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Sex Discrimination in Life and Law

Diane P. Wood†

The law of sex discrimination is hardly an innovation of the last decade of the 20th century. Depending on how broadly we define it, it began in the mid-19th century with the efforts of the pioneer women’s rights advocates, or in 1920, when the Nineteenth Amendment to the U.S. Constitution (guaranteeing women the right to vote) took effect, or in 1964, with the enactment of the Civil Rights Act.1 In that light, perhaps the most amazing thing about this area of the law is how poorly understood it remains after so many years of development.

Nonetheless, poorly understood it is. There is much that people fail to understand at the most basic level. This lack of comprehension in turn has subtle effects on the current development of the law in the courts. Paradoxically, it has led to an odd form of “progress”: the further we go, the more unclear some of the core concepts have become. This is so despite the fact that after all the theory is written and the talking stops, real people have continually tested the law in real litigation. That litigation, as we all know, reached the Supreme Court during October Term 1997 in four pivotal cases: Faragher v City of Boca Raton,2 Burlington Industries v Ellerth,3 Gebser v Lago Vista Independent School District,4 and Oncale v Sundowner Offshore Services, Inc.5 More

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2 118 S Ct 2275 (1998) (holding employers vicariously liable for the actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee and setting forth an affirmative defense if no tangible employment action is taken).

3 118 S Ct 2257 (1998) (holding that agency principles govern sexual harassment claims, regardless of whether the discrimination stems from a quid pro quo or a hostile environment claim).

4 118 S Ct 1989 (1998) (holding that agency principles govern sexual harassment claims, regardless of whether the discrimination stems from a quid pro quo or a hostile environment claim).
Supreme Court attention is on the way, in *Davis v Monroe County Board of Education*, which raises the question whether a school district will be liable in a private action under Title IX for student-to-student acts of sexual harassment.

It is worth asking how much we have learned, how much we must now unlearn, and how much remains to be considered, in the wake of those cases and other relatively recent pronouncements from the Court that affect the law of sex discrimination. (I am thinking, for example, of cases like *United States v Virginia*, better known as the VMI case, and *J.E.B. v Alabama*, which extended the rule in *Batson v Kentucky* prohibiting racially discriminatory peremptory challenges to prospective jurors to peremptory challenges infected by sex discrimination.) By way of introduction to this Symposium, this paper takes as its starting point the experiential world and moves from there to the legal world—in a sense, proceeding from the general to the particular. The real-world experience of discrimination ultimately must be translated into legal categories, and I will consider how successfully that has been done. I then turn to more specific doctrinal issues. From every vantage point, we will see that there is still a great deal of work to be done—a point that I am certain will relieve the participants in tomorrow's panels, since there is no need for them to shred their papers, pack up, and go home.

I. EXPERIENCING SEX DISCRIMINATION

In *My Fair Lady*, the Lerner & Lowe Broadway play based on George Bernard Shaw's *Pygmalion* (loosely inspired in turn by the Greek myth about the eponymous character), Henry Higgins has a wonderful song—almost rapped, if we think of his style and use an anachronistic term—in which he asks "Why

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6 523 US 75 (1998) (holding that Title VII does not bar same-sex sexual harassment claims).
7 *Davis* was decided after this speech was given. See 119 S Ct 1661 (1999). The Court held that a private damages action may lie under Title IX for student-on-student harassment where the funding recipient acts with deliberate indifference and the harassment is so severe that it effectively deprives the victim of access to the educational opportunity or benefit.
8 120 F3d 1390 (11th Cir 1997) (en banc), revd, 119 S Ct 1661 (1999).
9 *Davis* was decided after this speech was given. See 119 S Ct 1661 (1999). The Court held that a private damages action may lie under Title IX for student-on-student harassment where the funding recipient acts with deliberate indifference and the harassment is so severe that it effectively deprives the victim of access to the educational opportunity or benefit.
12 Bernard Shaw, *Androcles and the Lion, Overruled, Pygmalion* (Brentano's 1916).
Can’t a Woman Be More Like a Man?" (Higgins sings the song just after Eliza Doolittle has walked out on him, angry with his selfish failure to acknowledge her hard work in her language studies and her pivotal role in winning his bet for him.) Utterly befuddled about the inner workings of a woman’s mind, Higgins laments, “Straightening up their hair is all they ever do. Why don’t they straighten up the mess that’s inside?” He compares women’s behavior quite unfavorably first to that of all men in general and then to that of his friend Colonel Pickering; he concludes the song with a flourish by asking, “Why can’t a woman be more like ME?” On a similar note, it has now become fashionable for industry behavior experts and students of male-female relationships to observe that women and men essentially speak different languages. From this fact, they argue, workplace misunderstandings arise, women (assumed to be subordinate) see their accomplishments undervalued and their management skills overlooked by their presumptively male superiors, and the glass ceiling remains firmly in place. Companies fear liability for sexual harassment based on “mere” misunderstandings; they criticize the only alternative they see: a rigid, humorless, and unfriendly environment in which no one dares even to crack a smile directed toward a person of the opposite sex — or for that matter the same sex — as both too grim and too unenforceable to tolerate.

Why is this? Surely the people who have been working for years to eliminate sex discrimination — a century and a half, or a generation and a half, depending on where you want to enter the story — have not been pursuing a single-minded goal to eliminate all friendly interaction between men and women. I personally do not know any women who feel offended by a kind gesture if — and here is an important caveat — it is intended as nothing more than a courtesy and both parties understand clearly that there is no hidden agenda. No, our first problem is that the terms of the sex discrimination debate still reflect to an alarming degree the failure to communicate and the insistence on a male perspective so aptly and humorously illustrated by our friend Henry Higgins. (We see a reflection of this issue in the debate over the appropriate perspective for workplace discrimination actions: should it be the reasonable “person,” the reasonable “woman,” or the reason-
able "victim"? Surely not the reasonable "man," no matter what people who still think of the word "man" as generic for "human" might say.)

The dominant model, I suggest, is still subconsciously based upon the supposition that women should be more like men. Even more regrettably, many women set exactly this task for themselves: "I, too, can be a 'rat' at VMI; I, too, can work ten hours a day even though I'm pregnant and the men aren't; I, too, can intimidate opposing counsel with the best of them." Furthermore, accounts of discrimination offered by women are too often implicitly measured by a male standard. The befuddlement those accused of discrimination often express is genuine in a substantial number of cases. (I hasten to add that there is no reason to believe every tale of discrimination either: whether we are talking about sex discrimination, or discrimination based on other protected characteristics such as race, national origin, age, disability, or religion, any judge or experienced litigator will confirm the fact that disappointed people regularly blame a well deserved fate on their membership in some group, instead of taking personal responsibility where they should.)

But all cases begin with a story: a story told by the potential plaintiff about something that happened to her that she believes may have violated her legal rights. Who hears those stories? Who believes them? What difference does it make if someone thinks they are plausible or not? On what will the listener draw in making that crucial initial determination? And most importantly of all, which stories reveal the existence of something we should recognize as sex discrimination, and which do not?

First, consider the law against which any responsible lawyer will measure the plaintiff's story. No matter how many women we now have in state legislatures and the Congress, and no matter how many women now sit on the state and federal benches, we would all agree that gains in this area have been recent. (I was the second woman appointed to the Seventh Circuit, and my dear friend Ilana Rovner, the first one, joined the court only in 1992 — hardly ancient history.) Law, as we all know, is a conservative discipline, at least outside of the law schools. The United States follows a quasi-common law approach to the development and application of even statutory law, by which I mean that case law plays an important role in giving content to broad statutory declarations and (to a lesser degree because of Chevron
deference) to regulatory regimes. At the constitutional level, of course, case law emanating ultimately from the Supreme Court is almost the whole ball game.

Who created that law, which I remind you must be followed under principles of stare decisis? In a word, men. Now you well might ask — indeed, you have an obligation to ask — why that should make any difference. I, at least, have nothing whatsoever against men — some of my best friends are men, as the saying goes, and I have spent the entirety of my legal career working with men, many of whom have been brilliant lawyers, sensitive individuals, and committed soldiers in the battle against discrimination of every stripe. But there is still an experiential gap between the finest man and the average woman when it comes to sex discrimination. This gap has a profound effect on the lawyer's initial evaluation of our plaintiff's account of suspected discrimination. It also has an impact on a trial judge's assessment of a record, when a discrimination case reaches the summary judgment stage. At that point, the judge needs to decide whether the plaintiff has presented any "genuine issue as to any material fact" that would justify a trial. Invariably in discrimination cases a crucial part of the plaintiff's evidence will be her own affidavit, setting forth whatever it was that she believes was discriminatory or harassing. Even though we all know that judges are not supposed to make credibility determinations at that stage, the judge is free to decide questions like whether the conduct about which the plaintiff complained was severe and pervasive harassment or merely an "isolated incident," whether subtle differences in treatment between the plaintiff and co-workers or others "rose to the level" of discrimination, or whether the plaintiff has even identified a category associated enough with sex to come under the protection of the laws banning sex discrimination.

Over the last fifteen years or so, we have seen an interactive process through which the victims of sex discrimination have become more willing to tell their stories in their own words, from their own point of view. Slowly but surely, they are resisting the urge to conform their actions in the workplace, the school, or the family, to the old socially constructed norms. They are complaining about actions that genuinely hurt them, or are genuinely offensive, even if they were raised to "grin and bear it," or as one

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17 FRCP 56(c).
federal judge put it, to “wriggle past” someone who annoyingly persists in groping. There is a good reason why a woman doesn’t want to be “more like a man,” and I’m not talking only of our Gallic friends’ zest for la difference. Lawyers and courts have begun to hear about discrimination problems from the victim’s viewpoint, whether that victim be female, male, gay, or multi-categorical. One result of this is that this subset of discrimination is starting to become more visible to the world at large. You might think I have just referred to a euphemism for the male world, but that is not what I meant. As books ranging from Betty Friedan’s The Feminine Mystique to Simone de Beauvoir’s The Second Sex illustrate poignantly, women too were unaware that their individual experiences were part of a much larger picture. It has only been gradually, as victims of sex discrimination began to realize the nature of the phenomenon and their right to insist on its abolition, that courts have had to confront their stories within a recognized legal framework.

That’s the good news. The bad news is that many of these stories are still falling on deaf, or partially deaf, ears. Many in our society, including some judges, do not yet have as firm an intuitive grasp of sex discrimination as they do of other forms of discrimination. Consider the random person’s instant reaction to race discrimination or religious discrimination with the same person’s reaction to sex discrimination: that person will perceive an obvious case of race discrimination, but she may miss just as obvious a case of sex discrimination. Take the infamous letter Congressman Passman wrote to Shirley Davis, which saw the light of day in the Supreme Court’s decision in Davis v Passman. In that letter, you will recall, the Congressman frankly told Davis that he was not going to consider her for the position of deputy administrative assistant in his office, because, as he put it, “I concluded that it was essential that the understudy to my Administrative Assistant be a man.” We are talking about a letter written in July of 1974 — a time I certainly can remember, since I had by then finished two years of law school. People would have been flabbergasted at that late date if the Congressman had casually told a job applicant that it was “essential” that the applicant be White, or Protestant. Even the most

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18 See Hennessy v Penril Datacom Networks, Inc, 69 F3d 1344, 1353 (7th Cir 1995).
20 Simone de Beauvoir, The Second Sex (Knopf 1957) (H.M. Parshley, ed and trans).
22 Id at 230 n 3.
benighted amongst us realized by then that such preferences were inappropriate and had to be kept under wraps. (That obviously led and leads to a different set of problems, but my point here is about basic awareness that sex discrimination exists and is wrong.) Even today, it often brings people up short if one asks them to substitute the word "race" in a statement about sex. As other speakers will explore in greater detail, the new challenge is to decide which model of non-discrimination or equality — two potentially different things — one wants for sex, and whether the Constitution and statutes demand the same treatment for sex as they require for race. (I put to one side for the moment the specific Title VII notion of a "bona fide occupational qualification" ("BFOQ"), which can justify a policy that draws explicit lines based on sex, and assume for the moment that we are considering something that would not qualify as a BFOQ.)

Before we have any idea what kinds of laws we want or how those laws should be administered, we should know as much as possible about the problem the law should be addressing. In the case of sex discrimination, that has been more difficult than you might imagine. Even to brand certain behavior as discriminatory, as opposed to simply reflective of the differences between the sexes, is a major step, and one about which debate continues to rage both at a general level and with respect to countless particulars. So, having laid that problem at the feet of our Symposium speakers, I will move on to my next topic: What are the relevant legal categories, and have we achieved any degree of consensus about their meaning?

II. LITIGATING SEX DISCRIMINATION

Here, too, we find more confusion than clarity. At this moment, I could not even tell you with any confidence what "sex" is, when it comes to applying the laws that concern sex discrimination. There are a number of competing definitions for the legal meaning of "sex" in these laws. A few examples suffice to make the point.

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24 And if it seems jarring to think that legal "sex" might be different from ordinary sex, it is worth recalling that these kinds of anomalies are not restricted to the law of discrimination. In the area governing worker benefits to former coal miners suffering from Black Lung disease, for example, administrative agencies and courts draw a distinction between medical pneumoconiosis and "legal" pneumoconiosis, with the latter encompassing a significantly broader group of ailments than the former, for a variety of social policy
"Sex" might refer only to the observable physical characteristics that divide up the world into two genders, biological anomalies such as hermaphroditism to one side. Or the idea of sex might carry with it the associated behaviors that society expects from persons of each gender, including our concepts of masculinity and femininity. Or "sex" may include an idea of sexuality, such that an issue concerning sex discrimination does not arise unless some kind of libidinous behavior is occurring. Although some statutes draw a line between "sex" and "sexual orientation," it is probable that they do so because courts have not traditionally understood the term "sex" to encompass issues relating to sexual orientation. Yet it is easy to see how the two ideas are at least closely related, if not overlapping or coincident.

This is not the only area of discrimination law in which membership in a protected group is not always obvious. While the scope of certain protected categories, such as race, national origin, and religion, is normally clear, and (evidentiary problems to one side) it should be easy enough to determine whether someone is in the age group protected by the Age Discrimination in Employment Act\(^\text{26}\) (which kicks in at a sprightly 40 years old), the same is emphatically not true of the newer Americans with Disabilities Act ("ADA").\(^\text{26}\) What a disability is, who is disabled, and how disabled the person is, are questions that arise in nearly every case.\(^\text{27}\) The category "sex" falls somewhere between the still-unsettled idea of "disabled" and the more well established categories of race and religion. It is possible, interestingly enough, that we may be moving away from certainty rather than toward it in the area of race, as people begin to question the old assumptions about how people of racially mixed heritage should be classified. Lack of a clear vision about the scope of the category leads to questions like the following, all of which I have heard posed: (1) Can a man who has an entirely female workforce — perhaps

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\(\text{reasons. See Doris Coal v Director, OWCP, 938 F2d 492 (4th Cir 1991); Hobbs v Clinchfield Coal Co, 917 F2d 790, 791 n 1 (4th Cir 1990).}\)

\(\text{26} 29 \text{ USC §§ 621–34 (1994 & Supp 1996).}\)

\(\text{27} 42 \text{ USC §§ 12101–213 (1994).}\)

\(\text{28} \text{ The Supreme Court throw some light on those questions in the trio of cases it decided in October Term 1998: Murphy v United Parcel Service, 119 S Ct 2133 (1999) (holding that whether a person is disabled for purposes of the Act must be determined with reference to mitigating measures, and holding that being regarded as disabled from performing a single job is not enough to satisfy the statute); Sutton v United Airlines, Inc, 119 S Ct 2139 (1999) (holding that corrective and mitigating measures should be considered in deciding whether someone is disabled under the ADA); and Albertson's, Inc v Kirklingburg, 119 S Ct 2162 (1999) (holding that monocular vision did not automatically "substantially limit" an individual's major life activities).}\)
some kind of clothing assembly plant — be guilty of discriminating on the basis of sex when he promotes one individual over another? (2) What if the owner of the plant is a woman? Does it make any sense to allow a claim of sex discrimination to proceed against her? (3) Do gays and lesbians suffer from de jure sex discrimination when they are told that they may not marry, solely because of their sex? And if not, why not? (4) Does the "equal opportunity" discriminator, who viciously harasses men and women alike in the workplace, but whose methods involve sexual themes (for example, groping the women, exposing himself, etc., and threatening homosexual rape of the men), violate the law?

Whatever lack of clarity there is in the term "sex" when we think of proscriptions against sex discrimination, it is nothing in comparison to the confusion that abounds with respect to the notion of "discrimination" in this area. Is "discrimination" just the flip side of equality, or does an anti-discrimination principle evoke something different from the norm of equal treatment? Is equality itself the same thing as equal treatment, or does it mean more? In one fashion or another, most of the participants in this Symposium will touch on this question. Even if we think we know what discrimination means, at what point do we measure its incidence? Right now, when a claim of discrimination is made, it is made against a particular party — an employer, a university, a state actor — and we hold that party responsible only for any discriminatory behavior in which it has engaged. If it refused to hire someone because she lacked the necessary qualifications, we do not ask why she lacked those qualifications, and we do not blame the employer for failings in the education system or discriminatory decisions of earlier employers. Indeed, as Personnel Administrator of Massachusetts v. Feeney38 demonstrated, qualifications that everyone knows will inevitably exclude most female job applicants are nevertheless legal under constitutional standards, even if the reason that they have such a severe exclusionary effect stems from discrimination or unequal treatment of women.

While I can readily see the problems with the kind of "tunnel vision" approach to discrimination claims I have just described, and I recognize that this kind of "take your woman as you find her" attitude may leave many forms of discriminatory treatment unredressed, I fear that a host of different problems would attend

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38 442 US 256, 259, 275, 281 (1979) (upholding a Massachusetts veterans preference statute that "operates overwhelmingly to the advantage of males" because the statute was not "a pretext for preferring men over women" and did not "in any way reflect[] a purpose to discriminate on the basis of sex").
any different system. I do not mean to make a frivolous analogy here, but the picture that comes to my mind when I consider a system that holds present actors liable for the consequences of discrimination, no matter when they occurred, is of a Title VII equivalent to the Comprehensive Environmental Response, Compensation, and Liability Act, better known as CERCLA. As those of you with an interest in environmental law will know, CERCLA uses an exceptionally broad notion of "potentially responsible parties," or "PRPs." Not only is the present owner of a contaminated facility responsible for cleaning it up, whether that person so much as spilled a cup of coffee on the ground, but prior owners whose activities led to the problem, people who arranged for shipments to the property, and a host of others can also be held responsible. The statute then permits the parties to shift responsibility among themselves by means of contribution actions. In that way, the hypothetical innocent landowner to which I just referred should not be left holding the bag, while the guilty party (who may have been operating as long ago as a century earlier) goes free.

Playing the devil's advocate for a moment, I suppose one could say that human beings are at least as important as parcels of land, and that anyone who contributed to their devaluation by means of discriminatory action should be required to participate in the "remediation," to use another jargonish word borrowed from CERCLA. But I would not favor such a system, even though I deplore the social and personal cost that discrimination inflicts upon its victims. The sources of discrimination and devaluation of women run so deep into society's fabric that the threshold problem of identifying scapegoats is practically insurmountable. At least under CERCLA we know which questions to ask, and we can do our best to find accurate answers. Who owned the land? Did they pollute it somehow? When? Not so for sex discrimination. Schools, churches, parents limited by their own vision of the role of women, peers, and the mass media all appear to play some role in shaping our daughters' self-images. I will never forget listening to a conversation at a birthday party for one of my daughters when she was about eight years old. The topic was the importance of college, and one little girl solemnly announced to the table that girls had to go to college to find a husband.

31 42 USC § 9604 (1994).
ANATHEMA! I thought. I am happy to say that neither one of my daughters seems to have any use for that school of thought today, now that one is a freshman in college and the other a freshman in high school, but it shows how utterly impossible it would be to try to root out with the tools of the legal system, using a litigation model, every contributor to the disadvantages a woman experiences in adult life. Far more productive, I believe, are the efforts to think about the way sex discrimination manifests itself in the educational community, and the creative experiments that are designed to overcome its effects.

Even if we abandon thoughts of trying to stretch the concept of discrimination to reach those subtle disadvantages women face in the workplace, such as lack of qualifications, allegedly ineffective methods of communicating with co-workers, and the like, problems still arise when we try to think of how “equal” treatment should be assured for situations that at a common sense level appear to be unequal. Pregnancy discrimination is the example that comes most readily to mind. As we know, Congress decided to require that pregnancy be treated exactly the same as all other temporary medical conditions when it passed the Pregnancy Discrimination Act (“PDA”) in 1978. About ten years later, the Supreme Court had to decide whether the PDA actually prohibited more favorable treatment of pregnant women than other temporarily disabled employees, when state law singled out pregnancy for special consideration. In California Federal Savings & Loan Association v Guerra, the Court concluded that the PDA had no such preemptive effect. I do not want at this juncture to wade into the debate about affirmative action, but it seems to me that if pregnancy is really just like a broken leg, and if only women can get pregnant, then there were elements in Guerra suggesting that the concept of sex discrimination was not so rigid as to prohibit all distinctions based on sex, or favorable treatment for one sex or another when conditions warranted. I would also like to put to rest once and for all the notion expressed in the Supreme Court’s decisions in Geduldig v Aiello and General Elec-
tric Co v Gilbert, that a distinction based on pregnancy is not "sex-based." As it happened, I was in the courtroom the day the Court handed down Gilbert. Then-Justice Rehnquist, the author of the opinion, announced it from the bench and, as was customary, gave a brief summary of the holding. When he got to the part about pregnancy distinctions not being "sex-based," a spontaneous guffaw spread through the marble courtroom. Whatever else one might want to say about insurance plans, actuarial tables, observable differences between men as a group and women as a group, and so on, it is indeed laughable to think that a classification system based on pregnancy is not at the most fundamental level a sex-based system. (Interestingly, years later in UAW v Johnson Controls, Inc, the Court found a paternalistic rule forbidding pregnant or fertile women to work in a dangerous facility incompatible with Title VII. Since even the company agreed that not all women are fertile, this holding seems clearly to give the Geduldig notion a well deserved burial.)

If the two core concepts in the law about sex discrimination are unclear — what is sex, and at least for purposes of sex, what is discrimination — where does that leave us? It leaves us, in a word, with the traditional concepts with which a precedential legal system is comfortable. The Supreme Court's decisions in October Term 1997 illustrate both how incremental change occurs in such a system, and how much thinking remains to be done. Let us turn, therefore, to a brief look at the 1997 Quartet: Faragher v City of Boca Raton, Burlington Industries v Ellerth, Oncale v Sundowner Offshore Services, Inc, and Gebser v Lago Vista Independent School District.

III. APPLYING CURRENT SEX DISCRIMINATION LAW

It is no accident that all of these cases dealt in one way or another with one of the cutting edge issues in the law of sex discrimination, namely, sexual harassment. I doubt the Court would have needed to grant certiorari in a case where an employer literally or figuratively hung out a sign saying "women need not
apply," or "young mothers not welcome." Even though United States v Virginia concerned the constitutional dimension of this kind of behavior, the message the Court sent there was unmistakable: apart from the narrow, EEOC-sanctioned distinctions that permit insistence on a woman for a wet nurse or a man for a sperm donor, forget explicit classifications based on sex that will not qualify as a BFOQ under the narrow strictures established in Dothard v Rawlinson. So what the Court found worthy of its attention was the vexing subset of sex discrimination known as sexual harassment: vexing because the lower courts were struggling with the legal rules governing it; vexing because of the complex social issues it implicates; and vexing because the perennial question whether a plaintiff has presented enough evidence to survive summary judgment is especially difficult in these cases.

Anyone who wonders what issues might have been churning around in the lower courts before the Supreme Court spoke has only to look at the 203-page tome produced by the judges of the Seventh Circuit en banc in Burlington Industries v Ellerth to get a good idea. Recall that Ellerth and Faragher v City of Boca Raton both were limited to the problem of sexual harassment on the part of a supervisor against a subordinate employee. It is interesting to speculate about the effect of the Supreme Court's decisions on the related problems of co-worker harassment and harassment by customers or third-party business associates, but for now we can restrict ourselves to the supervisory harassment scenario before the Court. Among the issues debated by the Seventh Circuit were the following fundamental questions, not all of which were answered clearly by the Supreme Court's opinions: Should there be a difference, for purposes of "employer" liability for the acts of a supervisor, between so-called quid pro quo harassment and so-called hostile environment harassment — a distinction first suggested in Catharine MacKinnon's pathbreaking book two decades earlier, and which by the mid-1990s had taken on near-talismanic importance? Given the fact that the courts

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46 118 S Ct at 2280.
47 118 S Ct at 2262.
had already resolved the question whether the supervisor himself could be found liable under Title VII, and that the answer to that question was no, another question was under what principles of law would one hold the ultimate employer responsible for the supervisor's misdeeds? The Supreme Court had pointed the lower courts to the law of agency in Meritor Savings Bank, FSB v Vinson, but it had not specified whether it meant a federal common law of agency or a borrowing of state agency principles, nor had it revealed whether a deed like sexual harassment might nevertheless fall within the scope of someone's employment, by analogy to the driver of a delivery truck who has a crash and is still considered to be acting within the scope of his employment notwithstanding the employer's obvious disapproval of his reckless driving. Yet another question was whether a victim of sexual harassment could recover only if she could point to a "tangible job detriment" that resulted from her mistreatment, and a subsidiary question was what might count as a tangible job detriment. Procedural issues abounded as well, including the important question whether a person complaining of sexual harassment had to pigeonhole her complaint into the "quid pro quo" or "hostile environment" categories from the EEOC on forward, or if it was enough simply to set forth the facts forming the basis of her complaint and leave refinement of legal theory to a later stage. Some judges wondered why these categories should drive legal analysis under a statute that bans sex discrimination, rather than mistreatment on account of sex. And, looking at the problem from the company's side, the court struggled with how great a legal responsibility a company has to monitor the behavior of its supervisors, with whether a company could inoculate itself against sex harassment liability if it had a policy forbidding such behavior, and with whether an employee should be barred from recovering anything if she failed to "mitigate her damages," or if failure to use a policy was relevant if at all only to the amount of

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477 US 57, 72 (1986) ("We do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define 'employer' to include any 'agent' of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.") (citation omitted).

41 See, for example, Jansen, 123 F3d at 555, 556 (1997) (opinion of Easterbrook); id at 567 (opinion of Diane P. Wood, joined by Easterbrook and Rovner); see also Ellerth, 118 S Ct at 2264 (1998) (seven members of the Supreme Court reiterating that the question in harassment cases is "whether the conduct in question constituted discrimination in the terms of conditions of employment in violation of Title VII").
damages she might recover. Many of the same issues were before the Eleventh Circuit in *Faragher*.

For me as a lower court judge, it was nothing short of fascinating to see how the Supreme Court handled *Ellerth* and *Faragher*. To begin with, I was quite surprised that the Court decided to grant certiorari in *Ellerth*, because at that time it already had *Faragher* on its docket, and it had been my supposition that it would decide *Faragher* as it saw fit and remand *Ellerth* to our court if the need arose. But there was some clue to its decision in the fact that it limited the grant of certiorari in *Ellerth* to an apparently narrow question: whether an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer on a *quid pro quo* theory absent a showing of employer negligence or fault. One might have described *Faragher* the same way, in that the plaintiff there did not rest her case on the existence of a tangible job detriment apart from the indignity of having to suffer through her supervisor's crude and unwanted advances day in and day out. But *Faragher* reached the court as a fairly conventional hostile environment case, while *Ellerth* had aspects of both a *quid pro quo* theory and a hostile environment theory. The question on which the Court granted certiorari therefore signaled that it was going to consider how far one could go with a *quid pro quo* theory, when the "quo" was hard to identify.

As we all know, that is not quite what the Court ultimately did with the case. One way of answering the narrow question on which it granted certiorari was to jettison the distinction between *quid pro quo* cases and hostile environment cases altogether, and then answer the question. That is the step the Court took. It expressly stated that "[t]he terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility." It then went on to hold squarely that agency principles, created as a matter of federal law, governed the question of employer liability, and that the agency analysis would not vary depending on the type of discrimination suffered. Looking

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52 111 F3d 1530 (11th Cir 1997), revd, 118 S Ct 2275 (1998).
53 *Ellerth*, 118 S Ct at 2264.
54 Id.
55 Id.
56 Id at 2265.
for guidance to the Restatement (Second) of Agency law, the Court concluded that acts of sexual harassment by a supervisor fall within the narrow category of conduct outside the scope of employment where the principal, or employer, will nonetheless be liable, when the supervisor is aided in his misconduct by the agency relation. That will virtually always be the case when the supervisor takes a tangible employment action against the subordinate, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." In these situations, the injury could not have been inflicted absent the agency relation, and the Court therefore found employer liability appropriate. Turning to the cases in which the employee cannot point to a job detriment that is so visible — the person whose life is made miserable from day to day, but who still gets her paychecks and raises on time, and whose assignments are not affected enough to matter — the Court exercised considerable creativity in crafting its new federal common law. Responding to the employer community's pleas about the importance of policies forbidding sexual harassment, and perhaps also concerned about creating a disincentive to adopt and enforce such policies, the Court turned away slightly from its focus on the way that the agency relationship facilitated the injury. Instead, it said that an employer would also be subject to vicarious liability when a supervisor creates a hostile environment, but that the employer could raise a new affirmative defense with two elements. It would have to show (1) that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and ([2]) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." This is the same approach, as Justice Ginsburg emphasized in her concurring opinion, that the Court took in Faragher.

What does all this mean? From what I read in the papers, it has created a virtual stampede by employers to consultants and lawyers ready and willing to write sexual harassment policies for them. Very few, if any, of these cases have even reached the dis-

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118 S Ct at 2267.
Id at 2268.
Id at 2269.
Id at 2270.
118 S Ct at 2270.
Id at 2271 (Ginsburg concurring).
strict courts yet, much less the courts of appeals, so there is not much else to report. The repetitive use of the word "reasonable" in the affirmative defense, however, may make it difficult for an employer to win summary judgment on this kind of claim, especially because the Court was clear that the employer has the burden of proof on the affirmative defense. Beyond this, we are still left with questions about how ghastly the environment has to be before a plaintiff can recover — and the Seventh Circuit at least has denied relief for some pretty awful situations\[^{63}\] — and about the impact of these decisions on co-employee cases, more conventional sex discrimination claims, and fields other than sex discrimination.\[^{64}\]

A different host of questions arises from the Court's decision in *Oncale v Sundowner Offshore Services, Inc*\[^{5}\]*, which recognized that "same sex" harassment was actionable under the statute.\[^{65}\] Borrowing a phrase from a 1977 Supreme Court decision about discrimination in grand juries, the Court reiterated that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of [their] group."\[^{66}\] So far, so good: it is now clear that Title VII does

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\[^{63}\] See, for example, *Koelsch v Beltone Electronics Corp*, 46 F3d 705, 708 (7th Cir 1995) (denying relief for such incidents as: (1) employee stroking of plaintiff's leg; (2) grabbing plaintiff's buttocks; and (3) company president telling plaintiff that he could not control himself in her presence, because "[i]solated and innocuous incidents do not support a finding of sexual harassment"); *Saxton v American Telephone and Telegraph Co*, 10 F3d 526, 534-36 (7th Cir 1993) (denying relief when harassment such as employee rubbing plaintiff's leg, attempting to kiss plaintiff, and lurching from behind bushes at plaintiff had stopped, and therefore did not constitute severe and pervasive harassment); *Reed v Shepard*, 939 F2d 484, 492 (7th Cir 1991) (denying relief for such incidents as: (1) employee handcuffing plaintiff to the drunk tank; (2) holding conversations with plaintiff about oral sex; (3) grabbing plaintiff's head and forcefully placing it in employee's lap; and (4) placing a cattle prod with an electrical shock between plaintiff's legs, because the "showing that she welcomed the activity is fatal to her claim, particularly where [plaintiff] admits that the 'harassment' did not adversely affect her ability to do her job"); *Dockter v Rudolf Wolff Futures, Inc*, 913 F2d 456, 460 (7th Cir 1990) (denying relief for such incidents as: (1) employee fondling plaintiff's breasts; (2) repeatedly asking plaintiff on date; (3) playing with plaintiff's hair; (4) locking himself in plaintiff's office while he stared at her; (5) asking plaintiff to sit on his lap; and (6) attempting to kiss her several times, because plaintiff did not prove an injury "which can be remedied under the equitable provisions of Title VII").


\[^{66}\] Id at 78 (first alteration in original), quoting *Castaneda v Partida*, 430 US 482, 499 (1977) (holding that the existence of a governing majority was not sufficient to rebut a
not have an implicit restriction allowing individuals to sue for sex discrimination only if the perpetrator is of the opposite sex, or worse, only if the perpetrator feels some sort of sexual attraction to the victim (a rule that held sway in circuits that recognized the claim only if the perpetrator was homosexual). But here, as in Ellerth and Faragher, it is easier to state what the Court ruled out than what it ruled in. In its effort to prevent Title VII from turning into a general “civility code” — a prospect the Court viewed with horror — it stressed that the plaintiff “must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimination’ . . . because of . . . sex.” The Court actually went so far in its opinion as to distinguish between the football coach’s friendly smack on a player’s buttocks and the same behavior directed toward his secretary back at the office. With touching confidence in the lower courts, the Court concluded with these remarks:

Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.\(^7\)

I hope so, but once again, for the short term this leaves litigants without much guidance. That is probably a state of affairs that slightly favors plaintiffs, because it will be difficult once again to dispose of cases on summary judgment for some time to come. In Oncale itself, and in a similar case the Seventh Circuit decided before Oncale,\(^7\) the behavior was so awful that no one could have mistaken it for “mere” roughhousing.\(^7\) Left open are the many questions to which I alluded earlier about what exactly we mean,

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\(^6\) Oncale, 523 US at 80.
\(^7\) Id (alteration in original).
\(^6\) Id at 82.
\(^7\) See Doe v City of Belleville, 119 F3d 563 (7th Cir 1997) (concluding that sexual harassment of a man by another man is actionable under Title VII and the evidence, viewed in the light most favorable to plaintiffs, permitted the inference of harassment based upon sex), vacated and remanded on other grounds, 118 S Ct 1183 (1998).
\(^7\) See Oncale, 523 US at 77 (supervisors “physically assaulted [plaintiff] in a sexual manner” and one supervisor “threatened him with rape”).
when we say someone has been discriminated against “on account of sex.” The Court appears to assume that help will come from a different part of the analysis, namely, how hostile or abusive the environment must be before it can be called discriminatory.

There is very little I can say about Gebser v Lago Vista Independent School District except to note that the result there, which was that Title IX recipients are not liable for the sexual harassment of a student by a teacher unless the “district” has “actual notice” of the harassment and is “deliberately indifferent” to the teacher’s misconduct, draws a sharp line between the private right of action available under Title VII as a matter of statutory language, and the implied private right of action under Title IX that the Court recognized in Cannon v University of Chicago in 1979. The Court will be taking another look at this area this term, in Davis v Monroe County Board of Education, albeit in the context of student-to-student harassment instead of teacher-to-student. Groups all over the country have organized to try to persuade Congress legislatively to overrule Gebser, pointing out the even greater vulnerability a school child has to the authority of a teacher than the vulnerability of a subordinate employee has to a supervisor. If, however, Gebser remains the law, it is my guess that student victims will look more aggressively to state law theories of recovery against both the teacher and the school district in question. In every other way, our society abhors such behavior, and it would be surprising not to see either a federal or a state response.

CONCLUSION

Neither society nor the legal system yet has a firm grasp on sex discrimination — what it is, how great its incidence is, whether it is serious enough to warrant severe penalties, and what should be done about it. This lack of awareness can best be addressed initially by working hard to communicate the reality of the experience discrimination victims feel both to society at large and more specifically to the courts. If judges believe — really believe — that they are dealing with a problem every bit as serious as other forms of discrimination, then they will do a better job of

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78 Id at 1993.
80 120 F3d 1390 (11th Cir 1997) (en banc), revd, 119 S Ct 1661 (1999).
81 See note 7.
weeding the meritorious cases from the losers. Once they are dealing with cases of arguable merit, the challenge passes to you, the academics, and to the bar, to bring more clarity to the content of the law. The fuzziness that we see at present is a symptom of widely diverging views even among those who strongly support anti-discrimination and equality principles. At some point, we will have to stop finessing things and decide how far we can go with the law of sex discrimination, and where we want to step back and allow other social institutions to resolve these issues. Even within the narrow legal realm, however, the Supreme Court’s 1997 Term has created almost infinite new employment for lawyers and judges, as we work to fill in the blanks the Court has left in our care. That task will go forward best if the courts can draw not only on tight analysis of the cases, but also on the broader thinking fostered in symposia like this one.