# Harassment and Capabilities: Discrimination and Liability in *Wetzel v Glen St. Andrew Living Community, LLC*

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## I. WHAT MARSHA WETZEL WAS UNABLE TO DO

Following the death of her long-term partner, Marsha Wetzel, openly lesbian, moved into Glen St. Andrew Living Community, a residential community for older adults.[1] Almost immediately she faced "a torrent of physical and verbal abuse" from the other residents, targeting her sexual orientation.[2] She complained repeatedly to management.[3] Instead of helping her, "the staff's response was to limit her use of facilities and build a case for her eviction."[4] The abuse she suffered was widespread and severe.[5] Verbal abuse was harsh and obscene, including terms such as "fucking dyke" and "fucking faggot."[6] One resident threatened to "rip [her] tits off."[7] There was also actual physical abuse. One resident rammed his walker into the motorized scooter Wetzel uses to get around, knocking her off a ramp.[8] Another "bashed her wheelchair into a dining table that Wetzel occupied, flipping the table on top of Wetzel."[9] In another incident, she was struck in the head and knocked off her scooter. People spat at her in the elevator.[10]

Wetzel routinely reported this abuse to St. Andrew, but they "were apathetic."[11] Not only that, but they also took "affirmative

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1 *Wetzel v Glen St. Andrew Living Community, LLC*, 901 F3d 856, 859 (7th Cir 2018).

2 Id.

3 Id.

4 Id.

5 The court at this stage (a motion to dismiss) accepted her account as true, recognizing that St. Andrew would have an opportunity to contest it at trial. See *Wetzel*, 901 F3d at 861.

6 Id at 860.

7 Id.

8 Id.

9 *Wetzel*, 901 F3d at 860.

10 Id.

11 Id.

steps to retaliate against Wetzel for her complaints."[12] They gave her a less favorable spot in the dining room. They halted her cleaning services. They barred her from the lobby except to get coffee. They accused her of smoking in her room; when she said she had been sleeping, one of them slapped her in the face. They began building a case for her eviction, and they did nothing to discipline the harassing tenants.[13]

Wetzel's Tenant's Agreement guaranteed access to common facilities, including a community room and a laundry room, and three meals daily served in a central location.[14] Wetzel, however, could not avail herself of those guaranteed privileges: "She ate meals in her room, forgoing those included as part of the [Tenant's] Agreement. . . . She did not use the laundry room at hours when she might be alone. And she stayed away from the common spaces from which she had been barred by management."[15]

Eventually, Wetzel sued St. Andrew, claiming that "it failed to provide her with non-discriminatory housing and that it retaliated against her because of her complaints, each in violation of the Fair Housing Act."[16] St. Andrew maintained that the Fair Housing Act[17] (FHA) imposes liability only on those who "act with discriminatory animus," which Wetzel had not alleged.[18] The district court agreed, dismissing Wetzel's suit. Wetzel appealed the dismissal. The Seventh Circuit reversed and remanded for further proceedings.[19]

Writing for the three-judge panel, then–Chief Judge Diane Wood offered an account of the FHA that "read [it] more broadly" than the district court did.[20] In her view, the issue turned crucially on what Marsha Wetzel was unable to do: whether the discrimination was sufficiently pervasive and severe to constitute what Chief Judge Wood, analogizing to Title VII sexual harassment cases, termed a "hostile housing environment."[21] To determine this, the court needed to understand what opportunities and privileges Wetzel was guaranteed in the Tenant's Agreement and how

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12 Id.
13 *Wetzel*, 901 F3d at 860–61.
14 Id at 859.
15 Id at 861.
16 Id at 859.
17 Pub L No 90-284, 82 Stat 81, codified as amended at 42 USC § 3601 et seq.
18 *Wetzel*, 901 F3d at 859.
19 Id.
20 Id.
21 Id at 861.

far the discrimination interfered with those privileges, preventing her from doing things she was supposed to be able to do.[22] Further, the court insisted that in such a situation of pervasive discrimination, inactivity on management's part is sufficient for liability under the FHA.[23] In Wetzel's case, management went beyond inactivity and engaged in retaliation.

A crucial backdrop to *Wetzel v Glen St. Andrew Living Community, LLC*[24] is *Hively v Ivy Tech Community College of Indiana*,[25] in which the Seventh Circuit ruled that discrimination on the basis of sexual orientation is discrimination on the basis of sex under Title VII.[26] The Supreme Court has now concurred in *Bostock v Clayton County*.[27] Although *Hively* was not appealed and therefore played no official role in *Bostock*, the Court's reasoning is very similar to that used by the Seventh Circuit in *Hively*. As Chief Judge Wood mentioned early in her opinion in *Wetzel*, both parties accepted that the ruling in *Hively* "applies with equal force under the FHA."[28] This therefore needs no further argument.

My analysis will set *Wetzel* in the context of a past exchange between Judge Wood and me about my Capabilities Approach (CA).[29] I shall argue that we do not really need the CA to see what is well done about Judge Wood's opinion, but that her approach dovetails methodologically with the CA. This convergence is not surprising. My CA does not claim that judges should engage in applied philosophy; instead I have claimed that a related approach is already in place in our legal tradition of thinking about discrimination, both under the Equal Protection Clause of the Fourteenth Amendment and under Title VII. Now we may add the Fair Housing Act.

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22 *Wetzel*, 901 F3d at 861–62.

23 Id at 859.

24 901 F3d 856 (7th Cir 2018).

25 853 F3d 339 (7th Cir 2017) (en banc).

26 Id at 341. See also 42 USC § 2000e-2(a).

27 140 S Ct 1731 (2020).

28 *Wetzel*, 901 F3d at 862.

29 See generally Diane P. Wood, *Constitutions and Capabilities: A (Necessarily) Pragmatic Approach*, 10 Chi J Int L 415 (2010); Martha Nussbaum, *Reply to Diane Wood, Constitutions and Capabilities: A (Necessarily) Pragmatic Approach*, 10 Chi J Int L 431 (2010).

## II. THE CAPABILITIES APPROACH, CONSTITUTIONS, AND LEGISLATION

The CA has two related purposes, one descriptive and one normative.[30] As a descriptive project, which originated within international development economics, the CA holds that the most significant and illuminating way to compare nations (or regions or households)—the most pertinent *space of comparison*[31]—is not GDP per capita, nor is it utility; rather, it is what the people in question are actually able to do and to be. Methodologically, the approach sought to replace lofty distanced economic accounts of a nation's well-being or quality of life with an account that moved much closer to people and asks how the people are really doing in matters of importance to them. We ask about *capability*, not actual functioning, because choice is salient in the approach: what is important for people is to have real solid options—or what is sometimes called "substantial freedoms"—not to be pushed into a single mode of functioning, however glorious.

What was really going on in the background was that international development agencies were using average GDP as a measure purporting to say how life was in a nation. It did not really do that, since a nation might be very wealthy but not distribute those riches in a way that makes people able to do key things that they want to do. This flaw had long been evident to people on the ground, but such ordinary people could not just walk into the International Monetary Fund or the World Bank. For this reason, in all my books on the CA, I have talked endlessly to such people and put their stories into my writing in order to show what the GDP approach misses. I often have said that my role is not to make up something utterly new, but to act as a kind

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[30] The CA is a "they" not an "it." The theory was developed by Professor Amartya Sen and by me, and there is now the large Human Development and Capability Association (HDCA) dedicated to continuing the CA further. In this Essay, I state only my own views, and do not comment on how far they differ from the views of others. For fuller development of my own views, see generally Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard 2012); Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard 2006); Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge 2000). Differences between my views and those of Sen are discussed in Nussbaum, *Creating Capabilities* at 69–76 and further in Martha C. Nussbaum, *Labor Law and the Capabilities Approach*, in Brian Langille, ed, *The Capability Approach to Labour Law* 62–81 (Oxford 2019). Since I can be taken as an authority on views that I created, I shall not include further citations, except where a specific subject matter suggests them.

[31] This is a common term in development economics for designating a parameter of measurement.

of lawyer for the interests of common people who want a flourishing life.

What, then, are *capabilities*? I identify three types. First are what I call *basic capabilities*, the innate material out of which the more interesting capabilities grow. Second are *internal capabilities*: characteristics of persons formed by training and opportunity to make a choice in the relevant area. (In a very fruitful dialogue with University of Chicago Professor James Heckman, it has become clear that this is the usage of the word "capability" in the human capital movement, of which he is a leading exponent.)[32] But people may have internal capabilities and be prevented from exercising them, by political repression, social discrimination, or lack of means. The type of capability most pertinent to the normative aspect of the CA is what I call *combined capabilities*: internal capabilities plus suitable political and social conditions to choose the relevant functioning.

Such an approach can wax normative rather quickly. Indeed, the CA's descriptive use to specify a metric of comparison already involved normativity. Some combined capabilities (for example, the ability to sing while standing on one's head) are trivial, and nobody would claim that they are indices of how well a nation is doing, or appropriate goals for public policy. Some capabilities are outright bad (for example, the ability to harass women in the workplace). One can measure the quality of life of a group by the extent to which that bad capability is kept in check. In practice, then, in saying that national or regional well-being should be measured by capabilities rather than by GDP, our band of insurgents were always assuming that we're talking about capabilities that are both good and important. The Human Development Reports of the United Nations Development Programme (UNDP) already single out dozens of these (especially in the domains of health and education, since the United Nations is standoffish about political liberties) in creating its comparative measures. But I have taken the next step, defending a group of ten capabilities as normatively fundamental for political justice: a nation cannot claim to be even minimally just unless these ten have all

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[32] See generally *Heckman on Capabilities*, in Nussbaum, *Creating Capabilities*, Appx A at 193 (cited in note 30). Heckman also gave a superb plenary address on the two approaches at the annual meeting of the HDCA at Georgetown University in September 2015, but so far as I am aware, it has not been published. For a later version of this paper, see generally James J. Heckman and Chase O. Corbin, *Capabilities and Skills* (NBER Working Paper 22339, June 2016), archived at https://perma.cc/PWH3-J3E5.

been extended at a reasonably high threshold level to all the nation's people.[33] (You can see that, in many ways, my project dovetails with the international human rights movement.)

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[33] My list, the same in all three books and many articles:

The Central Capabilities

**1. Life**. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.
**2. Bodily health**. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
**3. Bodily integrity**. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
**4. Senses, imagination, and thought**. Being able to use the senses, to imagine, think, and reason—and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid nonbeneficial pain.
**5. Emotions**. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)
**6. Practical reason**. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)
**7. Affiliation**.

> **A.** Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)
> **B.** Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, and national origin.

**8. Other species**. Being able to live with concern for and in relation to animals, plants, and the world of nature.
**9. Play**. Being able to laugh, to play, to enjoy recreational activities.
**10. Control over one's environment**.

> **A. Political**. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.

How should these central capabilities be promoted in a nation? Well, one could always rely on legislation, but legislation is fragile, and these are very fundamental entitlements. So, I have suggested that a nation making a constitution should build protections for these ten into its enumeration of fundamental rights. India and South Africa have already done a good deal of this, for example. I am of course not suggesting that philosophers should dictate to the many peoples of the world, and respect for diversity is something I have theorized repeatedly. Mine is a persuasive proposal, which people may take up if it suits them.

Invited to write a Supreme Court Foreword for the *Harvard Law Review* ("Foreword"), I decided to pursue my CA/Constitution proposal in the US context, asking how far our own constitutional tradition has incorporated elements of CA-like thinking, and using some of those conclusions to comment on cases of the 2006 Term.[34] My answer was complex: some of the formative philosophical ideas shaping the CA (particularly ideas of Aristotle and of the Greek and Roman Stoics) did animate some of our Founders, especially James Madison and Thomas Paine, and in a diffuse way worked themselves into our founding documents. On the one hand, the US Constitution itself does not go where Paine determinedly goes, toward broad government protection for a wide range of social and economic capabilities. In areas such as education and health, the Constitution is silent (although Justice Thurgood Marshall did make a heroic effort to argue that a right to education is implicit in the free speech right[35]). On the other hand, there are a few areas in which our constitutional tradition does embody a very general type of capability reasoning, focusing on what people are actually able to do and be rather than on a more abstract notion of either freedom or equality. One area I studied was the Free Exercise Clause, where the tradition has not been content with the absence of persecution but has asked

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> **B. Material**. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

See, for example, Nussbaum, *Creating Capabilities* at 33–34 (cited in note 30).

[34] See generally Martha C. Nussbaum, *The Supreme Court 2006 Term – Foreword: Constitutions and Capabilities; "Perception" Against Lofty Formalism*, 121 Harv L Rev 4 (2007).

[35] See, for example, *San Antonio Independent School District v Rodriguez*, 411 US 1, 111–15 (1973) (Marshall dissenting).

whether people are really able to exercise their religion, and exercise it on a basis of equality with others.[36] Another, crucial for us here, is discrimination, as understood in judgments of equality under the Equal Protection Clause.[37] I'll shortly return to that topic.

Judge Wood accepted an invitation from the American Philosophical Association to comment on my Foreword at a program session in December 2008. We later decided to publish our exchange, and did so in the *Chicago Journal of International Law* in 2010.[38] She made many valuable points, such as examining a variety of international documents that protect capabilities and showing that capabilities not protected under the federal Constitution are sometimes protected in state constitutions.[39] But, like me, she was pessimistic about finding them all in the actual documents, and she was disposed to think that judges could not simply read them in, unless there was a legislative hook.[40] (I totally agree.) She did, however, sympathize with a canon of statutory construction holding that an act of Congress should not be construed to violate the CA if there is another available construction that makes it consistent with the CA.[41] And, more to my purpose in the present Essay, she said that a judge could think of the CA methodologically, suggesting a set of questions judges might ask of a constitutional provision.[42] In the Foreword, I had indeed argued that the CA suggests such a method, urging the judge to get close to people and the complexities of their situation, rather than retreating to a position of lofty formalism.[43]

## III. CAPABILITIES AND SEX DISCRIMINATION: EQUAL PROTECTION AND TITLE VII

Now we get to our topic: discrimination. In one section of my Foreword, I examined a tradition of thinking about the Equal Protection Clause, in cases relating to putatively "separate but equal" facilities.[44] Here, I said, what the Supreme Court has done, and rightly so, was not to rest content with formal symmetry, but to

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36 See Nussbaum, 121 Harv L Rev at 60–64 (cited in note 34).
37 See id at 64–67.
38 See note 29.
39 See Wood, 10 Chi J Int L at 416–20 (cited in note 29).
40 Id at 428.
41 Id at 424–26.
42 Id at 424.
43 See Nussbaum, 121 Harv L Rev at 24–33 (cited in note 34).
44 Id at 64–67.

press the question, "What are the people actually able to do and be?" I looked first at *Brown v Board of Education*,[45] defending the Court against Professor Herbert Wechsler's famous critique that urges courts to seek "neutral principles," by which he meant principles so far removed from the doings and emotions of the parties that the alleged inequality just disappears.[46] I then examined *Loving v Virginia*[47] in a similar vein, saying that the Court rightly refused the bogus and abstract symmetry of the Supreme Court of Virginia (all is well because Blacks can't marry Whites and Whites can't marry Blacks), insisting that in terms of how people are enabled to act and choose in society, the anti-miscegenation laws positioned the two races entirely differently.[48]

For our purposes, however, the most relevant case is *United States v Virginia*,[49] the case that opened the doors of the previously all-male Virginia Military Institute (VMI) to women.[50] Here, Justice Ruth Bader Ginsburg used a CA-like method of thought in reaching the conclusion that the two programs (VMI and its allegedly equal, female alternative, the Virginia Women's Institute for Leadership at Mary Baldwin College) were not equal at all: the program for women was profoundly inferior, and so the sex-based restriction violates the Equal Protection Clause.[51] If a program is an adequate remedy for a denial of opportunity, she says, it must "place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].'"[52] This is a precise statement of the notion of *combined capability*: the person's total position where opportunity is concerned. Virginia's proposed formal symmetry of programs did not meet the test of capability. The Mary Baldwin graduate, Justice Ginsburg concluded, lacked many opportunities characteristic of the VMI graduate. She was taught by an inferior faculty, with fewer PhDs.[53] Her curriculum was a

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45 347 US 483 (1954).

46 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1, 17 (1959).

47 388 US 1 (1967).

48 Nussbaum, 121 Harv L Rev at 64–67 (cited in note 34).

49 518 US 515 (1996).

50 Id at 519.

51 Id at 557.

52 Id at 547 (alteration in original), quoting *Milliken v Bradley*, 433 US 267, 280 (1977).

53 *United States v Virginia*, 518 US at 526.

"pale shadow" of VMI's.[54] She did not enjoy the benefits of the supportive VMI alumni network.[55] In short, however attractive the formally symmetrical remedy seems from a distance, up close it does not pass the test of promoting truly equal capabilities.

This Equal Protection Clause tradition is totally in line with what the CA recommends: the relevant criterion is what people are actually able to do and be. Of course the Court did not go out and read a philosophical theory and then apply it; but the theory in its origin is a kind of countertheory to ambitious types of formalism that ignore what is important to people.

Sex discrimination is sometimes, as in *United States v Virginia*, dealt with by constitutional law, under the Equal Protection Clause. More often, however, it relies on Title VII. Sexual harassment litigation, in particular, is almost always grounded in Title VII, and on the long line of cases in which the Supreme Court has agreed that workplace sexual harassment can be sex discrimination under Title VII if either an "economic *quid pro quo*" is involved or the harassment creates a "hostile working environment" for the plaintiff.[56] It is by now settled that to show a hostile work environment a plaintiff need not show grave psychological injury. She only needs to show that the conduct is "severe or pervasive enough to create an objectively hostile or abusive work environment,"[57] on the basis of "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[58] This, especially the last clause, is capability talk: we are asked to look at what the employee is able or unable to do, given the harassment.

Now we get to the heart of the matter for our purposes: employer liability. In a recent paper, Judge Wood has shown convincingly that there remains a lot of unclarity about this issue.[59] I think one thing that does emerge with clarity is that a showing of employer malice is not necessary for liability; the questions that survive deal with other matters, such as whether employers can avoid liability by having a written antiharassment policy. But

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54 Id at 553, quoting *United States v Virginia*, 44 F3d 1229, 1250 (4th Cir 1995) (Phillips dissenting).

55 *United States v Virginia*, 518 US at 552.

56 *Meritor Savings Bank v Vinson*, 477 US 57, 64–65 (1986).

57 *Harris v Forklift Systems, Inc*, 510 US 17, 21 (1993).

58 Id at 23.

59 See generally Diane P. Wood, *Sexual Harassment Litigation with a Dose of Reality*, 2019 U Chi Legal F 395.

let me consider just one case from the Seventh Circuit that seems quite parallel to *Wetzel*, in which the court found liability simply on the basis of total inaction. That case is *Carr v Allison Gas Turbine Division, General Motors Corp*,[60] and the author of the majority panel opinion is then–Chief Judge Richard Posner.[61] Judge Posner started his analysis by pointing out that the question is, first, "whether the plaintiff was, because of her sex, subjected to such hostile, intimidating, or degrading behavior, verbal or nonverbal, as to affect adversely the conditions under which she worked."[62] This he graphically described, by depicting the obscene and threatening behavior to which her fellow employees subjected her on a daily basis (using demeaning sexual language and stereotypes).[63]

The second question is whether the employer's response to its employees' behavior was negligent. "It would be unrealistic to expect management to be aware of every impropriety committed by every low-level employee. But if it knows or should have known that one of its female employees is being harassed, yet it responds ineffectually, it is culpable."[64] The two questions are "linked," Judge Posner remarked, "because the greater the harassment . . . is—the likelier is the employer to know about it or to be blameworthy for failing to discover it."[65] In the case at hand, he concluded that negligence was amply proved. In an early period when Mary Carr did not complain, Judge Posner still found that General Motors (GM) should have known about it. But he focused on a period starting in August 1988 during which Carr actively complained. Judge Posner found GM's response utterly inadequate: "No disciplinary action was undertaken against any of Carr's coworkers; no one was even reprimanded for the harassment. General Motors was astonishingly unprepared to deal with problems of sexual harassment, foreseeable though they are when a woman is introduced into a formerly all-male workplace."[66] Later he stated that "[n]o reasonable person could imagine that General

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60 32 F3d 1007 (7th Cir 1994).

61 I first discussed this case in Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* 104–11 (Beacon 1996), and subsequently in Martha C. Nussbaum, Carr*, Before and After: Power and Sex in* Carr v Allison Gas Turbine Division, General Motors Corp, 74 U Chi L Rev 1831 (2007).

62 *Carr*, 32 F3d at 1009.

63 Id at 1009–11.

64 Id at 1009.

65 Id.

66 *Carr*, 32 F3d at 1012.

Motors was genuinely helpless, that it did all it reasonably could have done."[67] "All it reasonably could have done" sets a demanding standard for management. As Chief Judge Wood remarked in *Wetzel*, courts interpreting Title VII have refrained from turning it into a general civility code, and have insisted that judges filter out "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing."[68] Employers are not liable if they fail to stop these minor inconveniences, but they are liable if they fail to do all in their power to stop pervasive and severe forms of discrimination.

## IV. LIABILITY FOR HARASSMENT: THE FHA AND *WETZEL*

Title VII cases do two things important for the judge deciding *Wetzel*. First, they establish that a hostile work environment should be demonstrated by finding interference with functioning. Hostile intent is neither here nor there: The inquiry is an objective one, using a notion akin to my notion of combined capability. And mere displeasure is insufficient—interference with activity needs to be shown. Second, Title VII establishes that mere inaction and mere absence of discriminatory animus are insufficient to get management off the hook. It needs to address, energetically and as best it can, the root of the problem: interference (by the discriminators) with the plaintiff's ability to function.

What remained to be established in *Wetzel*, then, was that the FHA sets similar standards for both hostile environment and liability. The facts are very similar to the facts in *Carr*, both as to the severity of the harassment and as to management's complete failure to take relevant remedial steps:

> We have no quarrel with the idea that direct liability for inaction makes sense only if defendants had, but failed to deploy, available remedial tools. St. Andrew protests that it can only minimally affect the conduct of its tenants because tenants expect to live free from a landlord's interference.
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> Control in the absolute sense, however, is not required for liability. Liability attaches because a party has "an arsenal of incentives and sanctions . . . that can be applied to affect conduct" but fails to use them. St. Andrew brushes aside the

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67 Id.

68 *Wetzel*, 901 F3d at 866 (quotation marks omitted), quoting *Faragher v City of Boca Raton*, 524 US 775, 788 (1998).

> many tools for remedying harassment that it has pursuant to the [Tenant's] Agreement. For example, the Agreement allows St. Andrew to evict any tenant who "engage[s] in acts or omissions that constitute a direct threat to the health and safety of other individuals" or who "engages in any activity that [St. Andrew] determines unreasonably interferes with the peaceful use and enjoyment of the community by other tenants."[69]

Indeed, St. Andrew was worse off than General Motors was in *Carr*: for it did not do nothing, it actively retaliated against Wetzel for her complaints. To prove retaliation, Chief Judge Wood reasoned, a plaintiff need not show hostile intent on the part of the defendant, in this case some type of discriminatory animus. Wetzel needed only to show that she engaged in a protected activity, that she suffered an adverse action, and that there was a causal connection between the two.[70] "Like all anti-retaliation provisions, [the anti-retaliation provision of the FHA] provides protections not because of who people are, but because of what they do."[71]

But how should the history of hostile environment sexual harassment law under Title VII influence the judge trying a parallel case under the FHA? Chief Judge Wood considered Title VII relevant in thinking about when harassment is severe or pervasive enough and especially in concluding that the defendant need not act with discriminatory animus.[72] "The FHA followed Title VII by four years. St. Andrew provides no reason why the FHA requires in all instances that the defendant acted with discriminatory animus when an identically worded statute has not been read in such a matter. As a textual matter, we see none."[73] However, Chief Judge Wood refrained from "reflexively adopting the Title VII standard."[74] A further "search for comparable situations"

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69 *Wetzel*, 901 F3d at 865 (citations omitted) (first, third, and fourth alterations in original).

70 Id at 868. Recall that after Wetzel complained, management "restricted her access to facilities and common spaces, downgraded her dining seat, halted her cleaning services, and attempted to build a case for her eviction." Id at 867. See also text accompanying notes 9–11.

71 Id at 868.

72 She did not actually cite *Carr*. That is my contribution, since it is from the Seventh Circuit; but she didn't need to. There were plenty of cases she could have used to make her points.

73 *Wetzel*, 901 F3d at 863 (citations omitted).

74 Id.

led her to Title IX, where similar standards are in play.[75] As for the FHA itself, it creates a statutory duty not to discriminate, and the areas in which most of the discrimination occurred were the public areas, over which the landlord has responsibility. After all, "the protections afforded by the Fair Housing Act do not evaporate once a person takes possession of her house, condominium, or apartment."[76] Does the FHA cover the particular type of discrimination Wetzel suffered? Yes, because it prohibits "discriminatory harassment that unreasonably interferes with the use and enjoyment of a home—by another name, a hostile housing environment."[77] A hostile housing environment claim requires a plaintiff to show

> (1) that she endured unwelcome harassment based on a protected characteristic; (2) the harassment was severe or pervasive enough to interfere with the terms, conditions, or privileges of her residency, or in the provision of services or facilities; and (3) that there is a basis for imputing liability to the defendant.[78]

The isomorphism between Title VII and the FHA can be supported from within the text of the FHA.

To show the second requirement, Chief Judge Wood returned to Wetzel's capabilities (though without using that word). She wasn't just displeased, she was disabled. She couldn't eat the meals she had paid for, she couldn't use the lobby or other common spaces, and she couldn't use the laundry room.[79] Some of these involved explicit violations of the Tenant's Agreement, and all were significant diminutions of Wetzel's opportunities to use her rental.

The district court's dismissal of Wetzel's complaint was reversed, and the case was remanded for further proceedings.

## V. JUDGES AND PHILOSOPHERS

Judge Wood reached a result that is similar to what someone using the CA as a method would say. Of course she didn't read into the case the full normative framework of the CA: she used

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75 Id at 863–64.

76 Id at 861.

77 *Wetzel*, 901 F3d at 861. Chief Judge Wood supported this claim by analysis of §§ 3604 and 3617 of the FHA. See id.

78 Id at 861–62.

79 Id at 861.

the normative materials that the relevant statutes gave her. And she did something the philosopher would not know how to do without a lot of further training: she used the facts and the law in an astute and reasonable manner, building on precedent, looking closely at the language of the statute, and consulting other relevant statutes that propose similar frameworks. This is legal, not philosophical, thinking, and she would have reasoned well had she reasoned purely in the manner of the philosopher. Here, as often, the common law provides continuity and solidity because of its way of combining reliance on precedent with openness to extension in the light of new cases.[80]

Why, then, do we need the CA at all? What does it bring to law when judges already know what they are doing? One use for the CA, and the primary one I had in mind, was to assist makers of constitutions—or indeed framers of statutes—to think well about which human capabilities might be in need of protection. That use is not at issue here, though perhaps it was in *Hively*, when discrimination on grounds of sexual orientation was held to be a type of sex discrimination. Another use for the CA, however, is as a method of judging, one that focuses on people and what they can be and do, and avoids the type of distanced formalism represented by Professor Wechsler's call for "neutral principles," since the Wechslerian standpoint looks at human lives from such a lofty difference that salient inequalities in what people are able to do and be cannot be seen. This use for the CA is amply represented in our entire legal tradition of thinking about sex discrimination, under both the Equal Protection Clause and Titles VII and IX—and as we now learn from Judge Wood, under the FHA. It was the main contention of my Foreword that judges should think this way whenever inequality is potentially at issue.[81]

Yes, but obviously Judge Wood reached her conclusion in *Wetzel* without turning to philosophy. Even more obviously, Judge Posner reached his conclusion in *Carr* despite his well-known hostility to philosophy.[82] So why the philosopher? What does Judge Wood bring to the table? Nothing, when people are

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[80] See Martha C. Nussbaum, *Janus-Faced Law: A Philosophical Debate*, in Saul Levmore and Frank Fagan, eds, *The Timing of Lawmaking* 249, 274–77 (Edward Elgar, 2017).

[81] See Nussbaum, 121 Harv L Rev at 64–67 (cited in note 34).

[82] See, for example, Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 Harv L Rev 1637, 1646–49 (1998).

judging human situations with the requisite insight and complexity. Philosophy is not required to prove that it changes everything, and a philosophy that did should be suspect.

Instead, philosophy gives firmness to sound human judgment when it is, as so often, prone to go astray in the direction of lofty but obtuse formalism of the Wechsler variety: it supplies what we might call a "countertheory" to the voices of lofty obtuseness in our own heads. In my career, and in that of Professor Amartya Sen, we have found those voices above all in formalist economics, in which people of great mathematical sophistication but paltry (often) human understanding create elegant structures that ignore what people actually seek. That's how the CA was born. People seeking fruitful lives could not get a hearing at the World Bank, but a philosophical approach proffered by a Nobel Prize Winner might. (A philosopher would never get a hearing all on her own.) Similarly, the CA reminds us why it is important to ask in a searching way what Marsha Wetzel was unable to do, and why that matters.

But there are many sources of obtuseness in human heads, and it's useful to have an articulated theory that holds in place some of the outcomes of sensible human judgment. Immanuel Kant put it well: people know pretty well what good practical judgment is, but they are "easily led astray" because we are imperfect, selfish, and power-grabbing beings.[83] That's basically what I think: judges don't need philosophy so long as they are judging with sound human understanding. Judge Wood, one of whose great distinctions is her sound human understanding, probably doesn't need it at all. But having it there to turn to, when others wax obtuse, is not such a useless thing either.

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[83] Immanuel Kant, *Grounding for the Metaphysics of Morals*, in *Ethical Philosophy: The Complete Texts of Grounding for the Metaphysics of Morals and Metaphyisical Principles of Virtue* 16 (Hackett 1983) (James W. Ellington, trans) (originally published 1785) (Akademie 405) (the authoritative edition of Kant, to which it is usual to cite in order to ensure comparability among editions).