

The Logic of Zero Tolerance — Ronald W Dworkin

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We must do what we can to stop sexual harassment. But what behavior separates intolerable or criminal behavior, including sexual harassment, from the mere jerk?

Every generation has a grudge against the previous one—often for good reason. A generation ago, powerful men such as Harvey Weinstein and Kevin Spacey got away with not just sexual harassment, but also assault. The eagerness of today's media to expose Weinstein and Spacey signals an important change. Accusations of sexual harassment once had an erratic quality about them, as they were often dealt with selectively. Democrats like President Clinton got a pass, while Republicans did not; the rich and powerful got a pass, the middle-class and poor did not. Now that progressive Hollywood is a target, charging sexual harassment is no longer a weapon to be used by some, but a constituent element of the general culture. It is the way we live now.

The problem is that we have yet to adapt this new element to everyday life. Below Weinstein and Spacey are millions of men who say or do stupid things every day, not assault or gross indecency, but things that nonetheless irritate women and can lead to prosecution, job loss, and public humiliation for men. These men are not criminals; they are only jerks of varying degrees.

What behavior separates the criminal, including the sexual harasser, from the jerk? The criminal physically assaults someone, or gropes someone, or exposes himself, or abuses his position at work to get sex, or seriously pressures a person to have sex, or continues to behave boorishly despite being told the behavior is unwanted. The jerk is in a lower league. He bombastically makes dirty jokes in mixed company, but stops and looks shamefaced when told he's not funny. He sneaks leering glances at women as they walk away, but behaves properly to them when they approach. He tells a woman with admiration, "I love your new hairstyle; it makes you look so hot!" then scratches his head when told his compliments seem unwelcome. He "mansplains" unintentionally. He creates a list of the best-looking women in his department. To get sex, he whines or begs, or tells a woman he loves her when he doesn't, then backs off when his stratagems fail.

There is a difference between the criminal and the jerk. The distinction is important, because the question of how to handle jerks goes beyond the issue of sexual harassment, and even men. For example, Hayley Geftman-Gold, a CBS attorney, recently mocked the victims of the Las Vegas massacre online, noting that country music fans "often are Republican." Melissa Click, a communications professor, was caught asking for "some muscle" to silence a student reporter during campus unrest. Michael Isaacson, a criminal justice professor, tweeted about teaching "future dead cops," seemingly with pleasure. These people are jerks.

How should we handle jerks? Our policy lately has been to destroy them along with the criminals. Humiliate them. Fire them. Make it so no one will hire them, at least not at their previous level, thereby depriving them of a livelihood. We proclaim zero tolerance for the jerk, even if a good deal of common sense still creeps in as a matter of actual practice. In fact, schools and corporations call their policy toward unwanted behavior "zero tolerance."

Behind the zero tolerance tilt is another question that has been debated for two millennia. Are human beings naturally prone to utter inanities, behave stupidly (although not criminally), and do lewd things—in other words, to be jerks? In late antiquity, Saint Augustine said they were, that people were inherently sinful, and that jerkiness lives in all of us. He did not say that faith or education was useless as a means to improve behavior, but that there were limits to what could be accomplished. For example, he preached against lust, but privately admitted that if a man lusted only after his wife and was respectful to her in the process, that was good enough. From Augustine's perspective, a jerk needed to be scolded but also forgiven, since we all live on the same inclined plane toward jerkiness.

The monk Pelagius argued the opposite, that being a jerk is completely within our control and a matter of choice. He compared jerkiness to a light coat of rust on pure iron: we can scrape off the bad stuff and leave the person underneath clean. The modern project built on Pelagian ideas. Hobbes, Locke, Rousseau, and Marx all argued that human beings had few, if any, innate qualities, and jerkiness was not one of them. Machiavelli argued that educational institutions could erase undesirable behavior and produce the desired human product. All of them to one degree or another imagined human beings in ideal form, which inevitably led them to create some version of

utopia.

Today's zero-tolerance perspective shares in this utopianism. Perfection, or a world without jerks, is proclaimed to be within our grasp. By funding more counseling sessions and sensitivity workshops, utopians believe people can ultimately be purified, if not in this generation then in the next. That jerkiness persists invites not a re-evaluation of their premise, but the conviction that some enemy must be responsible. This is why jerks are lumped in with criminals for serious punishment. Forgiveness and redemption flow out of acceptance of people's flaws and recognition that some rules of behavior cannot be followed perfectly. Utopians disagree; they think certain rules of behavior must be followed fully, and not just in part, because they believe they *can* be followed fully. If people surrender themselves 99 percent to a cause but show in their behavior that they have been hiding 1 percent of their souls, they become worth destroying in order to destroy the vestigial 1 percent.

Ironically, to enforce their anti-jerk agenda, today's utopians rely on character flaws that make people jerks in the first place: lust and vanity. When destroying a jerk, utopians know people have a side to them that loves to ruin and condemn. Destroying the enemy satisfies. It titillates. It makes people feel better about themselves when they learn that although *they're* not perfect, others are even worse.

Indeed, average people often feel themselves to be little people, and that nobody has any use for them, but when utopians tell the victims of jerkiness that their problems are not of their own making, that "the system" is also at fault, and that enemies surround them and even occupy high positions, average people begin respecting themselves more. If jerks are everywhere, tied in with Hollywood, government, and the big banks, for example, threatening their lives, then that means their lives must have colossal value. Many average people see jerks everywhere, causing their self-esteem to rise as they gaze outward.

This is the problem with the zero tolerance policy toward jerks: It fails to take into account human frailties, weaknesses, and errors. Education to improve things is worth the effort, but education to perfection is impossible. We hope to discover in others a perfect virtue that we ourselves do not possess. When people fail to live up to the models in books, we make jerkiness a crime in the first degree and enjoy watching jerks being destroyed. We do not offer forgiveness or redemption because we assume everyone has sworn the equivalent of a military oath not to be jerky, and therefore the jerk is a kind of traitor.

We also lack a language with which to question the victims of jerkiness. Even in cases of actual sexual harassment, any effort to probe a victim's complicity (For example: Was alcohol involved?) is rejected as an assault on the victim. This deficiency in language has found its way into other areas of life. As an anesthesiologist, for example, I am generally forbidden from second-guessing a patient's pain. If a patient says he or she has pain, I am obligated to treat it, even though there may be no physical evidence of pain and the patient looks fairly comfortable. Analogously, in sexual harassment, the accuser has been harassed if the accuser feels harassment has taken place. Like pain, the feeling of harassment is a subjective experience.

An irresistible force meets an unmovable object. Our culture says jerkiness can be eliminated through education—hence it sees no moral hazard in putting young men and women in a room with a beer keg. Jerkiness, in the form of lewd jokes or unwanted hugging, and its far more sinister counterpart, bona fide sexual harassment, are presumed not to be a problem while the keg sits there, since young people have sworn an oath to virtue. We have no language to even suggest that a moral hazard might exist, for such language would imply that the victim, if one arises, might be at least partly at fault. And yet people do seem to have a propensity toward jerkiness that education can ameliorate but not completely erase.

People of common sense and goodwill have tried to point out people's limits and to resurrect a language that re-establishes a balance between accuser and accused. They have failed. Indeed, from the utopians' perspective, these people seem sinister in their refusal to board the train to utopia.

Therefore, rather than fight against the utopians, I will follow the utopian dream to its logical dystopian conclusion. If we do not put a brake on the utopians, we will live in a world where women are harassed constantly, since the utopians refuse to warn women that many men have an innate tendency toward jerkiness that can sometimes spill over into outright harassment, and that therefore requires women to take appropriate precautions. We will live in a world where non-jerky men live in dread of being falsely accused of harassment, or worse—for example, the *Rolling Stone*/UVA rape story. [Women can be jerks too](#). It will be a world where good men crumble, since utopians refuse to tell them that sensitivity training might not be enough to keep them from behaving badly, or from crossing the line into harassment when tested in real life, and that they should avoid situations that could bring out the worst in them. It will be a world that grows steadily more bizarre and misanthropic, with technology accelerating the trend.

Single-sex education

Visiting the United States in the 1860s, writer Anthony Trollope observed that American women had a strong awareness of their privileges in the new democracy. American men, in turn, found a solution to the problem of dealing with women possessed of such knowledge (and the law): according to Trollope, they “kept their distance.” This led to different spheres of life for American men and women.

Such a division is no longer desirable or even feasible in most areas of life. But people will increasingly demand it wherever possible—for example, in higher education—if we continue on our path.

Young women rightly worry about sexual harassment in college. The study that showed one in five American college women to be the victims of sexual assault was flawed; the true number is closer to one in 40. But that is still a high number. Young men, in turn, rightly worry about being falsely accused of sexual harassment in college. Civil case criteria (the preponderance of evidence measure) are used to adjudicate alleged violations, but then criminal-case-style punishments are in effect applied, as the accused risk losing the ability to make a living for the rest of their lives.

Utopians create a moral hazard for young men and women when they invite them into institutions with little more than a few lectures on virtue, and where moral hazards abound. For example, rather than strongly advise against hook-up culture, or crack down on fraternities, sororities, and the ubiquity of alcohol, which leads to much of the sexual harassment on campuses, the utopians hold workshops and dispense information, as if this were all that were needed to keep young people safe from one another. In turn, administrators hesitate to diminish their college’s brand or take the “fun” out of college by cracking down on fraternities, sororities, and alcohol. Young men and women fall between the cracks. As this begins to dawn on them, they will clamor for single-sex college education to keep their distance from one another.

Interest in single-sex education is already on the rise in the K-12 level. In 2004, only 34 single-sex public schools existed in the United States. That number increased 25-fold in ten years: In 2014, [850 such schools existed](#). One big change associated with single-sex education was a [decline in disciplinary infractions and bullying](#).

Surveys show that only 2 percent of American women are [interested in single-sex education](#), so the 37 female colleges now in existence probably meet the demand—for now. But only four male colleges exist, and while surveys of male interest in single-sex education are not readily available, the demand will likely grow.

Technology will carry the trend to the next level. The rise of online courses has been discussed for its potential cost savings, but such courses also allow young people to study without having to come into close proximity with one another, thereby eliminating the moral hazard. Campus sexual harassment and false accusations of harassment decline when there is no campus. Students in the future will read books about brotherhood; they will be taught to believe in the affinity of humankind; they will be encouraged not to close their hearts, not to build walls, and not to resign themselves to evil; they will be asked to donate their time and love to community service—all from the safety of their personal computers, online. In reality, they will keep as far apart from one another as they can.

Chaperones

When I began medical practice in 1989, I never used a chaperone when taking care of a female patient. In the early 1990s, a male surgeon at a university hospital got into trouble for examining a female patient’s pelvic area for enlarged lymph nodes without getting explicit consent beforehand. After that, I had a chaperone whenever I performed a procedure on a female patient, or examined her. Starting in the 2000s, as conversation alone became a basis for sexual harassment, I had a chaperone whenever I spoke with a female patient, unless it was in the very public pre-operative holding area.

Many doctors behave similarly. While the American Medical Association only recommends chaperones, and does not require them, both statute and legal counsel have pushed to make them mandatory. Seven states now require their presence during physical exams. Lawyers argue that [chaperones should be mandatory](#) in health care for *all genders*, and at all times. The notion that only male doctors can harass female patients they call sexist.

Women’s fear of sexual harassment and men’s fear of being falsely accused of sexual harassment have altered behavior in other areas of my life. Increasingly, male college professors meet with female students only in public spaces, such as a Starbucks, rather than in their offices. More chaperones will be needed here, too.

More to the point, chaperones will one day be needed everywhere. In the 19th century, when Trollope wrote, men

and women could keep their distance from one another. This is no longer possible in a gender-integrated economy. Indeed, for men, the last remaining public space available exclusively to them is the locker rooms at private clubs. The clubs often furnish these rooms with living room furniture, replete with food service, aware that male patrons will stay in them for hours.

Chaperones were once quite common, especially in Europe, to protect young men and women at their few contact points. That culture recognized people's limitations. It knew that education only went so far in preventing bad behavior. Young women had to be protected against young men trying to seduce them. Young men had to be protected against young women who might falsely accuse a man of having "made an offer" (a marriage proposal). Both scenarios fill novels of the era. The culture policed the few contact points between young people at little expense, as middle-aged women typically volunteered to be chaperones.

Our era is different. Men and women come into contact everywhere. And with zero tolerance the risk arising from that contact is higher than ever. Therefore chaperones will be needed everywhere. This will be expensive. Within health care, for example, there is already debate over whether insurance companies should pay for chaperones or chaperones should be part of the doctor's "overhead." There are not simply enough middle-aged women (and now middle-aged men) to volunteer to be chaperones at all the contact points.

Again, technology will lead the way. Many police officers now wear body cameras to protect citizens against police abuse, and to protect police officers against false accusations—whether the cameras work as intended is open to debate. In the future, people will wear similar body cameras when approaching sensitive contact points, to protect against the moral hazard our culture has placed them in. The result will be an absurd form of cognitive dissonance. People will walk around believing the ideology that human beings are perfectible. They will believe in people's moral rectitude and incorruptibility, made possible through education and sensitivity workshops.

But the other sides of their brains will house a fear that each individual is a total jerk, and would bother a woman if he were a man, or falsely accuse a man if she were a woman. One moment, they will read somewhere that a person who has undergone sensitivity training has committed bad behavior. They will immediately write an angry refutation to the editors.¹ They will call it a libelous defamation of our social reality. They will say that people once educated do not commit such behavior, and that the author of such malicious fabrications should be punished. The next moment, they will put their body cameras on whenever venturing into risky terrain, and think people will act like jerks if the opportunity arises.

The Workplace

Every December, the nation's corporations hold office Christmas parties. Male and female employees are thrust together. Alcohol is everywhere. People get frisky. The corporations naively assume sexual harassment and sensitivity training seminars have sanitized their employees of jerkiness. They are wrong. Sexual harassment claims inevitably follow. One survey showed that [forty percent of employees](#) at such parties had either engaged in inappropriate behavior or knew people who had. Eleven percent of the group questioned reported that they or someone they knew had been terminated as a result of this misbehavior. Indeed, plaintiffs' attorneys count on office parties as a source of business.

This is the moral hazard that arises when zero tolerance ideology at work collides with the innate jerkiness of human beings. One would hope that human resources departments would counsel common sense in the face of all this. Often they do. But the people in these departments also feel pressure to implement zero tolerance. Ominously, compliance training sessions on sexual harassment these days focus less on obvious issues, such as "don't grope" or "don't squeeze"—they assume employees already know this—and more on the small things, such as how to compliment another person, how to criticize another person's work, or how to greet another person. This is not the stuff of sexual harassment; it is the stuff of jerkiness. Utopians are already forcing human resource specialists to punish people for infractions in this area. "Mansplaining" can now get a person fired.

There is no retreat from the gender-integrated workplace. Men and women cannot keep their distance from one another at work, although it has been reported that some men aspire to do so by talking casually only among themselves at the office, then [falling silent when a woman comes by](#). This angers women, who fear they may be shut out important business talk. Instead, utopians will compel businesses to keep social contact between men and women at a bare minimum. This will include a shutdown of unnecessary social events, including office parties.

This is cruel, since [American families work more hours](#) now than ever before in the country's history. People need to have some fun. In addition, many Americans experience social life *through* work. Indeed, in the 1990s, over-worked employees were known to have "work spouses," meaning people of the opposite sex whom they

confided in, since they had so little time to see their real spouses. Yet the moral hazard our utopians have created will inevitably force this change. Indeed, corporations may become liable for exposing their employees to this hazard.

Employers will also have to ban their employees from using social media, since online activity comes with the possibility of behaving like a jerk, for which there is zero tolerance. Again, this may seem cruel. Surveys have estimated that [more than half of Americans today are lonely](#), since they have no one (or at most one person) to talk to about their everyday life problems. Social media gives people an opportunity to talk to others, if just to strangers. Yet social media also poses a risk that people will say stupid things and get themselves into trouble. Companies will have no choice.

Again, technology will be used to cut down on the number of contact points between people at work. Working from home and “virtual meetings” have been advertised as a way of giving employees flexibility at work. It also has the benefit of keeping people apart from one another. When utopians realize that the perfect society resembles the unattainable horizon that merely recedes as you advance toward it, they will grow angry, and drag not just enemies but also accomplices into the dock. Someone must be blamed. This guilt by association will poison human relationships even more. After all, your friend at work could be everything but tomorrow he could be nothing, and you could become nothing with him.

A New Inferno

The new device coming onto market—sexbots, or robots to have sex with—captures the awful, almost sick society that the utopians are leading us toward. The demand for sexbots is high. Almost [half of American men](#) express an interest in having sex with a robot, as do a fifth of American women. Many orders come from MGTOWs, or Men Going Their Own Way, a mass movement of men who fear that contact with women will somehow lead them into trouble. These men sense the moral hazard that arises when zero tolerance ideology collides with human reality.

Sexbots will join body cameras, Skype, online learning, and other technologies to help men and women deal with the moral hazard they increasingly feel in their lives. This should not surprise. Karl Marx once observed that capitalism had a way of creating new technologies to manage needs arising out of its own contradictions. Today, capitalism supports zero tolerance policies. Zero tolerance molds workers into a single human type: the gender-neutral, humor-averse, self-policing knowledge worker who obeys sanitized rules and procedures of human intercourse. An army of such workers makes work more efficient. That people have a tendency toward jerkiness throws a monkey wrench into the plan—hence, the contradiction. Therefore, as Marx predicted, new technologies will re-divide men and women. It will police their behavior to protect them against harassment (or the false charge of harassment). In the case of sexbots, it will substitute a machine for a person’s need for human contact.

What will life be like under such a regime? Marx wrote about the life of the French industrial worker under 19th-century capitalism. That worker labored ten hours a day chained to his machine, doing the same task repeatedly. He sent his wife out to prostitute to earn extra money. He saw other people as competitors for his job and distrusted his fellow man. He ate, he slept, and he labored. It was a veritable Dante’s Inferno.

The prospective life of the American worker who uses technology to escape today’s contradictions in capitalism will be no less horrific. The worker will get a college degree online, studying alone, to avoid people. After graduation, the worker will live in a 28 square-foot pod apartment because housing is so expensive. The worker will labor at a job for ten hours, or even longer, since cell phones and the internet will follow him or her home. All the while, he or she will avoid co-workers to reduce the risk of saying something stupid to them, or of being injured by someone else’s stupid talk, or of being falsely accused of doing something stupid. The worker will have little time to develop a social life, therefore he or she will message co-workers through social media, or message strangers he or she has never met, but will do so anxiously, furtively, since social media exposes him or her to great risk. Otherwise, the worker will be alone.

Occasionally, the worker will stay inside his or her pod apartment to work, using Skype or virtual imaging. He or she will see no one in the actual physical world. Sometimes the worker will walk outside but then will wear a body camera to protect herself against sexual harassment, or to protect himself from a false accusation of sexual harassment. When the worker feels romantic urges, he or she will have sex with a robot in the tiny bed that fits inside the apartment, thereby avoiding interaction with a real person.

This is a perverse way to live. It may be productive. It may produce wealth. It may be efficient. But it is perverse. True, ideology has a way of putting a good face on matters. Some people will call this life cutting edge, even hip,

especially when lived in a city. But in reality it is another circle in hell.

And it will be the way we live. Defenders of the jerkless society say the theory is good but the practice is bad. The utopians have devised it correctly but our technicians have applied it wrongly. We still have some kinks to work out, they say. But what is so good about a theory if it can never be confirmed in practice, anywhere, under any conditions? On the contrary, the dystopia of the future *will be* the end result of its practice.

We are at crossroads. We must do what we can to stop sexual harassment, and we have tarried too long before the task. But if in the process we prosecute mere jerks as if they're criminals in the name of some unattainable higher end, we will undermine the entire effort. Rather than condemn, demonize and shun them, it would be better for everyone to regard them with a little sympathetic understanding, reproach them, let them repent, and then make that the end of the matter. As Wallace Stevens once said, "our paradise is the imperfect." We must learn to live with that insight.