

## REVIEW ARTICLE

### THE LAW AND SEXUAL HARASSMENT

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*The Law of Sexual Harassment: A Critique*

Mane Hajdin

Selinsgrove, Pa.: Susquehanna University Press, 2002. 271 pp.

In this exciting book, Mane Hajdin presents an outline for an alternative to the present sexual harassment law and explains why, in his view, the present law should be rejected. He argues that one important and frequently unrecognized deficiency in the present law is its two-level structure. In contrast to laws concerning rape, assault, etc., the present sexual harassment law generally addresses not the perpetrators of the deeds, but the *employers* of the perpetrators. When sexual harassment is claimed to have taken place, it is the employer, not the actual perpetrator, who is sued. To protect themselves from such lawsuits, employers have to show that they have made persistent efforts to combat sexual harassment in the workplace and have treated alleged sexual harassment cases in sufficiently stringent ways. Among other measures, they have to set up a "private" lower level judicial system for the adjudication of sexual harassment complaints in the workplace. Thus, the present sexual harassment law has two levels: the upper level, managed by the state, is directed mostly towards employers; and the lower level, managed by the employers, is directed towards the harassers and victims themselves and deals with most of the complaints in practice.

It is in the interest of employers to minimize the probability of being sued in the upper level. Therefore they prefer to act as stringently as possible at the lower level. This stringency has led to the adoption of a large number of problematic procedures in lower level hearings, procedures that would be considered unjust and unacceptable in any modern judicial system. For example, plaintiffs are frequently provided with better professional counseling and assistance than the defendants; employers provide free professional counseling to the plaintiffs, but not to the defendants; defendants are sometimes not allowed to bring a lawyer to lower level hearings, even at their own

expense; plaintiffs who are dissatisfied with the results of lower level adjudications may always "appeal" by moving to upper level courts, whereas defendants typically cannot; in lower level adjudications, unlike upper level ones, hearsay evidence is accepted; unlike upper level proceedings, lower level ones are not open to public scrutiny; at the lower level, there is no strict separation between those who formulate the sexual harassment regulations, assist the complainants, and adjudicate.

Such measures clearly do not serve the interests of justice. If they were adopted by the state itself, they would be considered scandalous and quickly revoked; because they are adopted by employers, at the lower level, they are rarely commented on or protested against. Hajdin emphasizes, however, that although such measures are not specified as such by the state itself, the state indirectly brings them about by its upper level rulings. The employers themselves do not resort to these measures because they like them, but in order to protect themselves from upper level lawsuits and penalties. We have, then, a case where the state imposes unacceptable procedures of adjudication, but not directly and openly, and leaves it to employers to do the "dirty work." Hajdin points out that this two-level system, where the upper level does not officially adopt laws that clash with justice and civil liberties but, nevertheless, makes employers adopt them as lower level regulations, should worry not only those concerned about sexual harassment, but also those who value justice and civil liberties in general. It would have been interesting here to compare the United States sexual harassment law with that of other countries. Hajdin, though, hardly mentions other countries' versions of the law.

Another major problem that Hajdin identifies in the present sexual harassment law is that it does not provide a feasible demarcation line between sexual harassment, on the one hand, and "legitimate" sexual and romantic conduct between people who work together, on the other. Thus, the present law does not give workers any helpful guidelines enabling them to know whether they are sexually harassing or showing a legitimate romantic interest in others. A valid, minimal requirement of a law is that it should provide such a demarcation between what is allowed and what is prohibited. Hajdin considers various candidates for a feasible demarcation line. One candidate, more popular in non-legal discussions of sexual harassment than in legal ones, is consent. According to this suggestion, sexual or romantic advances that are consented to are legitimate, whereas those that are not constitute sexual harassment. However, as Hajdin points out, one cannot know whether an expression of sexual interest will be consented to before it is made; and according to present definitions, asking others whether they would consent to a given romantic or sexual activity is already a sexual activity in itself. Hajdin considers also other candidates (e.g., unwelcomeness, offensiveness). They, too, however, are shown to be unhelpful.

Those who believe that the present sexual harassment law does provide a helpful demarcation line are likely to point to the "principle of reasonableness" or "the reasonable person" standard. But Hajdin argues, after carefully examining the frequently confused senses of "reasonable," that this standard is also unhelpful. It is in this context that the famous debate concerning the "reasonable woman" standard emerged. According to a frequently heard view, in sexual harassment cases where the alleged victim

is a woman, the standard that should be used is that of the reasonable *woman*, rather than that of the reasonable person (who is claimed to be male, or too neutral). Most commentators on the "reasonable woman" standard support the notion, as well as other specifications of the "reasonable person" standard (e.g., the "reasonable black person" standard in racial harassment cases). Hajdin follows the history of the literature and judicial decisions on the subject. He contends that the "reasonable woman" standard is, in fact, neither revolutionary nor necessary. The "reasonable person" standard is anyway expected to be applied so that the gender, social class, age, experience, and background of the person involved are taken into account. Hajdin observes as well that tort law (from which sexual harassment law developed) always asks whether the *tortfeasor*, rather than the victim, behaved reasonably or had reasonable reactions to whatever happened. Sexual harassment law is peculiar in this sense, because it concentrates on the *victim's* reasonable behaviors or reactions.

Thus, none of the suggestions for demarcating sexual harassment and acceptable romantic activity seem to be helpful. I wonder, however, whether Hajdin should have not given more thought to another suggestion: we may distinguish between sexual harassment and "legitimate" activities by looking at the actual court rulings on the subject and the precedents they set. Accumulated court decisions regarding the legitimacy of a many specific activities, together with their extrapolations, could perhaps be used as guidelines for distinguishing between what the law does and does not prohibit. Of course, this criterion would leave many penumbral cases; but Hajdin accepts that such cases would accompany a feasible demarcation line.

A third major problem raised by Hajdin is that the present sexual harassment law conflicts with the First Amendment's guarantee for free speech. Therefore, it is unconstitutional. There are, of course, various exceptions to the First Amendment. However, Hajdin argues (here following Kingsley Browne), that the present sexual harassment law cannot be subsumed under them, because the exceptions are required to be "viewpoint neutral." In other words, the exceptions have to be such that, if the state limits the expression of a particular view on a certain issue, then it must limit also the expression of all other views on that issue. The law may not forbid the expression of one viewpoint while permitting the expression of its opposite. This condition, however, is not fulfilled in the case of sexual harassment. Furthermore, freedom of speech is taken to guarantee also the right *not* to speak about a certain issue or not to support a law. (For example, although we have to pay taxes even if we do not want to, we are immune from the requirement to state our view, a fortiori our positive view, about paying taxes, and we have the right to oppose the law.) However, the present sexual harassment law requires a certain group of people (employers) to express views about the law; moreover, they must state supportive views. According to the present law, employers are required to express strong disapproval of deeds that the law considers sexual harassment, even if they do not think that the law, or parts thereof, are sensible.

Hajdin presents also some other arguments to show that the present sexual harassment law conflicts with the First Amendment, and carefully analyzes and comments on various court rulings on this issue. Discussion of court rulings of sexual harass-

ment cases is, indeed, important, because, as many do not realize, the present U.S. sexual harassment law has never been enacted by Congress: it is the creation of courts, which ruled on various cases, thus creating precedents. Among the court decisions Hajdin points at and analyzes is the almost universally ignored *Booher vs. Board of Regents, Northern Kentucky University*. In that case, a university professor won a summary judgment finding that the sexual harassment policy of the university was unconstitutional. Because that policy is by and large similar to many others, this decision should have been highly influential and widely applied. Unfortunately, it has not been published in a reporter of decisions, has been ignored by the media, and has remained largely unnoticed by legal scholars, lawyers, and courts. Here, too, Hajdin exhibits deep and extensive familiarity both with the professional literature and with court rulings on the subject. His arguments and analyses should have an impact on future litigation.

Before presenting his alternative to the present law, Hajdin needs to deal with two more claims concerning sexual harassment. Because subsuming sexual harassment under the anti-discrimination law (which is addressed to employers) has led to the development of the two-level structure, Hajdin has to deal with the view that sexual harassment is a type of discrimination. Hajdin accepts that some instances of sexual harassment are, indeed, examples of sex discrimination (e.g., cases where workers of one gender sexually insult a worker of another gender in order to force him or her to resign). However, he argues that most cases are not of this type, and that it would be wrong to generalize from a few to all cases. He also presents various general arguments against this view of sexual harassment. Among other analyses, he presents a thorough defense of the Bisexual Objection—that is, the claim that if a worker sexually harasses members of both sexes in equivalent ways, he cannot be seen as discriminating against one of them. We surely would not consider him or her to have stopped sexually harassing, or behaving wrongly, just because he or she inflicted the unpleasant behavior equally, without discrimination, on both gender groups. Sexual harassment, then, does not have to be discriminatory, and the thesis that sexual harassment is a type of discrimination is problematic.

Another group of arguments that Hajdin discusses concerns the wrongfulness of various phenomena associated with sexual harassment. It is argued, for example, that the acts described as sexual harassment often involve adultery or promiscuity, are not part of one's job, involve abuse of power and conflict of interests, or can lead to emotional suffering. Hajdin concurs that many such phenomena are indeed wrong, but argues that sexual harassment legislation should not be based on them. Many of these phenomena, even if morally wrong, are of the sort we would not like to see prohibited by state law. Moreover, if they should be legally prohibited, the prohibition should be done openly (i.e., as a state law prohibiting adultery, a state law prohibiting promiscuity, etc.), rather than as a law against *sexual harassment*, which is a different issue. Furthermore, many acts of adultery, promiscuity, etc., are not related to sexual harassment cases at all, and many sexual harassment cases do not involve such acts.

These and other arguments are taken by Hajdin to show that the present sexual harassment law is too problematic to accept. Instead, he offers an outline of the way an alternative to the law could look like. First, he suggests that "quid pro quo" harassment be distinguished from "offensive and hostile environment" harassment; these two notions, and the behaviors they deal with, are too distinct to be dealt with under one law. Moreover, many existing laws are sufficient to deal with some of the activities now considered as sexual harassment without the many deficiencies of the present law. The existing law of contracts, for example, could easily cover most cases of quid pro quo harassment. (Hajdin shows, moreover, that this law has, indeed, been used in the past for this purpose.) Quid pro quo cases could be punished under such a law by taking them to be a breach of contract. Subsuming such cases under the law of contracts (where they seem more naturally to belong), instead of the anti-discrimination law, would rid us of many of the eccentricities and contradictions in present rulings, as well as the problematic two-level system. Existing laws relating to assault, battery, and rape could similarly deal with some other acts now covered by the present sexual harassment law. The disappearance of the present sexual harassment law would still leave such activities illegal.

The same is true for many hostile environment harassments. There already exists, in the law of torts, a law concerning intentional infliction of emotional distress. Another relevant law is that of intrusion. And perhaps, Hajdin observes, additional laws should be enacted. That would improve on the present law, with its two level structure, its inability to demarcate between legitimate and illegitimate behaviors, and the difficulties relating to its affiliation with the discrimination paradigm. Hajdin identifies other advantages, such as the removal of the strange disparity that exists today between sexual and non-sexual offensive behaviors at the workplace. (For example, according to the present law, there is great disparity between the way one is punished for mocking a worker's big ears and the way one is punished for mocking a worker's big breasts.)

Hajdin points out that some behaviors considered today as sexual harassment would not be considered as such under the existing laws to which he directs our attention. For example, the existing tort of "intentional infliction of emotional distress" (which requires the conduct to be "extreme and outrageous") has a higher threshold than that of the present sexual harassment law. Hajdin argues that perhaps some new laws should be enacted, but it is also possible that for some cases, this higher threshold would be appropriate. Some behaviors should perhaps not be litigated. Hajdin envisages a situation in which, for these lighter cases, different workplaces would have different contractual policies, which would suit the temperaments of the employer and prospective workers and the nature of the job. Some workers, according to temperament and background, might prefer a workplace where flirtations and sexual jokes of some types are accepted, and others, of other backgrounds and temperaments, may opt for jobs where such behaviors are disallowed. Some restaurants or bars may endorse house rules of the former type, whereas the offices of religious organizations are likely to endorse the latter. Prospective workers would know the house rules in advance and take them into account when choosing a job. This arrangement would

not be very different from the way dress codes vary among workplaces, and would be preferable to the "one size fit all" policy, imposed uniformly from above, accepted today. Hajdin believes that such a program would be more sensitive to differences among populations, backgrounds, and temperaments. Moreover, it would combine in a more balanced way the interests of prospective victims of unpleasant sexual expressions and the interests of prospective enjoyers of pleasant and acceptable sexual advances or expressions.

The book shows a very high level of scholarship. There seems to be no relevant argument or pertinent court ruling with which Hajdin is not acquainted. His arguments are meticulously and cautiously structured, and they present serious challenges to those who would contest Hajdin's conclusions. Yet, Hajdin presents them clearly and provides many examples, making the text accessible to both professionals and students. Perhaps the most important characteristic of this work, however, is its innovativeness. It incorporates many arguments and observations concerning sexual harassment that have not been raised previously. There is much to learn from this important book, and its controversial theses call for serious discussion. If it would receive the attention it merits, there is enough in it to change our current discussion on sexual harassment.

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