Introduction

A Short History of Sexual Harassment

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Some two decades after the federal courts first recognized sexual harassment as a form of sex discrimination, debate still continues about what sexual harassment is, why it might be sex discrimination, and what law can and should do about it. Many voices take up these questions in the pages to follow. In this introduction I will describe the historical foundations of this conversation, a conversation that continues without sign of diminishing, in the workplace and the popular press, as well as in such academic fora as the conference from which this book grew.

What can history bring to our understanding of sexual harassment? Sexual harassment is a social practice. Social practices have lives, institutional lives and semiotic lives. And so social practices like sexual harassment have histories. Considering sexual harassment in historical perspective allows us to ask some fundamental questions about the nature of the practice, the terms in which it has been contested, and the rules and rhetorics by which law constrains—or enables—the conduct in question.

My object in these pages is to invite reflection, not only about sexual harassment, but also about the law of sex discrimination itself. It is only quite recently that sexual harassment acquired the name of “sexual harassment” and was prohibited as a form of “sex discrimination.” By examining the process through which a persistent and pervasive practice came to be recognized
as discrimination “on the basis of sex,” we learn much about what law does when it recognizes discrimination.

Clearly, this act of recognition was a momentous one. For the first time in history, women extracted from law the means to fight a practice with which they had been struggling for centuries. And yet, when we consider this development from a historical vantage point, it becomes plain that legal recognition of sexual harassment as sex discrimination was at one and the same time a process of misrecognition—involving a sometimes strange account of the practice in issue. On a moment’s reflection, this is not terribly surprising. When law recognizes the harms inflicted by social practices, it is intervening in the social world it is describing, both enabling and constraining challenges to the social order of which the practices are a part.

For this reason, the language of discrimination is a specialized language, one that describes the social world in selective ways. When we in turn talk about a practice in the language of discrimination, we are viewing the world through this conceptual filter. Recourse to history supplies one way in which we can think about the languages in which we characterize the social world, to consider what work they are doing, and to ask again what work we might have them do.

It is in that spirit that I offer the following short history of sexual harassment, as a prelude to a much larger conversation, and as a provocation of sorts: an invitation to meditate, yet again, on what we mean when we say that a practice discriminates “on the basis of sex.” The longer I think about what that proposition might mean, the more I appreciate how its elusive meaning is the very source of its power—its maddening capacity to excite and to deaden curiosity, to challenge and to legitimate the social arrangements that make men men and women women.

It is with a view to continuing a several-decades-old conversation about what discrimination “on the basis of sex” might mean that I begin my short history of sexual harassment at a time well before anyone dreamed of describing the practice in such terms. I begin my story, quite self-consciously, with a provisional account of what sexual harassment might be and end by speculating about some ways that the practice seems to be changing in our own day. In this way, I hope to survey the terrain of the debate that the essays in this book join—a debate about what sexual harassment is and what law should do about it, a debate about the terms in which we describe and remedy the wrongs we have only recently come to call “discrimination.”
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Some Historical Perspectives on the Practice, Protest, and Regulation of Sexual Harassment

The practice of sexual harassment is centuries old — at least, if we define sexual harassment as unwanted sexual relations imposed by superiors on subordinates at work. For example, sexual coercion was an entrenched feature of chattel slavery endured by African-American women without protection of law. While there were crucial differences in the situation of free women employed in domestic service, they, too, commonly faced sexual advances by men of the households in which they worked. Surviving accounts of women employed in manufacturing and clerical positions in the late nineteenth and early twentieth centuries also point to a variety of contexts in which men imposed sexual relations — ranging from assault to all manner of unwanted physical or verbal advances — on women who worked for them.

Nor was this sex shrouded in silence. Since the antebellum period, there has been public discussion of women’s vulnerability to coerced sexual relations at work. To be sure, Americans often blamed women’s sexual predicament on women themselves; both slaves and domestic servants were often judged responsible for their own “downfall” because they were promiscuous by nature. Yet an equally powerful line of public commentary condemned men for sexually abusing the women who worked for them. The abolitionist press, for example, “was particularly fond of stories that involved the sexual abuse of female slaves by their masters” as such stories directly put in issue the morality and legitimacy of slavery. And sexual relationships between women and the men for whom they worked as domestic servants were, if anything, even more volubly discussed. Over the decades, governmental hearings and reports, as well as all manner of commentary in the public press, delved into this and other aspects of the “servant problem.” Thus, by the close of the nineteenth century, we find Helen Campbell’s 1887 report on Women Wage-Workers invoking the common understanding that “[h]ousehold service has become synonymous with the worst degradation that comes to woman.” Campbell also described in some detail the forms of sexual extortion practiced upon women who worked in factories and in the garment industry. Along similar lines, Upton Sinclair’s 1905 exposé, The Jungle, dramatized the predicament of women in the meat-packing industry by comparing the forms of sexual coercion practiced in “wage slavery” and chattel slavery:

Here was a population, low-class and mostly foreign, hanging always on the verge of starvation, and dependent for its opportunities of life upon the whim of men every bit as brutal and unscrupulous as the old-time slave drivers; under such circumstances immorality was exactly as inevitable, and as prevalent, as it
was under the system of chattel slavery. Things that were quite unspeakable went on there in the packing houses all the time, and were taken for granted by everybody; only they did not show, as in the old slavery times, because there was no difference in color between the master and slave.\textsuperscript{10}

As public commentators such as Campbell and Sinclair and the abolitionists before them well appreciated, the American legal system offered women scant protection from sexual coercion at work. Rape was, of course, punishable by law; but the criminal law did not protect slaves from rape,\textsuperscript{11} and it defined the elements of rape so restrictively that most free women sexually coerced at work would have little reason to expect the state to sanction the men who took advantage of them.

Few women were willing to endure the damage to reputation and prospects for marriage that followed from bringing a rape complaint, and if they did, the prospects for vindication of their complaint were remote indeed. The common law required a woman claiming rape to make a highly scripted showing that sexual relations were nonconsensual; she had to show that sex was coerced by force and against her will\textsuperscript{12}—that she succumbed to overpowering physical force despite exerting the “utmost resistance.”\textsuperscript{13} Economic coercion did not suffice, nor was most physical resistance enough to satisfy the common law requirement of “utmost resistance.” New York’s high court explained in 1874, as it rejected a rape prosecution of a man who forcibly assaulted his fourteen-year-old servant girl, after sending away her younger siblings and locking her in his barn: “Can the mind conceive of a woman, in the possession of her faculties and powers, revoltingly unwilling that this deed should be done upon her, who would not resist so hard and so long as she was able? And if a woman, aware that it will be done unless she does resist, does not resist to the extent of her ability on the occasion, must it not be that she is not entirely reluctant? If consent, though not express, enters into her conduct, there is no rape.”\textsuperscript{14}

In short, the law assumed that women in fact wanted the sexual advances and assaults that they claimed injured them. Unless women could show that they had performed an elaborate ritual of resistance, perfect compliance with the legally specified terms of which was necessary to overcome the overwhelming presumption that women latently desired whatever was sexually done to them, they could expect little recourse from the criminal law. Rape law’s protection was further vitiated by the fact that prosecutors and judges relied on all kinds of race- and class-based assumptions about the “promiscuous” natures of the women in domestic service and other forms of market labor as they reasoned about utmost resistance.\textsuperscript{15}
Tort law was only marginally more effective as a weapon against sexual coercion at work. Initially, tort law gave women no right to recover damages for sexual assault. At common law, sexual assault gave rise to an action for damages insofar as it inflicted an injury on a man’s property interest in the woman who was assaulted; thus, a master might have a claim in trespass against a man who raped his slave, or a father might bring a seduction action against an employer who impregnated or otherwise defiled his daughter. When American law eventually began to recognize a woman’s right to recover for sexual injury in her own right—whether through an action for seduction or indecent assault—tort law developed a specialized body of law on “sexual” touchings that incorporated doctrines of consent from the criminal law of rape. By the early twentieth century, some jurisdictions moderated the consent requirement in actions for indecent assault, but none seems to have relinquished it. The tort action for seduction, by contrast, seems to have been more plastic, as it evolved from an action designed to recompense a father’s economic injury (when it focused on his daughter’s out-of-wedlock pregnancy) to an action designed to recompense injuries to a father’s honor (when it focused his daughter’s loss of virginity) to an action designed to recompense women directly for injuries suffered in “sexual connexion.” In this newly configured form, Lea VanderVelde reports, by the late nineteenth century there were at least some seduction cases in which “the coercive force of words of economic threat were sufficient to render the sexual predation redressible.” But this development was by no means uniform across jurisdictions and was, moreover, short-lived: by the early twentieth century, many states began legislatively to repeal the tort of seduction along with other “heart-balm” actions.

The law’s failure to protect women from sexual predation at work did not, of course, pass unnoticed; it has been a subject of protest since the days of the antislavery movement. We might count in this tradition abolitionist Henry Wright’s description of South Carolina as “one great legalized and baptized brothel,” or Harriet Jacobs’s *Incidents in the Life of a Slave Girl,* or the petitions of Henry McNeal Turner and other African-American men in the aftermath of the Civil War who protested the sexual violation of black women in domestic service: “All we ask of the white man is to let our ladies alone, and they need not fear us.” As the story of Turner’s petition reminds us, the parties most interested in achieving law reform in such matters were for the most part disfranchised. Petition thus emerged as a crucial weapon in the campaign. For example, even before the movement for woman suffrage emerged in the 1840s, women’s moral reform societies had begun to wage petition campaigns designed to persuade state legislatures to enact legal penalties for seduction.
campaign to reform tort law had both practical and expressive purposes. Abolitionist Lydia Maria Child described the dignitary affront of a tort regime that recognized the sexual injury of women as an economic loss to men. She protested the common law of seduction as it denied to women the legal subjectivity to sustain sexual injury and the legal agency to secure its redress, and argued that women had internalized their devaluation and objectification by law: “[A] woman must acknowledge herself the servant of some-body, who may claim wages for her lost time! . . . It is a standing insult to womankind; and had we not become the slaves we are deemed in law, we should rise en masse . . . and sweep the contemptible insult from the statute-book.”

With the rise of the woman’s rights movement in the decade before the Civil War, some of its more vocal spokespersons began to discuss the socioeconomic conditions that made women susceptible to sexual coercion. The portrait they painted of heterosexual interaction was completely at odds with the common law’s, insofar as it presented coercion as the normal rather than deviant condition of heterosexual relations. On this account, restrictions on women’s labor market participation (“crowding”) and the systematic depression of their wages left women as a class dependent on men for economic support, and it was in this condition of “pecuniary dependence” that men could extract their sexual compliance, in and out of marriage. As Ernestine Rose explained at an 1856 woman’s rights convention: “What was left for her but to sell herself for food and clothing either in matrimony or out of it; and it would require a wise head to determine which was the worse.”

In this critique of marriage as “legalized prostitution” the woman’s rights movement had begun to analyze the political economy of heterosexuality in a way that took as structurally interconnected the institutions of marriage and market. This socioeconomic understanding of sexual relations shaped the movement’s response to the trial of domestic servant Hester Vaughn in the aftermath of the Civil War. Vaughn was fired by her employer when she became pregnant by him; she gave birth alone, ill, and impoverished, and was found several days later with her dead infant by her side, adjudged guilty of infanticide, and sentenced to death. As Elizabeth Cady Stanton, Susan B. Anthony, and other woman’s rights advocates publicized the Vaughn case, they pointed to a variety of gendered injustices that cumulatively sealed Vaughn’s fate—an analysis that started with the gender and class restrictions that drove Vaughn to domestic service, and the sexual vulnerability her economic dependency engendered. For the woman’s rights movement, the Vaughn case presented an occasion to protest the economic arrangements and social understandings that visited the judgment of death on Vaughn for a
predicament the woman’s movement judged society as a whole—and men in particular—culpable.

The woman’s rights movement responded to Vaughn’s case with wide-ranging social critique and an equally wide-ranging remedy. The movement drew on Vaughn’s case to protest the injustice of women’s exclusion from jury service and suffrage and, after persuading the governor of Pennsylvania to pardon her, turned the Vaughn episode in the direction of its larger quest for political empowerment. During the late nineteenth century, only the Woman’s Christian Temperance Union mounted a sustained effort to reform laws protecting women from sexual predation; as Jane Larson has recounted, their effort took the form of a national campaign to raise the age of consent for statutory rape law. While the campaign spoke the language of moral purity, Larson has shown that it was centrally preoccupied with the failure of rape law to protect women from sexual predation, and at least some of its centrally publicized cases involved the sexual exploitation of young women workers.

For the most part, efforts to protect working women from sexual coercion in the early twentieth century focused, not on law reform, but on other modes of collective self-help. For example, in 1908, settlement workers Grace Abbott and Sophonisba Breckinridge took a saloon-keeper to court who fired a young barmaid when he discovered that she was about to bear a child by him; after losing the case, Abbott and Breckinridge they turned to organizing immigrant protective associations to provide young working women alternate bases of community support. Outside the settlement movement, various labor activists addressed the issue of women’s vulnerability to sexual coercion at work as part of a more wide-ranging effort to organize working women. But as Lisa Granik relates, there were pressures on women workers struggling to organize that caused them to defer gender-specific demands—such as protection from sexual coercion—in favor of traditional union demands such as seniority rights.

Even so, the fusion of labor and feminist advocacy agendas in the progressive era bore critical fruit. In 1916, for example, socialist-feminist Emma Goldman elaborated the “legal prostitution” critique of the nineteenth-century woman’s rights movement in her influential essay “The Traffic in Women”: “Nowhere is woman treated according to the merit of her work, but rather as a sex. It is therefore almost inevitable that she would pay for her right to exist, to keep a position in whatever line, with sex favors. Thus it is merely a question of degree whether she sells herself to one man, in or out of marriage, or to many men. Whether our reformers admit it or not, the economic and social inferiority of woman is responsible for prostitution.”
Women in the early feminist and labor movements never managed to organize a sustained assault on the set of practices we have come to call “sexual harassment,” but they did articulate an indictment of the practices that anticipated many of the arguments that women in the modern feminist and labor movements voiced in the 1970s.

The Rise of Sexual Harassment Law:
Regulating Sexual Harassment as Sex Discrimination

As we have seen, the practice and protest of sexual harassment have a long history, in which we can situate developments of the 1970s as a recent and relatively short chapter. But these developments nonetheless represent a dramatic turning point in social and legal understandings of the practice.

In the 1970s Catharine MacKinnon and Lin Farley and the many other lawyers and activists who represented women in and out of court were able to mount a concerted assault, of unprecedented magnitude and force, on the practice of sexual harassment. Responding on many fronts to the demands of the second-wave feminist movement, the American legal system began slowly to yield to this challenge, and for the first time recognized women’s right to work free of unwanted sexual advances.

How did this come about? Sexual harassment law arose, first and foremost, from women acting as part of a social movement speaking out about their experiences as women at work; the term “sexual harassment” itself grew out of a consciousness-raising session Lin Farley held in 1974 as part of a Cornell University course on women and work. But more was required for the American legal system to recognize this experience of gendered harm as a form of legal injury, when for centuries it had refused. We could speculate for a long time about the convergence of social forces and social understandings that enabled legal recognition of the sexual harassment claim—a story involving differences in the movements for race and gender emancipation in the nineteenth and twentieth centuries, shifts in women’s labor force participation, and much more. But for present purposes I would like to consider the question in rather modest terms. What new ways of talking about the harms of a centuries-old practice enabled its recharacterization as unlawful conduct?

Feminist Accounts of Sexual Harassment as Sex Discrimination

As we know, the practice of subjecting employees to unwanted sexual advances at work was made legally actionable under a particular legal regime, Title VII of the Civil Rights Act of 1964. During the 1970s, lawyers, advo-