

Scapegoating and a 'Hostile Environment' for the Unattractive: A Critique of 'Hostile Environment' Sexual 'Harassment' Law."

Though Catharine MacKinnon was well-intentioned, not only when she exposed *quid pro quo* sexual harassment, but also when she formulated the "hostile environment" clause, the latter has had terrible unforeseen consequences; thus, I advocate a terminological change in the Supreme Court's "hostile environment" clause to "sexual discomfort," and eliminating firings and "zero tolerance" policies. The term "sexual discomfort" retains the ambiguity good law needs, yet hopefully without the stigma of guilt toward a "perpetrator" which "harassment" carries. "Hostile environment" law has become a weapon for human cruelty. I hope to show the ways this law has gone wrong, and where it can change for the better. I believe it is time to add Foucault to this discussion, both in terms of content and as a methodological model. Foucault, especially in *Abnormal*, takes us through case after case; in a similar way, I hope to show "hostile environment" is far too broad a category, and has opened the door to abuses. There are many other factors that distort these cases. Because these other factors are at play, these hetero-normative laws have become a dangerous weapon of misandry, misogyny, racism, cultural intolerance, queer-phobia, and able-ism. Laws meant to curtail human cruelty have ironically further enabled cruelty. I contend that all of us, of whatever sex, sexuality, or gender, have made *advances* to someone else that have been *unwanted*, if we have ever pursued a relationship – by this definition of "unwanted advances," then, *all of us* are "harassers." This is, quite simply, too broad. I advocate requiring companies to listen to both sides of a "sexual discomfort" case in a compassionate manner and to *separate* the parties involved, rather than branding someone a "harasser" and *firing* that person. Also, hopefully such changes will help people to engage in the difficult work, yet necessary for us as social creatures, of dealing with one another more compassionately, rather than targeting each other with laws. Since human interaction is

ambiguous, thorny, and difficult for us all, I advocate the removal of loaded terms such as “perpetrator” and “victim” from sexual “harassment” literature. No one should be fired when the institution first addresses what I will argue is a natural, though uncomfortable, part of human existence: *unwanted advances*.

Indeed, Deleuze, Guattari, and Jameson consider schizophrenia part of our postmodern condition, and I argue that our society’s attitude toward *sexual advances* is schizophrenic. With Gregory Bateson’s essay “The Double Bind,”¹ mixed, contradictory messages induce schizophrenia. In our society, as a nice, shy, awkward male who has faced “hostile environment” sexual “harassment” charges after receiving confusing mixed signals, and being entrapped by them, I constantly, as a gendered male, receive mixed messages and a double bind from our society regarding relating sexually toward women: *pursue...but do not dare pursue*. Consider, for instance, a person considered unattractive in our society, according to societal dating literature: the “nice guy.” I turn to such literature not to espouse it uncritically, since it promotes gender norms, but rather to show how shy men receive mixed messages in our society. For instance, in *How to Succeed with Women*, Louis and Copeland state that the old adage that dating should be fair is a myth.² “You must go at her speed and yet push at the same time,” they state, and you must stop when she says no. They write that a highly successful seducer doesn’t get upset at her “no’s.”³ “The number one thing that stops most men from being successful,” Louis and Copeland write, “is that they give up when women ambiguously and uncertainly say ‘no.’” From our vantage point, women most certainly will say ‘no’ along the way.”⁴ They also argue that a highly successful seducer initiates everything with women, and that the man must always take responsibility in initiating every step of a romantic encounter.⁵ I ask: the number one mistake that men make is that they give up when women uncertainly and ambiguously say “no”?

And yet our sexual harassment law tells a different story. Ironies abound. Louis and Copeland further argue that you gain her trust, and alleviate her fear over time, over the course of a number of flirting interactions. If you're persistent in your flirting, consistently causing her to laugh and feel good, she'll start to trust you and know you're safe.⁶ And then they state this: "Most important, you must respect her when she says 'no.' A woman likes to move at a certain pace during a seduction. She feels safe knowing that she is in control of the speed. You'll get to know this pace by her use of the word 'no.' You must back off when she says 'no.' When you do this, she will feel respected."⁷ Of course, you also build her trust by not being desperate, they state. You must be patient in the flirting interaction over time.⁸ Thus, I assume, the ironic message is this: when she says no, ease off. But playfully continue the game, if she'll let you. This is not the message of "hostile environment" sexual "harassment" law. Louis and Copeland further write: "You must be willing to go see her again and again, and have multiple flirting interactions, before you go out with her....Patiently visiting her at her work place or gym also builds her trust in you, because she is seeing you again and again."⁹ And then they state, "Now that you've overcome her fears it's time for her to give you the next problem in your seduction. As she become attracted, she starts to answer that question, 'Why not?'...She'll tell herself—and you—that you are not her type, that she doesn't want to spoil the friendship..., or that she's still getting over some other guy. Like anyone contemplating trying something new and potentially risky, she thinks up any and every reason to not go out with you. You just have to handle it....She's not saying 'no' because she doesn't like you, or doesn't like something you did; 'why not' problems seem to be free-flowing, general problems with whole classes of relationships....If she says to you, 'Hey, I don't ever want to talk to you again. I'll never go out with you, and I want you to leave me alone,' she doesn't like you. Leave her alone, and move on to women who like you.

But if she says something vaguer, thrown out as an almost offhand problem, a problem more with the idea of relationships than with you specifically, then you must gently persist with her.”¹⁰

Then you must gently persist with her? And yet, it has been my experience that some women who are *not* interested can also be vague and give mixed, ambiguous signals. And when you continue to pursue, even gently, they bring you up on charges. These authors also state, “If you are looking for a girlfriend or a long-term relationship, to some degree you will have to court the woman. We define courting as a process in which your actions ‘prove’ to a woman over time that you want to be with her....The key to courting is to prove that you are patient. You are demonstrating that you are dependable, honest, good, moral, and that you have other noble qualities. In short, you are proving that you really want her as an individual, not just a one-night stand. This means that you consistently pursue her over time. Most women, especially those worthy of having a long-term relationship with you, want to know that you like them for more than just their bodies and sex.”¹¹ Consistently pursue her over time? But if the woman decides later that she does not want that, then this is the very essence of “hostile environment” sexual “harassment,” as defined by law: “unwanted advances.”

Considering the punishment for not enacting one’s gender properly, as we see in the work of Judith Butler, there is another popular online dating consultant, David DeAngelo, who argues, with such emails as “Why ‘Nice Guys’ Fail with Women” and “Examples of Cocky and Funny Humor,” that a “nice guy” is unattractive to women, and that one must learn to be “cocky and funny”¹² (which one can accomplish by buying his books and CDs, of course). In an amusing example of what DeAngelo means by “cocky and funny,” one of his subscribers writes:

I’m 30 and I always felt that I was GOOD with women, and many of my mates have come to me for advice, but I really wanted to be (and KNEW) that I was capable of so much more. I bought the book, read it front to back, TWICE in one weekend, and went

out ASAP to practice. Long story short, it works. I've always been C+F, but when confronted by a stunner (a 9 or a 10) I often felt as though the Force had left me. Not so any more. I got emails left and right, had a few dates, but usually by date 3 I had shelved the C+F. Needless to say, there was no date 4. And then I met this AMAZING hottie, a very beautiful 20 year old with a body that EVERY guy dreams of touching (believe it!). We were walking down the street coming back home from the beach (only 3 blocks) and 4 different times along the way, guys were literally turning their heads to look at her, and 1 guy actually looked at her, then looked at me, back at her again and said "DAMN!" and gave me a nod. AWESOME! :D I felt like the man! Then, on the next block, two dudes were whistling and yelling down from their balcony at her "Yo baby, you're hot!" and so I broke out the C+F and yelled back "Thanks dude, but I'm taken!" She busted a gut! ... Your techniques really are worth more than gold....You are the man! I'm now considering selling some of my stuff to buy your DVDs...¹³

I am very concerned that sexual cases are often ambiguous: it is not always clear who is harassing whom. Deborah Rhode, despite her overall agreement with MacKinnon, raises this question, when she asks how institutions can adequately prevent the harassing use of harassment procedures.¹⁴ I would argue that mixed-signal baiting and entrapment games, which I have experienced, constitute the harassing use of harassment law. Why would someone do this, play with someone using mixed signals and then bring them up on charges? Perhaps Camille Paglia provides a clue. Paglia states, in *Vamps and Tramps*: "...I know full well, from my own mortifying lesbian experience – men are tormented by women's flirtatiousness and hemming and hawing, their manipulations and changeableness, their humiliating rejections. Cock teasing is a universal reality. It is part of women's merciless testing and cold-eyed comparison shopping for potential mates. Men will do anything to win the favor of women. Women literally *size up* men – 'What can you show me?' – in bed and out."¹⁵ To flirt and mercilessly test for potential mates, which men and women can both do, then to slam someone and ruin a career for daring to express interest in return: I believe this is not only cruel, but also a harassing use of harassment law.

Let us examine the statement, “If someone feels harassed, they are,” since I have heard this before. This actually plays on a tautology, something akin to “If someone feels upset, they are upset.” Of course, no one can deny this. But that is not what that sentence is ultimately trying to say, if one looks closely, because what it is actually saying is that *someone else is guilty*. What it says, functionally, is something like, “If I feel someone has committed a crime against me, then they have committed a crime against me.” Or, put more simply, “If I feel someone has committed a crime, they have.” Suddenly, and I hope the reader sees this, one has a classic case of Orwellian doublethink which denies due process, something that, considering our country’s keeping of prisoners in Guantanamo Bay in the War on Terror, also without due process, is a profoundly disturbing trend in the late twentieth-century United States. If we think someone guilty, “then they are.” No more due process. For a chilling example of what could perhaps be the implications of this, we could return to Salem, circa 1692, and take a phenomenological or structural look at *spectral evidence*.

Moreover, I feel that one of the stereotypes we must dispel is that these cases are always about male “perpetrators” and female “victims.” In *Creed v. Family Express Corporation*, the District Court in Indiana granted summary judgment in favor of the employer in the case of a male to female transgender employee who did not abide by the dress code.¹⁶ In *Danes v. Senior Residential Care of America*, the Eastern District of Wisconsin Court decided the case of a sexually harassed male by a female boss must go to trial.¹⁷ One legal website, in examining a similar case in which their firm represented the employer on appeal, estimates that at least fifteen percent of cases now are brought against women, and that the number is steadily rising as women gain more power in the workplace.¹⁸ While I think fifteen percent is an arbitrary statistic, it is true that in my research I am having no difficulty finding cases of men charging women –

they are easy to find when looking through case files, arbitration books, or Lexis Nexus, the legal search engine. Female against female cases are also on the rise. For instance, in *Russell v. University of Texas of Permian Basin*, Dr. Russell, a newly-hired one-year, non-tenure track visiting assistant professor in English, alleged that, beginning in September 2002 and continuing through May 2003, Dr. Sarah Shawn Watson, her supervisor and chair of the department, sexually harassed her. The alleged harassment consisted of both suggestive remarks and provocative touching. Russell argued that her failure to receive the tenure-track position resulted from her rejection of Watson's unwanted sexual advances.¹⁹ Another issue concerns relationships gone sour. While the courts tend to say that soured relationships do not form the basis for a "hostile environment" claim, I must ask: what is to prevent that? For instance, in *Succar v. Dade County School Board*, the Florida District Court stated that the romance between two schoolteachers, which soured, formed no basis for a sexually hostile work environment claim by a male teacher against a female teacher.²⁰ But what is ultimately to prevent "hostile environment" law from being a weapon for those with hurt feelings?

There are many female and feminist writers across the political spectrum directly critical of "hostile environment" sexual "harassment" law, such as Daphne Patai, Janet Halley, Camille Paglia, Katie Roiphe, Helen Garner, Cathy Young, Wendy McElroy, and Jane Gallop. Vicki Schultz and Ruth Colker warn that the sexual has begun to eclipse the discriminatory in sexual harassment cases. Halley is concerned that targeting expressions that are alleged simply to "offend" may favor claims of harassment brought against gender- and sexual non-conformists. I will in my dissertation adopt Foucault's book *Abnormal* as both a theoretical and methodological model for this project, in the sense that Foucault takes us through case after case and shows us the problems in a way that is precursor to Patai's theory of domain expansion and Joel Best's

theory of concept stretching. In a similar fashion, I will examine some current cases that render problematic the male/female bifurcation typical in “hostile environment” literature. Joel Best’s theory of concept stretching and Patai’s theory of domain expansion will also be examined in light of Foucault’s concerns in *Abnormal*, where the concept of the “deviant” individual is, after being defined, elaborated and expanded in case after case. Furthermore, not only in *Abnormal*, but also in *The History of Sexuality, Volume One*, Foucault argues that power regarding sexuality has as its primary effect not repression but “normalization.”

Another concern I have is how these laws, as a weapon, can be used in racially-charged ways. Here it would behoove us to look at an MA thesis by Holly Kearn.²¹ In examining case law regarding street harassment from the twentieth century, Kearn finds numerous examples of the intersection of racism and sexual harassment. In postings on the anti-street harassment websites, Kearn notes that around 28 postings out of the 706 mentioned the race of the harasser and most of these also mentioned their own race to show the comparison.²² A few additional posters mentioned the race of the men who usually harassed them, often prefacing it by saying they did not consider themselves to be racist, but in their experience the harassers were usually from this certain race due to cultural differences, etc; the races was most frequently cited in this way were Hispanic, then African American.²³ Here are some examples:

“I am a 27 year old Asian-American female and I am writing to share my awful [sic] experience with mostly black and Latino men on the streets of New York. I am not being bias by pointing them out, I'm just telling straight from my personal experience because I rarely encounter any kind of harassment from Asian and Caucasian men. I do recognize the difference in culture, custom, education, social standing and class, however, regardless of all of these, I feel that it ultimately boils down to respect.”²⁴

And another comment:

“I know I should feel sorry for these men. Most of them are black or Latino, young, uneducated and have nothing to look forward to in life. I am of Indian descent so know some of the racism that they must face every day of their lives. But it is getting harder and harder [to handle the harassment from them].”²⁵

Kearl notes that, in response to reading these comments, a few others posted that they did not think culture/race made any difference; men of every race/culture had harassed them in different situations and locations.²⁶ Kearl presents her data without drawing conclusions. Then again, her work troubles these racial waters in a way quite important to my project. In a cross-racial or cross-cultural situation of “harassment,” is it “harassment” by the “perpetrator,” or *racism* by the “victim”? Or is it, for all of us, an *inability to accept cultural and background differences* in everyone’s different methods of flirtation? Perhaps it is important to listen to what the alleged “perpetrator” has to say, as well as the “victim.” Perhaps it is important to get away from the model of *perpetrator* and *victim*, and find creative ways to show compassion for both parties.

Proponents of queer theory should also be concerned about these laws, which I have called hetero-normative. Janet Halley writes: “I ask here whether sex harassment enforcement has become sexuality harassment – a mechanism of social control that pro-gay and feminist thought, alike, should find alarming.”²⁷ Halley, in trying to bring out gay and lesbian nuances, writes of MacKinnon’s formulation: “This formulation endorses a rigid, monolithic association of men with male gender with superordination, and of women with female gender and subordination.”²⁸ Halley further writes, “Gay rights organizations have fought to foreclose this route ever since circuit courts first opened it, however, because it is also a quick and easy route to homophobia via the inference that because the defendant is homosexual, he probably has done this bad sexual thing. In a male-male case the inference is even richer, borrowing as it does from the male-female model: because the defendant is a male homosexual, he is a sexual

dominator.”²⁹ Halley laments that when Justice Scalia complacently dedicated the reach of hostile environment liability in same-sex cases to the “common sense” of judges and juries, he opened Title VII to a homophobic project. After all, Halley notes, the very same Justice, less than two years before, had written an enraged dissent in *Romer v. Evans* asserting that it was completely reasonable for the voters of Colorado to regard homosexuals as “socially harmful.” If and when the possibilities implicit in his position are realized, Title VII will take us beyond sex harassment to sexuality harassment. Halley asks: “How is feminism going to react to this possibility?”³⁰ Perhaps Halley puts it best when she writes: “I’ll start with homosexual panic – the terror that some people feel when they think that someone of their own sex finds them sexually attractive. Homosexual panic can be extremely dysphoric. Some people might even say that having a homosexual panic experience at work was unwelcome and sufficiently severe to alter the conditions of their employment and create an abusive working environment. Under *Oncale*, they can sue for that. And since juries might well think that a single same-sex erotic overture was more ‘severe’ than a single cross-sex one, these suits could place gay men and lesbians in the workplace (especially the ‘known’ ones) under tighter surveillance than their obviously heterosexual counterparts.”³¹ As Halley puts it, “Both gay identity and queer projects would worry, for example, about the Ninth Circuit’s holding that the socially sensitive judgments in cases involving women’s complaints about the behavior of men are subject to a ‘reasonable woman’ test. What’s next? Are we going to refer these elements in male-male cases to the ‘reasonable (thus presumably the heterosexual) man’? I hope not.”³²

Another concern relates to disability theory, such as in Tobin Siever’s work regarding sexuality and disability issues, as well as Ruth Colker’s concern that “hostile environment” sexual “harassment” law does not protect such individuals. There are some cases I can mention

in this regard. For instance, in *Van Horn v. Specialized Support Services*, a case in Iowa in 2003, the district court held that the conduct of an employer's client, who suffered from Down's Syndrome, in telling an employee that he loved her and attempting to hug the employee, was not sufficiently severe and pervasive to create an objectively hostile or abusive environment. However, the court found that the employee's slapping of the client in reaction to his pinching her breast was an oppositional activity protected from retaliation under Title VII, and that though the reinstatement of the employee was not a feasible or desirable remedy, the employee was entitled to an award.³³ A related issue concerns obesity. Bernice Sandler argues on her website that obese women are often targets of sexual harassment.³⁴ However, if "hostile environment" sexual "harassment" is poorly defined as "unwanted advances," I have to raise the question whether obese women, and obese men for that matter, considered unattractive in our society, are not also targets for accusations being brought against them.

Against the stereotype prevalent in the literature, of a powerful male "perpetrator" and a hapless female "victim," I propose another model for the reader's perusal, based on my own experiences: a nice, shy, and hence unattractive male and a cruel, vindictive female. Of course, we can change the gender of either or both parties. Since the "unattractive" are the ones who make "unwanted" advances, I argue that those deemed unattractive, and the least of these, by our society, such as gay, lesbian, queer, and transgender people, are also possible targets to such vindictive law. It is ironic that certain "radical" feminists, at least of the MacKinnon and Dworkin variety, strike at people for being unattractive, when "radical" feminism also fights against the beauty industry. Judith Butler, in her work, warns about the heavy punishment society metes out to those who differ from its gender norms. Because of these concerns, I contend that *zero tolerance* is never a good idea. As I state in my novel *Witch Hunt*, "Zero

tolerance...it is what the name implies.” Should not those of us interested in feminism and queer theory promote *tolerance*, rather than *zero tolerance*? It should only be “harassment” after the person has been warned by officials at the place of employment that the behavior is “unwanted.” After all, what one person considers “harassment” would not be harassment for someone else. And, since almost all relationships have to be paced by the use of the word “no,” it would only be fair that someone be given an *official* warning that one’s behavior is officially *unwanted*, rather than being charged before they even know, due to mixed signals and ambiguity, that their behavior has been unwanted. As Katie Roiphe poignantly states, “The difficulty with these rules is that, although it may infringe on the right to comfort, unwanted sexual attention is part of nature. To find wanted sexual attention, you have to give and receive a certain amount of unwanted sexual attention. Clearly, the truth is that if no one was ever allowed to risk offering unsolicited sexual attention, we would all be solitary creatures.”³⁵

In the October, 2006 issue of *Stuff* magazine, Yunjin Kim states:

“I like funny guys and men who take charge. These days, a lot of guys are wimpy; they’re too scared to ask me out. There was a time when guys used to make decisions – now it takes them a half hour just to figure out where to eat. Also, I’m old-fashioned. I don’t believe in going up to a guy and asking him out. I’m going to make him work for it.”³⁶

At the end of an article, “Clueless guys can’t read women, study confirms: Why women’s friendly cues get interpreted as sexual come-ons,” by Jeanna Bryner, there is a respondent’s comment on April 3, 2008, which reads as follows:

“I myself am a shy man who struggles with reading women. I have all my life been bad at reading what women are trying to imply through non-verbal actions. I was raised to treat women with respect and dignity and see women as the most beautiful creation on Earth. Because of that I error on the side of inaction when it comes to making the first move. I would rather not make a fool of myself, or face a workplace sexual harassment charge

because I took a chance on a sign I was unsure on (which is pretty much all of them). I am 26 and have for the most part given up on making the first move, I mean as a guy who has been turned down many times because of misread signals I understand that if a guy can't handle rejection he is going to lead a very lonely life, but this study proves that women aren't making it very easy for guys to read them.”³⁷

The above two comments express different forms of frustration, in some sense attacking the opposite gender for it, yet in a way pointing to a very similar reality, really, what I am calling a crisis, if you look at both statements – as Foucault would say, they share an epistemological foundation, which I will argue has been in some ways created by, or at least reinforced by, “hostile environment” sexual “harassment” law, obverse sides of a similar coin: a sexual crisis, an all-too-ironic “hostile environment” of powerful sexual ideologies, in which I see our society gripped. We keep pointing fingers to those we see as “having” power; we keep speaking truth *to* power and attempting to locate it, attack it, dispel it, destroy it; yet, if Foucault is right, power *has us*, has all of us. Perhaps we err in *locating* our opponent's power. The initial temptation for me, perhaps for all of us, is to then strike back at *their* power. Perhaps Foucault can help provide a path, toward freeing ourselves from ourselves.

¹ Gregory Bateson, “The Double Bind,” in *Steps to an Ecology of Mind*.

² Ron Louis and David Copeland, *How to Succeed with Women*, 12.

³ *Ibid.*, 29-30.

⁴ *Ibid.*, 30.

⁵ *Ibid.*, 39-40, 53.

⁶ *Ibid.*, 153-154.

⁷ *Ibid.*, 154.

⁸ *Ibid.*, 154.

⁹ *Ibid.*, 157.

¹⁰ *Ibid.*, 161-162.

¹¹ *Ibid.*, 153.

¹² David DeAngelo, “Why ‘Nice Guys’ Fail with Women,” “Examples of Cocky and Funny Humor,” and “Making Yourself More Attractive to Women.”

¹³ From a subscriber. David DeAngelo, “Making Yourself More Attractive to Women.”

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- ¹⁴ Deborah Rhode, in *Directions in Sexual Harassment Law*, 291.
- ¹⁵ Camille Paglia, *Vamps and Tramps*, 35.
- ¹⁶ *Creed v. Family Express Corporation*. See Hubbard, Case Digest 10.40.
- ¹⁷ *Danes v. Senior Residential Care of America*. See Hubbard, Case Digest 30.00.
- ¹⁸ <http://www.fordharrison.com/shownews.aspx?Show=3036>. Retrieved March 15, 2010.
- ¹⁹ *Russell v. University of Texas of Permian Basin*. See Conte, section 3.05[B][1].
- ²⁰ *Succar v. Dade County School Board*. See Hubbard, Case Digest 40.10, 260.70.
- ²¹ Kearl, Holly. "Direct Action, Education, Consciousness-Raising, Activism and the Internet: Methods for Combating Street Harassment." MA Thesis George Washington University, August 2007.
- ²² *Ibid.*, 3.
- ²³ *Ibid.*, 3.
- ²⁴ *Ibid.*, 5.
- ²⁵ *Ibid.*, 5.
- ²⁶ *Ibid.*, 6.
- ²⁷ Janet Halley, in *Directions in Sexual Harassment Law*, 183.
- ²⁸ *Ibid.*, 189.
- ²⁹ *Ibid.*, 191.
- ³⁰ *Ibid.*, 193.
- ³¹ *Ibid.*, 195.
- ³² *Ibid.*, 196.
- ³³ *Van Horn v. Specialized Support Services*. See Conte, sections 3.05[A][3], 4.04[A], and 7.04[E].
- ³⁴ www.bernicessandler.com. Retrieved January 15, 2010.
- ³⁵ Katie Roiphe, *The Morning After: Sex, Fear, and Feminism*, 87.
- ³⁶ *Stuff* magazine, October, 2006, 74.
- ³⁷ Bryner, Jeanna. "Clueless guys can't read women, study confirms: Why women's friendly cues get interpreted as sexual come-ons." Retrieved April 30, 2008.