Phil 324: Law and Morality

Module 10 Reading Guide

# Catharine MacKinnon, *Sexual Harassment of Working Women*

## Preface

1. What does MacKinnon mean when she says sexual harassment is not just allowed but *unthinkable* under the law?
2. What does it mean to say sexual harassment is not just incidental to, but an *expression* of, gender inequality?
3. What are MacKinnon’s concerns in this book?
4. How was sex harassment treated by courts at the time MacKinnon finished her draft?
5. What “social function” does MacKinnon envision the book will serve?
6. **How does MacKinnon know that sexual harassment exists when there are no systematic social-scientific studies available to show that it does?**
7. **In what sense is sexual harassment a *women*’s experience, not just an individual *woman*’s experience? Does this imply all women experience sexual harassment the same way? Why or why not?**
8. Skim the rest of the Preface.

## Chapter 1

1. In what sense is the intimate violation that women experience *institutionalized*?
2. What forces contribute to the systematic silencing of survivors of work-related intimate violation?
3. **What, according to MacKinnon, is sexual harassment?**
4. **What is “the major dynamic” in sexual harassment?**
5. What forms can sexual harassment take?
6. **How is sexual harassment typically understood? How does MacKinnon propose we should understand it instead?**
7. Does the lack of reported cases imply that sexual harassment is not a pervasive problem? Why or why not?
8. **When are women workers seen as human beings, and when are they seen as women? What problems does this dichotomy create?**
9. Skim pp. 4–6, where MacKinnon previews the book’s argument.
10. Why does MacKinnon focus on sexual harassment specifically *in employment*?

## Chapter 3

### Introduction

1. **Why is sexual harassment at work objectionable?**
2. **What are women resisting in protesting sexual harassment?**
3. How do women’s experiences of sex discrimination interact with the legal concept of sex discrimination?
4. What does it mean to say sexual harassment is a structural and systematic problem, rather than an individual one? Is it just to say sexual harassment is widespread? Why or why not?
5. **How does the systematic and structural nature of sexual harassment bear on the argument that it is discriminatory?**
6. Why hasn’t sexual harassment been analyzed, protested, or even noticed?
7. **Why is naming the experiences “sexual harassment” so important?**
8. How is sexual harassment experienced by women of different ages, classes, and races? What is the common thread that underlies these experiences?
9. What deeper explanation does MacKinnon offer for the fact that the perpetrators of sexual harassment are overwhelmingly male and the victims female? Why is this explanation central to her argument that sexual harassment is an expression of gender inequality?
10. **Which three events make up a case of sexual harassment?**
11. What are some of the conceptual problems that a theory of sexual harassment must handle?
12. **What are the two forms of sexual harassment?**

### Quid Pro Quo

1. **What are the three forms of quid pro quo sexual harassment?**
2. How can job performance be used as a pretext for retaliation?
3. **What is the injury of sexual harassment?**
4. **How does sexual harassment still disadvantage women even when the promise of benefits is fulfilled?**

### Condition of Work

1. What in part explains why sexual harassment is so effective?
2. What does it mean to say sexual harassment is a condition of women’s work?
3. How might the quid pro quo and the condition of work forms of sexual harassment converge?
4. Why is it not enough to recognize just the quid pro quo form of sexual harassment?
5. In what sense does sexual harassment as a working condition does not really require compliance on the part of the woman employee?

### Impact of Sexual Harassment

1. Skim this section. Note especially the interplay between sex, sexual orientation, and race in sexual harassment.

## Chapter 6

### Introduction

1. Which three elements must a theory of gender inequality balance? How does the tension between the three give rise to a “persistent dilemma of discrimination law”?
2. **What does MacKinnon think is “the most striking yet the most concealed flaw of discrimination doctrine”?**
3. How does this flaw manifest itself in sex discrimination and sexual harassment cases?
4. What are the problems an argument that sexual harassment is sex discrimination needs to confront?

### What Is Sex?

1. What is the distinction between gender *per se* and factors other than gender *per se*?
2. How does MacKinnon propose we might reconcile *Gilbert* (holding that discrimination on the basis of pregnancy does not constitute discrimination on the basis of sex) and *Manhart* (holding that discrimination on the basis of women’s relative longevity constitutes discrimination on the basis of sex)?
3. **What are the presumptions that underlie the leading conception of what sex and gender are? How does this conception separate sex and gender from sexuality? Why is it a misconception?**
4. **How, according to MacKinnon, should sex and gender be understood in the sex discrimination context?**

### Legal Approaches Other Than Discrimination

1. Please skip this section.

### Sexual Harassment as Sex Discrimination: An Inequality Argument

1. What are the three supporting arguments for the claim that sexual harassment is sex discrimination, construed according to the inequality approach?
2. Skim the first two subsections, “Tradition” and “Sex Roles.”
3. **Pp. 182­–83: Why does sexual harassment constitute sex discrimination according to the inequality approach?**
4. Skim pp. 183­–89.
5. **Pp. 189­–90: How does MacKinnon respond to the objection that discrimination on the basis of women’s refusal of sexual advances is not discrimination on the basis of sex?**
6. Note the footnote on p. 190.
7. In the last paragraph of this section, we get perhaps the clearest statement of the inequality-based argument that sexual harassment is sex discrimination.

### Sexual Harassment as Sex Discrimination: A Differences Argument

1. What are the presumptions of the differences approach?
2. **How is disparate treatment different from disparate impact?**
3. In what sense can sexual harassment be sex discrimination under the disparate treatment theory?
4. What is “the most basic” distinction between sexual harassment cases and the pregnancy discrimination cases?
5. Skim pp. 194­–95.
6. Is sexual harassment still sexual harassment if the woman employee complies? Why or why not?
7. What are the two types of disparate treatment cases?
8. **What test can courts use to determine if sexual harassment amounts to sex discrimination under the disparate treatment theory?**
9. Skip the discussion of *Tomkins*.
10. Skim or skip the discussion under “Intent or Motive.”
11. What is the differences approach’s response to the objection that because gay or bisexual sexual harassment is possible, the sexual harassment by men of women cannot be sex discrimination?
12. What does it mean for someone to “function[] socially as if [one] were a man . . ., regardless of body”?
13. So what is *really* the differences approach’s response to the equal opportunity sexual harasser?
14. How does MacKinnon predict same-sex sexual harassment will be treated by courts under the differences approach? With four decades’ hindsight, how right has she been?
15. Using the differences approach, how can sexual harassment constitute sex discrimination under the disparate impact theory? What about the inequality approach?
16. Skim the rest of the subsection.

### Sexual Harassment as Employment Discrimination

1. The first paragraph provides a helpful summary of the argument so far.
2. Skim the rest of the subsection.

## Chapter 7

1. Skim p. 215.
2. What question divides the two approaches?
3. What is the implication of MacKinnon’s analysis of sexual harassment for the connection between women’s work and women’s social status?
4. Sexual harassment is the reciprocal enforcement of which two inequalities? What does this mean?
5. What is MacKinnon’s critique of feminist efforts to reconceptualize rape as a crime of violence rather than a crime of sex?
6. What does it mean to say “[g]ender *is* a power division and sexuality is one sphere of its expression”?
7. What is MacKinnon’s point in the last paragraph?