

NOTES

1. *Alexander v. Yale University*, 459 F.Supp. 1 (D. Conn. 1977), 631 F.2d 178 (2d Cir. 1980). The courts ruled the case moot since the student had already graduated and other students were not clearly adversely affected by the harassment of one of their friends.
2. John C. Hughes and Larry May, "Sexual Harassment" *Social Theory and Practice* 6 (Fall 1980).
3. See Larry May and John C. Hughes, "Is Sexual Harassment Coercive?" in *Moral Rights in the Workplace*, ed. Gertrude Ezorsky (Albany: State University of New York Press, 1987).
4. Laurence Thomas, "On Sexual Offers and Threats," in *Moral Rights in the Workplace*, ed. Ezorsky, p. 125.
5. This doctrine was first embraced, by a unanimous Supreme Court, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).
6. *Harris v. Forklift Systems Inc.* 114 S.Ct. 367 (1993).
7. *Ibid.*
8. This is a quotation from the Eleventh Circuit Court of Appeals ruling in *Henson v. Dundee*, quoted by Chief Justice William Rehnquist in *Meritor Savings Bank v. Vinson*.

Normative Issues In Defining Sexual Harassment

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Arriving at an acceptable conception or definition of sexual harassment is more difficult than arriving at acceptable conceptions of many other moral phenomena. Sexual harassment is still a relatively new construct, and thus far has been defined mostly by select groups needing to formulate laws or policies on sexual harassment for schools or places of employment. Thus, definitions vary widely, and disagreement may prevail about whether a given situation is an instance of sexual harassment. As a result, there are many controversial cases and few agreed-upon cases to use as a starting point for forging a conception of sexual harassment. In addition, Christensen (1994) has argued that "sexual harassment is an ill-conceived notion that should be discarded, since, given any group of alleged cases of sexual harassment, what the cases have in common (i.e., that they have

something to do with sexuality) has *nothing* to do with what makes the *wrong* action in each case *problematic*" (p. 1). Perhaps such a charge should be taken into account when attempting to elucidate an adequate conception of sexual harassment. For example, should we say that the sexual element in an instance of sexual harassment is a central part of the normative infraction that takes place, or is the sexual element merely an accidental property that accompanies a nonsexual wrongdoing? One's answer to this question will significantly govern the way one goes about defining sexual harassment.

Thus far, we can acknowledge that a common starting point for forging a conception of sexual harassment is the agreement that a normative infraction has occurred in instances of harassment, that is, that "something wrong" has happened, and that degree of wrongness

should be made apparent in an adequate definition. But what is it about sexual harassment that makes it subject to our disapprobation while breaches of etiquette or unprofessional or immature behavior can be equally annoying and disagreeable but do not bear the same negative moral import? On what basis do we hold the sexual harasser more deserving of moral blame than one who simply lacks etiquette, and are we justified in doing so? To date, the nature of the wrongness of sexual harassment has not been adequately explained in the literature, nor has the significance of the wrongness been adequately justified. . . .

Our purpose here is twofold. We intend . . . to evaluate three major conceptions of sexual harassment based on the nature of the wrongness they identify: sexual harassment as the oppression of women, as an abuse of power, and as a violation of privacy rights. While all three fall short as acceptable conceptions, for reasons we will see later, all of these conceptions identify important aspects of the wrongness of sexual harassment and help to move us closer to a more adequate conception of the wrongness of sexual harassment. . . .

In the final part of the chapter, we will examine moral principles from deontological ethics, which we take to be useful in the justification of the wrongness or disvalue in sexual harassment. In doing so, we will sketch our own conception of sexual harassment, which we believe encompasses and justifies the negative moral import of sexual harassment more successfully than the rival conceptions discussed in the chapter.

THE FEMINIST CONCEPTION OF SEXUAL HARASSMENT: OPPRESSION OF WOMEN

The danger in evaluating a feminist conception of sexual harassment stems from the fact that there is no *single* feminist conception of

any phenomenon. Feminists have had a central role in the study of sexual harassment. . . . In this section we will discuss Anita Superson's article "A Feminist Definition of Sexual Harassment" and evaluate it as representative of many feminists' views.

Superson (1993) puts forth the following as a definition of sexual harassment: "Any behavior (verbal or physical) caused by a person, A, in the dominant class directed at another, B, in the subjugated class, that expresses and perpetuates the attitude that B or members of B's sex is/are inferior because of their sex, thereby causing harm to either B and/or B's sex" (p. 46). Superson remarks that the main benefit of her definition is that it pin-points "the group harm sexual harassment causes all women, thereby getting to the heart of what is wrong with sexual harassment" (p. 61). . . . But is the expression or perpetuation of a person's inferiority because of her sex what we ought to identify as the disvalue of sexual harassment? . . .

Superson maintains that women cannot harass men. . . . Although her reason for making such a claim (that women cannot dominate men and harm them as a group given the current social structure) may be correct, the claim itself immediately clashes with our intuitions. For example, imagine a 45-year-old female professor directing sexually bothersome behavior at a 22-year-old male graduate student. Let us assume that the graduate student is poor and desperately hoping to get an assistantship and the female professor has made an implicit threat that he must tolerate her unwanted behavior in order to receive the post. Let us also assume that she is a bodybuilder and he is very thin, small, and frequently ill. He is greatly disturbed by the professor's behavior, and she recognizes this fact and enjoys the power she has over young graduate students who are so financially strained that they will be forced to drop out of school if she does not recommend them for assistantships. We hypothesize that to most people such a situation would clearly

appear to be one of sexual harassment; the woman is older and is physically, financially, and professionally superior to the man. . . . Superson, however, would have to maintain that this scenario is not an instance of sexual harassment because the professor's behavior cannot result in the harm or degradation of men *as a group*.

A denial of this scenario as an instance of sexual harassment reveals two striking but popular aspects of many feminist positions. First, since Superson claims that sexual harassment is about domination and abuse of power, and since our scenario obviously seems to involve domination and the abuse of power, we notice that Superson mistakenly sees the only "real" power as that which men (in general) have over women (in general). Superson does not provide a justification for such a strong claim; it is unlikely that any adequate justification for such a claim can be provided. Many factors determine power in relationships, including race, age, financial and professional status, physical strength, physical and mental health, intelligence, and so on. . . . We have no reason to think that the power one has in virtue of one's gender outweighs the power another has in any other area of life.

Second, . . . in the existing social structure, in which Superson maintains that no such group harm to men can occur, she does not seem to recognize that women like the professor still deserve our moral reproach. . . . While one may be correct and even justified in proclaiming that oppression and the abuse of social power are wrong, our moral intuitions tell us that, based on our scenario, there is still an element of wrongness present in sexual harassment for which one cannot fully account by appealing to the wrongness of an abuse of social power.

The belief that the power one holds on the basis of gender overrides other types of power also leads one to conflate sexual (erotic in nature) harassment and gender (or sexist)

harassment. . . . Superson . . . uses the phrase "sexual harassment" to denote both sexual harassment and gender harassment. . . .

The conflation of sexual harassment and gender harassment is . . . a common practice insofar as both are classified as sexual discrimination, and there is frequently an overlap between the two. . . . Although we regularly see sexual behavior linked with sexist behavior, we run into problems when we conflate the two. . . . If sexual harassment is a form of gender harassment and gender harassment can only be committed by males and against females, then sexual harassment cannot occur between two individuals of the same sex, nor can it be committed by women against men. . . . The wrongness . . . in sexual harassment differs from that in gender harassment and the conflation of the two results in a loss of meaning and moral import of either one or the other.

THE WRONGNESS OF SEXUAL HARASSMENT AS ABUSE OF POWER

The abuse of power . . . can be identified in female-to-male sexual harassment and same-sex sexual harassment as well as male-to-female sexual harassment. . . . We need to examine whether the abuse of power in general is the essential factor resulting in the disvalue in sexual harassment. . . . "Abuse of power" is a muddy notion despite its frequency in common parlance. Power is a difficult thing to define and identify; one individual may have power over another in numerous ways. . . .

If we say that an abuse of power must occur in order for sexual harassment to occur, we must have some idea of which individual is in a more powerful position in any allegedly harassing situation. . . .

We need to look at cases in which it is fairly simple to discern which individual is in the position of power and then decide if an abuse of

that power with sexual overtones constitutes sexual harassment. Consider the following scenario put forth by Crosthwaite and Swanton (1986) as an example in which there is a clear case of an abuse of power and the abuse is motivated by sexual attraction:

Consider a lecturer whose passions are so excited by a student that he loses his sense of professional responsibilities. Out of excessive concern for her interests, and neither requesting nor expecting any response from her, he gives her an unwarranted pass in the subject. This is wrong, but it is hardly harassment. The woman concerned need know nothing at all of his motivation, and may be only favorably affected by his action. (p. 99)

This example qualifies as an abuse of power but does not qualify as an instance of sexual harassment. . . . Abuse of power, even when exercised for sexual reasons in some sense, is not a sufficient condition for sexual harassment. There are cases that are intuitively not sexually harassing in which sexually motivated abuses of power do occur. . . .

The wrongness of sexual harassment cannot be found solely, if at all, in the abuse of power; something with greater negative moral import must be missing from the assessment. . . .

There must be something more illustrative than the misuse of power that is central to the wrongness of sexual harassment. . . .

Perhaps the illustrative element we are looking for is that which is also similar to and closely associated with an abuse of power—namely, coercion. Part of the reason that the example of Crosthwaite and Swanton lacked negative moral import is that the scenario failed to identify specific *harm* committed by the perpetrator. Coercion, however, can be defined in terms of harm, since what often occurs in an instance of coercion is that the victim commits an action she would not otherwise commit with the belief that doing so will spare her some sort of threatened harm from the perpetrator. . . . We do not need to ver-

ify the existence of power between two or more individuals in order to determine whether coercion has taken place. Rather, we can simply use an objective standard to determine whether coercion has taken place and evaluate the wrongness of coercion and its relationship to sexual harassment, happily ridding ourselves of the bewildering search for a misuse of power. . . .

It will be helpful to explain what we mean by coercion so that we may see why it is or is not essential to the wrongness of sexual harassment. . . . Consider the following scenario, which [Edmund] Wall uses to stress the importance of the perpetrator's intentions in determining whether a situation is coercive:

P is a homeless individual who happens to be a very large man. P approaches another man, Q, seeking some money for that night's meal. P goes about his request in a polite fashion. However, unknown to P, Q was once the victim of a serious and unprovoked assault. Similar to P, the assailant was a very large man dressed in soiled clothing. The thought of this terrible incident is recalled by Q when P approaches him, evoking a feeling of fear in Q. As a result of fear, Q feels threatened into performing the action (A) that P requests. He does, indeed, perform A. But, do we want to conclude that Q was coerced by P into doing A? I think not. (p. 76)

Wall mentions that although Q feels threatened, he is not actually threatened. Such a distinction applies to sexual harassment, as we often hear that sexual harassment is whatever makes the victim feel uncomfortable, or that we must define sexual harassment from a victim's point of view. While it may be perfectly normal for Q to feel threatened given his having previously been an assault victim, the proposition *Q was coerced by P* remains false. In Wall's example we can say that Q's reaction is normal or even justified and yet still maintain that coercion, or a moral infraction, did not occur.

The same attitude must be brought to instances of alleged sexual harassment. Too often those asked to judge whether sexual harassment has occurred are forced into a false dichotomy of deciding whether the victim's feelings are normal or abnormal and on that basis deciding whether sexual harassment did or did not occur. In brief, the victim's feelings are not ultimately decisive in ascertaining whether sexual harassment occurred, but they are a part of that decision, just as they are in coercion. . . . On the other hand, the *moral* status of an act does not fluctuate with the reaction of the victim of the act. Thus, even if the victim of an attempted sexually harassing action is not bothered by the action, we ought to still assign moral blame to the perpetrator. Again, because both coercion and sexual harassment are subject to our moral disapprobation, we must make sure we can point to a breach of a moral principle in such cases, and we must make sure that the perpetrator is a thinking, feeling, purposeful being who is at least *capable* of knowing the moral principle he violates. . . .

Other definitions of coercion, such as Robert Nozick's (1972), focus on whether the victim would have chosen to perform the action *had the threat not been made*. But, as Wall's example demonstrates, one may decide to perform a certain action before the threat is made, but still ultimately perform the action to avoid harm coming to oneself and be coerced. . . .

In instances of quid pro quo sexual harassment we frequently hear of cases of alleged harassment in which the victim had shown a sexual interest in the perpetrator before the sexually threatening or harassing behavior occurred. The victim's sexual interest is then sometimes incorrectly used as evidence that no sexual harassment could have occurred. However, the perpetrator may not *know* about the victim's interest and so may still attempt to coerce her into a sexual relationship. The

perpetrator may threaten the victim with diminished promotional opportunities should she refuse to undertake a sexual relationship with him. In such cases the perpetrator deserves moral blame regardless of whether the victim had a previous sexual interest in him. . . .

Cases of hostile environment sexual harassment typically do not involve coercion unless we were to construe coercion broadly enough to include a forcible exposure to a certain environment. However, coercion is readily apparent in quid pro quo sexual harassment, and when coercion of a sexual nature occurs, we will almost certainly declare that action to be sexually harassing. Thus, sexual coercion is a sufficient condition for sexual harassment, although it is not a necessary one. Notice that the wrongness in quid pro quo sexual harassment lies primarily in the coercive nature of the phenomenon; the sexual aspect does not appear to play a role in the wrongness but is merely an accidental feature. That is, this harassment is wrong because it is coercion, not because it is sexual coercion. . . .

THE WRONGNESS OF SEXUAL HARASSMENT AS A VIOLATION OF PRIVACY RIGHTS

In this section we will evaluate what Wall (1991) and others identify as the wrongness in sexual harassment. Although we found much of what Wall says about coercion applicable to at least some forms of sexual harassment, Wall makes no mention of coercion in his defense of the wrongness of sexual harassment; instead, he locates the disvalue of sexual harassment in a violation of the victim's privacy rights. In "The Definition of Sexual Harassment," Wall (1991, 374) sets up his own necessary and sufficient conditions for sexual harassment, which are as follows:

1. X does not attempt to obtain Y's consent to communicate to Y, X's or someone else's purported sexual interest in Y.
2. X communicates to Y, X's or someone else's purported sexual interest in Y. X's motive for communicating this is some perceived benefit that he expects to obtain through the communication.
3. Y does not consent to discuss with X, X's or someone else's purported sexual interest in Y.
4. Y feels emotionally distressed because X did not attempt to obtain Y's consent to this discussion and/or because Y objects to the content of X's sexual comments.

The first strength of Wall's set of conditions is that most of us agree that the right to privacy is a basic human right, and so the violation of it is likely to warrant moral censure. However, Wall's first condition seems overly stringent in requiring that X attempt to obtain Y's consent merely to communicate one's sexual interest in X. Of course, it depends on what Wall means by "sexual interest," which he does not make clear in his article. But since sexual interest is usually understood to include attraction, the condition seems too stringent. Most of us would not want to say that X would be violating Y's privacy rights merely by not attempting to obtain Y's consent to express to Y, X's or *someone else's* sexual attraction to Y. Asking someone out for a date, for example, could be a way of expressing sexual attraction/sexual interest. Under Wall's condition, however, X would be required to attempt to obtain Y's consent simply to *ask* Y out for a date. It is difficult to get permission to express sexual interest without inadvertently expressing one's interest in the process of asking for permission. A failure to obtain an individual's consent before asking her out for a date is not even severe enough to qualify as a breach of etiquette, much less a moral infraction.

The reason Wall makes the first condition so inclusive is to capture those cases in which Y has an interest in X but still objects to X's sexual behavior. As Wall (1991) notes, "Y may

actually agree to a sexual proposition made to her by X and still be sexually harassed by X's attempting to discuss it with her. . . . Y might not feel that it is the proper time or place to discuss such matters" (p. 375). Again, Wall holds that a failure to obtain consent to a certain type of communication (in this case, to discuss sexual matters with an individual) is a violation of one's privacy rights and is central to sexual harassment. He goes on to elaborate about the wrongness of sexual harassment in the following passage:

What is inherently repulsive about sexual harassment is not the possible vulgarity of X's sexual comment or proposal, but his failure to show respect for X's rights. It is the obligation that stems from privacy rights that is ignored. Y's personal behavior and aspirations are protected by Y's privacy rights. The intrusion by X into this moral sphere is what is so objectionable about sexual harassment. If X does not attempt to obtain Y's approval to discuss such private matters, then he has not shown Y adequate respect. (p. 375)

Although Wall's conception of sexual harassment is too broad, he makes an important point: that vulgarity is less central to sexual harassment than the failure to show respect for X's rights. If coworkers, or even supervisors and subordinates, have an agreement that sexual joking and teasing is harmless and enjoyable, then it is not sexually harassing even though it may be unprofessional. However, less vulgar sexual joking directed at someone whom the perpetrator knows is distressed by such language can be sexually harassing.

The areas in which Wall's conception can be shown to be too broad are what he means by a victim's privacy rights and by "some perceived benefit" in the second condition. For instance, we know that Wall maintains that failure to gain consent to a certain type of communication violates a victim's privacy rights, but such communication is not only verbal; it includes "gestures, noises, stares, etc. that violate its

recipient's privacy rights. Such behavior can be every bit as intrusive as verbal remarks" (1991, 375). We do not typically think of an individual's privacy rights as something that can be violated by noises, stares, and so on. It sounds as though Wall's idea of the right to privacy is more like a right to be left alone from all disturbances. The problem with such a broad conception of an individual's privacy rights is that it encroaches on other individuals' rights to free expression.

Also, Wall appears inconsistent in qualifying a failure to attempt to obtain consent as a *violation* of a victim's privacy rights. If one fails to attempt to gain consent, then it is more fitting that we should say he perhaps has been insensitive, negligent, or has *failed to show proper respect* to the victim's privacy rights. A *violation* of privacy rights should occur only if the perpetrator *acts against* (and, hence, violates) the victim's wishes. . . .

THE WRONGNESS OF SEXUAL HARASSMENT AS TREATING PERSONS AS MERE SEX OBJECTS

Although we have not yet settled on a firm conception of what sexual harassment is, we have, it seems, come closer to deciding what is wrong with sexual harassment, and once we discover the wrongness of sexual harassment, we have at least one necessary condition in its definition. What is central to the wrongness of sexual harassment, we propose, is that it involves using another individual as a means only. The wrongness of using a human being as a means is a much defended and easily accepted principle in moral philosophy that first gained popularity as the principle of humanity in the categorical imperative of Immanuel Kant (1964): "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply

as a means, but always at the same time as an end" (pp. 32–33). . . .

The notion of respect for persons is relatively straightforward. As one would expect, respecting persons as persons entails respecting those characteristics about persons that make us persons as opposed to animals or automata. For instance, persons make rational and moral judgments and act on the basis of those judgments, so we have a duty to respect a person's liberty to make such judgments. . . .

It is on the notion of respect for persons that the deontologists part with the utilitarians and consequentialists most drastically. Deontologists claim that utilitarians cannot recognize respect for persons as a fundamental ethical principle, because utilitarians cannot accept humans as having incalculable intrinsic worth. . . . As a result, deontological theories have greater explanatory and justificatory power for the wrongness of sexual harassment, since according to deontological theories, sexual harassment, insofar as it displays a lack of respect for persons, is always wrong, while in some utilitarian theories an act of sexual harassment may be justifiable. . . .

Sexual harassment involves treating someone as a means or not showing her the respect that is morally required of us. These are the fundamental ethical principles that are violated in the act of sexual harassment and that are the basis on which we are justified in passing a negative moral judgment on those who sexually harass. A violation of such principles, then, is a *necessary condition* of sexual harassment; that is, it is what we ought to look for as a minimum requirement in determining whether sexual harassment has occurred in a given situation.

The disvalue of sexual harassment, on our view, is that when A sexually harasses B, he displays a lack of respect for her as a person. We may say that he treats her as less than a person, and he uses her sexuality *as a means* of treating her as less than a person. Therefore, a second necessary condition of sexual harassment is

that the *vehicle* for violating these ethical principles is something sexual. Put simply, we may say that sexual harassment involves treating someone as a sex object rather than as a sexual person. Let us examine briefly what it means to treat someone as a sex object by contrasting the meaning of "sex object" with the meaning of "a sexual person." . . .

Sexual persons seek after valuable sexual interactions, are capable of following rules or principles to which they have assented as guides for their sexual conduct, and have the ability to choose their sexual partners and the timing of their sexual interactions. There are, of course, other attributes that make sexual persons worthy of respect and distinguish them from animals or objects but these are some of the basic differences. . . .

Ways in which one might treat a sexual person as if she did not possess characteristics making her, *qua* sexual person, worthy of respect would include many of the cases already discussed, such as any type of action in which one individual coerces another into a sexual relationship, thereby not respecting the victim's ability to choose his or her own sexual interactions. In addition, a man who subjects a woman, against her interests, to listening to detailed reports of sexual fantasies he has about her would be in violation of these principles because we may construe one's ability to choose his or her own sexual interactions to include sexual conversation. . . .

Our proposed principle is not put forth as a necessary or sufficient condition of sexual harassment but is proposed as a general principle that tends to be violated in many instances of sexual harassment. . . .

CONCLUSION

In the foregoing examination of various conceptions of the disvalue of sexual harassment, we have attempted to make several important

points. First, an adequate conception of sexual harassment must make explicit what it posits the disvalue or wrongness in sexual harassment to be. Second, the wrongness identified in sexual harassment should coincide with our fundamental moral intuitions, or the principle that one claims is violated in sexual harassment should be a principle on which there is a general consensus. Third, deontological ethical theories give us a stronger basis than utilitarian or consequentialist theories from which to argue for the necessary wrongness of sexual harassment because deontological theories stress the incalculable worth of human beings and locate the wrongness of actions in the moral duty that is violated rather than in the contingent consequences of the action. Fourth, the principle that one claims is violated in sexual harassment must have the moral significance to enable us to differentiate cases of sexual harassment from cases of poor etiquette or mere unprofessional behavior.

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LEGAL PERSPECTIVES

Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission

United States Supreme Court

In 1975, petitioners were found guilty of engaging in a pattern and practice of discrimination against black and Hispanic individuals (nonwhites) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and ordered to end their discriminatory practices, and to admit a certain percentage of nonwhites to union membership by July 1981. In 1982 and again in 1983, petitioners were found guilty of civil contempt for disobeying the District Court's earlier orders. They now challenge the District Court's contempt finding, and also the remedies the court ordered both for the Title VII violation and for contempt. Principally, the issue presented is whether the remedial provision of Title VII, see 42 U.S.C. § 2000e-5(g), empowers a district court to order race-conscious relief that may benefit individuals who are not identified victims of unlawful discrimination.

Petitioner Local 28 of the Sheet Metal Workers' International Association (Local 28) represents sheet metal workers employed by contractors in the New York City metropolitan area. Petitioner Local 28 Joint Apprenticeship Committee (JAC) is a management-labor committee which operates a 4-year apprenticeship training program designed to teach sheet metal skills. . . .

Petitioners joined by the EEOC, argue that the membership goal, the [Employment, Training, Education and Recruitment Fund ("the Fund")] order, and other orders which require petitioners to grant membership preferences to nonwhites are expressly prohibited by § 706(g), 42 U.S.C. § 2000e-5(g), which defines the remedies available under Title VII. Petitioners and the EEOC maintain that § 706(g) authorizes a district court to award preferential relief only to the actual victims of