Maison des Sciences de l'Homme PARIS-SACLAY

ACTES

ÉCRIRE L'HISTOIRE DU HARCÈLEMENT SEXUEL

LES MOTS POUR LE DIRE

DIRECTION
Armel Dubois-Nayt
Réjane Hamus-Vallée

WEBINAIRE AVISA
(Historiciser le harcèlement sexuel)
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Touch and Pressure

Sensing Sexual Harassment in Medieval Common Law Sources

Gwen Seabourne

Résumé

Le toucher et la pression. Sentir le harcèlement sexuel dans des sources juridiques anglaises médiévales

Cet article envisage à la fois la présence et l'absence de références à des comportements relevant du harcèlement sexuel et non du viol dans les documents conservés dans les archives de la *common law* datant de la fin du Moyen Âge. Il suggère que, si l'étude de ce type d'infraction dans ces sources judiciaires n'est pas facile, des leçons importantes restent à tirer des références éparses qui peuvent y être trouvées, et ce du fait même qu'elles sont peu nombreuses et éparpillées. L'article analyse la façon dont ces actions ont été marginalisées, effacées, fragmentées, que ce soit dans le contexte judiciaire ou dans l'histoire du droit. Enfin, il plaide en faveur d'un regain d'efforts pour explorer les sources disponibles, en gardant l'esprit suffisamment ouvert pour chercher ce type d'infraction dans des plaintes apparemment sans lien avec les délits sexuels.

Mots-clés : *Common law*, Angleterre, Moyen Âge, sources judiciaires, délits sexuels

The last three decades have seen a great deal of work by historians of medieval England on legal responses to rape. There have been explorations from a doctrinal point of view, looking at the different misconduct that might be covered by the Latin term *raptus*, close readings of particular rape narratives, and considerations of the theory and practice of prosecution for felonious rape. What has not been explored in detail is the extent to which other non-penetrative but arguably sexually

charged contact might come to the attention of the common law, and might therefore appear in its records. This paper will argue that, while the investigation of this area of misconduct in the records of common law is far from easy, it is not absent, and there are important lessons to be learned from the scattered references that can be found, and from the fact that they are few and scattered. It will identify what we can and cannot see regarding ideas about sexually harassing behavior in common law sources, illustrating the ways in which this area of concern has been marginalized, effaced, and fragmented in the legal context.

Occasional incursions

The rich sources for judicial proceedings in the common law courts of later medieval England do not reveal a wealth of examples of sexual misconduct accusations not defined as *raptus*. It is easy to form the impression that the only relevant concerns of those in charge of creating and administering the system were with instances of penile penetration of the vagina, or with the removal of women from the control of family or husband: any of the other acts we might now consider to be sexual harassment were simply not thought appropriate for the intervention of secular law. Narratives of 'full' rapes themselves do not dwell on any preliminary touching: to the extent that they ever do give details of events leading up to penetration, this tends to be aimed towards establishing the forceful nature of penetration on that particular occasion, and does not deal with any previous contact. The sorts of physical contact mentioned in entries relating to 'ravishment' may involve mistreatment such as tying a woman up and throwing her over the back of a horse to take her away, or they may show an attempt to negate the allegation of forcible removal by alleging the woman's consent (Seabourne, 2013: 40, 51), but there is no place for an idea of previous impropriety. There are no statements in these rape and ravishment accusations about anything remotely like sexual harassment as an independent wrong. To the extent that relevant misconduct appears, this is either in non-standardized forms of complaint, or else it comes in via an oblique route, as a defense. Both the content of relevant entries and their form can, however, tell us something.

We can see an allegation of what looks like sexual misconduct in the non-standardized complaint of a woman called Christian, widow of Adam Prudhomme of Newport. In 1292, she complained to a royal court (the Eyre of Shropshire) about her treatment at the hands of a goldsmith, Nicholas Broun. The allegation was that Nicholas had accused her of the theft of a silver buckle. Her objection was not (or was not only) to this accusation, but to the way in which he proceeded, and his physical actions in relation to her body. He had, she said, dragged her off to a house outside Bridgnorth, then he had stripped her naked, torn her hair, and conducted a full body search 'indecently', including 'even her secret parts' (Bolland ed., 1914: 30; Seabourne, 2017: 270). None of this revealed the allegedly stolen buckle, and Christian said that Nicholas then threw her out of the house. The claim was unsuccessful, the twelve men of the neighborhood who heard it did not find Nicholas guilty. Christian was therefore neither compensated nor vindicated.

Thus far, it will be deduced that it was possible to make this sort of complaint in a royal court. There was no objection that this matter was non-justiciable, or insufficiently serious for the attention of royal justices: the matter proceeded on the basis that it was something the justices could entertain, but that Nicholas was not in fact guilty. It should be stressed, however, that the procedure here was unusually free: generally, those coming to common law courts had to fit their claims into a limited number of set patterns, bringing an 'appeal' (an individual prosecution) for one of a small number of common law or statutory offences, which did not include anything appropriate for the sort of allegation Christian was making, or else they needed to persuade (male) representatives of the local community to initiate a prosecution, via presentment or indictment mechanisms where again there were restrictions concerning the causes of action permitted that would not have accommodated these facts. It is only on the occasions when people were allowed or encouraged to formulate their own complaints, without the usual constraints, that we are likely to see these matters in the royal courts' records (Seabourne, 2017: 266-267).

We should note the rarity of such finds, and also try to use them to elicit as much as possible about the attitudes and the world that created them. In the case of Christian, we are fortunate enough to have two different

records, enabling some 'fleshing-out' of the picture: both the complaint and the eyre record (record of the session) survive[1] (Bolland ed., 1914: 31). The eyre record both conceals and reveals important truths. Rather than dealing with the matter in the same terms used in Christian's complaint, the verdict of the jury is summed up without the element of 'indecency': Nicholas did not beat or trample Christian, nor did he 'do any other trespass', as was alleged. The sexual aspect to the allegation is thus concealed. Nevertheless, the record also reveals, or at least hints at, something else that is very relevant to an attempt to historicize sexual harassment. The rather vague allegation of trespass in the eyre roll is the sort of thing one encounters over and over again in common pleas records. Were it not for the fact that, unusually, we have the more specific bill setting out Christian's complaint, there would be no reason to regard this as anything other than a 'simple' physical assault. That does raise the ultimately unanswerable question of how many other entries that appear to be monotonous allegations of beating might in fact have had an element of indecency in the initial complaint. This seems to be the case in at least one other instance: facts suggesting sexual harassment, including stripping a woman, emerged in a late thirteenth-century plea that originally mentioned only that 'enormities' had been done (*Hadestok v Montibus* (1276), *in* Weinbaum ed., 1976: plea 519).

Later in the medieval period, we find a further tantalizing partial revelation. A plea roll from the Court of King's Bench (one of the central royal courts), from 1422, records that Amice Everard brought a trespass case against John Bennet of London[2]. Her allegation was that, on Sunday next before the feast of St Bartholomew the apostle, in the ninth year of King Henry V [August 24, 1422], he had, with force and arms, i.e. swords, clubs and daggers, broken into her home, in the parish of St Olave, in the ward of Colman Street, in London, and had assaulted, beaten and mistreated her, and committed other enormities, against the king's peace, causing her £40 worth of damage. This allegation followed

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1 The National Archives (TNA), Kew, London JUST 1/739 (Rolls of the itinerant justices) m. 36.

2 TNA, Kew, London KB 27/643 (King's Bench, plea rolls), m. 5.

a standard formula that had evolved over the previous two centuries, and is not therefore particularly informative. Nobody would have thought that those particular weapons were in fact used, for example; that was just the way these matters were conventionally described. All we really know is that Amice was saying that John had come into her house and committed some sort of trespass to her person. The record of John's pleading, however, is more than usually full, and gives us some hints in relation to what was considered legitimate touching by a man of a woman, and what was considered an actionable trespass.

John denied most of Amice's allegation outright. As far as the entry into her home was concerned, he said that at the time concerned he had Amice's permission to enter the house when he wished, so that on this occasion he was in the house with her consent. As for the assault on Alice, he said that at the time of the supposed trespass he entered the house as stated and had a romantic tryst (*colloquium … causa amoris*) with Amice. With Amice's agreement, consent, and free will, he took her in his arms, put her on her bed, and kissed her. He said that this was the assault of which Amice complained in her writ, and asked for judgment whether she should be allowed such an action against him. Amice stuck to her story that there had been a wrongful entry and assault, and contradicted John's allegation. The matter was referred to a jury for trial in a future term. Sadly, but not at all unusually, it then disappears from the record, indicating either that Amice gave up or that there was an out-of-court (and so untraceable) settlement of the grievance.

As usual, there is no way of knowing the truth of allegation and counter-allegation. But as with the case brought by Christian described above, some useful details can be gathered from what remains to us. We can see the underlying assumption that kissing (or this sort of kissing, perhaps) was something that required agreement on the part of the person being kissed. It does not quite tell us that kissing (on a bed) would be regarded as a trespass, and so actionable at common law, but perhaps it hints at this.

Picturing an absence

It may perhaps seem unsurprising that the medieval common law would only rarely demonstrate a concern with wrongful sexual touching other than rape. After all, its commitment to the prosecution and conviction of rapists seems rather questionable. Nevertheless, it is interesting to note that earlier legal systems, including some of those within Britain, did at least declare that some sorts of touching should receive a legal response and were of concern to royal authorities. There are 'prescriptive' legal statements in pre-Conquest English law and in other neighboring legal systems.

The laws of Alfred the Great, who ruled the kingdom of Wessex from 871-899, included some 'improper touching' offences. Alfred's laws, like those of many other rulers in medieval Western Europe, took the form of a compensation tariff, and in the case of the 'improper touching' offences they specified the compensation to be paid by anyone who grabbed a woman by the breast (Oliver, 2019: 199). This provision is put in a section that also covers throwing a woman to the ground and rape, with the penalties increasing from five shillings for grabbing the breast of a woman of the ceorl class to twelve times that sum for raping her (Jurasinski & Oliver, 2021: 13, 62). As was common with this sort of tariff, the amount of compensation varied both with type of offence and also with social position of the victim.

The medieval Welsh laws, which had evolved from what was probably a tenth-century nucleus over the medieval period and survive to us in later medieval manuscripts (Watkin, 2012: c. 4), took a broadly similar form, setting out offences and compensation payments (specifically, this is payment for insult or shame: *sarhaed*), though it covered different types of misconduct in this area: kissing a woman against her will and groping her (the latter being reckoned to be worth three times as much compensation as the former). Again, the offences are set out in order of deemed seriousness, beginning with the kiss and ending with rape. Sexual harassment is thus defined on a pathway as if leading to rape, just as it was in some literary texts and the texts of canon lawyers (Brundage, 1987: 204; Payer, [1984] 2019: 302, 303).

It is interesting to note the variation in areas of the body highlighted in the different laws: the English example highlights the breast, the Welsh example suggests touching in the genital area. There is also something of a contrast in terms of conceptions of the offence. The laws of Alfred focus on violence, while the Welsh passage is concerned with lack of consent or with something being against the woman's will, and is in a more sexual register, a more shame-focused register. There is a long-established debate in current legal scholarship around sexual offences in relation to whether they are about sex or violence (Bourke, 2007). Clearly, different views on this reach back into the early medieval period.

Ideas of shame or insult (to the woman herself or to her husband or male kin) are regarded as being embedded in these compensation tariffs, whether or not the language of shame is used explicitly (Roberts, [2007] 2011: X31; Q 24, 255). To the modern observer, the idea of touching a woman as a wrong to her male kin is unpalatable, in that it seems to treat her as less than a full person in her own right. Nevertheless, it seems that in some codes it is the woman who is supposed to receive the compensation payment (this is the case with the Welsh laws mentioned above, and probably in the Old English laws. In addition, the focus on shame—even the shame of others—did at least serve to bring this conduct within the purview of the law and, crucially for those seeking to historicize sexual harassment, it means that concern with this sort of misconduct is visible to us).

The existence of these early laws undermines any possible argument that medieval western Europeans were untroubled by sexual touching that did not amount to rape, or that there was no idea that the law could be involved in punishment or compensation in these circumstances. These matters are, however, withdrawn from view in the common law of later medieval England. They are not of interest to *Glanvill*, *Bracton*, *Fleta,* and *Britton,* the great treatises of the twelfth and thirteenth century, and nor do they feature much in the surviving records of decided cases. It may be that, behind the bald, general, and monotonous allegations of trespass brought by a woman against a man, or by a husband and wife against a man, that appear in plea rolls from the thirteenth century onwards, lay sets of facts including sexual touching. It is, unfortunately, impossible to know whether this is so or whether there really was no way of bringing a

prosecution or action in the normal course of common law proceedings for improper sexual touching not connected with a rape.

Pressure

More evident in later medieval common law than intervention with regard to improper touching is a degree of concern with misconduct amounting to pressure to influence somebody to submit to marriage (marriage, of course, implying sex without the possibility of refusal). There were, from the thirteenth century, statutory offences focused on physical removal of heirs, heiresses, and wives, and from the fifteenth century, further laws to penalize abduction leading to forced marriage (Seabourne, 2011: c. 4). Three different legal problems were raised by the possibility of forced marriage. The first issue was the integrity and validity of marriage itself; a concern for both church and secular law. The second problem concerned property: heiresses or wealthy widows might be 'stolen' and married off, and given the power that a husband was accorded in the land and goods of his wife, this would affect the holding of land to the detriment of the woman and her family. The third problem was one created by the common law itself: because of the construction of marital relations in common law, a woman was unable to sue her husband. Thus, if a man succeeded in marrying a woman after abducting her, she could take no action for his sexual mistreatment of her before or after that point. We can see this last difficulty in a case from 1321 in which a woman, Isabella, widow of William de Bernard, wanted to prosecute a man called Walter de Manston for theft of her property and for rape, but was thwarted when it was proved that she was married to Walter[3]. She alleged forcible abduction, but because their marriage had been certified by the ecclesiastical authorities Walter was safe: a husband could not be found to have raped his wife.

Outside the domain of forced marriage, evidence for pressure to engage in sex is sparser, but there are tantalizing traces of what people thought the law was, and what it could do. Such a trace can be seen in a case on employment law from the later fourteenth century. Following the

[3] TNA KB 27/244 Rex m. 5d.

Black Death, legislation was enacted in England to regulate wages and employment in the interests of employers: the Ordinance of Labourers 1349 and the Statute of Labourers 1351. Those servants who left their masters' service contrary to the rules set out in the legislation would be penalized. The suspicion was that, in the sellers' market that had been created by a decline in the population available for work, employees would leave those to whom they were contracted seeking higher wages. It was enacted, therefore, that they were not to leave employment without a legitimate cause. Those alleged to have done so, and other employers accused of enticing them away, could be sued in the courts of common law. A case in this area worthy of attention is in the Common Pleas plea roll for Michaelmas term 1363: *Thomas de Queldale v William de Ramkill and Elena de Hustwayt* (1363)[4]. This case was brought by the former employer of Elena de Hustwayt against Elena and a chaplain, William de Ramkill. Thomas claimed that Elena was his servant, employed under a contract for one year, but left his employ before that time was up without permission and without reasonable cause, and was thus guilty of an offence under the Ordinance of Labourers. William was accused of having committed another offence against the same legislation by hiring Elena while she was under contract to another employer. Unusually, rather than denying having been employed by Thomas on the terms he had stated, Elena argued that she had had reasonable cause to leave. Thomas, who was, she stated, 'a married man', had often pestered her for sex (*frequenter solicitavit ipsam ad cognoscend' ipsam carnaliter contra voluntatem suam*).

Thomas denied that Elena had left for this reason, and managed to convince a jury that she had left without cause, and that the pestering had not happened. Elena's defense failed, and she and William were held both to have damaged Thomas and also to have acted in contempt of the king (because of the breach of royal legislation). It is not very surprising that this was the outcome; juries, made up of local men of some property, were not at all inclined to find in favor of employees in these cases. It is, however, unexpected to see this indication of pestering, which

4 TNA, Kew, London CP 40/416 (Common Pleas, plea rolls) m. 128d.

apparently did not involve rape or attempted rape, being acknowledged to be a possible 'reasonable cause' for a female servant to leave her position, and which could absolve her from liability under the Ordinance and Statute of Labourers.

One other instructive 'pressure' case appears in a plea roll of the King's Bench[5] from 1371. The wrong alleged here is the use of sexual harassment as pressure for financial gain (at least in part). The entry tells us that indictments from part of Lincolnshire brought before royal justices various accusations against a man called Robert Gaskell of Wold Newton. His alleged misdeeds covered the period from 1364 onwards, including a homicide, thefts, and menaces. In addition, it was stated that Joan Fettys of Bondeby had come to Glanford Brigg on legal business with an ecclesiastical court on October 3, 1368, and Robert somehow got her into his room. Joan was said to have 'known nothing bad against' Robert (though by this point, according to the list of allegations, he had committed a number of offences). When Robert had her in his room, he said he should have her as his concubine. Joan, however, was unwilling: according to the record she said that with God's help this would not happen. Moving from something looking like sexual harassment to something rather more like extortion, Robert then would not allow her to leave the room until she paid him off with money and personal property. Eventually, Robert was acquitted: a royal pardon was involved in relation to the homicide and he was found not guilty of the other offences. This, then, is another not entirely satisfactory piece of evidence, but we must endeavor to use such evidence as has been left to us. The record does at least show that those involved in composing the indictment against Robert thought that the law might or should act here. Logically, they must also have thought that the misconduct they outlined amounted to unacceptable treatment of Joan. It was seen as something that strengthened their other accusations of Robert. Although it did not succeed in the sense of leading to a finding of guilt, and although none of this shows a strong desire on the part of those in charge of setting the rules to be

5 TNA KB 27/443 m. 34.

active in seeking out and punishing sexual harassment, it does show that this was not thought out of the question.

Concluding thoughts

The picture of legal responses to conduct we would regard as sexual harassment emerging from the records of later medieval common law is a fragmented one. It is certainly worth noting that we do see, even in these (elite, man-made) records, traces of concern regarding sexual harassment of women, and occasional action. We have seen the Welsh laws and the laws of Alfred expressing concern at unwanted touching, and we have seen individuals and communities trying to raise complaints about unwanted touching or sexual pressure in later medieval cases. There is enough evidence to ensure that the present cannot congratulate itself by drawing a straight line of progress from medieval brutality and lack of concern about the issue of sexual harassment to greater understanding and legal intervention (at least in theory) in more modern eras.

As well as providing these rare traces of concern and action, legal records may well also serve to keep from us additional instances that did in fact deal with relevant, sexually charged allegations, since cases that originally involved such allegations may appear, in the terse and formulaic phrases of the record, to focus on another sort of misconduct. In this way, law itself has been one of the structures that has made it more difficult to see this sort of misbehavior. Unwanted touching and inducement or pressure to enter into sexual relationships may be masked by certain aspects of legal procedure, and scattered between different jurisdictions, different forms of action. The common law has never, in fact, developed a single remedy for sexual harassment, and remains to some extent fragmented and 'multi-centered', with aspects of this misconduct covered by crime, tort, and employment law. This long-term legal fragmentation and concealment might be thought to bear some similarity in effect to a frequent strategy of modern abusers: isolating and muffling the voices of victims/survivors (Frawley-O'Dea & Goldner, 2007).

In general, legal historians have not felt inclined to put the pieces together to reconstruct what we can of the picture. This is probably at least partly explicable by a general lack of interest in the history of

crime, and of women, among 'classical' legal historians, (Seabourne, 2021: Introduction), as well as by the difficulty of uncovering the rare examples of relevant material within the vast corpus of remaining records. There is, however, clearly a need for greater effort to seek out, find, and amplify these barely audible signals from the past, rather than allowing their continued silencing.

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ÉCRIRE L'HISTOIRE DU HARCÈLEMENT SEXUEL

LES MOTS POUR LE DIRE

Depuis 2017 et l'affaire Weinstein, la parole des femmes semble se libérer devant les violences qu'elles subissent. Pour bien comprendre la singularité de l'ère post-Weinstein, il apparaît nécessaire de considérer le harcèlement sexuel comme un phénomène historique ayant connu des occurrences antérieures à la post-modernité. Telle est la dynamique générale du projet AVISA dans lequel s'inscrit ce premier ouvrage, partant du constat que l'histoire du harcèlement sexuel reste à écrire.

Car si le terme même semble surtout mis en lumière depuis la fin du XX^{e} siècle, au gré des lois s'adaptant peu à peu aux évolutions apparentes de la société, certains comportements tels que des contacts physiques non consentis ou des comportements verbaux à caractère sexuel ne sont pas nouveaux et se retrouvent dans de nombreux documents. Comment rendre compte du « harcèlement sexuel », qui n'est d'ailleurs pas tout à fait la même chose que le droit de cuissage, quand il n'existe pas de terme usité à l'époque étudiée pour le nommer, sans risquer de tomber dans une forme d'anachronisme ?

Pour répondre à cette question, ces actes comportent des contributions de disciplines différentes (histoire, littérature, sociologie, études cinématographiques…) exploitant une diversité de sources (archives, nouvelles, manuels, procès, films…), de périodes (du XIV^{e} au XXI^{e} siècle) et de zones géographiques (France, Italie, Angleterre, États-Unis…). Cette approche comparatiste met à jour des schémas récurrents, que ce soit dans les relations de genre et de classe, dans les conséquences pour les victimes, dans les stratégies des femmes face à ce type d'agissement ainsi que dans celles de leurs auteurs. Les contributions se répondent, se croisent et s'enrichissent pour mieux cerner les contours de cette histoire. Voir comment le harcèlement sexuel est représenté et évoqué avant Weinstein permet de mieux comprendre la nature et les mécanismes d'une expression de la domination masculine à travers les siècles.

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