Sexual Labor

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(Editor's Note: Associate Professor Jane E. Larson joined the UW Law School faculty in 1996. Among her teaching and research interests are women's legal history law, and feminist legal theory. She is co-author (with Linda Hirshman) of Hard Bargains: The Politics of Sex, *published in 1998 by Oxford University Press. The following article is scheduled to appear in 1999 in a collection of essays to commemorate the 20th anniversary of the publication of Catherine MacKinnon's landmark book,* Sexual Harassment of Working Women, *the first comprehensive statement of the theory of sexual harassment, and is reprinted here with Professor Larson's permission.)*

Professor Larson

Politics are fluid. No gain is ever certain, nor any loss. Following a string of Supreme Court decisions solidly affirming the theory of sexual harassment,[2] we find ourselves in 1998 in a political context in which sexual harassment is cast as the stepchild of sex discrimination law. Commentators pose sexual harassment against "real" discrimination and question its theoretical coherence with liberal equality.[3]

There are reasons why sexual harassment has been able to live within liberalism, even though the two may not always be fully reconcilable. Most amenable to liberalism is that sexual harassment is litigated on the basis of an individual's claim of injury. By the nature of its structure of proof and its individualist frame, the cause of action bears strong family resemblance to tort. This has muffled the group-based and civil rights underpinnings of the claim.

But the underlying conception of sexual harassment is a defense of the civil right of women to participate in the public sphere of the labor market. In this essay I argue that a concern for assuring dignified labor conditions and not just the policing of sexual boundaries should guide the courts and scholars in defining doctrinal elements of the cause of action. I seek to assess how differing regimes of sexual harassment law affect women's relationship to work. I consider "sexual labor" and the definition of work, and ask what it means to get equal pay and enjoy equal working conditions. I propose an alternative vision of sexual harassment law as collective bargaining by women over the conditions of their labor through the political process. Finally, I argue for substantial revision of one element of the existing doctrine, the requirement of "unwelcomeness," from this labor perspective.

Sex Work

Debates over sexual harassment are, at bottom, disputes about the level of sexualization of the workplace that is to be accepted as normal "background noise"—that is, neither an unreasonable imposition nor an expression of hostility. "Unwelcomeness" is the doctrinal place where much of that line-drawing work is done. For women who work, this level of tolerated sexualization sets the price they must pay to have a job.[4]

In her 1983 book, *The Managed Heart*, sociologist Arlie Russell Hochschild defines "emotional labor" as work that "requires one to induce or suppress feeling in order to sustain the outward countenance that produces the proper state of mind in others."[5] Hochschild illustrates emotional labor's demands through the example of the flight attendant. Hired for their grace and charm, it is the flight attendant's job to make passengers feel content so that they will choose to fly on the employer's airline in the future. In the face of fatigue, boredom, discomfort, and even passenger abuse, the attendant must smile and reassure.[6]

The measure of skill in such emotional labor, Hochschild observes, is to make it appear effortless and sincere, not a task the employee is performing but an innate quality that she possesses. Hochschild observes further that asymmetrical norms govern the claims that employers and customers make on male and female workers in the realm of "emotional labor." Women are more likely to be employed in jobs that require emotional labor, and at the same time emotional labor is often not recognized as work when performed by women, being seen instead as the natural expression of femininity.[7] But

if emotional labor requires no special effort, then it need not be compensated; as Maureen Arrigo succinctly puts it, "employees as a general rule are paid not for who they 'are,' but for what they 'do.' "[8]

There is a parallel of sexual labor that women in a sexualized workplace must perform. Fending off solicitations, ignoring personal remarks, not seeing the pictures or hearing the words, acting demure or flirtatious or crude, talking back or playing along—these are all forms of sexual labor. Yet this is usually not recognized as work, being seen instead as the natural expression of an innate condition of femaleness.

Even if male and female employees are paid the same, if the women must accept less amenable working conditions, be exposed to greater risk of insult and injury, and perform uncompensated sexual and emotional labor, they are effectively being paid less than the men around them who are not affected by this workplace sexualization. This creates a further gender gap in wages and working conditions, and the width of that gap turns in important measure on the legal requirement of "unwelcomeness."

How "Unwelcomeness" Works in the Workplace

Following the Supreme Court decision of *Meritor v. Vinson* (1986), the courts have used a five-part test for proving hostile environment sexual harassment. The plaintiff must demonstrate that: 1) she is a member of the protected class; 2) she was subjected to unwelcome sexual harassment in the form of requests of sexual favors or other verbal or physical conduct of a sexual nature; 3) the harassment was based on her sex; 4) the harassment unreasonably interfered with the plaintiff 's work performance and created an intimidating, hostile or offensive work environment; 5) there is respondeat superior liability on the part of the employer.

The "unwelcomeness" requirement (#2 above) means that employers are not necessarily liable for harassing acts that are objectively objectionable—that is, so offensive, severe and pervasive as to undermine working conditions in the eyes of any ordinary person. The plaintiff must prove in addition that she in particular is not "the kind of girl" who likes such treatment. She must prove her non-consent. As legal scholars have demonstrated, defendants who cannot deny that the plaintiff was badly treated nonetheless try at trial to undermine her credibility by introducing evidence bearing on her dress and manner, sexual history, and other sexual conduct outside of work. The goal is to prove that she is in fact "that kind of girl."

The existing structure of "unwelcomeness" proof thus establishes the default rule that sexual targeting and objectification of a subordinate or co-worker is presumptively acceptable workplace conduct. Even conduct that an ordinary person would find objectionable is still lawful so long as the individual target didn't find it unwelcome. And it follows that if individual and subjective decisions of unwelcomeness (and not social norms of acceptable conduct) set the standard of workplace dignity, then every dog gets at least one bite at each potential target. How else is he supposed to know that she doesn't really want it? So long as he "takes no as no," according to Gloria Steinem in her effort to distinguish Bill Clinton from Clarence Thomas and Bob Packwood, the "key concept [of] respect for women's will" is maintained.

This picture of what sexual harassment is distorts the effects of the practice on women's civil right to work in two ways: by focusing exclusively on the experience and interests of the individual target and not on the workplace environment generally, and by focusing on the one-shot encounter.

By focusing on the subjective preferences of the target, the unwelcomeness rule hides the extent to which the working conditions of women *as a group* are structured by the sexualization of the workplace environment that any one woman's negotiation of welcomeness or unwelcomeness permits. The workplace can be sexualized to the greatest extent permitted by the most accepting or weak worker. If the least resistant sister sets the sexual dignity level for the workplace, it is like having the most starving worker set the minimum wage. Other workers can bargain up from there, but their opening position is weakened.

Blithe images like Steinem's of a one-shot transaction redeemed by respect for consent—"he proposed, she disposed, and he went away"—further distort the true dynamic of the workplace situation. Taking "no as no" draws a good enough boundary in a sexually-charged exchange between adults in a social setting like a bar or a party. But power circulates differently in workplaces, and different interests are at stake. Workplaces are characterized by shared physical space, the necessity for continuing effective interaction with co-workers and superiors, and a high cost of exit—in short, repeat encounters.

Carol Rose illustrates the dynamic of repeat encounters by considering

how it structures male-female negotiations over the distribution of domestic burdens. In a shared household, women begin from a position perceived as weaker because they are expected to carry a disproportionate burden of housework. As a result, when they try to negotiate a better deal, their male partners challenge them at every turn. (This relates back to Hochschild's point about the asymmetrical norms that govern the claims we feel free to make on male and female workers for uncompensated labor.) Rose uses the example of the husband who without argument shares the cooking chores with his camping buddies, but puts up a relentless fight when asked to take up slack in the household he shares with his wife. He just does not expect her to demand a fair deal. Challenged at every turn, the women will tire of fighting for the things the men get without a fight. Failing to fight, the women will be perceived as weaker still, and offered still worse bargains. The broader point is that when bargainers of differential power meet for repeat rounds, their initial position of inequality is intensified, creating a downward spiral of worsening offers for the weaker player.

In bargaining over sex, whether at work or not, the initial expectation of female weakness can be established based only on the natural inequality of physical size and strength between women and men, but also by the fact that men are richer (owning more assets and earning more income), more powerful (dominating the spheres in which social power is wielded), and the beneficiaries of ancient and enduring assumptions that they belong on top. It also can be created or reinforced by the presence of individual women in the workplace who are more willing than others to cooperate with the sexualization agenda, creating expectations that affect the bargaining position of all the women there.

In the specific context of workplace sexual bargaining, the unwelcomeness rule accelerates the downward spiral. If you cannot know until you ask, the existing rule creates a workplace culture in which the female workers are defined as available at least for asking. Some women may welcome sexual opportunity at work. Other women, faced with repeated solicitations, may just get tired of saying no and managing the discomfort; after a while they just give in. Having gained the upper hand once, the rational stronger player will offer the weaker—or someone just like her (members of the relevant group are easy to identify)—an even worse deal the second time around.

Objective Unreasonableness as Against Subjective Unwelcomeness

If we consider sexual harassment as a public issue of work rather than a personal expression of sexuality, we must ask whether the presumption of maximum sexualization of the workplace created by the existing "unwelcomeness" rule accords with the understandings and preferences of working women and men? If the answer is yes, then the existing law is appropriate. The burden should be on the employee who wants less sex to make her atypical preference known and the plaintiff should carry the burden of proving unwelcomeness, as she currently does. But if workers prefer some sexual restraint, then perhaps unwelcomeness should be only an affirmative defense and not the plaintiff's burden.

I would suggest, however, that the unwelcomeness inquiry be eliminated altogether, allowing the claim to be proved by evidence that the conduct complained of was both objectionable and an interference with working conditions as measured by a standard of objective reasonableness. If the worker of ordinary sensibilities would perceive the sexual conduct complained of as humiliating, degrading, abusive, severe and pervasive (all the substantive standards the law already requires to prove that the conduct complained of was more than merely annoying), the law would find the conduct sexually harassing, whether the target liked it or not. These last two alternatives have the merit of presuming (at least presumptively, and perhaps even conclusively) that women prefer sexual treatment at their job that workers in general would judge to be not abusive, degrading, humiliating, coercive or deeply undignified.

Collective and Individual Interests

As a measure of the conditions of women's labor, these alternatives to the existing rule work like a union contract, raising the base contract price for all workers by the power of the collective and preventing the strong from making private bargains with the weakest in order to drive down the market price. Groups with common sexual interests may act collectively to negotiate norms, ideologies or laws in order to advance their position. That can happen through a regulated structure of private bargaining, such as that established by the

labor laws, or through collective participation in cultural or political contests. Using their power to vote, women can pressure lawmakers to enact legislation that sets some outer bounds on the sexual price women must pay for the right to work.

This vision of sexual harassment law as a collectively-bargained-for labor contract offers a new angle on the tension between individual and group interests that is exposed in current debates over whether sexual harassment law has "gone too far." In the same way that the power of unions is undermined by mechanisms such as "right to work" laws that allow any individual worker to bail out of the collective, those who resist the sexual constraint of harassment laws have put the individual desiring female at the head of the charge. Yet a bargaining perspective demonstrates that strong harassment protections will benefit even those individual women who welcome sexual opportunity at work.

In the state of nature where, by definition, there is no law, sexual bargainers negotiate based on innate physical and psychological endowments. Between men and women, this means physical realities such as strength or weakness, and vulnerability to pregnancy or disease. But it also includes, for example, the value to sociable and pleasure-seeking creatures like ourselves of consensual sex with an amiable and enthusiastic partner. In any state other than the state of nature, social facts like legal rights, economic power, cultural status and ideology affect the distribution of sexual bargaining power. But it is law that establishes the outside parameters for private negotiations. No matter how covert or under-the-covers, private sexual bargains are always concluded in the shadow of the law. A straightforward example is the law of rape. The rape prohibition rules some strategies of the stronger player out of bounds (such as force), and thus strengthens the position of the weaker player. If the stronger must now negotiate for consent instead of just taking what he likes, the price of sexual access has just gone up. He must offer her more of what she wants from a sexual encounter—making himself a more agreeable companion, perhaps, or promising her more mutuality of pleasure, or agreeing to forego sex with others, or using a condom.

The point can be generalized. All efforts to broaden legal definitions of sexual coercion, including creating a sexual harassment cause of action, strengthen the structural bargaining position of the weaker player to such negotiations. More of the time, those private arrangements will come closer to her definition of the sexual good. The law of rape makes consent the price of sexual access. An objective standard of unwelcomeness in sexual harassment doctrine adds assurances of the security and dignity of labor to the price.

Thus current rhetorical efforts to pit civil rights against sexual satisfaction—asking women to choose, in effect, between equality and celibacy—make no sense, at least from the woman's perspective. Not surprisingly, elevating her status in one realm elevates her status in the other.

ENDNOTES

1. I am grateful to Linda Hirshman, Neil Komesar, Victoria Nourse, Jane Schacter and Jonathan Rosenblum for insight, and to the organizers and participants of the Yale Sexual Harassment Symposium at which this essay was first presented. Finally, to Catharine MacKinnon, who deserves honor in her own country and house. See Matthew 13:57.

2. See, e.g., Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct.998 (1998) (same-sex workplace harassment actionable under Title VII); Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) (abusive work environment need not cause worker severe psychological damage to be actionable as sexual harassment); Franklin v. Gwinnett County Public Schools, 503 US. 60 (1992) (sexual harassment in education is sex discrimination under Title IX); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (workplace sexual harassment is sex discrimination under Title VII).

3. On renewed arguments to repeal or restrict the sexual harassment cause of action, see, e.g., Jeffrey Rosen, "When Reckless Laws Team Up," New York Times, Jan. 25, 1998. See also Jeffrey Toobin, "The Trouble With Sex," New Yorker, Feb. 9, 1998.

4. Not all, but much sexualization in public places—at work, on the streets, at school, in the media—is directed at females. The evidence for this fact is indisputable; the explanation, however, is greatly debated. I regularly use the female pronoun in this essay, but this is not to deny that boys and men are subject to sexual harassment.

5. Arlie Russell Hochschild, The Managed Heart: The Commercialization of Human Feeling (Berkeley: University of California Press 1983): 7.

6. Id. at 8.

7. Id. at 174–181.

8. Maureen J. Arrigo, Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs, 70 Temple Law Review 117, 162 (1997).