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**The Economics and Law of Sexual Harassment in the Workplace**

by

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Some years ago, a marshland (subsequently named Salt Lake) adjoining the city of Calcutta was developed by the local government and sold as small plots, at a subsidized price, to people who were not rich and who might not otherwise have been able to afford their own property. Politicians masterminding the plan worried that, unless some special precautions were taken, the rich would soon buy the land from the original owners, thereby “depriving” them of their plots. Thus, a law was announced which prohibited the sale of land by the original owners in Salt Lake. When I tell economists about this law, they usually laugh at the folly of politicians. If an owner wants to sell land, it must be that the owner expects to be better off by doing so; it is thus hardly a favor not to allow the sale.

However, economists do not laugh when it is pointed out that under current U.S. law, a firm cannot offer a job contract in which the pay is high and the benefits good -- but the employer reserves the right to sexually harass the worker. The fact that the worker who accepts this job must find the cost of sexual harassment to be less than the benefits associated with the job does not seem reason enough to allow such a contract. Though in some ways the two examples may appear similar--both involve two adults choosing to make an exchange that seems to have no obvious negative externality on others— most people perceive some crucial difference. However, when it comes to enunciating just what the difference is, we often make hand-waving references to how some exchanges are “obnoxious” or some contracts “unconscionable.”

This paper seeks to spell out an economic principle of why certain kinds of contracts, such as one where a worker is subjected to sexual harassment, may need to be legally banned. I begin with some empirical context, discussing the magnitude of sexual harassment in the workplace and the evolution of the law. The focus will be on U.S. experience, since the United States has played a pioneering role in curbing workplace harassment and the American law has been a model to many nations that have recently drafted sexual harassments laws (like Bangladesh) or are in the process of drafting such a law (like India). I then offer a theoretical model to explain why society may desire legislative intervention to control sexual harassment in the workplace. It is important to unearth the underlying *principle* for such rules, since it can influence a host of labor market policies, such as stopping workers from being exposed to excessive health hazards and having statutory limits on the hours of work. This economic approach is then used to critique the current law and government policy, both with regard to sexual harassment and in other matters of labor rights and standards.

## **The Context**

In the United States, charges of sexual harassment are usually handled under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, sex or national origin. The Equal Employment Opportunity Commission (EEOC), which went into effect in 1965, was established to enforce and administer this statute.

## **The Incidence of Sexual Harassment**

In 2001, 15,475 cases of sexual harassment were filed in the United States, shown in Table 1. This total combines charges filed with the Equal Employment Opportunity Commission and various state and local level Fair Employment Practices Agencies. Since all cases that end up in the courts are filed with the EEOC or one of the state and local agencies, this total offers a fair measure of the number of charges that are serious enough to enter the legal process. The total number of sexual harassment charges rose sharply from 1992 to 1995, and has remained at roughly the same level since then. This was probably a lagged effect of the confirmation hearing of Clarence Thomas for the U.S. Supreme Court, which brought high visibility to issues of sexual harassment in the workplace, and also the passage of the Civil Rights Act of 1991. This Act, which became effective in November 1991, allowed victims to claim compensatory damages for suffering caused by discrimination. Prior to the 1991 act, the only forms of relief available were “injunctive relief”—a court injunction that the discriminatory act be stopped—or, in the most egregious cases, that the harassee, who may have been denied promotion or dismissed, get back pay.

Table 1 also presents the number of cases “resolved” each year. (These figures can exceed the number of charges filed in any particular year because of overhang of charges from previous years.) A lack of resolution does not mean that the case did not have merit since many cases are closed for administrative reasons, such as failure of the charging party to respond to EEOC communications. Of the cases that are resolved, of particular interest are the “merit resolutions,” since in these cases the allegations seemed to have enough merit that the charges led to outcomes favorable to the charging parties.

The final row of the column shows cases where the harassment may be sexual in nature but the *basis* of the harassment is not the plaintiff's sex, but some other attribute, such as the person's race or religion. Hence, in 2001, 2.5 percent of sexual harassment charges involved cases where the basis of harassment was not the plaintiff's sex.

Of course, Table 1 should not be treated as a measure of the actual incidence of sexual harassment in the workplace. The table does not include charges that do not reach the EEOC and the state and local level Fair Employment Practices Agencies, because they are filed and resolved within firms and corporations. Moreover, there is surely a large number of cases where the victim does not file charges at all. On the other hand, there must be some bloating of numbers caused by false charges.

A few sector-specific studies offer some sense of the percentage of people who face sexual harassment in the workplace. The largest study was based on a survey of active-duty women in the U.S. Armed Forces in 1995. A questionnaire was sent to 49,003 individuals and there were 28,296 returns, of which 22,372 were from women. According to this study, 70.9 percent of active-duty women had faced some form of sexually harassing behavior over the previous one year (Antecol and Cobb-Clark, 2002). This figure seems very high, which may reflect the special circumstances of the armed forces or be caused by the survey design.

One of the largest studies from the civilian sector in the United States was conducted by the U.S. Merit Systems Protection Board in 1980, 1987 and 1994 among federal employees all over the country (USMSPB, 1995). In 1994, a questionnaire was sent out to nearly 13,200 federal employees and about 8,000 were returned. This study found that 44 percent of the women employees and 19 percent of the male employees had

faced some form of sexual harassment in the previous two years. These numbers were only slightly higher than in the previous surveys. In a similar survey in 1987, 42 percent of women employees and 14 percent of male employees claimed to have faced some form of sexual harassment; still further back in a 1980 survey, the figures were 42 percent of women employees and 15 percent of male employees. The study also found that only 6 percent of those who faced harassment actually lodged a complaint (and, no doubt, many fewer filed a legal charge).

Since sexual harassment is notoriously difficult to define, self-reported surveys like these have to be treated with caution and more work remains to be done in measuring the extent of sexual harassment (Welsh, 1999). For example, it is a plausible but unproven hypothesis that the quantity of sexual harassment in the workplace has declined in recent years and decades, but that an increasing awareness and empowerment of women workers has led to a greater percentage of cases being reported in surveys. The statistics we observe are a mixture of these countervailing forces. But despite the uncertainties that surround estimates of the extent of sexual harassment, the figures are sufficient to indicate that actual charges reported in Table 1 are the tip of the iceberg of instances of sexual harassment in the workplace.

### **The Concept of Sexual Harassment in Law**

One reason for the different definitions is that “sexual harassment” as a legal concept is only about 25 years old. According to Farley (1978), the concept was “discovered” in 1974 in the course of discussions in a class on women and work in Cornell University (see also Crouch, 2001). We have come a long way since then. In the

years after the passage of the Civil Rights Act of 1964, federal courts typically refused to view sexual harassment as a form of employment discrimination under the meaning of the statute. However, in the case of *Barnes v. Costle* (561 F.2d 983 [D.C. Cir. 1977]), a federal circuit court held that sexual remarks and solicitations, when linked to threats about being fired, constituted sexual harassment. Catherine MacKinnon (1979), who was one of the attorneys for Barnes, then published a pioneering book which argued that sexual harassment itself, with or without a threat of being fired, constituted employment discrimination on the basis of sex in the meaning of the Civil Rights Act of 1964.

In 1980, the Equal Employment Opportunity Commission issued “Guidelines on Discrimination Because of Sex,” which declared sexual harassment a violation of Title VII of the Civil Rights Act of 1964. Along with offering some guidelines for establishing criteria for determining when sexual harassment has occurred, these guidelines split sexual harassment into two categories: “quid pro quo” harassment, whereby a refusal to grant sexual favors were met with blocked promotion or frozen wages or outright dismissal from work; and “hostile environment” harassment, which took the form of sexually abusive language or gestures which made some workers feel humiliated and discriminated against.<sup>1</sup>

The courts soon followed the lead of the Equal Employment Opportunity Commission. In *Bundy v. Jackson* in 1981 (641 F.2d 934, 942 n. 7 [D.C.Cir.1981]), a hostile environment alone was for the first time recognized by a federal appeals court as a form of harassment. In *Bundy*, a female employee of the Department of Corrections in Washington, D.C., was repeatedly invited by her supervisor to describe her sexual experience. When she complained about these comments to a senior manager, he took it



lightly, saying that the feelings of the supervisor were understandable. The court upheld Bundy's charge that the innuendo and implicit threats created an intimidating and hostile atmosphere, and were unlawful, *even though she had not suffered any tangible loss*, such as the withholding of salary increments or promotion.<sup>2</sup>

In 1986, the U.S. Supreme Court affirmed this distinction in *Vinson v. Meritor Bank* case (477 U.S. 57 [1986]), in which Michelle Vinson, a trainee-teller, was repeatedly propositioned by Sidney Taylor, a vice president of the bank. After resisting for some time, she relented for fear of losing her job and was subjected to repeated unwanted sexual relations for over four years. In this case the court did not find that the worker had suffered in terms of pay or promotions; in fact, the court did not even find it necessary to decide whether a sexual relationship between worker and manager had happened at all. The court held that a hostile work environment alone was a violation of employment discrimination under the Civil Rights Act of 1964.

## **A Model of Sexual Harassment in the Workplace**

In building a model of labor markets for analyzing sexual harassment, I want to motivate the exercise with a conceptual puzzle. One of the basic principles used by economists to guide policy decisions is the “principle of free contract,” which asserts that

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<sup>1</sup> Juliano (1992) discusses the history of the “hostile environment” claim.

<sup>2</sup> As a digression, note that the “hostile environment” clause suggests that what constitutes sexual harassment may well have a cultural element to it and so may, reasonably, differ across time or across nations. In the United States, defendants in harassment cases have sometimes tried to use the First Amendment (Schauer, 2002), arguing that, for instance, *Playboy* posters in the workplace should be allowed as a form of freedom of expression. Even if we were to contest this argument, most people would recognize that there is a line where not all art or expression that is somehow related to sex or gender and that offends a single person should be grounds for a sexual harassment suit. The point here is that different societies may wish to draw the line in different places.

when two or more consenting adults agree to a contract or an exchange that has no negative externalities on uninvolved individuals, then government has no reason to intervene and prohibit such a transaction.<sup>3</sup> This principle is the product of two more fundamental ideas: the Pareto principle and consumer sovereignty. The Pareto principle asserts that if a change is such that at least one party is better off and others are no worse off, then that change is desirable. Consumer sovereignty asserts that each (adult) individual is the arbiter of that individual's own welfare.

Now consider a case where a firm, either by virtue of its reputation for harassment or by writing down an explicit contract, ensures that a potential employee knows that she will be sexually harassed on the job. If she nevertheless accepts the job, then, by the principle of free contract, there seems to be no economic case for stopping such a contract. From this it seems a short step to argue that government should not use the law to stop sexual harassment in the workplace. It should be left to the individuals involved to be worked into the terms of employment contract appropriately. Given the heterogeneity among human beings, some will agree to work for lower wages but want a guarantee of no harassment; others may prefer higher wages, while relinquishing the right not to be harassed.<sup>4</sup>

However, I will argue that what was described as a "short step" in the above paragraph is deductively invalid, because there is a difference between a single contract or a small number of contracts of a particular kind and a large number of contracts of that

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<sup>3</sup> This principle has a long intellectual history and has been subjected to repeat scrutiny. John Stuart Mill (1848) favored this principle, though was concerned about some special cases, such as a laborer's right to enter into voluntary slavery. For contemporary discussions in the context of labor markets, see Zimmerman (1981), Trebilcock (1993), Sunstein (2001) and Kanbur (2002).

<sup>4</sup> Observe that in this scheme each worker has the right not to be harassed, and in addition they have the right to give up that right. As Sunstein (2001) lucidly demonstrates, giving a person the right to give up a certain right, call it R, is not the same as not giving the right R (see also Basu, 1984).

same kind. The former may be morally permissible, but the latter not. Even if single contracts are Pareto-improving, we cannot automatically conclude that such contracts in general should be legally permitted. I shall call this the “large numbers argument” and begin by constructing a model that validates this insight.<sup>5</sup> The model consists of a straightforward adaptation of the standard demand-supply model of labor.

### **A Model of Wages With and Without A Ban on Sexual Harassment**

Consider a market in which every firm and every worker is a price taker. I shall assume that employers are the potential harassers and the workers the potential harassees. I am therefore ruling out the problem of one worker (for instance, a supervisor) harassing another worker (for instance, a trainee). In reality such harassments occur, and under the current U.S. law the employer has “vicarious liability” and can be held responsible for not having taken adequate measures to prevent such harassment.

Assume that we are in a legal regime where firms are allowed to harass workers as long as that possibility is made clear at the time of employment. Treating harassment as a zero-one concept, it is clear that at most two kinds of contracts will come to prevail—one where the owner retains the right to harass his workers (contract H) or one where the owner guarantees no harassment (contract N). Hence, at most two wages will come to prevail:  $w_H$  for jobs with harassment and  $w_N$  for jobs with no harassment. Let  $\theta$  be the amount of benefit or “perverse gratification,” measured in output units, that the

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<sup>5</sup> An important precursor of the large-numbers argument is Parfit’s important work (1984), where he tries to argue that we cannot morally evaluate a *set* of acts on the basis of our moral judgment about each act contained in the set; to think otherwise is to make a mistake in “moral mathematics” (see also Neeman, 1999; Genicot, 2002).

employer gets from being able to harass an employee. Since firms are free to offer N or H contracts, the following condition must hold:

$$w_H - \theta = w_N$$

Note that in equilibrium, firms will be indifferent between the two kinds of contracts, since the gratification of harassment is just offset by the higher wage that has to be paid. I shall use  $D(w_N)$  to denote the aggregate demand for labor by all firms when the wage associated with a no-harassment job is  $w_N$ .

Let us now turn to the workers. They find harassment painful; however, the extent of pain will differ across individuals. Measuring pain in money terms (that is, in the same units as wages), let us think of  $c_i$  as the pain of harassment as perceived by worker  $i$ , and use  $c_{\max}$  and  $c_{\min}$  to denote the pain levels felt by, respectively, the worker who finds harassment the most painful and the worker who finds it the least painful. The interesting case occurs when

$$c_{\max} > \theta > c_{\min} ,$$

and, in what follows, I will assume this condition holds true. It means that there exists at least one worker whose pain exceeds the gratification the employer gets from harassing her and at least one worker whose pain is less than the gratification. This condition ensures that both H and N contracts will occur in the market if the law permits harassment contracts. That is, some workers can be persuaded to accept harassment contracts by virtue of the higher wage, but not all workers. This condition seems empirically plausible and, in the absence of more evidence, the natural assumption to use.

Before proceeding further, it is worthwhile commenting on some indirect empirical evidence which supports the assumptions of this model. Of course, there is

harassment in the workplace even though it is prohibited by the law. Antecol and Cobb-Clark (2002) in their study of active-duty personnel in the U.S. found strong evidence that sexual harassment led to diminished job satisfaction—a fact for which there is a lot of evidence from studies in psychology (for instance, Schneider, Swan and Fitzgerald, 1997). On the other hand, carefully constructed bivariate probit analysis shows that sexually harassing behavior does not lead to a heightened desire to quit military employment. While Antecol and Cobb-Clark present this finding as a bit of a puzzle, if the women went into this job knowing that they would face harassment, then the finding of diminished job satisfaction but no accompanying desire to quit the job are perfectly compatible, and in keeping with this theoretical model.

Concerning labor supply we will make the usual assumptions. Each worker's labor supply,  $s$ , is an upward-sloping function of the net wage that she earns. If worker  $i$  chooses an N contract, the amount of labor supplied by her is given by  $s(w_N)$  and if she chooses an H contract, the supply is  $s(w_H - c_i)$ . Recall that though the latter worker gets a wage of  $w_H$ , her net wage is less because she has to deduct the cost of harassment from it. Equilibrium in this labor market is defined in the usual way: The wage rates,  $w_N$  and  $w_H$ , associated with the N and H contracts, respectively, constitute an *equilibrium* if, given these wages, for each type of contract the demand for labor equals supply. I shall denote the equilibrium wages by  $w_N^*$  and  $w_H^*$ .

Consider next a labor market in which there is a law prohibiting sexual harassment (and this law is fully enforced). In such a legal regime there will be only one equilibrium wage, *equilibrium* being defined as the wage rate for which aggregate demand equals supply. Let me denote the equilibrium wage by  $w^*$ . What is easy to

prove, and of central interest here, is that the equilibrium wage, when harassment is illegal, will exceed the equilibrium wage, associated with a no-harassment job in a regime which permits harassment (Basu, 2000); in the terms of the model,  $w_N^* < w^*$ .

The intuition behind this result is straightforward. Consider the legal regime where no harassment is permitted and the wage is  $w^*$ . Now suppose government revokes the law banning sexual harassment. Assume for a moment that, in this new legal regime, the wage that is paid for no-harassment jobs, namely,  $w_N$ , happens to be equal to  $w^*$ . In that case the total demand for labor in this new regime will be equal to the demand for labor in the old regime, that is,  $D(w^*)$ . Remember that, given  $w_N$ , we know that  $w_H$  will be equal to  $w_N + \theta$  and employers are indifferent between the two kinds of contracts. What will labor supply be in this new regime? All those who choose no-harassment contracts will supply the same amount of labor as in the old regime, since  $w^* = w_N$ . Consider now a person  $i$ , who chooses a harassment contract. The reason for such a choice must be that the wage they receive, after subtracting their personal costs of harassment  $w_H - c_i$ , exceeds  $w_N$ . But this means that a person who makes such a choice faces a higher net wage than in the old regime. Hence, all such people will supply more labor than in the old regime. This means that aggregate supply of labor exceeds aggregate demand in the new regime. Hence, the wage  $w_N$ , described above, cannot be an equilibrium. In particular, the equilibrium wage for no harassment jobs will have to be lower, so that  $w_N^* < w^*$ . It follows from this result that all those people who take up jobs with no harassment guaranteed, in a regime where there is no ban on harassment, are better off when the economy switches over to a regime in which harassment is prohibited outright by the law.

Indeed, it also turns out that many workers who, in a regime with no ban on harassment, choose jobs with harassment clauses would also prefer a regime where no harassment is permitted. That is, there will exist workers, who, when confronted with a choice between the low-wage job with no-harassment and the high-wage job with possible harassment, prefer the latter; that is,  $w_H^* - c_i > w_N^*$ . However, compared to both of these choices, they would prefer a job with the intermediate wage that would come to prevail in an economy where there is an outright ban on sexual harassment; that is  $w^* > w_H^* - c_i > w_N^*$ . Thus, a ban on sexual harassment benefits those who would otherwise have chosen the no-harassment contract and also a number of those who would have chosen the harassment-allowed contract.<sup>6</sup>

Hence, even if a single pair of agents entering a harassment contract is Pareto-improving, prohibiting sexual harassment in general does not result in a state that is Pareto-inferior to the one that would occur in the absence of such a law, but rather involves a set of tradeoffs where some groups benefit and others suffer. This outcome does not mean that we already have a case *for* banning harassment, but simply that the case against a ban, on purely Paretian grounds, no longer exists.

### **Moral Judgement**

To go from here to a case for a ban one needs to combine the above positive result with some normative conditions. I shall argue that, once we are in the domain where

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<sup>6</sup> One effect of harassment that is important in reality but has been ignored here is that it reduces the harassed worker's productivity. In addition, harassment can have substantial spillovers, resulting in the decline of productivity of the co-workers of those who are harassed. The USMSPB (1995) study estimated that, during 1992-94, such "group productivity losses" because of sexual harassment in the Federal Government alone was equal to \$193.8 million. In terms of the model, this spillover amounts to another reason why wages associated with contracts that guarantee no harassment (in a regime in which there is no

alternatives cannot be ranked purely on Paretian grounds, there is a case for breaking away from welfarism and looking instead at what lies *beneath* people's preferences.

We often hold views of approval or disapproval about other people's preferences. Thus, we may consider a person's preference for racism unacceptable, whereas a person's preference for alcohol (though not good for his health) fine. The argument here hinges on distinguishing between two kinds of preferences that we consider acceptable or legitimate: maintainable preferences and inviolable preferences. A particular preference is *maintainable* if a person has the right to the preference, though the person may have to pay a price for having such a preference. On the other hand, an *inviolable* preference is something that a person has a right to have and, in addition, no one should have to pay a price for it (Basu, 2000, elaborates further). For instance, a person's preference for working only two days a week is a maintainable preference. No one can object to it. Of course, the person with that preference will be poorer and cannot expect society to make amends for it, but he has a right to that preference. On the other hand, the preference not to be sexually harassed, we can argue, is inviolable. Not only do people have a right to such a preference but no one should have to pay a price for having such a preference. What is being claimed here is that this normative evaluation of preferences should come into play when there is no ranking based on Paretian grounds.

The categorization of preferences completes the argument. If a person is forced to choose a low-paying job because she has a strong aversion to being sexually harassed (as we showed above), we may have reason to take legal action so that this does not happen.

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outright ban on harassment) may be lower and the intermediate wage that would prevail in a regime with an outright ban on harassment. A formal modeling of this could be worthwhile in the future.



What is being argued for is a blending of consequentialism and rights or, more correctly, the moral worth of preferences.<sup>7</sup>

It is important to note that the case for banning sexual harassment is being justified here only partly by the suffering of those who get harassed. The model draws attention to all of those who do worse in the labor market when a ban on sexual harassment does not exist, a matter of some policy significance and one to which I return later.

Before moving on to policy matters, let me briefly address a theoretical question that arises from the above model: How is it possible for each single contract to be Pareto-improving but a large set of such contracts to be not so? The way this was established above was by a standard competitive equilibrium argument, in which each agent is assumed to be a price taker. Hence *one* more worker signing a harassment contract is assumed not to affect wages, and, therefore, the welfare of other workers. On the other hand, when a large number of agents sign such contracts, this affects wages and, through that, can have an adverse effect on the welfare of other workers. Though this point is not always made explicit in standard economics texts, this kind of competitive equilibrium analysis turns out to be *formally* valid only in economies with an infinite number of agents. Is there any way of justifying this within the more realistic paradigm of a finite number of agents? This question, which is also one of the core concerns of Parfit's much-discussed work in philosophy (1984), is pursued further in Basu (2002). It is shown, for instance, that one way to make this "large numbers argument" formally consistent is to assume that human beings do not have endlessly fine perception. That is, they cannot

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<sup>7</sup> This line of argument is close to Sen (1982), but the particular kind of blending that is being recommended here is different from his.

distinguish between very fine differences. Such an argument is based on recognizing that individual preferences are typically not transitive. This seems strange at first sight because the assumption of transitivity is so familiar to economics. Yet it is realistic to assert that an individual will be indifferent between  $n$  and  $n+1$  grains of sugar, for every integer  $n$ , but may well prefer one spoon of sugar to three spoons. This clearly implies a violation of transitivity.<sup>8</sup>

### **Separating Sexual Harassment from Sex Discrimination**

The economic perspective on sexual harassment legislation, developed above, comes with its own suggestions for the kind of law that ought to be used to control harassment in the workplace. This perspective, which is generally ignored in the large literature and many legislative debates on workplace harassment, has a lot to offer.

The key to the U.S. legislation regarding sexual harassment, as discussed earlier, has been to view it as a form of sex discrimination in employment (Mackinnon, 1979; Schultz, 1998; Crouch, 2001; LeMoncheck and Sterba, 2001). This American model has influenced legislation worldwide; Husbands (1992) presents a comprehensive account of sexual harassment law in different nations. For example, Britain's Sex Discrimination Act of 1975, which closely parallels Title VII in the United States, recognizes sex discrimination to be unlawful and recognizes that discrimination occurs if a person treats a woman less favorably than he treats or would treat a man. In India, sexual harassment is for the first time being recognized as unlawful. India does not have a special law

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<sup>8</sup> It is arguable that the notion of "pecuniary externality," which is germane to

against sexual harassment and has had to be content with the use of tort and criminal law to deal with the problem (Nussbaum, 2002). However, a recent writ of mandamus (a Court order that serves as law till formal legislation is adopted) issued by India's Supreme Court in the context of a judgment in a rape case, *Vishakha and Others v the State of Rajasthan and Others, 1997* (6 Indian Supreme Court 241 [1997]), provides guidelines for controlling and punishing harassment in the workplace. This well-crafted writ draws on both the Indian constitution and American legislative practices, as it stresses the discriminatory aspect of harassment and the principle of vicarious liability (Haspels et al., 2001), mentioned above.

However, I shall argue that this tying up of sexual harassment with sex discrimination, though it has played an important role historically, is now becoming a hindrance. There should be strong laws to prevent discrimination and strong laws to prevent harassment. But it would be unfortunate if the only way to establish sexual harassment is to categorize it as a form of discrimination, because this approach raises a number of problems (Abrams, 1994; Hajdin, 2002). Employment discrimination by sex has traditionally meant men discriminating against women; for example, consider Farley's (1978) definition: "Sexual harassment is best described as unsolicited nonreciprocal male behavior that asserts a woman's sex role over her function as worker." But sexual harassment is a more complex topic.

First, men's claims of sexual harassment are increasing; from the Equal Employment Opportunity Commission data reported in Table 1, men's claims now account for 13.7 percent of all sexual harassment charges, up from 9.1 percent in 1992.

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competitive equilibrium analysis, hinges on such intransitivities.

The coupling of sexual harassment with sex discrimination does not work neatly to protect people in such cases.

Second, in the United States there is a significant amount of same-sex harassment, another situation in which law based on discrimination according to sex often does not provide adequate protection to sufferers -- and when it does, it is only because judges and lawyers interpret the law according to its likely intent rather than what it actually says (Talbot, 2002). According to the study by the U.S. Merit Systems Protection Board (1995), 21 percent of men who report being harassed were harassed by other men. However, in 1998 the U.S. Supreme Court cleared up some confusion in lower courts by ruling in *Oncale v. Sundowner Offshore Services, Inc.*, (523 US 75 [1998]) in a case involving a man who experienced a hostile working environment as a result of harassment by other men working on an oil rig in the Gulf of Mexico, that Title VII should be viewed as including same-sex harassment.

A third category which is difficult within the sex discrimination framework involves the problem of the boss who harasses both men and women with equal vigor and thus does not harass anybody because of his or her sex (Paul, 1990; Epstein, 1985).

A final category is those who are harassed not because of their sex, but because of their sexual orientation. This problem was exemplified by a case concerning Mr. Medina Rene, an openly gay person who worked as a butler at the MGM Grand Hotel, Las Vegas, and for years was harassed by co-workers. His complaint to the hotel resulted in no action and so he took the matter to the court. A U.S. district court ruled that Rene's harassment was not based on his *sex* but on his sexual *orientation* and so was not covered under Title VII (Abelson, 2001). However, the ruling was overturned on September 24,

2002 by the U.S. Court of Appeals of the Ninth Circuit, which ruled in *Rene v. MGM Grand Hotel, Inc.* (No. 98-16924) that Rene could bring suit (Talbot, 2002, p. 57; decision online at <<http://www.ca9.uscourts.gov>>).

The linkage from sexual harassment to employment discrimination law occurred through a set of understandable historical connections. The original sexual harassment cases in the late 1960s and early 1970s focused on “quid pro quo” harassment in which men threatened women with loss of job or reduction in pay unless the women participated in sexual activity. But these situations left out the issues raised by “hostile environment” sexual harassment. As Lipper (1992, p. 301) pointed out, in the past, “while a woman who had been physically assaulted, i.e. grabbed, touched or kissed, might have prevailed under tort theories, one who had been the object of sexual jokes would be unlikely to be compensated for her resulting anguish.” Such situations often had no clear injuries from the viewpoint of traditional employment discrimination law, and so they had historically been ignored and victims left without legal recourse.

The advantage of treating a hostile work environment as workplace discrimination was that it provided a pre-existing legal avenue -- to wit, laws against discrimination -- for addressing the problem. But once a hostile work environment has come to be recognized as a wrong, it is not clear why it should not be considered wrong *per se*, that is, whether or not it can be classified as workplace discrimination. Society may wish to have separate legal provisions for harassment that is motivated by discrimination, since this phenomenon is pervasive, and also because we may want to punish both the harassment and the discrimination. But it seems odd to confine the scope of bringing harassment charges only to cases where the harassment is prompted by discrimination.

In an influential paper, Superson (1993) defended the connection between harassment and discrimination by arguing that sexual harassment should be viewed as “an attack on the group of *all* women, not just the immediate victim” (p. 49). One problem with this argument is that it is not clear why an attack on one, say, black, gay, woman is to be viewed as an attack on all *women*, and not all blacks, all gays, or, for that matter, all moral beings? A second problem is that sexual harassment may not always arise from a feeling that the victim is inferior, as this argument suggests. It seems more sensible to categorize harassment by the effect on the harassee, no matter what motivates the harasser. However, in Superson’s emphasis on discussion of social mechanisms whereby one person’s victimization affects others, her argument is very much in the spirit of this paper, which emphasize how such effects can spread through the workings of the market.

Indeed, the economic model of sexual harassment presented here suggests that even if a harassment-allowing contract was freely accepted by both sides, society would have reason to ban harassment because of the costs that it imposes on those who choose the no-harassment contract. This economic approach suggests that the existing interpretation of sexual harassment may not be going far enough. The existing legal provisions are not cognizant of the losses of those who are not harassed because they may have taken otherwise-inferior jobs, where there is the assurance of no harassment, or have remained unemployed. Such workers cannot seek compensation under existing sexual harassment laws, because they are not harassed physically or even environmentally. But they nevertheless pay a price. Hence, perhaps surprisingly, the economic approach takes us to a more widespread interpretation of what constitutes the harm of sexual harassment.

Finally, it is worth noting that in the above model it was assumed that sexual harassment is well-defined and can be the subject of enforceable contracts. It is possible, however, to argue that it is difficult to write contracts about harassment, and try to construct an argument for a legal ban based on this difficulty. While this is a line that needs to be explored, one must not prejudge its conclusions. Even if complex contracts are not possible, it is often possible to write simple contracts, such as, “I relinquish all rights that I have under Title VII.” If the rights under Title VII are meaningful, then relinquishing those rights must be meaningful. Hence, in principle, it is possible to grant individuals the right to give up those rights. But the fact that people may want to use more nuanced contracts about what workplace conduct is acceptable, which in turn may be harder to monitor and enforce, does lead to open questions deserving future investigation.

## **Reflections on Labor Standards and Rights**

The approach to analyzing sexual harassment in this paper provides an instrument for analyzing other kinds of labor market problems, such as occupational safety, child labor, and labor rights and standards in general. In all of these cases, it is possible to compare an across-the-board government regulation with a market in which workers sort themselves into different jobs according to their preferred combinations of pay and work environment.

Consider the problem of hazardous jobs. Should workers be allowed to opt for such jobs, on the argument that some workers may find poverty more grueling than the

pain of such a job? In answering or examining this question, the focus is invariably on the workers who take up such jobs; for instance, Cohen's (1987) thought-provoking paper on this subject has this focus. I am arguing that in considering the general question of whether such jobs should be allowed or whether firms should be compelled by law to take safety measures, a crucial constituency is not the workers who currently have such jobs, but those, especially poor workers, who do not. Moreover, one needs to consider the constituency of those who will choose a high-wage hazardous job over a low-wage safe job, but who would prefer a medium-wage safe job.<sup>9</sup>

Of course, the arguments presented here should not be taken as a defense of all labor market interventions. One hugely contentious debate on labor market policy in recent times concerns international labor standards (for instance, Bhagwati, 1995; Krueger, 1997; Basu, 2001; Engerman, 2001; Satz, 2003). Is there reason for international authorities to try to enforce certain minimal standards in labor markets, such as prohibiting child labor, or stopping workers from doing hazardous work, or imposing a minimum wage, or allowing workers to unionize? On some of these matters we may reach a straightforward conclusion on the basis of the standard externality or multiple

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<sup>9</sup> In certain situations, it is possible to have an equilibrium in which firms offer only one kind of contract, where individuals have to relinquish the right not to be harassed, and the worker may take it or leave it. This gives rise to some interesting philosophical questions concerning the moral status of "standard form" contracts that many large and powerful enterprises use. Wertheimer (1996, Chapter 2, pp. 45-6) discusses this problem in the context of *Henningsen v. Bloomfield*, (32 N.J. 358, 161 A.2d 69 (1960), in which Mrs. Henningsen, who was injured while driving her newly purchased Plymouth car, sued for damages, whereas Bloomfield Motors and Chrysler argued that by signing the standard purchase order, Mr. Henningsen, her husband, had absolved Bloomfield Motors and Chrysler of any responsibility. The question was whether by signing beneath the fine print of the *standard form* he could be described as having got into the contract *voluntarily*. It seems arguable and the New Jersey Supreme Court did indeed take the line that "freedom of contract" applies most clearly to contracts that are the result of "free bargaining of parties" rather than the standardized mass contracts used by enterprises with strong bargaining power. What Wertheimer does not discuss is another dimension to this problem which arises from the fact (to which we have been alerted by the new behavioral economics) that human choice is highly dependant on what is presented as the default option. Workers can be made to contradict their own choice by altering what is presented as the standard form.



equilibria arguments. For example, in the case of child labor, Basu (1999) argues that there are two possible equilibria, a low-wage equilibrium with child labor and a preferable high-wage equilibrium where children attend school, and so, if an economy happens to be caught in the less-desirable equilibrium, a natural case arises for prohibiting the behavior that occurs in that equilibrium so that the economy is deflected to the other equilibrium. But there are cases where there may not be more than one equilibrium and the externality principle may not work, at least not without stretching the principle beyond recognition. In such cases, it will be worthwhile trying to apply the large-numbers argument along with the normative criterion discussed above.

As a particular example, consider what may be called the “*maquiladora* dilemma.” A *maquiladora* or an export-processing zone is an area often on the border of a country where goods are often imported, processed in some way, and then shipped back across the border, free of export duties. In some countries, if a worker wants to work in a *maquiladora*, that worker is required to give up certain labor rights that are guaranteed in all other sectors of the economy. Many labor rights advocates argue against such exemptions (ILO, 2000; and the proceedings of an ILO meeting at <http://www.ilo.org/public/english/region/asro/bangkok/download/epz.pdf>). However, if a worker chooses to give up certain rights in order to work in an export-processing zone, it must be because the worker expects to be better off by doing so. On standard Paretian grounds, there seems to be no reason to stop a worker from making such a choice.

The only way to justify such an intervention is to check where the large-numbers argument takes us. That is, find out how the existence of such export-processing zones may affect the wages and work conditions of those who do not work in the zones, and if

some of those who work in the zones prefer that the zones be outlawed. It seems clear that the spillovers of sexual harassment reduce the welfare of other workers who may not be direct victims, but it is an open question how the spillovers from export-processing zones affect workers who are not in those zones. Finally, the argument that it is unfair to force workers who prefer not to be sexually harassed into low-wage jobs has considerable moral force; the corresponding argument that it is unfair to force workers who prefer that, say, their job be guaranteed by the government to last in perpetuity into lower-wage jobs has somewhat less moral force. Of course, listing these arguments does not settle the maquiladora question, but it suggests how the analyst might proceed in analyzing labor standards.

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**Table 1**

**Sexual Harassment Charges Filed with Equal Employment Opportunity  
Commission and Fair Employment Practice Agencies, 1992-2001**

	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
<b>Total Charges</b>	10,532	11,908	14,420	15,549	15,342	15,889	15,618	15,222	15,836	15,475
<b>Charges Filed By Men (%)</b>	9.1	9.1	9.9	9.9	10.0	11.6	12.9	12.1	13.6	13.7
<b>Resolutions</b>	7,484	9,971	11,478	13,802	15,861	17,333	17,115	16,524	16,726	16,383
<b>Merit Resolutions</b>	2,019	2,524	2,713	2,709	2,882	3,253	3,576	3,840	4,724	4,768
<b>Total Charges Where the Basis was the Person's Sex (% of Total Charges)</b>	96.7	96.6	97.6	96.9	97.4	97.1	97.1	97.0	97.1	97.5

**Source:** Equal Employment Opportunity Commission, National Data Base.