

Sex Skeptics: Speech is Free but Thought Remains In Chains

Joan Kennedy Taylor, *What to Do When You Don't Want to Call the Cops*. New York and London: New York University Press, A Cato Institute Book, 1999.

Elizabeth Brake

I

Of course hardly anyone could really be a skeptic about sex — that is, not many are likely to deny that there is sex or that we know that there is sex; but I am addressing those who are skeptical (in particular, Joan Kennedy Taylor) of a particular philosophical view about sex. Perhaps I should be careful, because to be skeptical about a view, one must be aware of its existence; and in fact, on the evidence of her book, one might judge Taylor to be rather cheerily oblivious to the issue at hand. Perhaps she has not been reading the same books as the rest of us ('us' being millennial feminists, a group to which she claims to belong); perhaps she has, but their meaning has not hit home. As we shall see, in this case it is better to have known and doubted than never to have known at all, so I shall be charitable and assume that Taylor is simply a skeptic.

The view which I think Taylor doubts is itself a skeptical view, skeptical of received truths — or what were once received truths — about sex and the sexes. (Then again, if we broaden the definition that way, what views aren't skeptical?) In fact, the view is not young and is getting older, but that's all the more reason why oblivion is unforgivable. The view I want to lay on Taylor's table is this: significant behavioral differences between men and women should not be uncritically accepted as natural, especially when such differences involve the exercise of power. Sex, and the way we talk about it, are not just instinctual. Sometimes our sexual feelings and expressions are related, in complicated ways, to sexist ideas and behavior and institutional arrangements. (And then again, sometimes a cigar is just a cigar, and sex is just sex.) And finally, when a feminist investigates an issue involving sex and power and men and women, she or he will usually spend some time analyzing it in terms of inequality between men and women.

Taylor's issue is sexual harassment, and her book is a libertarian feminist discussion of the same.¹ She is consistent: her libertarianism is as restrained as her feminism. Her libertarianism shows in her

arguments that sexual harassment cases too frequently end up in litigation, that existing sexual harassment law punishes too many activities, and that it conflicts with First Amendment rights. (One need not be a libertarian to agree with all that.) Her feminism consists mainly in her supportive attitude towards women in the workplace. (Ditto, *mutatis mutandis*.) The book—though certainly not a comprehensive survey—synthesizes “hundreds of articles” from “business, psychology, sociology, and gender studies” journals, as well as *Ms.*, *Working Woman*, and *The New York Times* (p. 7). Taylor has collected some fascinating material on group behavior, cross-cultural communication, fitness standards in the armed forces, hazing rituals, rape law, and the history of Title VII. There are also some rather tedious descriptions of sexual harassment sensitivity training videos, course materials, and seminars. There are many anecdotal accounts of the experiences of women in non-traditional workplaces, and of women who run the aforementioned training seminars. Whether these strike the reader as tiresome or fascinating is a matter of taste (readers hoping for prurient details or off-color jokes will, however, be disappointed).

What to Do When You Don't Want to Call the Cops is an informative layperson's manual on sexual harassment. Taylor addresses it to female workers, managers, and the interested general reader. It is the third category to whom I would most recommend it. I cannot imagine giving it to one of my female students on her entrance to the work force; if a concerned student asked for material, I would direct her to NOW or the AAOWW, which publish reliable self-help books. Taylor's book would most likely induce paranoia (I shall explain why shortly). If I were in management, I would simply retain a good lawyer. (Though, for Taylor, the book would be cheaper.) To the interested general reader, I would say that Taylor's account of harassment law is clear, concise, and up-to-date. I would add that she manages to convey a good deal of information while maintaining a line of argument throughout, which adds interest. I would hasten to mention that her approach has the merit of being likable: Taylor writes in a common-sensical vein which is far preferable to the strident lecturing or grandiose claims which the interested general reader might anticipate in a feminist book on sexual harassment.

But I would also sadly inform the interested general reader that, if his interest issues from a sincere love of wisdom, he must prepare himself for strident lecturing and grandiose claims. (Not many will seek this Grail.) For a profoundly influential and provoking legal, social, political, and economic analysis of sexual harassment, the interested general reader would be best advised to go straight to Catharine MacKinnon's *Sexual Harassment of Working Women*.² I would send him off with some trepidation, since I disagree with much of what she writes.³ But I expect that many feminists today would both disagree with MacKinnon and send the truth-loving reader there (either that or Judith Butler). Given the dissension from MacKinnon, this is no feminist dogma. She is as important for the questions she asks as for the answers she gives. Her

project is central to serious feminist theory today: understanding how sexism is maintained, and how we can bring about change. MacKinnon — like John Rawls in political philosophy — draws constant criticism but defines the questions of her discipline.⁴ As Martha Nussbaum wrote, “If one disagrees with her proposals — and many feminists disagree with them — the challenge posed by her writing is to find some other way of solving the problem that has been vividly delineated.”⁵

II

But let us return to Taylor, whose argument also deserves discussion. Her central thesis is that much of what is considered harassment is in fact the result of misunderstandings, or failures of communication, between men and women. Women could combat this more effectively through ignoring it or confronting the harasser than through law. Taylor’s solution would benefit women (‘Avoid costly court cases, career setbacks, and emotional distress!’) and companies (‘Avoid costly court cases!’) and should please those who feel harassment is currently over-regulated (‘Avoid court cases!’). Sexual harassment, on Taylor’s view, is a problem of *communication*, and the best remedy is for women to come to understand “male group culture.” After all, it is *women* who want to enter *male* workplaces; they should therefore be prepared to alter their behavior and expectations accordingly.

This makes the book useful as a self-help manual for nervous ingénues (is *anyone* that sheltered anymore?): “swearing *in front of* someone is different from swearing *at* them” (p. 96). But not all harassment can be construed as sheltered young ladies misunderstanding male humor. For instance, can the accusations of Lt. Gen. Claudia Kennedy — “the Army’s top intelligence official” — be understood as a naïve misunderstanding?⁶ And what about the Navy’s Tailhook scandal? Of course, Taylor would probably not describe such extreme cases as communication problems. But one would expect a consideration of such counter-examples, and none is forthcoming.

The careful reader will, in fact, find an array of fallacious arguments here. Taylor’s favorite fallacy is that of unqualified authority. We are given theories from the social sciences, such as group behavioral theory or ‘sex-role spillover theory’, and expected to accept analyses of harassment based on these theories. But Taylor explains little and justifies less. She seems unaware that a behavioral theory is not justified just because some sociologists have held it. She also delights in anecdotal evidence. For example, we are told, “One telephone company manager agrees... ” (p. 97). This is presented as evidence about workplace dynamics. Elsewhere, a long e-mail sent anonymously to the ‘Feminists for Free Expression’ website is reprinted as an “example” of a general claim for which adequate evidence is not given (p. 53).

And then, Taylor’s flair for stating the obvious entertains only for a while: sexual harassment at work, it turns out, is a reaction to women entering the work force (p. 56). Both “the view that there is no such offence as sexual harassment and the view that any behavior to do with

sex that makes someone uncomfortable should be actionable" are mistaken (p. 17; this is also a nice example of a straw man fallacy). No doubt there is need for sensible commentary in this area. No doubt some people need to be reminded of the distinction between swearing *in front of* and swearing *at*. But will these people be reading this book?

Moreover, Taylor herself does not escape the lure of making insane pronouncements which afflicts so many scholars in this area. We learn that men get angry when they accidentally swear in front of women because "[t]hey are terrified that they might inadvertently slip into the male pornographic communications argot" (p. 99). To be fair, Taylor is quoting here, but she endorses the passage.⁷ This quotation has plenty of company in Taylor's study of "male group culture" which is central to her analysis of harassment. Much of what Taylor has to say about men, though she disapproves of male-bashing, is not at all flattering. I will seek to offer persuasive reasons against taking her analysis of harassment as definitive.

III

Any adequate discussion of this topic must undertake three tasks, as Taylor does. The first is to describe harassment law. Taylor's reports are informative and I direct the interested reader there (or to the EEOC web-site, which contains updated information). I will limit myself to a few pertinent reminders. Sexual harassment lawsuits are brought under Title VII of the 1964 Civil Rights Act, which forbids discrimination in employment on the basis of sex (as well as race, color, religion, and national origin). Since 1972, the (federal) Equal Employment Opportunity Commission has been empowered to enforce this statute. Its operation is somewhat unusual. Someone wishing to bring a sexual harassment suit must submit her or his claim to the EEOC for approval. Once approved, the suit may be brought against the *employer* (not the harasser) for failing to comply with Title VII.

The law in this area undergoes continual change as new cases are tried. The two main types of suits are *quid pro quo* (in which a supervisor threatens punishment, or the withholding of some benefit, if sexual favors are not given) and hostile environment (in which there is persistent intimidating harassing behavior). However, variations are endless and judicial rulings unpredictable (as Taylor points out, statutory vagueness leaves judges with much discretion). For same-sex, or female-on-male, harassment, incidents between peers, workplace displays of pornography (what counts?), joking, dating, harassment by nonemployees, for these and many other cases, employers might be held liable, *even if they were unaware of the harassment*. Supreme Court rulings have suggested that the only way an employer can effectively defend themselves against suits is by instituting and promulgating sexual harassment policies and user-friendly complaint procedures.

The rest of this essay will be concerned with the other two tasks. The second is an analysis of harassment. Defining harassment belongs to the task of analysis, since definitions (here) are not value-free, especially

if the definer assumes that all instances which fall under her definition are punishable. A definition can fail by making too many acts actionable. It can fail (arguably) by being too broad in another way: by defining *all* anti-woman jokes or comments, or *all* sexual jokes or comments, as harassment. (It seems plausible that not all sexual jokes, for instance, are harassing. As Thomson writes on abortion, “there are cases and cases, and the details make a difference.”⁸ Surely not all anti-woman jokes should be considered actionable, and, depending on how we take ‘anti-woman’, even harassing.) In the next section, I will contrast my preferred analysis with Taylor’s. Like her, I will ask why harassment occurs, but I will include an ethical analysis of it. Once we have figured out what it is, we must ask why is it wrong. The purpose of this essay is to persuade the reader of the superiority of MacKinnon’s view, despite its demerits, to Taylor’s.

We must distinguish our understanding of harassment (we might say, “the ethics of...”) from our views on how law and management and individuals should deal with it. The writer’s third task is to issue prescriptions. Prescriptions are a function, among other things, of the writer’s analysis, her goals, and her political theory. Beliefs about human nature and psychology, sociological data, and the possibilities of change given the current state of affairs will also factor in a complete account. In the final section of this essay, I will describe what I believe the goals of a sexual harassment policy should be, and advance some supporting considerations.

IV

My analysis will start with definition, and definition will start with distinctions: what exactly are we talking about when we talk about sexual harassment? First and foremost, a legal category: sexually harassing acts are those actionable under sexual harassment law. But surely it makes sense to say that sexual harassment existed before the law (otherwise ...), so it cannot be just a legal category. Someone defending the view that it is merely a legal category, perhaps for simplicity’s sake, might suggest that when we speak of pre-Title VII harassment, we mean behavior which Title VII, and judicial rulings, would count as harassment. But this will mean that the definition of harassment is changing all the time, with the law. Moreover, we want to be able to say (for instance): “The judge didn’t rule that Clinton’s act was harassment, but surely it is — and even if the Supreme Court were to rule otherwise, it still would be!”

Since it is part of the definition of sexual harassment that it is unjust, vicious, harmful, or immoral, I suggest that we think of the definition as a moral (as opposed to legal) category. Just in the same way, ‘murder’ is defined as ‘unjust killing’; the term contains evaluative import. Someone might balk at this definition, claiming that some acts — for instance, displaying girlie calendars in the workplace — which have been considered harassment aren’t immoral. But this is just to dispute whether or not the act really was harassment. Just in the same way, we argue over whether or not abortion is murder; we would not say,

“Abortion is murder, but it’s not unjust.” So when we seek to define harassment, we must keep in mind that it is immoral.

It is also behavior which often involves expressing sexual thoughts or desires, or talking about them, or implying them; but it is not just any behavior which involves sex and is immoral. For instance, it is not date rape or incest. It is workplace-related (although it need not occur in the workplace, nor must the harasser be another employee!). The harassment must be somehow encouraged or allowed by the employer’s policies. But there is another dimension to sexual harassment: it is sexist, that is, discriminatory on the basis of sex (analogous to *racial* harassment). A harassing act, or remark, need not involve a grope or dirty joke; it might be a derogatory remark about women in general, for instance, about their abilities. So sex-as-in-intercourse is not essential to harassment; sex-as-in-male-and-female *is*. (This seems to make unwanted same-sex overtures not harassment; but the account I prefer will explain their inclusion.) Additionally, harassment operates through intimidation or abusive behavior; by some objective standard (“the reasonable woman”), it must be intended to, or likely to, produce distress, offence, fear, or some harm. ‘Harassment’ is not a success term. Finally, someone may be blamed for harassing despite his good intentions, since he may be negligent.

V

Taylor fails to make such distinctions. Her thesis, as summarized above, is that women’s perceptions of harassment result from their failure to understand male group culture. Men alone together behave differently than they do with women, and women entering a male environment may feel harassed when they are simply being treated as one of the boys. The resulting litigation is wasteful, and tending to erode First Amendment rights; it would be better for everyone if women adapted to male group culture, and men became — a little — more sensitive.

These are the things we need to know about men (if you are a man, I apologize in advance): “*Men alone together use vulgar language that they are sure women won’t like.*” (In fact, this is said to explain why Nixon censored transcripts of the Watergate tapes.) “*Men tell dirty and anti-female jokes among themselves.*” “*Men enjoy, or at least tolerate, displays of visual pornography.*” “*Men are routinely competitive and are expected to be.*” “*Men haze newcomers to the group.*” (Taylor’s italics; pp. 92, 103, 111, 119, 129) Each of these claims gets a chapter of mostly anecdotal support. I have complained above that this analysis makes light of harassment, which can be severe, intentional, and harmful. It also seems doubtful that many women are as naive and sheltered as Taylor thinks. Nor are women entirely innocent (if that is the right word) on all these counts. I will leave it to readers to judge the fairness of her claims about men. In short, this analysis of harassment seems to be based on false empirical claims and to present an ineffective strategy for dealing with harassment. The account has, in addition, a major *moral* failing.

A general point is that such group behavior to outsiders is

immoral. Sociological or biological explanations do not exculpate the offenders, or render it permissible. One could compare an incident in Céline's novel, *Journey to the End of the Night*, in which the hero is nearly killed as fellow passengers on a ship turn against him, an outsider, and plot to throw him overboard. Now, just because something is immoral does not mean it should be illegal, or actionable, or even regulated by employers. But neither should an analysis overlook this dimension of harassment, because it makes a difference. Sexual harassment is immoral, first, because it is harmful. But, second, it is also unjust or unfair. Sexual harassment does not arbitrarily pick out females, but issues from and contributes to inequality between men and women. Feminism sees this situation as bad, because it is harmful to women and because it is unfair, and needing change. Whether or not law is the proper instrument of change is a separate question.

Someone might reply to the charge of unfairness that, while harassment is not random, it is inevitable: it is simply a male biological imperative. But this, even *if* it were shown to be true, is an inadequate response. We do not in general excuse people's acting out their instinctual drives, morally or legally. We are civilized, we can do something about unfairness. (Abolish slavery, for example, or extend suffrage to women, or teach children to share.) Taylor's analysis is a sociological variant of the biological approach, with all its moral blindness. Why I am criticizing her is not because she would limit harassment law, but because she does not advocate a radical change in the status quo. (Advocating is different than enforcing; what I am complaining about is Taylor's failure to see that the situation she describes is wrong.) Taylor writes that her analysis "explain[s] that male behavior that may seem directed at women in a hostile way may just be treating them as women often say they wish to be treated — like men" (p. 7). In other words, men treat women with hostility, but not because they are *women*.

But why is part of men's culture to tell "dirty and anti-female jokes," as Taylor claims? She writes that women should shrug off such joking; "[g]enerally, it's not really directed at her, except perhaps as a representative of Sex Objects Unlimited" (p. 98). Compare relations between blacks and whites. Would the workplace situation that Taylor describes seem as harmless if she wrote, "Whites tell dirty and anti-black jokes among themselves"? Would she still counsel that the targets of such jokes should toughen up, rather than advocating a behavioral change on the part of the jokers? One might balk at the comparison between racism and sexism. Differences between men and women (unlike racial differences) are sometimes thought to be deep, natural, and morally significant. But how do we know that? And even if they are, why should women have to put up with "anti-female jokes"? It is staggering that Taylor forgets to ask *why* these jokes target women. And why does the hazing or teasing of women take a sexual form? I take it that men do not grope each other as part of their hazing rituals.

Taylor's analysis ignores feminist theory (she shows no familiarity with recent literature). This is an intellectual flaw, but ignoring the

underlying sexism of harassment also skews her prescriptions for its cure. "Women have to do most of this work [of changing behavior] because ... the workplaces they usually want to be in are predominantly male" (p. 73). "Once more, it should be the woman, and not the man, whose behavior is modified. Because we are talking about women wanting to enter male workplaces that are permeated by male culture" (p. 200). These are claims that drive a feminist (which Taylor claims to be) crazy. Once again, in a new way, stunningly, what we thought was aggression against women turns out to be women's fault. To make sexual harassment go away, *women* will have to change their behavior. Aside from the moral imbecility and intellectual obtuseness of this, it means that — if Taylor is right about the deep differences between male and female culture — she thinks that women who cannot adapt will have to continue to suffer in the male workplace.

VI

Seyla Benhabib writes that feminist theory assumes that "the gender-sex system is not a contingent but an essential way in which social reality is organized.... Second, the historically known gender-sex systems have contributed to the oppression and exploitation of women."⁹ A clear-eyed assessment of harassment should see its roots in the oppressive gender-sex system of our society (in which, for instance, women are treated as sex objects) and should see its contribution to that system (by, for instance, helping to impede women's entry into male workplaces). Seeing this, in turn, helps us to see why harassment is wrong and why its effects are so damaging. Behavior which seems threatening to a reasonable woman might not seem so to a reasonable man; he might even find it flattering.

On MacKinnon's view (and this is what Benhabib is getting at too), differences between the sexes are socially taught, and their teaching results from and contributes to the oppression of women.¹⁰ In particular, MacKinnon sees the "construction" of gender as entwined with that of sexuality: both are "defined by" inequality. "Stopped as an attribute of a person, sex inequality takes the form of gender; moving as a relation between people, it takes the form of sexuality" (1987, p.6). "[T]he sex difference and the dominance-submission dynamic define each other. The erotic is what defines sex as an inequality, hence as a meaningful difference" (1987, p. 50). On this view, harassment should be understood as anti-female behavior, not as resulting from men's uncontrollable sex drive or pack behavior. Men seeing sex as dirty and women as sexual objects and so forth is not simply a given, but is part of systematic sexism. (This is not new with MacKinnon. Simone de Beauvoir makes this point, and this is what the 1970's feminists writing about patriarchy — Betty Friedan, Eva Figes, Kate Millett — try to show. MacKinnon is ground-breaking in her systematization of the claim, and, for better or worse, her Marxist method of analysis.)

A gloss on MacKinnon's view is that sex is not always just sex. MacKinnon thinks that sexuality and gender roles, or our "constructions"

of them, are linked in deep ways we don't anticipate. (Then again, who is likely to be surprised if we continually turn up new complications in sex and sex roles and relationships between men and women? Given such complexity, surely her analysis could not be *exhaustive*.) So harassment is not just joking, or a natural expression of desire: it is an assertion of male dominance. Now, this might not be what the harasser thinks he's doing, and I am not inclined to defend the view in its entirety. But here are three considerations in favor of admitting a connection: only a system which routinely places men, and not women, in positions of power gives them the opportunity routinely to abuse it, as in harassment. And a system which sees women as sexual objects encourages treating them as sex objects. And harassment has the effect of weakening women (not just psychologically; women's authority can be undermined through harassing behavior). This feminist analysis explains what is wrong with sexual harassment, and why it is unfair.

Now, again, someone might object that Taylor is talking about law and business. Ethics and feminist theory are beside the point. Three more considerations: first, our understanding of what the acts are may affect what we think the law should do. For example, in a recent sophisticated treatment of pornography, MacKinnon uses philosophy of language to analyze hate speech as criminal speech-acts.¹¹ And, surely we should be concerned to arrive at the best understanding, if not for its intrinsic merit, then for prescribing a cure. Taylor's forays into sociology show the relevance of disciplines outside law and business. Finally, we can't get a thorough analysis of the topic without a moral analysis. Otherwise, we don't have the needed categories: for example, "legal but not good."

VII

I have argued that a moral analysis of this topic requires feminist theory, in order to show why harassment is unfair. It hinders women from achieving equality in the workplace, and it is an expression of institutional sexism. But there are other moral considerations. Let us imagine a case of same-sex or female-on-male harassment, and let us focus, since space is limited, on *quid pro quo*: demanding sexual favors as the price for keeping one's job. Clearly this is harmful (psychologically, emotionally, and possibly physically unpleasant) to the (psychologically normal) victim, and likely to bring greater harm to him than pleasure to his harasser. It is also likely to reduce the efficiency and productivity of the workplace (people are worrying about matters other than work; people take time off or leave their jobs as a result). Rule-utilitarianism would then forbid the practice, or benevolence the act.

But there are reasons why the act is wrong in itself — even if it increased workplace efficiency and total happiness. It is unfair, not just because it is sexist, but because it makes someone's job depend on something irrelevant to their performance. (I am not asserting that anyone has a right to a job, but that it is unfair to fire an otherwise adequate employee on such grounds.) Most importantly, from a Kantian standpoint, this behavior treats someone as a means only. The victim's

needs and well-being are not considered; instead, he is seen as an object to be used for the harasser's satisfaction. Say that he uses the harasser in return, to keep his job. What is wrong with the scenario then? Isn't it simply contractual? Well, we should keep in mind that what the harasser is offering in fact (usually) belongs to someone else: the employer.

But the abuse of the employer's property is not the main problem. The harasser is using her power to get the victim to do something they may find unpleasant, disgusting, or immoral. In this way, a sexual act carried out under these circumstances is not fully voluntary. I do not want to compare it to rape, because this would be to take rape too lightly. However, I am inclined to say that in such an act, the victim has not given his full consent. Perhaps it could be compared to certain cases of statutory rape, or an act of prostitution in which the prostitute is desperate, or a relationship between a young intern and a powerful politician. There is no exact analogy. But what makes *quid pro quo* harassment a treating of another as a means only, and not as an autonomous agent, is that a sexual act carried out under such circumstances is not fully consensual. It violates the principle of consensuality, which gives, plausibly, a morally necessary condition for permissible sex: it must be consensual.¹²

Objections might arise here. Could we then say that prostitution, or sexual acts within (say) Victorian marriages, are not fully consensual? I part company with MacKinnon (who would say yes) at about this point.¹³ To resist this conclusion, notice that the husband, or the prostitute's client, do not create the situation in which the woman feels compelled (for different reasons) to have sex in order to meet her basic material needs. The harasser, on the other hand, does create the dilemma for her victim. This may not seem to show that consent is vitiated, only that the harasser is culpable. But there is more: the harasser arranges circumstances in order to obtain a particular sexual act, with this person. The victim's scope of choice is narrowed. One can still say he chooses to participate. But we can also say that if the harasser holds a gun to his head, he chooses to have sex rather than to die. So there is some level, as we know, at which consent loses its moral significance. This is coercion, and is notoriously difficult to define.¹⁴ Now, one might think sex in a Victorian marriage is not coercive because no individual is compelling her; it is society's fault. But plausibly, sexual harassment is wrong because it obtains, or seeks to obtain, sexual acts in a context in which consent is reduced below the level at which it is morally significant.

A second objection might focus on the notion of consent. If we accept the claim that the victim's consent is so significantly reduced in this exchange that the action is immoral (not rape, but not morally permissible sex either), might this not be applied in other circumstances, to criticize, for instance, capitalist employment practice? (So we could say that workers are not free.¹⁵) Again we might note the different placement of responsibility (the harasser arranges the situation, whereas no-one is directly and intentionally responsible for the poor worker's plight). Moreover, we might want to consider whether we need a special notion of

sexual consent as more than just not saying 'no'.¹⁶ Or perhaps we want to shore up the principle of consensuality with some other criterion for permissible sex: love, or communication, or reciprocity.¹⁷ Finally, we could focus on the character of the harasser. She is irresponsible, predatory, insensitive, selfish, and disrespectful.

The form of harassment with which Taylor is most concerned — hostile environment — deserves a separate analysis. Here there are no explicit demands for sex from a superior. Although sexual remarks and (aggressive) sexual teasing might be involved, in which case hostile environment might share moral characteristics with *quid pro quo*, it generally functions, instead, to intimidate, disconcert, and upset. The best analogy here would be with racist remarks and name-calling. This comparison is in fact much closer than that between *quid pro quo* harassment and rape.

VIII

I have attempted a brief ethical analysis of harassment, but what about law? Remember that law and morality are distinct: not all impermissible acts should be illegal. Taylor makes a compelling case that making employers liable for hostile environment harassment comes into conflict with First Amendment rights: not directly, since the government is not prohibiting any speech, but indirectly, since employers will prohibit certain speech to avoid lawsuits.

I think that gender equality will not be achieved until women can go to work without worrying about harassment any more than men do. I also look forward to women's representation in positions of power being proportionate to their numbers in society, and I believe that such a demographic change will change the atmosphere of the workplace. But feminists must ask not only what means will best achieve that goal, but what means are permissible, constitutionally and morally. First Amendment rights, for example, might override a course of action which seems promising for achieving gender equality, such as outlawing pornography. And here we see a problem which libertarian feminists like Taylor must address.

Political philosophy asks what role the state is justified in playing in our lives, and libertarianism would minimize that. But feminist theory has redrawn the landscape of justified intervention, especially by insisting that the demarcation between public and private needs revision.¹⁸ And, as Taylor realizes, minimal adherence to law in order to avoid lawsuits will not change deep-rooted behavior (p. 152). But this is just why MacKinnon thinks the law must be used to reconstruct that behavior — to achieve not just formal but substantive equality! This tension between feminist goals and libertarian values is one I would like to see creatively resolved by libertarian feminists. For now, some freedoms valued by libertarians still seem to be in conflict with achieving women's freedom from sexism.¹⁹

Notes:

1. Joan Kennedy Taylor, *What to Do When You Don't Want to Call the Cops* (New York and London: New York University Press, A Cato Institute Book, 1999). Future references to Taylor will be inserted into the text. Throughout, 'harassment' is short for 'sexual harassment'.
2. Catharine A. MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979).
3. I have argued against MacKinnon's view of gender elsewhere; see Elizabeth Brake, "A Liberal Response to Catharine MacKinnon," *Southwest Philosophical Studies*, vol. 22, 2000 (forthcoming).
4. See Victoria Davion and Clark Wolf, eds., *The Idea of Political Liberalism: Essays on Rawls* (New York: Rowman and Littlefield, 2000), p. 14 (on Rawls).
5. Martha Nussbaum, "The Professor of Parody" (a review essay on Judith Butler) in *The New Republic*, 2/22/99, p. 37.
6. Paul Richter, "Female General Truthful on Groping, Investigators Say," *L.A. Times*, 5/11/00.
7. She quotes from Betty Lehan Harragan, *Games Mother Never Taught You: Corporate Gamesmanship for Women* (New York: Warner Books, 1978), pp. 110 ff. Be warned.
8. Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs*, vol. 1, no. 1, 1971, pp. 47-66, p. 58.
9. Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (Cambridge: Polity Press, 1992), p. 152.
10. Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987), p. 49.
11. Catharine A. MacKinnon, *Only Words* (Cambridge, Mass.: Harvard University Press, 1993).
12. David Archard, in *Sexual Consent* (Oxford: Westview Press, 1998), engages in a book-length discussion of the merits and demerits of this principle.
13. "Never has it been asked whether, under male supremacy, the notion of consent has any real meaning for women.... Consent is not scrutinized to see whether it is a structural fiction to legitimize the real coercion built into the normal social definitions of heterosexual intercourse.... If consent is not normally given but taken, it makes no sense to define rape as different in kind." MacKinnon 1979, p. 298, fn. 8.
14. For a discussion, see Jon Elster's *Making Sense of Marx* (Cambridge: CUP, 1985), esp. pp. 211-12.
15. MacKinnon compares 'compulsory heterosexuality' to capitalism; see MacKinnon 1987, p. 60. For MacKinnon, consent is vitiated not just by the threat involved, but also (when the harassment is male-on-female) by the social conditioning of women.
16. MacKinnon is famous for claiming that ordinary consensual heterosexual sex is on a continuum with rape due to the inadequacy of the patriarchal definition of women's consent; see quotation in footnote 13.
17. Kant, Thomas Nagel, Robert Solomon, and Roger Scruton, among others, have suggested such conditions.
18. See Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989); Benhabib 1992, pp. 107-113; Will Kymlicka, *Contemporary Political Philosophy* (Oxford: OUP, 1990), Chapter 7, section 2.
19. Thanks to Michael Watkins for his contributions, to Kelly Jolley and Roderick Long for comments on a draft, and to David Archard for many helpful discussions.