefully is her pseudo-scientific observation that “[a] job, no matter
how menial, offers [to a woman] the potential for independence from the nuclear family,
which makes women dependent upon men for life necessities.” MacKinnon at 216. Rather
than referring to anthropological studies of kinship systems, she makes the assertion with-
out attempting to justify it. She fails to explain why or how the nuclear family makes a
woman more dependent than does an extended family; nor does she explain whether this
asserted dependence results from biological or from cultural (presumably mutable) forces.
She fails to acknowledge that the concomitants of any kinship system vary throughout a
woman’s life—as a girl, a new mother, a grandmother. Different expectations and responsi-
bilities apply to each. I respect the urgency with which MacKinnon attacks the serious
problems of sex discrimination and sexual harassment, but she should be both practical and
accurate. I fear that she is neither.
the extent McKinnon's theory is workable—courts can deal with easily recognizable elements and consequences of sexism—it is unnecessary. MacKinnon admits that the disparate impact theory partly incorporates the inequality perspective. As Griggs v. Duke Power Co. established, disparate impact can suffice to make out a prima facie case of employment discrimination, even where the disproportionate impact is due to social conditions and was not caused by the defendant, the policy in question, or prior law.

Disparate impact can remedy sexual harassment without much difficulty in most cases. A complaining woman can show that, in the workplace, most supervisors are heterosexual males and that therefore women as subordinates are in a position to be harassed. She can argue that few men are sexually harassed, because they can fire any subordinate woman who harasses them. Also, she can cite studies purporting to show that sexual harassment is the result of a desire to dominate rather than of sexual attraction. She can point to studies showing that men are taught to be sexually more aggressive than women, making it more likely that they will harass women rather than the reverse. The obvious question is why, if disparate impact analysis is so versatile, it is necessary to adopt an inequality approach that requires the judiciary to see what is not yet discernible.

Most courts that have considered the question have anticipated MacKinnon's conclusion that sexual harassment is unlawful sex discrimination. Those cases, however, have been based on

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74 See id. at 162.
75 See, e.g., Staples, Male-Female Sexual Variations: Functions of Biology or Culture?, 9 J. Sexual Response 11-20 (1973), quoted in MacKinnon at 152.
76 MacKinnon, however, believes that her manuscript may have been "pivotal, in litigation establishing sexual harassment as a legal claim and term of art." MacKinnon at xi.

The EEOC's guidelines on sexual harassment make a frontal attack on the problem:
traditional theories, showing that those theories are adequate to

§ 1604.11 Sexual harassment.

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(c) . . . [A]n employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. . . .

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.


Substantially similar interim guidelines, 45 Fed. Reg. 25,024 (1980), were used in Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. 1627, 1631-32 (W.D. Okla. May 30, 1980), and were cited with approval in a non-Title VII case, Continental Can Co. v. State, 22 Fair Empl. Prac. Cas. 1808, 1813 (Minn. July 3, 1980). In Continental Can, the court held that the prohibition against sex discrimination contained in the state human rights law prohibited sexual harassment by a coworker. This is one of the first cases to impose liability on an employer for the actions of nonsupervisory personnel.

The interim EEOC guidelines were criticized by some. E.g., Sex Harassment Rules: A Help or a Hindrance?, Chi. Tribune, June 22, 1980, § 5, at 3, col. 1 (interview with William Knapp, attorney with the U.S. Chamber of Commerce); Whoa Now, Ms. Norton, Nat'l L.J., May 19, 1980, at 14, col. 2 (editorial). For a summary of selected public comments on the guidelines, see Comments on Proposed EEOC Guidelines on Sexual Harassment, 118 DAILY LAB. REP. (BNA) E-1 (June 17, 1980). Opposition to the guidelines centered on employer liability for actions of nonsupervisory personnel. Id. at E-1, -2, -4. But see id. at E-6 (Comment by Working Women's Institute favoring liability).

Although the EEOC Guidelines, if employed by courts, can be expected to have far-reaching consequences, the most effective point of attack is at the workplace. Companies and universities have been urged to establish and implement personnel policies forbidding sexual harassment. See, e.g., E. Bloustein, President of Rutgers, Memorandum to All University Personnel (Feb. 5, 1979) (on file with The University of Chicago Law Review); J. Martin, Vice President for University Personnel, Rutgers, Memorandum to Members of the University Community: Sexual Harassment: Procedures for the Handling of Complaints (June 28, 1980) (on file with The University of Chicago Law Review); Women Employed, How to Combat Sexual Harassment in the Office (n.d.) (mimeographed handout) (on file with The University of Chicago Law Review). The nation's largest employer has issued its own statement of policy concerning sexual harassment. U.S. Office of Personnel Management, Policy Statement and Definition on Sexual Harassment (Dec. 12, 1979) (on file with The University of Chicago Law Review). This policy reads in part:

Specifically, sexual harassment is deliberate or repeated unsolicited verbal comments, gestures, or physical contact of a sexual nature which are unwelcome.

Within the Federal Government, a supervisor who uses implicit or explicit coercive
deal with most sex discrimination. Overt discrimination is prohibited by disparate treatment theory. Artificial barriers to employment are prevented by disparate impact analysis, which strikes a balance between a recognition of historical deprivation and the need of business to employ a competent workforce. The group-reference problem has been reduced by judicial recognition that the reference is present when the conduct is related to sex or would not have been imposed on a member of the opposite sex; the problem also may be reduced by a proper understanding of the "framework chosen to identify and describe the operational features" of the challenged conduct.

MacKinnon is correct in saying that traditional legal theories have inadequately addressed the social status of women. There is something wrong with legal theories that approve of an employment system that, as MacKinnon says, takes account of the male life cycle, but not that of the female. Traditional theories, however, have been utilized to remedy the situation. When Congress passed the Pregnancy Disability Amendments, it intended to clarify the original congressional purpose by defining sex discrimination explicitly to include discrimination based on pregnancy. The dissents in General Electric Co. v. Gilbert and Geduldig v. Aiello make clear that disparate treatment and disparate impact could have yielded the same conclusion. More importantly, a woman's family obligations or an employer's idea of a woman's proper role have not sufficed as defenses, either as bona fide occupational qualifications or as business necessity. Perhaps this out-

sexual behavior to control, influence, or affect the career, salary, or job of an employee is engaging in sexual harassment. Similarly, an employee of an agency who behaves in this manner in the process of conducting agency business is engaging in sexual harassment.

Finally, any employee who participates in deliberate or repeated unsolicited verbal comments, gestures or physical contact of a sexual nature which are unwelcome and interfere in work productivity is also engaging in sexual harassment.

78 See Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977).
81 MacKINNON at 118.
83 429 U.S. 125, 146-60 (1976) (Brennan, J., dissenting).
85 See, e.g., Reeb v. Marshall, 23 Fair Empl. Prac. Cas. 124, 126 (8th Cir. June 19, 1980) (dictum): "If it were true that Reeb was discharged because she did not behave as her supervisor believed a woman should, Reeb's claim of discrimination would be established and we would be required to reverse."
come shows that courts understand the relationship between stereotype and conforming behavior. At least the courts are willing to use traditional theories of employment discrimination to some extent to aid social change rather than reflect the status quo.  

The problem with the traditional theories is not their content but their uneven and attenuated application. Why, for example, should sex be a bona fide occupational qualification for the job of maximum security prison guard, when business necessity would suffice? How can we persuade courts to take sex discrimination claims as seriously as they take race discrimination claims? Why are the race cases the "most highly developed application" of discrimination law?  

CONCLUSION

Notwithstanding the criticism voiced above, MacKinnon's book is a significant contribution to the literature of employment discrimination. Her suggestions can be expected to spur serious investigation and analysis of sexual harassment. Although I am convinced that her inequality standard has no chance of being adopted in this century, her book is important for exposing the unwillingness of our legal system to address sexism with the same vigor with which it addresses racism. MacKinnon does not go far enough in delineating the precise functions of her new approach, however, perhaps because her theory admits of no precision. Moreover, the recognition of the injuries done to women by pervasive sexism causes concern that the enforced inferiority is too deep to be cured. MacKinnon recognizes this tension when she observes: "Balancing an indictment of the damage with an affirmation of the positivity of womanhood, while claiming women's right to be

Dramatic progress in attacking sexism through sexual harassment suits may result from the opinion in EEOC v. Sage Realty Corp., 22 Fair Empl. Prac. Cas. 1660 (S.D.N.Y. June 6, 1980). The plaintiff's claim that the company "required her to wear a revealing and provocative uniform which subjected her to repeated and abusive sexual harassment," id. at 1661, survived a motion for summary judgment. This case could have a significant impact on the working conditions of waitresses in bars and nightclubs.

** An example of this is the comparable-worth movement, which has sought to require employers to pay women the same amount as that paid to men in comparable, though not identical, positions. In one such case, a claim under Title VII survived a motion for summary judgment. International Union of Electrical, Radio & Mach. Workers v. Westinghouse Elec. Corp., 23 Fair Empl. Prac. Cas. 588 (3d Cir. Aug. 1, 1980).


** MACKINNON at 4.
treated the same as everyone else, is the challenge that women's inequality poses.\textsuperscript{89} The inequality theory develops and highlights this tension, but fails to resolve it.

\textsuperscript{89} Id. at 143-44.