

# **Sexual Harassment Law**



# Sexual Harassment Law

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## History, Cases, and Practice

SECOND EDITION

**Jennifer Ann Drobac**

SAMUEL R. ROSEN PROFESSOR OF LAW, INDIANA UNIVERSITY,  
ROBERT H. MCKINNEY SCHOOL OF LAW

**Carrie N. Baker**

PROFESSOR OF THE STUDY OF WOMEN & GENDER  
SMITH COLLEGE

**Rigel C. Oliveri**

ISABELLE WADE AND PAUL C. LYDA PROFESSOR OF LAW  
UNIVERSITY OF MISSOURI SCHOOL OF LAW



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*To the people who help to prevent and prosecute sex-based harassment and  
for all the brave survivors who have announced #MeToo.*

Jennifer Ann Drobac

*To my students. You give me hope for the future.*

Carrie N. Baker

*To Griffin and Shennie: The future is yours. May it be better.*

Rigel C. Oliveri



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# Preface

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SEXUAL HARASSMENT LAW: HISTORY, CASES & PRACTICE is the second edition of Professor Jennifer Ann Drobac's SEXUAL HARASSMENT LAW: HISTORY, CASES & THEORY. That book was the first comprehensive textbook to explore sex-based harassment law for a full-semester law school course. For this second edition, Professors Carrie N. Baker and Rigel C. Oliveri join Professor Drobac. Together, we bring our unique scholarly talents, professional experiences, and shared dedication to civil rights to create a textbook accessible to college students, graduate students, and others.

This new edition traces the development of American law, practice strategies, and legal reasoning concerning sexual harassment in employment, education, housing, prisons, and the military, updated with recent cases. This edition also explores the #MeToo movement, which has made sexual harassment a much-discussed topic everywhere. In its discussion of statutory law, case law, and legal reasoning, this edition acknowledges the usefulness of traditional legal analysis of sex-based oppression. It also, however, recognizes the experiences, perspectives, and creativity of parties and lawyers involved in sexual harassment litigation and remediation. It considers how the law successfully curbs abuses or how and why it fails to address sex-based abuses of power.

In addition to careful analysis of relevant law, this book also examines topics such as street harassment, online harassment, press coverage, extralegal responses to misconduct, and mandatory arbitration, among others. Ethics hypotheticals at the end of each chapter incorporate the study of professional responsibility into this examination of sexual harassment law.

This book is divided into 10 chapters. Chapter 1 examines the legal and theoretical developments of sexual harassment law in the 1970s and 1980s. It covers the early interpretation of the 1964 Civil Rights Act and the initial rejection of the notion that Title VII prohibits sexual harassment. It follows the shifting tide that resulted in the understanding that sexual harassment constitutes discrimination “because . . . of sex.” It credits, in part, early feminist activists and scholars who facilitated that shift and the necessary recognition of the plight of many female workers. Chapter 2 introduces the concept of intersectionality—how gender, race, class, and other aspects of identity intersect to shape people's experience of sexual harassment—through the examination of the Anita Hill/Clarence Thomas hearings in 1991. It

also reviews contemporary examples of the intersectionality of sex-based oppression, such as immigrant farmworker women and low-wage restaurant workers.

Delving into law and practice, Chapters 3 and 4 explore each element of the plaintiff's prima facie case. Chapter 5 explains liability damages. These chapters demonstrate how courts have interpreted the law narrowly to deny relief to many harassed individuals. Chapter 6 surveys sexual harassment law in the educational context under Title IX of the 1972 Educational Amendments to the Civil Rights Act, which courts have interpreted even more narrowly than Title VII. Chapter 7 addresses sexual harassment law in housing under the Fair Housing Act and Chapter 8 covers sexual harassment in the highly regimented environments of prisons and the military.

Introducing new topics, Chapter 9 examines street harassment and online harassment. Chapter 9 reconsiders traditional defenses, analyzing defendants' assertion of First Amendment free speech protection and the exploitation of plaintiffs' sexual history. This Chapter also highlights how media coverage of sexual harassment cases can influence the course of litigation. Finally, Chapter 10 explores the rise of the #MeToo movement and calls for reform of sexual harassment law to expand coverage, close loopholes, and make the law more effective.

We offer this textbook because we believe that sexual harassment law merits full semester coverage. The pervasiveness of sexual harassment, as well as the many substantive law fields that influence its redress, prompts in-depth analysis. This edition reflects the evolution of the study of sexual harassment law. Because we also see a continuing need for ethics education, in this edition we place an ethics hypothetical at the end of each chapter. These hypos are based on real experiences from our years of sexual harassment law practice. We have also retained selected theoretical excerpts and quotes that provide a variety of different perspectives regarding sexual harassment and the legal response to it. This book necessarily reflects our philosophy that one cannot separate the "law" from legal theory or from practical application. Only an integrated approach to legal problems produces the most effective tool for managing our society and personal relations. Thus, we incorporate legal theory and practice considerations into every chapter. We debated calling this book *Sex-Based Harassment: History, Cases, and Practice* because sexual harassment law was originally a common law creation from the sex-based discrimination prohibition in Title VII. In the end, we chose to stay with the more common appellation to avoid confusion and because sexual harassment law has evolved to become a substantive legal field in its own right, distinct and distinguishable from other types of antidiscrimination law.

We thank the many contributors to both editions of this textbook. For this edition in particular, we want to thank the Indiana University McKinney Law Library Faculty: Professors Miriam A. Murphy, Susan David deMaine, and Benjamin J. Keele. We are also grateful for the excellent research assistance we received from Kristen Coffey, Jessica Dickinson, Alexia Lopez, Deborah P. Morton, Nick Moscalick, and

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In the edited cases, articles, and other materials, ellipses indicate omitted footnotes and citations. We omitted most footnotes and citations. When we retained footnotes from original sources, original footnote numbering was preserved.

Finally, we invite comments and suggestions regarding this book. You can reach us through Professor Jennifer Drobac, Indiana University Robert H. McKinney School of Law, 530 W. New York St., Indianapolis, IN 46202-3225, (317) 278-4777, [jdrobac@iu.edu](mailto:jdrobac@iu.edu).

JENNIFER ANN DROBAC  
Indianapolis, Indiana

CARRIE N. BAKER  
Northampton, Massachusetts

RIGEL C. OLIVERI  
Columbia, Missouri



# Acknowledgments

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# About the Authors

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Jennifer Ann Drobac, M.A., J.D., J.S.D.

Professor Drobac is the Samuel R. Rosen Professor of Law at the Indiana University Robert H. McKinney School of Law. She holds her doctoral (J.S.D.) and J.D. degrees from Stanford Law School and Master's and Bachelor's degrees in History from Stanford University.

Her scholarly work has been published in a variety of law reviews and journals. In 2005, she finished the first edition of this textbook, *Sexual Harassment Law: History, Cases and Theory* (Carolina Academic Press, 2005). In 2016, she offered her second book *Sexual Exploitation of Teenagers: Adolescent Development, Discrimination, and Consent Law* (University of Chicago Press, 2016) (rated “Essential,” the highest rating by *Choice*, a publication of the Association of College and Research Libraries). She is currently working on another monograph project, *The Myth of Consent*, under contract for publication with Cambridge University Press (anticipated 2020). This book will analyze the neuroscientific and psychosocial aspects of decision making by vulnerable adults and offer legal solutions for reform.

Since the beginning of October 2017, Professor Drobac has given more than 120 interviews to media outlets concerning sexual harassment, #MeToo, and a number of high-profile cases. Her comments have appeared in *The Washington Post*, *The New York Times*, *Vox*, and *MarketWatch*, to name just a few.

From 1992 to 2001, she practiced law in California, focusing on sexual harassment law litigation, and from 1997 to 2000, she served as a lecturer at Stanford Law School. Following law school, she clerked for the Honorable Barefoot Sanders, U.S. District Court for the Northern District of Texas.

Carrie N. Baker, J.D., Ph.D.

Professor Baker is a Professor and the Director of the Program for the Study of Women and Gender at Smith College in Northampton, Massachusetts. Baker has a Bachelor of Arts degree in philosophy from Yale University, a Juris Doctor degree from Emory University School of Law, and Master of Arts and Doctor of Philosophy degrees from Emory University's Institute of Women's Studies. She was editor-in-chief of the *Emory Law Journal* while in law school and later served as a law clerk to United States District Court Judge Marvin H. Shoob in Atlanta, Georgia.

Baker's research and teaching centers on gender, law, public policy, and feminist social movements, with a focus on sexual harassment, sex trafficking, and

reproductive rights and justice. Her first book, *The Women's Movement Against Sexual Harassment* (Cambridge University Press, 2008), won the National Women's Studies Association 2008 Sara A. Whaley book prize. This book examines how a diverse grassroots social movement created public policy on sexual harassment in the 1970s and 1980s. Baker's second book, *Fighting the US Youth Sex Trade: Gender, Race and Politics* (Cambridge University Press, 2018), tells the story of activism against youth involvement in the sex trade in the United States between 1970 and 2015. Baker has published articles in a range of journals, including the *Journal of Women, Politics, and Policy*; the *Journal of Women's History*; the *Journal of Human Trafficking*; the *Journal of Law and Inequality*, and *Emory Law Journal*. Baker is a regular writer for *Ms.* magazine and serves on the editorial board of the journal *Meridians: feminism, race, transnationalism*.

Rigel C. Oliveri, J.D.

Professor Oliveri is the Isabelle Wade and Paul C. Lyda Professor of Law at the University of Missouri. She holds a Bachelor of Arts in Political and Social Thought from the University of Virginia and a Juris Doctor degree from Stanford Law School, where she was elected to the Order of the Coif.

Professor Oliveri is a nationally recognized expert on fair housing law. Her scholarship focuses on housing discrimination, residential segregation, zoning and property rights, and sexual harassment. Her published work has appeared in a number of law reviews, journals, and books. She was recently featured in a national program put on by the Department of Housing and Urban Development on sexual harassment in housing. She currently serves as a Commissioner for the Columbia, Missouri, Public Housing Authority.

Following law school, Oliveri served as a law clerk to the Honorable Stephanie K. Seymour on the United States Court of Appeals for the Tenth Circuit. Prior to joining the Missouri Law faculty, she served as a trial attorney with the U.S. Department of Justice through the Honors Graduate Program. She practiced in the Civil Rights Division, Housing and Civil Enforcement Section, where she litigated and tried a number of significant cases involving housing discrimination and sexual harassment in housing. In 2003 she was awarded a Special Commendation from the Attorney General for outstanding service.