Part II

Theoretical Issues
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The philosophical analysis of a concept, while by no means indifferent to ordinary usage . . . is concerned to give a rational account of such usage. It is concerned, for example, to answer the question: What is there about all cases of [sexual harassment] that makes us group them under one concept and thus use the same word?

In addition to the legal and social scientific conceptions of sexual harassment that have been developed, philosophical conceptions of sexual harassment have been proposed.¹ These conceptions seek to go beyond the constraints imposed by the particular concerns and categories of the law and of empirical research, though they may be made use of in either of these contexts. In particular, philosophical conceptions of sexual harassment typically seek to articulate what it is about sexual harassment that makes those actions that fall under its purview morally wrong.² Philosophical definitions of sexual harassment commonly claim that sexually harassing conduct is in some way harmful to someone. From a liberal perspective, that a form of behavior harms specific individuals is a reason for regulating that behavior.³ Since we live in a liberal state, specification of this harm is important in justifying laws that govern sexual harassment. So, the question is, What kind of harm, if any, is caused by sexual harassment, such that we should prevent it by means of the law? Philosophical conceptions of sexual harassment seek to answer this question.

I have selected several theoretical definitions of sexual harassment for analysis. They represent different perspectives on sexual harassment that are circulating in society. I shall explain and evaluate each of them. I will make clear that these definitions are not politically neutral, so that accepting a
definition entails accepting a broad theoretical perspective. I shall also argue that each of the definitions is either too narrow, or too broad, or both. In addition, each definition seems to focus on one kind of behavior identified in the law and/or in empirical research as “sexual harassment,” and to make the definition adequate to that sort of behavior. This leaves unexplained other sorts of behavior, or at least requires a reconceptualization of this other behavior to allow it to fit the definition. All the definitions seem to assume that sexual harassment should be illegal, though they disagree about the kind of law that should be applied or how it should be applied. Finally, I shall consider the arguments of two philosophers who for different reasons maintain that the concept of sexual harassment is deeply flawed.

The Dominance Perspective

MacKinnon’s Conception

Any discussion of conceptions of sexual harassment must begin with Catharine MacKinnon’s as it appeared in her 1979 Sexual Harassment of Working Women. Her analysis of sexual harassment has been the most influential, whether supported or criticized. MacKinnon defines sexual harassment in such a way that the harm of sexual harassment is that it wrongfully discriminates against women. Given this, sexual harassment constitutes sex discrimination under Title VII. Thus, her initial definition was: “Sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power.” This very general conception was applied specifically to the workplace. MacKinnon’s understanding of sexual harassment incorporated two kinds of inequality and two kinds of oppression: gender and economic.

Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another. The major dynamic is best expressed as the reciprocal enforcement of two inequalities. When one is sexual, the other material, the cumulative sanction is particularly potent. American society legitimizes male sexual dominance of women and employer’s control of workers, although both forms of dominance have limits and exceptions. Sexual harassment of women in employment is particularly clear when male superiors on the job coercively initiate unwanted sexual advances to women employees; sexual pressures by male co-workers and customers, when condoned or encouraged by employers, might also be included. . . . The material coercion behind the advances may remain implicit in the employer’s position to apply it. Or it may be explicitly communicated through, for example, firing for sexual noncompliance or retention conditioned upon continued sexual compliance.

Thus, sexual harassment is most fundamentally a misuse of power. One kind of sexual harassment, the kind that is emphasized in this book, comes at the intersection of two forms of social inequality: male/female and employer/
employee. In the context of employment, “[s]exual harassment at work critically undercuts women’s potential for work equality as a means to social equality.” This is MacKinnon’s response to the question, What kind of harm, if any, is caused by sexual harassment, such that we should prevent it by means of the law. In her view, sexual harassment is caused by the social inequality of women and men, and in turn contributes to that inequality: “[T]he specific injury of sexual harassment arises from the nexus between a sexual demand and the workplace . . . the situations can be seen to include a sexual incident or advance, some form of compliance or rejection, and some employment consequence.”

According to MacKinnon, there are two ways of arguing that sexual harassment constitutes sex discrimination, the differences approach and the inequality or, as I have termed it in chapter 1, the dominance approach.

The [differences] approach envisions the sexes as socially as well as biologically different from one another, but calls impermissible or “arbitrary” those distinctions or classifications that are found preconceived and/or inaccurate. The [inequality] approach understands the sexes to be not simply socially differentiated but socially unequal. In this broader view, all practices which subordinate women to men are prohibited. The differences approach, in its sensitivity to disparity and similarity, can be a useful corrective to sexism; both women and men can be damaged by sexism, although usually it is women who are. The inequality approach, by contrast, sees women’s situation as a structural problem of enforced inferiority that needs to be radically altered.

As we have seen, MacKinnon prefers the inequality, or dominance, approach. According to this approach, sexual harassment has a different meaning for women than it does for men. What is perhaps most striking about MacKinnon’s conception of sexual harassment is that, given her description of traditional sexual relations between women and men as the sexual dominance of women by men, and given the social realities of the workplace, where workers are dominated by employers, sexual harassment is to be expected. That is, her analysis of inequalities between the sexes and in the workplace predicts that sexual harassment will be prevalent. It is not an aberration. Sexual harassment is the manifestation of male sexual dominance over females in the workplace. One commentator describes MacKinnon’s view this way:

Sexual harassment . . . is the imposition of a subordinate sex upon women that we know as womanhood itself. Sexual harassment is not then arbitrarily imposed upon women, it is part of their very subordinate identity under the gender hierarchy that characterizes the relationship of heterosexuality. Thus, MacKinnon argues that we should analyze sexual harassment under a theory of inequality that would recognize women’s systematic subordination through the imposition upon them of their identity as “fuckees.” Her analysis of why sexual harassment is gender discrimination turns on her explanation of why women cannot be similarly situated to men for purposes of understanding sexual
harassment. Her conclusion is that sexual harassment is at the very heart of the systematic subordination of women.¹⁰

There are several reasons to favor MacKinnon’s definition. One is that it conceptualizes sexual harassment in such a way that its apparent prevalence and intractability are explained. Sexual harassment is what we should expect, since it characterizes heterosexual relationships. Furthermore, MacKinnon’s account provides an explanation for why sexual harassment should be conceived of as a form of sex discrimination. Sexual harassment can happen only to women, in her view. What happens to men may look like sexual harassment, but because of the gender hierarchy that puts all men above all women, sexual harassment does not have the same meaning for men it has for women.¹¹ In her view, sexual harassment places conditions on women’s work and educational lives that men do not share. Thus, sexual harassment of women is sex discrimination. Conceiving of sexual harassment as sex discrimination provides a way of seeing all the sorts of sexual harassment as variations of the same fundamental behavior. Sexual taunting and quid pro quo sexual harassment are on a continuum. They are not different kinds of conduct.

Some critics have suggested that MacKinnon’s definition be rejected because it is not politic—that is, it is better politically to propound a definition of sexual harassment that does not incorporate controversial assumptions because one is more likely to garner support for the view that sexual harassment is an offense that should be addressed legally. Ellen Frankel Paul contends:

Incorporating abuse of power into the definition . . . seems unduly limiting. While it mirrors accurately what transpires in the classic quid pro quo situation, it reflects only uneasily hostile environment sexual harassment by co-workers—unless one accepts the added, debatable, and more global assumption that males occupying any position in the workplace enjoy more power than women. If one favored such a claim, arguing for it directly, rather than importing it into the very definition of sexual harassment (thus begging the question and, perhaps, alienating those who might be sympathetic to the complaint but not the assumption), seems desirable.¹²

From a legal and political point of view, Paul’s point may be correct—though this criticism of MacKinnon’s definition precedes Paul’s own ideologically informed argument that sexual harassment is not sex discrimination and is better conceived legally as a harm inflicted by one individual on another (see chapter 6). However, from a philosophical point of view, such a comment is not to the point. How one conceives of sexual harassment, particularly, how one conceives of the harm of sexual harassment, will determine the kinds of behaviors one includes as sexual harassment and the kinds of remedies one believes are just, as well as the kinds of changes, both social and political, one thinks required for the eradication of sexual harassment. One must argue directly against MacKinnon’s definition if one does not think that it
adequately describes the harm of sexual harassment, the kinds of behaviors that should be categorized as sexual harassment, and the changes necessary to eradicate sexual harassment.

Though there are reasons to favor MacKinnon’s definition, there are stronger reasons against it. The strongest reasons against MacKinnon’s definition are: (1) it rests on problematic assumptions, (2) it is too broad, and (3) it is too narrow.

One implication of MacKinnon’s conception of sexual harassment may not be immediately evident. It is that, in this society, all heterosexual sexual relationships involve sexual harassment. To see this, one need only go back to the broad definition of sexual harassment as “the unwanted imposition of sexual requirements in the context of a relationship of unequal power.” This definition contains no mention of the kind of “unequal power” involved. It can apply to any situation in which sexual requirements are imposed by the powerful on the powerless. According to MacKinnon, in our society, men have sexual dominance over women. Because of this, women are routinely unable freely to consent to sexual relationships with men. MacKinnon usually limits her discussion to economic relationships. But these can include informal arrangements, such as traditional marriages, where economic inequality and sexual inequality are both present. Most fundamentally, however, sexual inequality, the sexual dominance of women by men, combined with the assumption that true consent is not possible in the context of inequality, implies that all heterosexual sexual relationships are sexually harassing.

For some, this implication of MacKinnon’s conception of sexual harassment is so clearly false that it reduces the definition to absurdity. However, some sort of argument is required if one wants to avoid begging the question. The argument can be made that MacKinnon’s theoretical equations are just that—equations—and that this makes them absolute and, thus, easily falsifiable. The claim that men have power over women is at the heart of MacKinnon’s view. On one interpretation of this claim, every man has power over every woman. This is true by definition, since “woman” and “man” are defined, culturally, in terms of subordination and domination. But when we think about the world, it is evident that not every man has power over every woman. Race, class, ethnicity, nationality, and sexual orientation are just a few of the factors that confound this simple—too simple—equation. There are many vectors of power among peoples of the world. Women of color have been making this argument for years. Some kinds of power may trump others. Some power that a woman has can trump the power a man has by virtue of being a man. And some men do not seem to possess “masculine” power to any degree. Consider men who are thought to be insufficiently masculine. Their “gender harassment” usually begins in grade school and may never cease. In general, MacKinnon’s analysis of “power” is underdeveloped. Usually, she equates power and domination: if one person has more power than another, then the first dominates the other. However, people who have examined power describe many uses of power, not all of which are inherently oppressive. Consider the power a parent has over a child, or a teacher over a student. Such power is necessary to enable the child or student to develop.
MacKinnon’s binary focus—man/woman, powerful/powerless—is rhetorically effective, but too simple to allow articulations of the complex power relations between human beings in society. Approaches to gender such as those of Franke (see chapters 3 and 6) and Cornell (see the discussion that follows) seem better able to explain the complex relationships between power and gender. They emphasize that gender is not dichotomous and that men as well as women experience dominant conceptions of “masculinity” and “femininity” as coercive.

MacKinnon’s definition is both too broad and too narrow. It is too broad because, as we have seen, every heterosexual sexual relationship turns out to constitute sexual harassment. Her description of sexual harassment as “[s]exual pressure imposed on someone who is not in an economic position to refuse it” illustrates this view. Women, in general, are economically subject to men because of their sexual subordination to men, so any sexual initiation on the part of a man toward a woman becomes sexual harassment. However, many women—and men—would deny that this is their experience. They are quite able to distinguish coercive sexual encounters from noncoercive ones. They do not believe that every heterosexual sexual relationship is oppressive, though they believe that some are. MacKinnon can simply claim that such people are victims of false consciousness. However, her grounds for saying this seem to be definitional, and I have already provided reasons for thinking that the absolute claim from which her view follows is problematic. Thus, she must show that individual sexual relationships between women and men are coercive, contrary to their belief, without appeal to the general claim that all such relationships are coercive.

One can also criticize MacKinnon’s definition because it is too narrow. Though MacKinnon’s definition covers all unwanted sexual behavior addressed to women, it does not provide an analysis of what looks to be similar behavior addressed to men—especially by other men. Sexual bullying and ridicule of the sort discussed by Abrams and Franke seem similar enough to the behaviors experienced by women to suggest a uniform account. MacKinnon seems to have to resort to ad hoc explanations for such conduct. The experiences of gay rights activist Ron Woods at Chrysler should fit the category of sexual harassment—or at least, some closely related category.

Thus, MacKinnon’s definition of sexual harassment is problematic for a number of reasons. It rests on problematic assumptions, and it is both too broad and too narrow. One might argue that it cannot be either too broad or too narrow since there really is no standard conception of sexual harassment understood by many with which to compare it. This is a good point, and one that I will bring up again in my discussion of Mane Hajdin’s claim that sexual harassment is not a morally significant concept. However, if we are in the process of creating the conception of sexual harassment, we should take into account these consequences of MacKinnon’s definition: (1) it categorizes all heterosexual relations as similarly oppressive; (2) it does not allow a similar analysis of the oppressiveness of apparently similar kinds of behavior directed toward women and men. Those who wish to distinguish between morally acceptable heterosexual relationships and morally unacceptable ones should
not accept MacKinnon’s definition of sexual harassment. Nor should people who believe that dominant conceptions of gender are oppressive to women and men.

MacKinnon’s definition of sexual harassment has been extremely influential. Its most salient characteristic is that it conceives of sexual harassment as a social problem rather than as a problem between individuals. That is, sexual harassment is harmful to individual women, and to women in general, because it perpetuates women’s social inequality. A more recent conception of sexual harassment, also taking the dominance approach, seeks to articulate and strengthen MacKinnon’s conception.

Superson: A Feminist Conception

Anita Superson agrees with MacKinnon that the harm of sexual harassment should be understood primarily as social rather than individual harm. She considers current legal conceptions of sexual harassment to be inadequate and the continued pervasiveness of sexual harassment to be evidence of their inadequacy. Superson argues that sexual harassment, as it is currently defined in the law, does not adequately reflect the social nature of sexual harassment, or the harm it causes all women. As a result, sexual harassment comes to be defined in subjective ways. One upshot is that when subjective definitions infuse the case law on sexual harassment, the more subtle but equally harmful forms of sexual harassment do not get counted as sexual harassment and thus not afforded legal protection.

To remedy this, Superson proposes a definition of sexual harassment that emphasizes the “group harm” that she alleges results from all forms of sexual harassment. She defines sexual harassment as “any behavior (verbal or physical) caused by a person, A, in the dominant class directed at another, B, in the subjugated class, that expresses and perpetuates the attitude that B or members of B’s sex is/are inferior because of their sex, thereby causing harm to either B and/or members of B’s sex.” Thus, according to Superson, each act of sexual harassment constitutes a group harm, a harm to all women. Superson draws an analogy between her conception of sexual harassment and the way racial discrimination is sometimes conceived. Racist ideas expressed in racist speech have been prohibited by a number of national and international charters and declarations on the grounds that dissemination of racist ideas, because of the message of inferiority they carry, harms people. She cites Mari Matsuda’s claim that the idea underlying these views is that racist speech “interferes with the rights of subordinated-group members to participate equally in society, maintaining their basic sense of security and worth as human beings.” Superson contends that sexual harassment has the same effect on women.

Superson, like MacKinnon, holds that power is at the heart of sexual harassment. Like MacKinnon, she conceives of the oppression of sexual harass-
ment not as one individual having power over another, but in terms of men’s power over women. She expresses this in the claim that “[w]hen A sexually harasses B, the comment or behavior is really directed at the group of all women, not just a particular woman. . . .” 23 A particular woman is the target of the behavior simply because she happens to be available. But the “message” of the harassment is for all women. Superson cites examples of such harassment: catcalls on the street, professors who call their female students “chicks,” and medical instructors who use Playboy pinups in their lectures. Superson concludes: “These and other examples make it clear that [sexual harassment] is not about dislike for a certain person; instead it expresses a person’s beliefs about women as a group on the basis of their sex, namely, that they are primarily emotional and bodily beings.” 24

Because “all women” are the target of sexually harassing behavior, “all women” are harmed by such behavior.

Indeed, when any one woman is in any way sexually harassed, all women are harmed. The group harm [sexual harassment] causes is different from the harm suffered by particular women as individuals: it is often more vague in nature as it is not easily causally tied to any particular incident of harassment. The group harm has to do primarily with the fact that the behavior reflects and reinforces sexist attitudes that women are inferior to men and that they do and ought to occupy certain sex roles. 25

According to Superson, there are several kinds of harm done to women as a group by sexually harassing behaviors. First, sexual harassment takes away women’s autonomy. Harassment determines which roles are appropriate for women and imposes these roles on them. Second, “[t]he belief that [women] are sex objects, caretakers, etc., gets reflected in social and political practices in ways that are unfair to women.” 26 Furthermore, “the particular form of stereotyping promotes two myths: (1) that male behavior is normally and naturally predatory, and (2) that females naturally (because they are taken to be primarily bodily and emotional) and even willingly acquiesce despite the appearance of protest.” 27 These myths prevent sexually harassing behaviors from being seen as sexist. The first excuses sexually harassing behaviors as simply the expression of “natural” male sexuality. Superson’s myth is Browne’s and other biologists’ truth. Superson claims that “[sexual harassment] has nothing to do with men’s sexual desires, nor is it about seduction; instead, it is about oppression of women. Indeed, harassment generally does not lead to sexual satisfaction, but it often gives the harasser a sense of power.” 28

Like MacKinnon, Superson takes it to be a consequence of her conception of sexual harassment that “it is only men who can sexually harass women.”
tion and being relegated to certain sex roles are absent. She cannot remind the man that he is inferior because of his sex, since given the way things are in society, he is not. In general, women cannot harm or degrade men as a group, for it is impossible to send the message that one dominates (and so cause group harm) if one does not dominate... any bothersome behavior a woman engages in, even though it may be of a sexual nature, does not constitute [sexual harassment] because it lacks the social impact present in male-to-female harassment.29

This is simply an implication of her definition of sexual harassment plus the claim that in our society, men as a group dominate women as a group, regardless of individual power relations.

Superson claims that her conception of sexual harassment avoids the problem of subjectivity that plagues current legal conceptions of sexual harassment. According to the EEOC Guidelines, sexual harassment is “unwelcome.” Thus, to make a claim of sexual harassment, a woman must prove that the behavior to which she objects is “unwelcome.” “The criterion of unwelcome-ness or annoyance present in these subjective accounts of harassment puts the burden on the victim to establish that she was sexually harassed.”30 The question becomes whether the woman was bothered by the behavior. Superson thinks it is a mistake to make the victim’s reaction determinative of whether sexual harassment has taken place. This makes sexual harassment “subjective.” Superson’s conception makes sexual harassment objective: “what is decisive in determining whether behavior constitutes [sexual harassment] is not whether the victim is bothered, but whether the behavior is an instance of a practice that expresses and perpetuates the attitude that the victim and members of her sex are inferior because of their sex.”31

Superson points to a number of significant implications of her definition. First, “it reflects the correct way power comes into play in [sexual harassment].”32 According to Superson’s definition, “[t]he one sense in which it is true that the harasser must have power over his victim is that men have power—social, political, and economic—over women as a group.” “Defining [sexual harassment] in the objective way I do allows us to see that this is the sense in which power exists in [sexual harassment], in all its forms.”33 She claims that her conception corrects a deficiency in MacKinnon’s conception: it does not rely on the assumption that every man has power over every woman. Rather, it relies on the assumption that the class of men dominates the class of women.

Another implication of Superson’s definition is that “it gives the courts a way of distinguishing [sexual harassment] from sexual attraction.” She explains:

It can be difficult to make this distinction, since “traditional courtship activities” are often quite sexist and frequently involve behavior that is harassment. The key is to examine the practice the behavior is an instance of. If the behavior reflects the attitude that the victim is inferior because of her sex, then it is [sexual harassment]. Sexual harassment
is not about a man’s attempting to date a woman who is not interested, as the courts have tended to believe; it is about domination, which might be reflected, of course, in the way a man goes about trying to get a date. My definition allows us to separate cases of [sexual harassment] from genuine sexual attraction by forcing the courts to focus on the social nature of [sexual harassment].

Superson claims that her definition “shifts the burden and the blame off the victim.” The victim no longer has to prove that she was bothered by the behavior, or that she did not provoke it. And finally, defining [sexual harassment] in a subjective way means that the victim herself must come forward and complain. Recognizing [sexual harassment] as a group harm will allow women to come to each other’s aid as co-complainers, thereby alleviating the problem of reticence. Even if the person the behavior is directed at does not feel bothered, other women can complain, as they suffer the group harm associated with [sexual harassment].

Superson’s definition suffers from many of the same deficiencies as MacKinnon’s, with some additional ones: (1) it depends on some disputable facts, (2) it is too broad, and (3) it is too narrow. Superson claims that “all women” are the targets of each instance of sexually harassing conduct, and that sexual harassment “is not about dislike for a certain person.” However, this is questionable. At least some of the time, dislike of a particular person does appear to be the primary motivation for sexually harassing behavior of the sort commonly called “gender harassment,” and the use of sexist means for expressing that dislike secondary. These are the sorts of cases forming the group of examples that those who hold the natural/biological perspective consider “nondiscriminatory.” In such cases, a person is disliked, and the harasser or harassers choose what they know will be the most distressing means of humiliating the person. In these cases, the target of the insult is not all women, but one particular woman.

Because of the importance of status and dominance in male hierarchies, men are very attentive to signs of weakness in others and correspondingly reluctant to reveal weakness and vulnerability in themselves. Where they see weakness, they may attack. People sensitive to sexually oriented attacks—women and particularly sensitive men—are likely to be attacked in that way. Potential victims with other sensitivities are likely to be attacked in other ways. This may be vicious and sadistic, but it is not necessarily discrimination.

Now, the natural/biological perspective tends to ignore the reasons that “women and particularly sensitive men” are sensitive to “sexually oriented attacks.” However, their way of describing this “weakness” suggests that it is not simply individual, hypersensitive women who are so vulnerable—that
there is something social rather than individual that renders women as a group sensitive to such attacks. This would support Superson’s claim that such harassment is at least in part drawing on the fact that women can be humiliated or insulted or harmed by such attacks. In this sense, then, it is true that what the harassers say when engaged in certain forms of sexual harassment “applies” to all women. But to say that the harasser is really “directing” the message at all women is simply false. The person may have no such intention, and surely intention is required to attribute “direction” to someone’s actions. If Superson means that the message of inferiority is understood by other women and taken to apply to them as well, it is possible. However, she seems not to limit the impact of harassing behavior to those women who hear the remarks or witness the behavior. Also, some kinds of sexist harassment are very individualized and so are probably not taken to apply to all women by those who hear them—for example, sexist behavior that is also racist or based on ethnicity. Women’s solidarity with women is not so well developed that women take everything that happens to one of them to happen to all of them—though perhaps they should. Superson may simply be saying that sexually harassing conduct, insofar as it is sexist conduct, perpetuates the sexism in society, thereby contributing to the view that women are inferior to men in certain ways, and so harming women in the ways that such inferiority does harm them. Her analogy between sexual harassment and racist speech, just described, suggests that this is her meaning. Some of her examples also support this interpretation: “a catcall says . . . that he thinks women are at least primarily sex objects and he—because of the power he holds by being in the dominant group—gets to rate them according to how much pleasure they give him. . . .”38 However, she must demonstrate that all sexually harassing behavior “conveys a message,” and this is difficult to do when we are talking about conduct rather than language. In other words, her claims best fit examples of sexually harassing conduct that consists of actual messages, either verbal or pictorial. But can the same be said for quid pro quo harassment?

Superson says that sexual harassment “has nothing to do with men’s sexual desires, nor is it about seduction; instead, it is about oppression of women. Indeed, harassment generally does not lead to sexual satisfaction, but it often gives the harasser a sense of power.” This is another doubtful claim. Quid pro quo harassment seems often to have something to do with men’s desires, to be about seduction, and to lead to sexual satisfaction. Superson has not demonstrated that this appearance is illusory. But admitting that quid pro quo harassment is sometimes about men’s sexual desires does not entail that one is committed to the two “myths” that Superson has described, that “male behavior is normally and naturally predatory,” and that “females naturally . . . acquiesce.” One may admit that some sexual harassment involves sexual desire without excusing quid pro quo harassment as natural and inevitable. One may hold that some men take advantage of their power in one realm to satisfy their desires in another, and that sometimes this is an abuse of power. The second myth suggests that women invite harassment. Superson simply denies this, claiming that “the perpetrator alone is at fault.”39 However, while it may be true that women do not invite sexually harassing behavior, they
may invite sexual behavior. What is at issue is when the latter becomes the former. Superson’s definition provides no way of determining this, rendering the definition too broad.

Superson recommends her definition on the grounds that it allows for the objective determination of when conduct constitutes sexual harassment and when it does not: “If the behavior reflects the attitude that the victim is inferior because of her sex, then it is [sexual harassment].” But how are we to determine whether behavior reflects the attitude that someone is inferior because of her sex? Superson herself claims that “‘traditional courtship activities’ are often quite sexist and frequently involve behavior that is harassment.” The fact that many Americans continue to engage in such practices and to find nothing wrong with them suggests that there is going to be a great deal of disagreement about what kinds of conduct “reflect the attitude that the victim is inferior because of her sex.” Given Superson’s understanding of the criterion for determining whether conduct is sexually harassing or not, even if a woman is interested in a man and shows her interest in a relationship with him, if he behaves toward her in a sexist way, he is guilty of sexual harassment in the sense in which it is illegal under sex discrimination law. It may even be the case that any man who initiates a sexual relationship with a woman is guilty of sexual harassment since traditionally, men are the sexual initiators because they are dominant in sexual matters, so that the practice of male initiation of sexual relationships may convey the message that women are inferior because of their sex.

Superson’s definition is too broad to be used as a legal definition for other reasons. Her definition makes any expression of sexist beliefs by men to women illegal. Any behavior that “expresses or perpetuates the attitude” will do. This definition seems to have moved away from quid pro quo cases and nearly to have identified sexual harassment with sexism. In lamenting the inadequacy of current legal definitions of sexual harassment, Superson describes examples of behaviors that are considered sexual harassment under her definition, but that are not currently illegal.

Victims not protected include the worker who is harassed by a number of different people, the worker who suffers harassment but in small doses, the person who is subjected to a slew of catcalls on her two mile walk to work, the female professor who is subjected to leering from one of her male students, and the woman who does not complain out of fear. The number of cases is huge, and many of them are quite common. It is not clear that we should want the “victims” of such behaviors to be protected by the law. If we should, Superson has not provided the argument.

There are reasons for thinking that Superson’s definition is too narrow. As I argued here, her claims about the social harm of sexual harassment best fits cases of “gender harassment” and catcalls. It is not clear that they fit quid pro quo sexual harassment. In addition, like MacKinnon’s definition, Superson’s limits sexual harassment to the harassment of women by men. Superson seems not to worry that women sometimes impose themselves on other
women, and men on other men. An adequate definition of sexual harassment ought to allow the inclusion of such conduct.

Superson’s definition is similar to MacKinnon’s and suffers from some of the same deficiencies. It depends on some doubtful claims of fact. It is too broad because it includes behaviors that many reasonable people do not regard as sexual harassment or sex discrimination, or behaviors that should be illegal. It is too narrow because it does not seem to include all cases of quid pro quo harassment and seems to rule out the possibility of sexual harassment of men, or of women by other women.

I turn now to a selection of conceptions of sexual harassment that come from the liberal perspective. Because of the great variety of positions that are included under the liberal perspective, these conceptions differ from one another considerably.

The Liberal Perspective

Hughes and May

John Hughes and Larry May argue that sexual harassment is fundamentally a form of coercion. Sexual harassment is morally wrong because coercion is morally wrong. Hughes and May also consider sexual harassment to be a form of sex discrimination. Allowing the practice of sexual harassment in the workplace discriminates against women: “the harm of harassment is felt beyond the individuals immediately involved because it contributes to a pervasive pattern of discrimination and exploitation based on sex.”

Though their analysis seems to support the currently accepted legal analysis of sexual harassment, it exhibits the very bifurcation evident in that analysis. Sexual harassment involves two kinds of harm, at least when the victim is a woman: coercion and discrimination. This raises the question, How are the elements of coercion and discrimination related? In other words, how is the harm to the harassed individual (coercion) related to the harm to other individuals (discrimination)?

Hughes and May define sexual harassment as follows: “The term sexual harassment refers to the intimidation of persons in subordinate positions by those holding power and authority over them in order to exact sexual favors that would ordinarily not have been granted.” This seems very much like MacKinnon’s definition. However, there are significant differences in their interpretation of the definition. These differences become evident when May and Hughes distinguish different kinds of sexual harassment:

1. Sexual threat: “If you don’t provide a sexual benefit, I will punish you by withholding a promotion or a raise that would otherwise be due, or ultimately fire you.”
2. Sexual offer: “If you provide a sexual benefit, I will reward you with a promotion or a raise that would otherwise not be due.” There are also sexual harassment situations that are merely annoying, but without demonstrable sanction or reward.
May and Hughes’s first and second categories seem to be limited to quid pro quo harassment. These are the only kinds of sexual harassment they acknowledge as wrong because they involve coercion. The third category, which they do not number, would seem to include hostile environment harassment, or gender harassment. Behavior in this category is wrong, if it is, because it is discriminatory, not because it is coercive. Thus, their interpretation of sexual harassment differs from MacKinnon’s, for she does not treat the two kinds of harassment as different in kind. On their analysis, there is a difference of kind between quid pro quo and other forms of sexual harassment.

Sexual threats are coercive because “they worsen the objective condition the employee finds herself in.” A woman who has been sexually threatened by her supervisor is in a worse position than she was before the threat was made. Both her freedom to make choices about her social relationships and the conditions under which her work is evaluated are affected. If the woman gives in to the threat, she may still be coerced into remaining in the relationship, for fear of losing her employment.

Sexual offers are harmful because they change the working environment of the woman in such a way that she is no longer viewed in the same terms as her male co-workers.

[A] sexual offer disadvantages the woman employee by changing the work environment so that she is viewed by others, and may come to view herself, less in terms of her work and more in terms of her sexual allure. This change, like the threat, makes it unlikely that she can return to the preproposition stage even though she might prefer to do so. Furthermore, to offset her diminished status and to protect against retaliation, a prudent woman would feel that she must accept the offer. Here, sexual offers resemble the coercive threat.

Hughes and May claim that men are not as harmed by sexual offers as women are.

Men are not similarly harmed by sexual offers because they do not have the same history of sexual exploitation. Men are likely to regard such seductive offers either humorously or as insults to be aggressively combatted, while women have been socialized to be passive rather than combative in such situations. The woman to whom the offer is made becomes less sure of her real abilities by virtue of the proposal itself.

It is not clear whether Hughes and May think that men are not coerced at all by sexual offers, or that sexual offers are less coercive for men. However, in either case, this seems to need further argument. Recent cases of same-sex harassment suggest that many men are very vulnerable to sexual offers, especially young men or men who are relatively powerless because of some other characteristic.

Hughes and May argue that both kinds of sexual harassment, threats and offers, are also discriminatory to women, though not to men. They offer two
reasons for this. Each reason analyzes the harm of sex discrimination differently. The first follows the court’s argument in \textit{Barnes v. Costle}:

\begin{quote}
[Sexual] threats treat women differently than men in employment contexts even though gender is not a relevantly applicable category for making employment-related decisions. The underlying principle here is that like persons should be treated alike. Unless there are relevant differences among persons, it is harmful to disadvantage one particular class of persons. In the normal course of events, male employees are not threatened sexually by employers or supervisors. . . . When persons who are otherwise similarly situated are distinguished on the basis of their sex, and rewards or burdens are apportioned according to these gender-based classifications, illegal sex discrimination has occurred.\textsuperscript{49}
\end{quote}

This description of the discriminatory nature of sexual threats exhibits MacKinnon’s differences approach. It is a straightforward application of the liberal principle of equality. Recall that, according to the liberal perspective, sexual harassment is not intrinsically connected to gender, as it is for proponents of the dominance approach. Women are more often harmed by sexual harassment, however, because of contingent gender disparities in our society.

The second reason that sexual harassment is discriminatory to women is found in the court’s reasoning in \textit{Tomkins v. Public Service Gas and Electric Co}.: “Sexual threats also contribute to a pervasive pattern of disadvantaged treatment of women as a group. Under this approach, the harm is not viewed as resulting from the arbitrary and unfair use of gender as a criterion for employment decisions. Rather, emphasis is on the effect the classification has of continuing the subordination of women as a group.”\textsuperscript{50} This interpretation is not precisely an application of the principle of equality because it is treating women as a group rather than as individuals. Hughes and May call this the “group disadvantage model” of classification: “Under this approach, the harm that results from classification is . . . viewed . . . in terms of whether the effect of the classification of persons is such as to stigmatize or to contribute to the continued subordination of a protected class relative to others in society.”\textsuperscript{51} This explanation of the discriminatory character of sexual harassment is very close to Superson’s account of the harm of sexual harassment.

Hughes and May accept both ways of understanding the harm of discrimination. They acknowledge that there are certain difficulties with each but seem to think that, using both, the deficiencies of each can be lessened. Hughes and May argue that sexual threats such as those involved in the early quid pro quo sexual harassment cases constitute discrimination on the group disadvantage model because

the burden was imposed on the female employee based on a sex stereotype held by the supervisor and implicitly endorsed by the company when it terminated the complaining employee. It is precisely because a sex stereotype did supply the impetus for the supervisor’s classification
that his action injures women as a group, regardless of whether all members of that group are included within the classification. . . . When a company tolerates coercive behavior against one woman, it perpetuates the social convention that a woman’s merits are to be measured in terms of her sexual attractiveness and compliance, not in terms of her skills or job performance. Women as a group are injured by the supervisor’s conduct. . . . 52

To summarize, Hughes and May consider sexual harassment to be, at its core, coercion. Sexual threats and, perhaps less obviously, sexual offers both involve coercion because they force a woman into a position less favorable than her position before the threat or offer, and this less favorable position is one she would not have chosen had she had the option. Sexual harassment of women is also discriminatory because it disadvantages women as a group. Men who are sexually threatened are victims of coercion, but not of discrimination. Men to whom sexual offers are made are not coerced as much as women are, and they are not discriminated against.

One benefit of Hughes and May’s definition is that behavior directed at men can be counted as sexually harassing, and, unlike MacKinnon’s or Superson’s definition, the way in which sexual harassment for men is different from that for women is clearly articulated. However, it is not clear why men do not suffer discrimination as a group when one man is sexually threatened. If we think about vulnerable groups of men, it is less clear why such actions are not based on derogatory stereotypes as much as are actions directed toward women, stereotypes that harm men.

Hughes and May’s group disadvantage model is articulated in terms of stereotypes. This model is similar to Superson’s analysis and suffers from similar difficulties. Like Superson, Hughes and May argue that women as a group are harmed by each sexual threat or offer. Like Superson, they analogize such cases to a supervisor’s “use of racial epithets”: “Women as a group are injured by the supervisor’s conduct, just as blacks as a group would be injured by the supervisor’s use of racial epithets against a faction of his black employees.”53 Their argument that a sexual threat or offer disadvantages women as a group depends on the assumption that the supervisor held a derogatory stereotype about women and that the stereotype provided the impetus for the supervisor’s classifying the woman threatened. What is that stereotype? The passage cited earlier suggests that the stereotype is that the worth of women in general, and so as employees, “is to be measured in terms of [their] sexual attractiveness and compliance, not in terms of [their] skills or job performance.”54 But how could we determine whether such a stereotype was operative? What does it mean to say that “a sex stereotype did supply the impetus for the supervisor’s classification”? Perhaps the stereotype, if there was one, supplying the impetus for the supervisor’s action was that employees over whom he has power can be fired at his whim. He fires a man because he perceives him to be a sexual rival. He fires a woman because she will not sleep with him. Why is the latter treated as discriminatory and the former not? The answer would be that the latter disadvantages women as a group, whereas the

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former does not disadvantage men as a group. However, the reason for this
difference is not clear. Like Superson, Hughes and May pass over the possibil-
ity, suggested by adherents of the natural/biological perspective, that the
motive for a supervisor’s threats or offers is sexual desire.

It does seem that coercion is present in the sorts of cases Hughes and May
discuss. We have seen this in many accounts of quid pro quo sexual harass-
ment. However, their definition is too narrow, in two ways. First, they do not
seem to consider hostile environment sexual harassment to be sexual harass-
ment. This is not surprising, since when they first developed their definition,
hostile environment sexual harassment was largely unrecognized. They refer
to some sexually harassing behavior as “merely annoying,” and by calling
such behavior “sexually harassing,” they seem to be implying that it is coer-
cive. But they do not analyze the ways in which such behavior is coercive,
and by describing it as “merely annoying,” they seem to imply that it is not dis-
criminatory, or not discriminatory enough to warrant legal action. Of course,
this is a position that someone might defend; but they do not do so. Secondly,
their analysis seems to include only harassment perpetrated by supervisors,
omitting co-worker harassment.55 The reason for this seems to be that only
supervisors, persons with the authority to confer or withhold employment-
related benefits, have the power to coerce. Yet, co-worker harassment would
certainly seem to fit their account of group disadvantage.

Some might argue that Hughes and May’s definition of sexual harassment
is too broad because it includes sexual offers. Their argument is that sexual
offers are similar to sexual threats, but many view such offers—when made
to women—as discriminatory toward men, because they treat women and
men differently. Hughes and May do not discuss the question whether sexual
offers made exclusively to women are discriminatory toward men. They would
not see such offers as disadvantaging men as a group, but they might see them
as discriminatory on the differences analysis of discrimination. There have
been sex discrimination lawsuits brought against employers for “sexual fa-
voritism.”56

Furthermore, the double analysis of the harm of sexual harassment in
terms of both coercion and group disadvantage for women is problematic.
Coercion initially seems to be the defining harm of sexual harassment. But
how does the coercion fit in the analysis of discrimination? It seems that it
does not. That is, the behaviors in question would be discriminatory even if
they were not coercive. If coercion is the primary harm of sexual harassment,
then it is not clear that considering sexual harassment to be sex discrimina-
tion is the best way to address it. Perhaps a better way to say this is: Hughes
and May actually provide two analyses of the harm in sexual harassment.
Any given act may be coercion, group disadvantage for women, or both. This
raises problems for treating all sexual harassment in the same way in the
workplace—as sex discrimination. For example, on their analysis, men should
not be treated in the same way as women since they suffer only coercion, and
not discrimination in addition to it. However, the dominant interpretation of
discrimination law is the differences approach, under which women and men
must be treated in the same way. Such a two-pronged analysis is necessary
for conceptions from a liberal perspective, if one wishes to claim that sexually harassing conduct is wrong and discriminatory.

Hughes and May, in their definition of sexual harassment as coercive, do seem to capture an important element of much sexually harassing behavior. This element is what makes such behavior, in some people’s view, a form of extortion. However, as Edmund Wall points out in his critique of this understanding of sexual harassment, discussed in the next section, it does not capture what many think is wrong about other sorts of sexually harassing behavior. Hughes and May focus on sexual threats and sexual offers, which turn out to be very like sexual threats. They categorize as “annoying” certain other forms of behavior that are considered to be sexually harassing. But they do not say how these other forms of behavior are coercive, or, if they are not, how they harm the victims.

Wall: Invasion of Privacy

Edmund Wall’s analysis of sexual harassment seems to be the definition most consistent with a natural/biological perspective on sexual harassment, although it is also consistent with certain versions of the liberal perspective. His definition of sexual harassment places at the core an element which has been only implicit in the preceding definitions. In his view, “the mental states of the perpetrator and the victim are the essential defining elements.” Wall conceives of sexual harassment as a form of “wrongful communication”: “Sexual harassment is described as a form of communication that violates a victim’s privacy rights. This interpersonal definition purports to capture the more subtle instances of sexual harassment while circumventing those sexual advances that are not sexually harassing.” Thus, Wall wants his conception of sexual harassment to be narrow enough to allow a distinction between morally permissible and morally impermissible sexual advances by men toward women, and to be broad enough to encompass all sexually harassing behavior.

Wall argues that a definition of sexual harassment which takes into account the intentions of both parties to the behavior is adequate. He offers the following:

Where X is the sexual harasser and Y the victim, the following conditions are offered as the definition of sexual harassment:

1. X does not attempt to obtain Y’s consent to communicate to Y, X’s or someone else’s alleged sexual interest in Y.
2. X communicated to Y, X’s or someone else’s alleged sexual interest in Y. X’s motive for communicating this is some perceived benefit that he or she expects to obtain through the communication.
3. Y does not consent to discuss with X, X’s or someone else’s alleged sexual interest in Y.
4. Y feels emotionally distressed because X did not attempt to obtain Y’s consent to this discussion and/or because Y objects to what Y takes to be the offensive content of X’s sexual comments.
I take Wall to be providing both necessary and sufficient conditions for sexual harassment in his definition. That is, in order to count as an instance of sexual harassment, an action must meet all four conditions, and any action that meets all four conditions constitutes an instance of sexual harassment.

The first condition, says Wall, is crucial, since it is by not attempting to obtain Y’s consent to “a certain type of communication” that X fails “to show respect for Y’s rights.”61 “It is the obligation that stems from privacy rights that is ignored. Y’s personal behavior and aspirations are protected by Y’s privacy rights. The intrusion by X into this moral sphere is what is so objectionable about sexual harassment. If X does not attempt to obtain Y’s approval to discuss such private matters, then he or she has not shown Y adequate respect.”62 However, fulfillment of the first condition alone is not sufficient to constitute sexual harassment, since in order to count as harassment, “X’s conduct must constitute a rights violation.”63 The second condition supplies this, for “the second condition refers to the fact that X has acted without concern for Y’s right to consent to the communication of sexual matters involving Y.”64 Wall contends that X’s motive for attempting the communication “always includes some benefit X may obtain from this illegitimate communication.”65

The third condition is also necessary, since for X to violate Y’s rights, Y must not consent to participation in the communication in question. If Y does consent, then the behavior is not sexually harassing. As Wall acknowledges, (3) may seem to make (1) unnecessary. But Wall wants both (1) and (3), to allow for genuine mistakes by alleged harassers.

Consider the possibility that the second and third conditions are satisfied. For example, X makes a sexual remark about Y to Y without Y’s consent. Now suppose that the first condition is not satisfied, that is, suppose that X did attempt to obtain Y’s consent to make such remarks. Furthermore, suppose that somewhere the communication between X and Y breaks down and X honestly believes he or she has obtained Y’s consent to this discussion, when, in fact, he or she has not. In this case, X’s intentions and actions being what they are, X does not sexually harass Y. X has shown respect for Y’s privacy. Y may feel harassed in this case, but there is no offender here. However, after X sees Y’s displeasure at the remarks, it is now X’s duty to refrain from such remarks, unless, of course, Y later consents to such a discussion.66

Wall says that the possibility of genuine miscommunication shows the importance of clear communication.

The fourth condition is necessary because Y’s mental state is essential to genuine cases of sexual harassment. According to Wall, “Y must be distressed because X did not attempt to ensure that it was permissible to make sexual comments to Y which involve Y, or because the content of X’s sexual comments are offensive in Y’s view.”67

Thus, Wall’s analysis includes the notions of wrongful communication, invasion of privacy, and intention. These are important elements in some behaviors considered to be sexual harassment that other definitions do not in-
clude. The possibility of genuine misunderstanding should be something for which an adequate conception of sexual harassment allows. Wall's account of how certain behaviors constitute an invasion of privacy well describes certain experiences of sexual harassment. In particular, it seems consistent with an important element of some verbal harassment that MacKinnon points out in her book *Only Words*. MacKinnon suggests that in some cases, words are actions: "To express eroticism is to engage in eroticism, meaning to perform a sex act. To say it is to do it, and to do it is to say it. It is also to do the harm of it and to exacerbate harms surrounding it." Wall may not agree with the argument in the context in which MacKinnon makes these claims. However, MacKinnon’s discussion helps to highlight one of the elements of some sexually harassing behavior that Wall’s definition captures: by behaving sexually toward one, either verbally or physically, a person can force intimacy or sexuality on one against one’s will. MacKinnon pushes this further, by saying that in expressing certain words or gestures, the person can force one to have sex.

Thus, Wall’s definition accounts well for certain kinds of sexually harassing conduct that Hughes and May’s conception, for example, does not. However, Wall’s definition is too narrow because of its emphasis on communication. Even more than Superson’s and Hughes and May’s conceptions, Wall’s conception depends on language in a way that renders it inadequate to account for what is wrong with certain types of sexual harassment. To say that sexual harassment is “a form of communication that violates its victim’s privacy rights” does not seem to the point in cases of quid pro quo harassment, though this may have taken place. As Hughes and May point out, coercion seems central in these cases. Also, Wall’s insistence that whether or not sexual harassment has taken place depends on the intentions of both perpetrator and victim is very problematic, though I agree that it allows him to distinguish between genuine cases of sexual harassment and innocent, but mistaken, behavior. On Wall’s view, whether or not a person has committed sexual harassment depends on the intentions and beliefs of the alleged perpetrator. We may ultimately want to adopt such a definition, but we should think carefully about what it means if we do. As we all know, the road to hell is paved with good intentions.

It seems clear that Wall has in mind cases of sexual harassment which might be confused with ordinary “courtship behavior.” As I said in chapter 1, this is typical of the natural/biological perspective. According to the natural/biological perspective, sexual harassment is primarily a result of misunderstanding. Wall allows that some instances of apparent sexual harassment are not due to misunderstanding. Sometimes people violate the privacy of others intentionally. In such cases, genuine sexual harassment has occurred. To see that the definition is too narrowly focused on a certain kind of case, we can imagine the following sort of case. A supervisor approaches an employee and asks her whether he can communicate his sexual interest in her, because he wants a sexual relationship with her. Suppose that she says no and is denied her next promotion as a result. On many understandings of sexual harassment, this is a classic case of quid pro quo sexual harassment.
The supervisor is retaliating against the woman by denying her employment-related benefits because she has refused him sexual access. However, the case fails to constitute sexual harassment on Wall’s definition, because the case fails to meet condition (1). The supervisor did try to obtain Y’s consent to communicate his sexual interest in her. Now, suppose that the employee says yes. The supervisor then proceeds to communicate to the employee that if she wants her next promotion, she must have a sexual relationship with him. Again, this seems to be a classic case of quid pro quo sexual harassment. Yet, on Wall’s conception, it is not. The case fails to meet conditions (1), (3), and (4).

Though Wall has developed his conception of sexual harassment at least in part in order to allow for a clear distinction between ordinary courtship behavior and sexually harassing conduct, it is not clear that he has done so. Mane Hajdin has argued that many conceptions of sexual harassment, including the one currently in the law, suffer from the “demarcation” problem. That is, it is not possible to distinguish acceptable from unacceptable sexual behavior in the workplace. According to Hajdin, “an individual needs to be able to determine in advance whether the conduct is covered by the definition.”73 However, “often the only way to find out whether someone would find certain conduct of a sexual nature unwelcome and offensive is to ask the person. . . . But here is the catch: asking a person about such matters is itself verbal conduct of a sexual nature that may easily be unwelcome and offensive and thus come under the definition of sexual harassment.”74 One can see how this might occur under Wall’s definition. Condition (1) requires that a person, to avoid sexually harassing conduct, attempt to obtain Y’s consent to communicate something sexual to Y. But that in itself is sexual. The possibility of an infinite regress looms.

Wall’s definition does seem to fit quite well a certain kind of sexual violation. The following explanation fits such cases well:

What is inherently repulsive about sexual harassment is not the possible vulgarity of X’s sexual comment or proposal, but X’s failure to show respect for Y’s rights. It is the obligation that stems from privacy rights that is ignored. Y’s personal behavior and aspirations are protected by Y’s privacy rights. The intrusion by X into this moral sphere is what is so objectionable about sexual harassment. If X does not attempt to obtain Y’s approval to discuss such private matters, then he or she has not shown Y adequate respect.75

However, while this may be so in some kinds of cases, it is not what is inherently repulsive in others.

Wall’s use of “he or she” in his discussion of sexual harassment indicates that he believes that sexual harassment, as he defines it, is gender neutral (that is, it is not sex discrimination). He does not conceive of sexual harassment as a form of gender discrimination. He clearly distinguishes his conception of sexual harassment from that of Hughes and May when he states that “[s]exual harassment is not necessarily tied to discrimination or coercion.”76 Hughes and May’s definition includes both power and sexuality. However, as
I have mentioned previously, and as Wall points out, they seem to leave out co-worker harassment; or, as Wall also says, “May and Hughes would need to demonstrate that social inequities and issues of power are central to all sexual harassment cases before they could say without qualification that sexual harassment is a form of sex discrimination.”

It should be evident that each of the different definitions of sexual harassment we have examined seems to fit different kinds of cases, and to account for different aspects of what has been called sexual harassment. Wall’s definition seems to account well for a certain kind of hostile environment sexual harassment, and he does provide a way of distinguishing between apparent sexual harassment and real sexual harassment, but it is not clear how helpful the distinction is outside the heads of the people directly involved. Furthermore, he seems to think that there is a “right to privacy” that is fairly straightforward, but in what this right consists is unclear from his discussion.

Cornell: Self-Respect

Some of the definitions we have been examining have been around since the early 1980s. Recently, some new understandings of sexual harassment have been articulated, including some that self-consciously utilize a liberal perspective. Drucilla Cornell provides a definition of sexual harassment in her book *The Imaginary Domain* in the context of a larger project concerning “a view of equality that provides us with a new perspective on the relationship of sexual difference to equality and of equality to freedom in the hotly contested issues of abortion, pornography, and sexual harassment.” Cornell sets out what she considers to be the necessary conditions for personhood or, as she puts it, for “individuation.” These conditions are “(1) bodily integrity, (2) access to symbolic forms sufficient to achieve linguistic skills permitting the differentiation of oneself from others, and (3) the protection of the imaginary domain itself.”

For Cornell, one is always in the process of becoming a person, of working through “imposed and assumed personae.” Sex and sexuality are fundamental to one’s personhood. The “minimum conditions of individuation” she sets out “are necessary for the chance of sexual freedom and the possibility of sexual happiness.” Legal protection of these conditions is necessary to provide everyone the equal chance to transform themselves into the person they choose to become.

Central to Cornell’s position is the claim that women have been held responsible for men’s reactions to them, and that this responsibility has been enforced by law. This is evident in the practice of inquiring into a rape or sexual harassment victim’s dress, drinking habits, and sexual history. While the latter two have now been banned from both rape and sexual harassment inquiries, a victim’s appearance is still considered to be relevant in determining whether sexual behavior is “welcome.” This was stated explicitly in *Meritor*.

The claim that women are held responsible for men’s reactions to them is used in Cornell’s argument that sexual harassment law is not designed to protect women, but to ensure their freedom: “when women demand the space to be sexual in their own way and still be accorded respect for their worthiness
as persons, they are demanding the equal chance to seek happiness, not protection."  

It is against this background that Cornell provides a reworking of the EEOC definition of sexual harassment:

[S]exual harassment consists of (a) unilaterally imposed sexual requirements in the context of unequal power, or (b) the creation and perpetuation of a work environment which enforces sexual shame by reducing individuals to stereotypes or objectified fantasies of their "sex" so as to undermine the primary good of their self-respect, or (c) employment-related retaliation against a subordinate employee or, in the case of a university, a student, for a consensually mutually desired sexual relationship.

For Cornell, these three different "routes to claiming sexual harassment . . . stress the importance of the protection of the imaginary domain for the chance of sexual freedom."  

Cornell considers clause (a) to be a revision of the legal definition of quid pro quo sexual harassment. She replaces "unwelcome" or "unwanted" with "unilaterally imposed" in the EEOC definition of quid pro quo harassment, and she claims that "[t]he wrong" in quid pro quo sexual harassment, "is in the unilateral imposition in a context of unequal power." Cornell claims several advantages for her revised definition of quid pro quo sexual harassment over the current legal definition. First, "unilaterally imposed," "serves the same purpose as 'unwanted' and 'unwelcome' in directing us to investigate the differences between a desired sexual relationship and one that is not mutual, one that is imposed upon the other party," so nothing is lost. However, it makes clear that the harm involved is failing to respect a woman as an equal human being. This echoes the element of Wall's definition which assumes a right to privacy. Second, "the phrase, 'unilaterally imposed,' would not disallow evidence of mutual involvement in consent but this would be evidence of mutual involvement in consent and not evidence of how women implicitly invite sex." This would make inquiries into women's attire and general behavior inappropriate when charges of sexual harassment are made. And this would guard against women's being judged according to what Cornell describes as the "psychical fantasy of Woman." Investigation into a woman's general behavior "implicitly incorporates fantasies about women which impose someone else's imaginary upon women's sense of self-worth."  

Part (b) of the definition replaces the legal standard of hostile environment sexual harassment. Cornell's definition diverts attention from the question whose perspective represents "objectivity"—the reasonable man or the reasonable woman—to the question of "whether or not the workplace and the contested behavior effectively undermined the social bases of self-respect by enforcing stereotypes or projecting fantasies onto the plaintiff as one unworthy of personhood." This makes the behavior the issue, not the woman's perception of the behavior. Cornell argues that "each one of us should be accorded the primary good of self-respect for ourselves as sexuate beings."
This requires “space for the free play of one’s sexual imaginary.” Cornell argues that “sexual harassment both enforces sexual shame and does so in a way that effectively undermines any woman’s projected self-image of herself as worthy of equal personhood.” Cornell contrasts this perspective with the view that prohibitions on hostile environment sexual harassment protect women’s virtue. In her view, such prohibitions are not about protection of virtue, but about the defense of freedom. One of the features of this position is that it does not divide women into the reasonable and the unreasonable, and it makes clear why gays and lesbians should be protected from hostile environment abuse by same-sex abusers.

Part (c) of the definition of sexual harassment addresses the kind of behavior regulated by consensual relationship policies at colleges and universities. Cornell says that her formulation focuses on “the wrong of the abuse of power,” and she characterizes that wrong as “the inequality in holding women responsible for their sexual behavior in a way that men are not.” Clearly, this makes such behavior discriminatory.

For Cornell, the wrong in quid pro quo harassment is the “unilateral imposition in a context of unequal power.” The wrong in hostile environment sexual harassment is that it undermines equality in the workplace. The wrong of the third kind of harassment is that it is an abuse of power and treats women unequally. If the wrong in these kinds of behavior is different, why should they all be called sexual harassment? Cornell would probably respond that they are united by their purpose, to curtail people’s sexual freedom. However, we might ask whether that is sufficient conceptually to unite them. Are there other sorts of behavior that should also be included in the protection of sexual freedom? And if there is conceptual unity between these behaviors, is sexual harassment the best label for such a concept?

One feature of these definitions is that gender is not essential to sexual harassment. In this, Cornell’s definition diverges from MacKinnon’s and Superson’s, for which gender is essential to the definition of sexual harassment. Cornell’s definition points toward an expanded protection of sexual expression, the sort favored by Abrams and Franke. Because of this, many would find her definition too broad. It is unlikely that any would find it too narrow. Both women and men would find protection from such laws. Both are free to develop their sexual selves. All of the kinds of behavior that have been categorized as sexual harassment are covered by the definition.

Like MacKinnon’s and Superson’s definition, Cornell’s rests on a number of problematic assumptions. Her assumptions involve the conditions for personhood and, particularly, for free sexual development. Many people object to sexual harassment law precisely because it challenges the status quo. These people would certainly object to Cornell’s definition and its underlying assumptions. Cornell sees herself as articulating the view that women should have what men demand for themselves: “entitlement to their own sexuality as a crucial aspect of their subjectivity.” In her view, the behaviors that constitute sexual harassment deny this to women. Women’s entitlement to their own sexuality, at this moment in time, requires laws prohibiting sexual harassment.
Cornell’s conception, then, is not too narrow but would be regarded as too broad by many, including adherents of the dominance perspective. Perhaps its greatest merit is that it conceives of the prohibition of sexual harassment as necessary for women’s equality, yes, but also for their freedom, including their sexual freedom. This is something that is implicit in MacKinnon’s conception, with its emphasis on the coercive nature of heterosexual sex. The major fault of Cornell’s conception is a certain disunity in the concept of sexual harassment, when different kinds of sexual harassment are conceived as involving different sorts of wrongs. Unity is restored if one accepts Cornell’s assumptions that sexual freedom is necessary for personhood, and that these behaviors curtail sexual freedom. The main difficulties for the conception are the controversial assumptions that provide its unity. Many do not want the law’s protection of sexual freedom of the sort Cornell says is necessary for personhood.

Cornell’s definition seems to emphasize the disparity in the various behaviors that are categorized as sexual harassment. It may be that accepting a definition of the sort she recommends would lead to an abandonment of that concept in favor of a group of concepts classified under the heading of “obstacles to sexual freedom.” This may not be a bad idea.

Davis: Sexual Inappropriateness

Breaking apart the category of sexual harassment and giving up the term “sexual harassment” is recommended by Nancy Davis. Davis has written on sexual harassment in academe. She argues that we need to be able to distinguish between different sorts of harassers because different sorts of responses are likely to be effective.

It is wrong for instructor A to coerce a student into a sexual involvement with the threat of academic reprisal (quid pro quo), and it may also be wrong for instructor B to offer academic encouragement to a student in order to have more frequent contact with her and thus more opportunities to initiate a sexual relationship with her. It may be wrong for instructor C to make frequent remarks to female students about how “sexy” they are and wrong for D to use classroom humor that relies on jokes and examples that are demeaning to women. However, though the actions of all four instructors may be wrong, they are not wrong for the same reasons, and the differences may be more significant than the similarities, both with respect to the moral assessment of the instructors’ conduct and the design of plans or policies to remedy it. The blanket characterization of all four as sexual harassment conceals and may mislead.99

Davis suggests that instructor A is intentionally exploiting students, while B, C, and D may be unwittingly insensitive or confused about their own motivations. She allows that all of these behaviors may be “sexually inappropriate” but says that
it is unfair to lump the willful exploiter and the unwittingly insensitive instructor together in the same moral (or legal) category and to treat their misconduct as deserving of the same sorts of sanctions. It is also practically unwise, for the measures that are likely to be effective and appropriate means for eliminating willful exploitation are different from those that serve to eliminate insensitivity.\textsuperscript{100}

Davis is more concerned to critique the broad definitions in university sexual harassment policies which are based on the EEOC Guidelines. This is an important task: “Because such definitions lump together many different kinds of behaviors, they blur distinctions that may have moral, psychological, and practical relevance.”\textsuperscript{101} Because people see sexual harassment as involving some sort of sexual offense, if one is charged with sexual harassment, moral opprobrium follows.

I find the analyses of sexual harassment by Cornell and Davis most illuminating. Many of the definitions reviewed here seem to force disparate behaviors under one conception. Cornell and Davis acknowledge that there are significant differences between behaviors that resemble the core sexually harassing behaviors of quid pro quo and hostile environment sexual harassment. However, before I provide my conclusions about conceptions of sexual harassment, I must discuss the view that sexual harassment is not a legitimate concept.

Sexual Harassment Is Not a Legitimate Concept

Some philosophers argue that sexual harassment is not a legitimate concept, or that it is not a “morally significant” concept.\textsuperscript{102} These possibilities should be investigated, because they would explain why there are so many flawed definitions of sexual harassment, and why there is so much disagreement about what it is.

F.M. Christensen argues that “the concept of ‘sexual harassment’ is not a legitimate concept. Its major defects are: “(1) It lumps together serious crimes, minor offenses, and actions that are arguably not wrong at all. (2) What the actions do have in common . . . is irrelevant to what it is about each action that makes it wrong.”\textsuperscript{103} A legitimate concept, we may infer, is one that properly carves up the world at its joints. This one does not, since it gathers together behaviors that are different in important ways, and that have no significant commonality.

Mane Hajdin’s argument that the concept of sexual harassment is morally insignificant is similar to Christensen’s argument that the concept is illegitimate. Hajdin agrees with Christensen that there is no single wrong common to all sexually harassing conduct. He further argues that “[t]he distinctions between sexual harassment and other similar kinds of conduct are not morally significant distinctions.”\textsuperscript{104}

Christensen’s first criticism of the concept of sexual harassment is that it encompasses a range of behaviors, some of which are serious wrongs, some
of which are less serious wrongs, and some of which are not wrong. A legitimate concept does not do this.

It is true that the behaviors that have been included under the heading sexual harassment have included everything from failed compliments to rape. Rape is a serious injury to a person; unwanted sexual teasing is much less serious. To put them all in one category tends to render the least harmful as serious as the most harmful. Thus, a charge of sexual harassment against a person can take on the moral condemnation associated with rape.

However, this seems to be more a legal problem than a conceptual problem. People are often shocked upon reading *Meritor* because one of the claims is that the supervisor raped Vinson. We think of rape as a criminal offense, not something to be remedied under discrimination law. However, we must consider that different kinds of laws embody different conceptions of the wrong committed, and that it is at least possible that one action—such as rape—could be wrong for different reasons under different conceptions of the action.

Christensen is assuming that a moral concept is legitimate only if the behaviors it encompasses are all of the same degree of wrong, or at least are all wrong. But on the face of it, this is simply false. There are many concepts that encompass such a range of behaviors. Many believe that lying, for example, is a concept of this sort. Some lies are not wrongs, some are less serious wrongs, and some are very serious, indeed. Lies are particularly serious in the context of the law, where lies are sometimes “perjury” and constitute legal wrongs. Another such concept is “homicide.” This term encompasses many different kinds of killing, some of which are morally and legally wrong, some of which are not.

However, suppose that we accept Christensen’s first criterion for what constitutes a legitimate concept. Is it true that the concept of sexual harassment fails to meet it? I would argue that it has been met by some definitions of the concept of sexual harassment—MacKinnon’s concept, for example. According to her conception, all sexually harassing behavior is discriminatory against women, whatever else it might be. This means that it is all wrong and all wrong to the same degree, under at least one way of understanding it. The reason that Christensen does not agree is because of the way that he describes the phenomena usually categorized as sexual harassment. He does not see that these phenomena have anything in common except sex and objectionableness. But he gives us no reason to prefer his description over MacKinnon’s. He does argue, however, that sexually harassing behaviors do not constitute sex discrimination. I shall address these arguments later in this chapter.

Christensen’s second criticism of the concept of sexual harassment suggests another criterion for a legitimate moral concept: a moral concept is legitimate only if all of the behaviors included under it are wrong for the same reasons. He claims that the concept of sexual harassment does not meet this criterion. In his view, all that the actions called sexual harassment have in common is the fact that they involve “sex” and that they are “objectionable” to someone. His attempt at a definition that captures all of the behaviors considered sexually harassing—“attempted or actual extortion of sexual favors, bodily contact of a sexual nature, and sexual expressions of any kind: jokes,
insults, propositions, passing comments, visual displays, facial expressions, etc., etc.”—is “[s]omething or other to do with sex that someone or other may find objectionable.”107 However, he claims:

“[T]he fact that sex is involved has nothing to do with why or whether any of the proscribed actions is wrong. Sexual extortion is heinous because it is extortion, not because it is sexual; unwanted sexual touching is wrong because it is an invasion of personal space, not specifically because it is sexual; sexual insults are objectionable because they are an attempt to harm, not because they are sexual. And simple sexual frankness is not wrong at all.108

One could argue, along these lines, that rape is not wrong because it is sexual. But surely rape would not be rape unless it were sexual. Similarly, for those who believe that sexual harassment is a legitimate concept, the sexual element of the behaviors Christensen describes is relevant to their wrong. Take, again, MacKinnon’s definition. In a patriarchal culture, heterosexual activity has a particular meaning, so that coercive sexual behavior by men toward women constitutes sex discrimination, whatever else it may constitute. Thus, all behavior classified as sexually harassing behavior is wrong for the same reason.

Christensen creates a category of behavior which he calls “sexual frankness.” He does not define it, but it seems to include any kind of “frank sexual talk.” It would seem to include most of what has been included in “hostile environment” sexual harassment. An example of sexual frankness is what Clarence Thomas is accused of having said to Anita Hill. Christensen comments: “The fact that a type of behavior as harmless and as natural for human beings as talking about sex would be treated as a crime reveals something deeply perverted in this culture.”109 Christensen argues that “sexual frankness” is not wrong in itself, but that definitions of sexual harassment assume it to be wrong. Christensen admits that sexually frank communication is sometimes wrong. It is wrong when it is used in sexual extortion and in cases in which, “no harm is intended or foreseen but arguably should be foreseen, notably, making sexual requests to someone over whom one has supervisory authority: for all the recipient knows, the person having the authority might use it to retaliate for being rejected.”110 In addition, “the use of sexual talk to insult another person”111 is objectionable, and “unjustifiably hounding someone—over sex or anything else whatever—is certainly objectionable, and those who engage in such behavior must be restrained.”112 But the harm in these cases is not in the sexually frank communication itself: in the first case, it is the intent to cause distress that is wrong, and in the second, it is the hounding that is wrong, not its being “sexual.”

I describe “frank sex talk” in order to reveal more of Christensen’s position. In his view, the fact that some kind of behavior involves sex is never relevant to its wrongness. In this, he is in disagreement with not only MacKinnon but Wall. Wall seems to hold that communication involving sex requires more privacy than other sorts of communication.
However, should we accept Christensen’s second criterion for a legitimate moral concept? We do not, in general, require that legitimate moral concepts be such that all behaviors classified under them be wrong in the same way. Nancy Davis makes this point for the term “homicide”: “It is not necessarily incorrect or unreasonable to use one word to refer to a family of behaviors that are wrong for different reasons: homicide refers to involuntary manslaughter as well as to first-degree murder, and they are surely wrong for different reasons.”

I tend to agree with Christensen that the legal treatment of sexually harassing behaviors is problematic. This is a point that should be acknowledged by supporters of legal redress for sexual harassment. Under some conceptions of sexual harassment, behaviors that are only slightly harmful will be included under the definition. In fact, some definitions used in institutional policies and empirical research are such that not all the behaviors that fit under the definition would constitute sexual harassment in a court of law. This means that there is some sexual harassment that is not harmful enough to qualify for legal remedy. But sexual harassment is often understood to be by definition wrong and illegal. This tends to amplify the perceived harm of the less serious instances of sexual harassment, and to classify as legally wrong any behavior that is included among sexually harassing behaviors. The association of behaviors labeled “sexual harassment” with sex and harm tends to brand unfairly those accused of, or even found guilty of mild forms of, sexual harassment, ruining their reputations in ways that similar behaviors not involving sex would not.

Christensen thinks that sexual harassment is singled out for attention because Americans are antiseosexual, and because women are thought to require more protection in general than men. He is right to point to the tendency in American culture to intensify the moral tone whenever sexuality is involved. It seems quite clear that judges would never have found that sexual harassment is sex discrimination in those early cases if they had not been appalled by the sexual nature of the offenses. He is also correct that we should look at comparable actions that do not involve sex, to see how we regard them. One of the problems with charges of sexual harassment is the association with sexual perversion or child molestation. Thus, one of the issues that should be addressed in discussing the harm involved in sexual harassment is the gravity of the charge. One has a sneaking suspicion that the fear of being falsely accused, which one writer argues has informed current sexual harassment law, is because the charge is one of sexual misconduct. How many men are afraid of being accused of being a bully? But a sexual bully? Carol Smart raises the question of the seriousness of sexual harassment: “if our concern is about the ‘use’ of women and others as a means to an end, then why do we only seem to become so alarmed about it in a sexual context?”

Much of the alarm is from people who do not perceive the context of inequality that some feminists do. This suggests that it is traditional beliefs about male and female sexuality that cause the alarm.

In addition, in considering sexual harassment, one should address the question why sexual harassment deserves a kind of attention from the public
and the law that is not deemed necessary for other kinds of harassment. As Christensen points out:

[v]irtually none of the institutions that have created “sexual harassment” policies have adopted explicit rules to penalize all the major and minor non-sexual ways one person can harm or offend another. The author knows of cases in which co-workers or supervisors have deliberately made life miserable for someone, forcing the person to quit; also of cases of non-sexual extortion by supervisors. . . . In most institutions, except for ethnic and gender discrimination, the larger portion of the many ways in which one person can mistreat or upset another are not in any specific way prohibited. Why single out the sexual ones?

Indeed, why not simply adopt general policies of “worksite harassment” (or the like), which would automatically cover the sexual variety as well as all the other kinds of extortion, assault and offensive expressions?117

Why not indeed? These are excellent questions and should be addressed by anyone arguing that sexual harassment should be prohibited in the workplace. However, most commentators do not.

Both Christensen and Hajdin argue that the behaviors identified as sexual harassment are not discriminatory toward women. According to Christensen, arguments that “sexual frankness” constitutes sex discrimination against women are confused. First, the ambiguity of the term “sex” leads people to think that if something has to do with sex, it is automatically sexist. This is not true because discrimination does not necessarily entail unjust discrimination. Secondly, because many people are only attracted to members of one sex, sexual frankness usually discriminates against one sex—it is directed at members of one sex but not the other. However, as Christensen rightly points out, this kind of discrimination is not in itself wrong.

Hajdin makes a similar argument, though, unlike Christensen, he admits that some hostile environment sexual harassment is illegal sex discrimination. This is because it is “motivated by hostility toward the presence of women, and not men, and because its purpose is to embarrass, humiliate, and intimidate women, and not men.”118 Thus, Hajdin seems to understand behavior to be sex discrimination when it is motivated by hostility toward one sex and when its purpose is to harm members of that sex.

Hajdin denies that what he calls “offensive sexual advances” and quid pro quo sexual harassment constitute sexual harassment, because they are not motivated by hostility and it is not their purpose to harm women. However, as we have seen, this is controversial. Many would claim that quid pro quo harassment is motivated by hostility toward women and that its purpose is to harm them.

As we can see, how to describe the phenomena in question in this debate is a major point of contention between those who conceive of sexual harassment as sex discrimination and those who do not. Hajdin seems to be claiming that
if the act is intended to lead to sexual interaction, then it is not motivated by hostility but by sexual desire. Since there is nothing wrong with discriminating based on one’s sexual desire, then it is not wrongful discrimination on the basis of sex. However, one could argue that these are not mutually exclusive motivations. When a male supervisor threatens a female employee with harm in order to obtain sexual favors, hostility or at least indifference toward women seems to be part of the motivation. People who engage in such behavior tend to hold the female sex in low regard. Women exist for their use. It is true that the supervisor may also feel this way about other men. But unless the supervisor acts on this feeling, it is unclear whether this is relevant.

Hajdin might respond that the purpose of the supervisor’s conduct in cases of quid pro quo harassment is not to humiliate, embarrass, or otherwise harm the employee; rather, the supervisor wants a sexual relationships with the employee. Since this is not wrong, then discrimination on the basis of sex is still not wrongful sex discrimination. Again, one could respond that the supervisor does intend to harm the employee. He intends to intimidate her, and to take away her freedom to make choices about her job and her sexual activity. This is what many feminists, such as MacKinnon and Superson, would claim.

Hajdin’s debating partner, Linda LeMoncheck, emphasizes that the dispute over sexual harassment is a dispute over how certain sorts of behavior will be described in moral and legal discourse. It is clear that whether one considers quid pro quo sexual harassment to be sex discrimination will depend on how one describes the behavior in question. The main political dispute lies here. A part of the struggle concerns whose experiences will be taken as definitive.

Christensen’s main argument against treating sexual frankness as discriminatory is a critique of the argument that sexual frankness confines women to her traditional sex role:

Traditionally, women in this culture were limited to the roles of sex partner and mother. . . . What seems to have happened since the rise of feminism is that the roles women were traditionally allowed have been aversively associated, in the minds of some, with those they were denied. Consequently, calling attention to sexuality seems to these individuals to devalue women’s other roles—notably, that of productive worker. Christensen points out that the proper response to this problem is not to deny the sexuality of women, but to acknowledge that women and men are full human beings, sexual and productive. This sounds similar to Cornell, and thinking about this superficial similarity can help to highlight the assumptions of Christensen’s response. He claims that allowing “sexual frankness” is the way to treat everyone as fully human. Cornell argues that such frankness—by which I take it Christensen means talk that is not insulting or bullying or otherwise objectionable—under current circumstances will impose the fantasies of men on women and subject women to shame and curtailment of freedom. Women and men do not engage in “sex talk” equally in the workplace.
and it is difficult to see how this can change under the current circumstances, where if a woman talks about sex publicly, she is seen as having given up her freedom to say no to any man. While Christensen’s suggestion might be ideal, it ignores present realities.

Christensen also denies that sexual extortion—also known as quid pro quo harassment—is discriminatory toward women. His argument is that “the fact that a given offender victimizes members of only one sex is not part of what makes the actions wrong.”121 There is something correct about this argument. As Christensen points out, if the fact he states were to render sexual extortion wrong, then every crime would be discriminatory, since not everyone is victimized. However, what is left out of Christensen’s characterization of the “offense” is the factual claim that motivated people like Lin Farley to invent “sexual harassment.” Many women had to quit jobs or put up with sexual impositions to keep their jobs. Not nearly as many men have had to do so. Christensen characterizes the aspect of the extortion that is relevant to discrimination in such a way that the “crime” is between two individuals, and it is incidental that women tend to be the victims. I admit that this is not the way that sex discrimination is established by law, and I also admit that the arguments seeking to fit quid pro quo sexual harassment into the sex discrimination analysis strike me as artificial. As Christensen points out, “[T]he fact that most sexual harassment involves the ‘discrimination’ of being heterosexual or homosexual is not grounds for calling it sexist.”122 However, I take it that those arguing for the use of Title VII and Title IX to address sexual extortion acknowledge this.123

The primary point of disagreement between Christensen and those whose definitions we have examined—perhaps with the exception of Wall—seems to be whether sex in our culture has the same meaning for women and men. Christensen assumes that it does or should, and the others say it does not but should. Their major disagreement is over how to get to the position that it does. Christensen thinks that this happens by eliminating legal and moral differences in treatment. Others think this merely reinforces the status quo. They claim that we must use the law to bring women to a position of equality with men in the sexual realm. In part, this is an empirical claim. How we could determine who is right without actually trying the two approaches is unclear, however. What we now seem to do is base some law on one approach, and some on the other. This ensures that both remain in the running.

Many of those who oppose Christensen and Hajdin would claim that what those actions considered sexual harassment have in common is a particular combination of sex and power—coercion in the context of sex—or a particular kind of invasion of privacy. They claim that what instances of sexual harassment have in common is that they are expressions of and manifestations of inequality. Christensen and Hajdin’s inability to find a common “wrong” in sexual harassment stems from their denial that the kinds of behaviors collected under the heading “sexual harassment” have anything significant in common. All they can see is that they have “sex” in common. And that is not morally significant, in their view. In other words, they beg the question.
Considering Hajdin and Christensen’s view and then the others examined here is like putting on two different sets of spectacles which enhance certain features of the landscape while diminishing the rest. Proponents of the concept of sexual harassment emphasize the commonality of the behaviors identified as sexual harassment, while playing down the similarities between those behaviors and other behaviors. Christensen and Hajdin downplay the similarities between behaviors identified as sexual harassment and focus on the similarities between the behaviors identified as sexual harassment and other behaviors that are not considered to be sexual harassment. Christensen focuses on talking, and Hajdin on sexual advances. Both play down the significance of gender. This is an abstract approach, and it is this very abstraction that allows Christensen and Hajdin to ignore what other theorists claim is inequality between the genders.

In summary, Christensen and Hajdin raise some important issues for those who seek to define sexual harassment. Their questions help to specify what such a definition must do. To meet the objections, any responsible analysis of sexual harassment should clearly differentiate between a moral (or conceptual) definition of sexual harassment and the legal definition of sexual harassment. The boundaries of the moral definition should be clear, so that no behaviors resembling sexual harassment but not morally wrong should be included in the definition. The moral definition should be clearly differentiated from the legal definition: It is not required that all instances of a moral wrong also be illegal. Nor is it necessary that there be only one approach to a moral wrong under the law.

Conclusion

The problem with all these definitions of sexual harassment seems to be that everyone has got a piece of the truth. That is why each has some appeal. But none seems to provide an adequate definition for all of the kinds of behavior that have been considered. This does not necessarily imply that a definition is wrong; but it should suggest to us that perhaps these behaviors are not similar enough to fit under one category.

Christensen and Hajdin’s discussions highlight the difficulties in conceptualizing sexual harassment as a single concept, and in conceiving of sexual harassment as sex discrimination.

In my view, Cornell’s approach may be the sort of approach that is necessary if all of the behaviors that are now considered sexually harassing are to be included in the concept. I am thinking, in particular, of the recent Supreme Court decision that same-sex harassment constitutes sexual harassment. Cornell has provided a wider justification for finding quid pro quo, hostile environment, and certain other behaviors wrong. However, this justification is so broad that one starts to lose the glue that holds together those behaviors originally identified as sexually harassing. The label no longer seems to fit. Perhaps this is pointing the way to the post–sexual harassment society, where the kinds of
rights to self-determination articulated by Cornell and others are legally protected. The question then becomes, Does the country want to protect individual gender development to the extent this implies?

The problem is that there are so many different kinds of behavior that are collected under the concept sexual harassment. Feminists such as MacKinnon and Superson do not see this as a problem because they subscribe to underlying theories that render these behaviors similar enough to warrant treating them as similar. Biologists see these behaviors as having similar causes (male sexual strategies), but they distinguish between those that are (unacceptably) coercive and those that are not. But we are discussing what we should do in a liberal state, so it seems that we should be as neutral as we can between competing ideals of the good. We should not inscribe either of the views into law. However, if we circumscribe actionable sexual harassment according to what feminists and biologists agree are wrong actions, we will favor the biologists. Those actions they believe are wrong will be illegal, and those they do not consider wrong will not be. Feminists will have some of the actions they believe are wrong be illegal, but many they think are wrong will not be illegal. How are we to reconcile these positions?

The legal definition of sexual harassment, as it stands, is surely both too wide and too narrow. It is too wide because it counts as sexual harassment any “unwanted sexual advance.” This would seem to include invitations offered by well-meaning people to anyone who is not interested. We seem to have a law against sexual initiation, unless the recipient desires the initiation. But, as many have pointed out, how does one know whether such an initiation is wanted?

There have been studies purporting to show that men perceive sexual interest in women’s behavior when women intend friendliness. If this is true, then there will be many unwanted sexual advances, not through malice, but because men think that their advances are desired. Simply making such advances illegal does not appropriately address the problem. Perhaps teaching boys, from a young age, that not every smile is a sexual come-on would be more appropriate.
In this chapter, I shall address several issues in sexual harassment law that are controversial and that help to explain some of the controversy surrounding sexual harassment in general. The issues, to be addressed consecutively, are (1) whether sexual harassment should be considered sex discrimination under Title VII, (2) whether the so-called reasonable woman standard should be adopted (3) whether same-sex harassment is sex discrimination, and (4) whether other forms of harassment should be conceptualized in the same way as sexual harassment.

Sexual Harassment and the Law

As I have emphasized throughout this work, the concept of sexual harassment has been developed on the assumption that it should be illegal. This is why, from the start, sexual harassment was conceived as a legal wrong—either extortion, or sex discrimination, or an invasion of the right to privacy. It is important to recognize, however, that a definition of sexual harassment need not entail its illegality. Even if one agrees that some or all of the behaviors that have been designated sexual harassment are morally wrong or cause inequality, it does not follow that they should be considered legally wrong. One might hold that some of the behaviors should be illegal, but not all. If what is desired is the cessation of such behaviors, then we must consider whether the instrument of the law is the best means to this end.

Ours is a liberal society, in the sense that our governmental institutions are based on liberal political theory. Liberal theory values liberty, or freedom, first. In our society, this is often seen in terms of a right to do what we desire unless what we are doing harms others. The idea that our behavior can justifiably be proscribed if it harms others has been called “the harm principle.”
According to this principle, “A person’s liberty may be restricted to prevent physical or psychic injury to other specific individuals; likewise, a person’s liberty may be restricted to prevent impairment or destruction of institutional practices and regulatory systems that are in the public interest.” Other reasons for prohibiting behavior have been advanced, but most can be seen as variations of the harm principle. As we saw in chapter 5, most people who argue that sexual harassment should be prohibited couch their arguments in terms of the harm done to the victims of sexual harassment, or to women in general. They argue that sexual harassment should be illegal because it unju

justifiably harms its victims. However, some are skeptical about whether the law can be used to prevent sexual harassment, because they doubt whether the law can effect meaningful social change. Even MacKinnon acknowledges that laws crafted by women to address harms suffered by women may end up harming women. In addition, those who agree that sexual harassment should be illegal do not agree on whether tort law or discrimination law is best suited to its regulation.

Whether sexual harassment should be illegal, and if so, in what sense, remains controversial. The issues considered below examine aspects of these controversies.

Discrimination Law or Tort Law?

In the approximately twenty years since the concept of sexual harassment was created, most people have come to agree that quid pro quo sexual harassment is wrong and should be illegal. Many also agree that the more severe forms of behaviors included under the term “hostile environment sexual harassment” should be illegal. However, there is still a good deal of disagreement about the kind of law that should regulate sexual harassment. MacKinnon and others argue that sexual harassment should be considered a form of sex discrimination, in violation of Title VII of the Civil Rights Act. However, until passage of the 1991 Civil Rights Act, those bringing claims of sexual harassment under Title VII could not sue for compensation or punitive damages. The only remedies available under Title VII were “equitable relief”—such as back pay (in cases where the plaintiff is fired in retaliation or quits because of the harassment), an injunction against the employer to stop the harassing behavior, or reinstatement. In order to receive compensation or punitive damages, people sued under tort laws such as invasion of the right to privacy, intentional assault and battery, and intentional infliction of emotional distress. Some have argued that sexual harassment should be treated under tort law, rather than under sex discrimination law, either using existing torts, or creating a new tort specifically for sexual harassment. Still others advocate criminal law for some forms of sexual harassment.

This dispute may sound arcane, but there are two general issues that are important for understanding the sexual harassment controversy. The first is that whether sexual harassment is litigated primarily under tort law or under discrimination law determines how sexual harassment is conceptualized in
the law. The second concerns access to the law for victims of sexually harassing behavior.

Tort law concerns personal injuries, harms done by one person to another. Its purpose is to compensate the injured party for the harm done to them. According to one account, “Tort liability . . . exists primarily to compensate the injured person by compelling the wrongdoer to pay for the damage he has done.” Thus, use of torts—such as “assault and battery, insult, offensive battery, intentional infliction of emotional distress by extreme and outrageous conduct, invasion of privacy”—to litigate sexual harassment claims conceptualizes sexual harassment as behavior offensive to the integrity or sensibilities of an individual. Discrimination law, on the other hand, exists to ensure equal opportunity regardless of sex, race, national origin, religion, age, or disability. As such, it is “sensitive to . . . power dynamics” that operate in obstructing equality of opportunity. If the dominant remedy for sexual harassment is tort law, then sexual harassment will be conceived of primarily as “personal.” Conceiving of sexual harassment in this way tends to undercut the conception of sexual harassment as part of a system of abuses of patriarchal power explicit in many feminist conceptions of sexual harassment. Thus, the dispute over which kind of law should govern sexual harassment is a dispute about what sexual harassment is.

The definitions we examined in chapter 5 fit rather neatly in either the sex discrimination group or the tort group. This is not surprising, since, as I remarked there, these definitions were created with an eye toward the law. The definitions offered by MacKinnon, Superson, Hughes and May, and Cornell conceptualize sexual harassment as sex discrimination. Wall’s is a definition that lends itself to a tort interpretation. The first two of the broad perspectives discussed in chapter 1 also fit quite well into these groups. Browne suggests that there is no “sexual harassment” that qualifies as sex discrimination, so any illegal behavior would be a criminal act or a violation of tort law. The dominance perspective would favor the view that sexual harassment is sex discrimination. Only sex discrimination law is concerned with ensuring the equality of groups, which is central to the dominance perspective. Proponents of liberal perspectives might support sex discrimination or tort law, depending on the kind of liberalism they espouse. As we shall see, libertarians tend to support the use of torts, while more egalitarian liberals support the use of sex discrimination law. Some advocate the use of both sex discrimination law and tort law, because they believe that both are needed to capture the full character of the harm of sexual harassment.

We have seen that MacKinnon considers sexual harassment to be sex discrimination. Because of her more general theory of the sexual subordination of women to men, conceiving of sexual harassment as primarily a violation of tort law is inadequate.

“[T]ort is conceptually inadequate to the problem of sexual harassment to the extent that it rips injuries to women’s sexuality out of the context of women’s social circumstances as a whole. In particular, short of
developing a new tort for sexual harassment as such, the tort approach misses the nexus between women’s sexuality and women’s employment, the system of reciprocal sanctions which, to women as gender, become cumulative. In tort perspective, the injury of sexual harassment would be seen as an injury to the individual person, to personal sexual integrity, with damages extending to the job. Alternatively, sexual harassment could be seen as an injury to an individual interest in employment, with damages extending to the emotional harm [attendant to the sexual invasion as well as to the loss of employment.] The approach tends to pose the necessity to decide whether sexual harassment is essentially an injury to the person, to sexual integrity and feelings, with pendent damages to the job, or whether it is essentially an injury to the job, with damages extending to the person. Since it is both, either one omits the social dynamics that systematically place women in these positions, that may coerce consent, that interpenetrate sexuality and employment to women’s detriment because they are women.14

MacKinnon holds that the distinctive character of those behaviors she believes should be classified as sexual harassment is that they are a result of and a cause of gender inequality. Classifying sexual harassment as a form of sex discrimination captures this; conceiving of sexually harassing behaviors as violations of torts does not. If sexual threats, unwanted sexual advances, and unwanted sexual touching are all considered to be forms sex discrimination, one tends to consider them violations of equality, harms that one sex inflicts on another. However, if sexual threats are considered intentional infliction of emotional distress, unwanted sexual advances are considered invasions of privacy, and unwanted sexual touching is considered battery, one tends to see them as kinds of invasions of privacy, inflictions of distress, and battery, but with nothing common among them. They are simply some among the many wicked things that individuals do to other individuals.15

Those who favor a tort interpretation of sexually harassing behaviors sometimes do so because they oppose all employment discrimination law. One of the most eloquent advocates of this position is Richard Epstein. Epstein opposes Title VII because he believes the costs of enforcement outweigh the benefits. In his view, laws prohibiting discrimination against groups threaten the fundamental principles of “individual autonomy and freedom of association”: “Their negation through modern civil rights law has led to a dangerous form of government coercion that in the end threatens to do more than strangle the operation of labor and employment markets. The modern civil rights laws are a new form of imperialism that threatens the political liberty and intellectual freedom of us all.”16 In general, Epstein believes that “discrimination by private parties are not wrongs requiring state intervention or correction” and that “the norms of ordinary contract law are adequate to deal with the problems that arise in the employment context.” However, “[s]exual harassment is an entirely different matter. Contractual principles play a leading role, and significant common law tort liability for both individual and firm would, and should, remain even if the antidiscrimination laws were erased
from the statute books tomorrow. With harassment cases, the elimination of
the antidiscrimination law does not return us to a world of properly function-
ing competitive markets.”

Epstein emphasizes the conceptual difference between the tort approach
and the sex discrimination approach: “Does Title VII offer a regime for regulat-
ing sexual harassment better than its common law alternative? The analyti-
cal contrast between the two systems is stark. Title VII stresses the harasser’s
motive, while the common law ties liability to the use or threat of force that
results in emotional distress to its victim.” Epstein opts for use of torts, and
he seems to think that existing torts are sufficient. Besides his general objec-
tions to Title VII, he considers the tort approach superior to the sex discrimi-
nation approach in the case of sexual harassment because it does not face the
problem of the bisexual harasser, and because it allows women and men to be
protected equally. Of course, MacKinnon and other advocates of the domi-
nance approach do not think that men need the degree of protection that
women do, so this reasoning would not be persuasive to them.

Other advocates of a tort approach to sexual harassment recommend that
a special tort of sexual harassment be legislated. Most seem to advocate a new
tort because they believe that neither existing sex discrimination law nor ex-
isting tort law adequately compensates the victim of sexual harassment. This
tort is targeted at quid pro quo sexual harassment. Ellen Frankel Paul
argues that

[quid pro quo sexual harassment is morally objectionable and analogous
to extortion: The harasser extorts property (i.e., use of the woman’s
body) through the leverage of fear for her job. The victim of such be-

havior should have legal recourse, but serious reservations can be held
about rectifying these injustices through the blunt instrument of Title
VII. In egregious cases, the victim is left less than whole (for back pay
will not compensate her for ancillary losses), and no prospect [sic] for
punitive damages are offered to deter would-be harassers.]

This is no longer true, since the passage of the Civil Rights Act of 1991. Victims
discrimination are now able to sue for punitive and compensatory dam-
ages. However, as I stated in chapter 3, the amounts are limited, according to
the number of employees. Paul may not believe these limited amounts to be

sufficient. However, even if this change in the law did meet this objection to
the use of Title VII for sexual harassment cases, she has a further objection.

Even more distressing about Title VII is the fact that the primary target
of litigation is not the actual harasser, but rather the employer. This
places a double burden on the company. The employer is swindled by
the supervisor because he spent his time pursuing sexual gratification
and thereby impairing the efficiency of the workplace by mismanaging
his subordinates, and the employer must endure lengthy and expen-
sive litigation, pay damages, and suffer loss to its reputation. It would
be fairer to both the company and the victim to treat sexual harassment as a tort—that is, as a private wrong or injury for which the court can assess damages. Employers should be held vicariously liable only when they know of an employee’s behavior and do not try to redress it.22

This objection introduces the subject of employer liability, which has been an extremely contentious issue among legal scholars.23 It is not necessary for our purposes to engage in that debate. However, Paul’s point is important to consider. Treating sexual harassment as sex discrimination under Title VII holds the employer responsible for the actions of the harassers, in cases in which the employers are not the harassers themselves. The harasser is only held responsible secondarily, and not by the law. This has struck many as unfair. The employer did not harass; the employee did. Yet the employer is treated as if he or she did.

Whether holding the employer liable is perceived as unfair depends on one’s conception of sexual harassment. If, like MacKinnon, one conceives of sexual harassment as a group-based problem, as a form of discrimination, then this may not be objectionable. Employers are charged with maintaining nondiscriminatory environments for their employees. If an employee is discriminating against someone, the employer has the responsibility to stop it. More broadly, the employer has a responsibility to act so as prevent such discrimination in the first place by making it clear to all employees that discrimination will not be tolerated and by punishing those who discriminate. However, if one conceives of sexual harassment not as group based, but in terms of individuals, this is likely to seem wrongheaded. The person who performed the harmful act—and especially, the person who benefited from the act—should be held responsible, should pay for the harm; and the person who performed the harmful act and benefited from it is the harasser. The employer might be seen to have harmed the victim in an extenuated way—by not protecting the victim from the harasser—but the employer does not benefit from the harassment. In fact, the employer suffers harm. That something like this underlies Paul’s objection is suggested by her inclusion of the remark that employers suffer a “double burden.” Some have argued that the fact that the employer is harmed by the harassing employee suggests that market forces do, if allowed, eventually eliminate much sexual harassment without any interference by the government.24

Paul’s sexual harassment tort would apply to both quid pro quo and some of what has been termed hostile environment sexual harassment. She suggests that

[ Only instances above a certain threshold of egregiousness or outrageousness would be actionable. In other words, the behavior that the plaintiff found offensive would also have to be offensive to the proverbial “reasonable man” of the tort law. That is, the behavior would have to be objectively injurious rather than merely subjectively offensive. The defendant would be the actual harasser not the company, unless it knew about the problem and failed to act.25]
It is unclear how this differs from the current interpretation of Title VII in cases of hostile environment sexual harassment, except for the fact that it is the harasser that is the primary target rather than the employer.

Paul objects to MacKinnon’s definition of sexual harassment on the grounds that it includes abuse of power in the very definition of sexual harassment.

While it mirrors accurately what transpires in the classic quid pro quo situation, it reflects only uneasily hostile environment sexual harassment by co-workers—unless one accepts the added, debatable, and more global assumption that males occupying any position in the workplace enjoy more power than women. . . . I prefer a neutral definition of sexual harassment to MacKinnon’s, which injects an ideological bias against men and the capitalist marketplace.26

Thus, she seems to reject the assumption of male dominance central to the dominance perspective. This is reinforced by her argument against the notion that “sexual harassment is essentially a group injury.”27 According to Paul, quid pro quo sexual harassment is not a group injury because it lacks “an essential attribute of discrimination: that is, that any member of the scorned group will trigger the response of the person who practices discrimination.”28 She claims that the quid pro quo harasser acts only on someone he finds sexually attractive, not on all women. Paul argues that hostile environment sexual harassment fails to count as discrimination for similar reasons. Usually, it is individuals who are singled out for harassment, not every woman employee. Furthermore, she points out, there are difficulties with making the Title VII analysis of sex discrimination fit same-sex harassment.

Discrimination . . . is harming someone or denying someone a benefit because that person is a member of a group that the discriminator despises. What the harasser is really doing is preferring or selecting some one member of his gender for sexual attention, however unwelcome that attention may be to its object. He certainly does not despise the entire group, nor does he wish to harm its members, since he is a member himself and finds others of the group sexually attractive. . . . Homosexual sexual harassment . . . raises the large issue of whether it makes sense to characterize the archetypical case of male to female harassment as discrimination, rather than as a preference, albeit misguided and objectionable.29

These concerns are those of courts confronting same-sex harassment, as we saw in chapter 3. However, Paul sees them as reflecting back on the original analysis of sexual harassment as sex discrimination. They do suggest that certain of these analyses are problematic.

Paul’s recommended sexual harassment tort would allow behaviors others have wanted to classify as sexual harassment to be grouped together, thereby
emphasizing that they have a common element. However, that common feature for Paul differs from that for MacKinnon. Paul supports an “individualist” approach, one that “stresses the victim’s rights to privacy, to freedom from physical assault or the threat of it, and to freedom from the infliction of severe emotional distress.” The tort approach is consistent with this perspective. She argues that her approach “would also place all similar behavior under the same theoretical umbrella.”

Sexually offensive behavior occurs in settings other than the workplace—in universities, housing, and ordinary social situations of all sorts. When such behavior becomes egregious, plaintiffs should have a remedy, and a tort would allow courts to treat all sexual harassment alike. Moreover, a new state tort of sexual harassment, created by judicial construction or legislative craftsmanship, would be preferable to the doctrinal and theoretical confusion that the sexual-harassment-as-sexual-discrimination theory has engendered.

Thus, what all instances of sexual harassment have in common is that they are “sexual,” “offensive,” and “egregious.” The tort itself would resemble the tort of intentional infliction of emotional distress, which distinguishes between “mere insults, indignities, threats, annoyances, petty oppression, or other trivialities,” and behavior that causes emotional distress “so severe that no reasonable man could be expected to endure it.”

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, “Outrageous.”

In addition, the behavior in question must be reckless or intentional. Paul’s tort is:

(1) Sexual harassment is comprised of
   (a) unwelcome sexual propositions incorporating overt or implicit threats of reprisal, and/or
   (b) other sexual overtures or conduct so persistent and offensive that a reasonable person when apprised of the conduct would find it extreme and outrageous.

(2) To be held liable, the harasser must have acted either intentionally or recklessly and the victim must have suffered, thereby, economic detriment and/or extreme emotional distress.
(3) In the employment context,
(a) the employer is liable when the plaintiff had notified an appropriate
officer of the company (not himself the alleged harasser) of the offensive
conduct, and the employer failed to take good faith action to forestall future incidents;
(b) The employer is liable, also, when he should have known of the offending incident(s) (that is, when he failed to provide an appropriate complaint mechanism). 35

This tort is supposed to include both quid pro quo and hostile environment sexual harassment in its definition of sexual harassment and would use the reasonable person standard for determining whether hostile environment sexual harassment had occurred.

One major difference between this tort and MacKinnon’s Title VII analysis is that the definition of hostile environment sexual harassment is narrower. It makes no mention of the genders of the harassed and harasser, or of their sexual orientation. No formal relationship between the harassed and the harasser (supervisor-employee) is required. The law applies anywhere that offensive sexual behavior may arise.

Though Paul’s suggested tort intentionally omits any mention of inequality between the parties involved in an instance of harassment, a sexual harassment tort need not do that. Michael Vhay advocates the creation of a sexual harassment tort to be used in addition to existing discrimination and tort laws. His tort includes the notion of “abuse of power.” To establish a prima facie case of sexual harassment, the following conditions would have to be fulfilled:

(1) A sought to participate in a special activity (e.g., tenancy, school, or work).
(2) B harassed A.
(3) B’s harassment unreasonably harmed A.
(4) B holds a position with respect to the special activity that creates a duty for B towards people in A’s position. 36

Thus, how we decide to treat sexual harassment under the law is important for how we think about sexual harassment. Both group-based and individualistic approaches are consistent with a broad, liberal perspective. Besides these conceptual issues, there are what might be called external reasons for preferring one sort of approach over another.

One significant factor is that when someone files a suit under Title VII, the government pays for it, not the individual on whose behalf the suit is filed. This is not the case with state torts. This means that torts are available only to those who can afford them. Also, the burden of proof on the complainant is heavier in a tort case than in a discrimination case. 37 In addition, under tort law, there is “no administrative mechanism to preserve confidentiality, protect against retaliation, seek conciliation, or encourage the company to make changes. Also, consider that filing a lawsuit it usually an inflammatory act—likely to jeopardize your job status and aggravate your working relationship
with your employer.” Therefore, bringing charges against one’s employer would be feasible only if one did not intend to continue one’s employment with the concern.

I have been comparing two approaches—tort and sex discrimination—but there may be others. Anita Bernstein suggests that we look to the Europeans for suggestions. She claims that in the United States, there are currently two paradigms for treating sexual harassment: (1) as sex discrimination and (2) as rude behavior. The remedy for (1) is Title VII, and the remedy for (2) is tort law. But this may be a false dilemma. She suggests a third approach. It is to consider sexual harassment as a form of “detrimental workplace conditions.”

According to Bernstein, Europeans are more skeptical than are Americans of the ability to bring about social change through civil litigation.

While Americans see the problem of sexual harassment as either wrongful private conduct between two people or as sex discrimination, Europeans have shaped it as a problem of workers, and sited the problem in the workplace. In the United States, sexual harassment is a legal wrong: in Europe—with the exception of extreme situations that amount to blackmail or physical violence—sexual harassment is atmosphere, conditions, an obstruction, or trouble, with very little blame from the law.

While Bernstein does not advocate exchanging the American approach for the European approach as she describes it, she does suggest that we reconceive sexual harassment as “detrimental workplace conditions” and use litigation to remedy it.

While some European countries have conceived of sexual harassment as sex discrimination, as discussed in chapter 3, it remains true that, “[i]n most EC countries, sexual harassment cannot be the basis for criminal prosecution or private civil actions for damages . . . the idea that sexual harassment constitutes a legal wrong is not widely shared in Europe.” According to Bernstein, this is because, “[m]ore than any other country, the United States associates individual rights with private-law remedies. . . . The array of private-law remedies available—at least in theory—is wider in the U.S. than anywhere else.”

As we saw in chapter 3, responses to sexual harassment are circumscribed by the European Community. Bernstein argues that Europeans “describe sexual harassment as a danger to health and safety in the workplace,” and that this conception works well within the constraints of the Community, since “working conditions have always been regarded as part of the economic policy that justified the formation of the Community.” She suggests that controversy among the Member States over what should be done to prevent discrimination can be sidestepped by focusing on health and safety. Bernstein points out that there is research by both Americans and Europeans to support the claim that sexual harassment can cause physical and emotional harm.

Bernstein raises the question of why Americans have not adopted this approach to sexual harassment.
The answer lies in the tension between viewing sexual harassment as a
discrete wrong amenable to civil litigation and viewing it as an instance
of collective harm, with neither victims nor wrongdoers sharply defined.
A wrongful-conduct approach dominates the entire perception of sex-
ual harassment. When sexual harassment is seen as a legal wrong, tort
concepts predominate and the concept of workplace hazard becomes
harder to keep in mind.45

Viewing sexual harassment as a workplace hazard has several potential ad-
vantages. One is that such a view relates sexual harassment to the “rights of
workers in general.” Such a conception focuses on human rights, on the right
of every person, and thus every worker, to be treated with dignity. Also, in
Europe, this way of conceiving of sexual harassment has led to the develop-
ment of a variety of ways of treating sexual harassment in the workplace.
These methods aim at preventing or stopping harassment, rather than at find-
ing who is at fault. For example, some Europeans distinguish between formal
and informal ways of resolving sexual harassment complaints.

“[A]n informal method refrains from trying to judge the validity of the
complaint of harassment, whereas a formal method points toward the
goal of determining fault. An employee who wants only that the harass-
ment stop and who has no interest in official blame would prefer an in-
formal approach to a formal one. Such a preference is likely to be found
in cases where a fault-based inquisition has not yet caused the employee
to suffer, or where the objectionable conduct is not quite outrageous.”46

In addition, the greater strength of trade unions in some European countries
has meant that labor agreements can be used to address sexual harassment.
As Bernstein points out, union involvement in remedying sexual harassment
“would offer little to an American worker, who typically is not a member of a
union and can be terminated without cause.”47 However, it would be possible
for unions in the United States to do more to prevent sexual harassment than
they currently do.

Bernstein ultimately recommends that we conceive of sexual harassment
as “detrimental workplace conditions, to be cured by devices other than liti-
gation.”48 She emphasizes that this is not intended to replace existing remedies
for sexual harassment, but to provide additional remedies for sexual harass-
ment.

There are thus several large questions before us (1) Is the law the best way
to prevent sexual harassment? (2) If so, which kind of law, or combination
of kinds of laws, is most likely to bring this about? Advocates of both the tort
approach and the sex discrimination approach claim that their approach will
be most likely to bring about the desired outcome. Of course, the outcomes
they desire seem to be different. As we have seen, some supporters of the sex
discrimination approach desire radical changes in the workplace, for exam-
ple, the elimination of any sexual behavior. Advocates of the tort approach,
such as Paul, do not think this end desirable. Paul wants an end to what she
considers to be the “most egregious” examples of quid pro quo and hostile environment sexual harassment. (3) If the law is not the best way of preventing sexual harassment, what ought we to do? These questions shall be taken up in chapter 7. But first, we must address several other legal issues.

The Reasonable Woman Standard

One of the most controversial elements of sexual harassment law in recent years has been the question of the standard to be used in assessing whether hostile environment sexual harassment has occurred. It has been customary for courts in harassment cases to adopt a reasonable person standard as an objective standard. The notion of the reasonable person standard is borrowed from tort law.49 However, as we saw in chapter 3, in Ellison v. Brady, the court argued that adopting such a standard was unfair. The court claimed that because women and men experience sexual behavior differently, the standard used to determine whether harassment has occurred should be the perspective of the “reasonable victim.” Because in sexual harassment cases, the victim is usually a woman, this has become known as the reasonable woman standard. Some commentators distinguish between the reasonable woman standard and the reasonable victim standard, so that the issue of which standard to use in sexual harassment cases involves three possible standards.50 I shall treat the reasonable woman standard and the reasonable victim standard as variations of the same standard in what follows.

The reasonableness standard becomes relevant in hostile environment sexual harassment cases in seeking to prove one of the elements of a prima facie case: “For sexual harassment to be actionable, it must be sufficiently severe or pervasive to ‘alter the conditions of [the victim’s] employment and create an abusive working environment.’”51 The question is how can it be determined whether the behavior in question is severe and pervasive enough to alter the conditions of employment.52 And what standard should be used? It should not simply be that the plaintiff, the alleged victim, claims that her conditions of work have been altered by severe and pervasive behavior, though the Supreme Court has made this a necessary condition for satisfaction of this element of hostile environment cases.53 This would render any such claim by any person an instance of sexual harassment. The standard should not simply be the perspective of the defendant, the person accused, for this would absolve nearly all defendants. The standard should not simply be the perspective of a judge, or even a panel of judges, either. It is clear from some of the early decisions discussed in chapter 3 that judges sometimes simply use their own perspectives, with apparently unfair results.

The standard used to determine whether an abusive environment exists should take into account the perspective of the victim, of the defendant, of the judges themselves, and of society as a whole—to a certain extent. And this is where things begin to get tricky. Conceiving of sexual harassment as sex discrimination seems to require a departure from the status quo. This is evident in the disagreement between the majority and Judge Keith in Rabidue.
Recall that the majority in *Rabidue* declared: “It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.” Judge Keith’s dissenting opinion challenged this claim: “[U]nless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men.” Keith believed that the reasonable person standard did not represent an objective viewpoint. Rather, it represented the viewpoint of those who had, until quite recently, had the power to determine appropriate workplace behavior. It does not represent the viewpoint of those who have had to suffer the consequences of this “appropriate workplace behavior”—having to leave a position, being fired in retaliation for rejecting advances, having to suffer an abusive work environment. The reasonable person standard only represents what society finds socially acceptable if society is limited to those in power.

The claim that sexual harassment—particularly hostile environment sexual harassment—is illegal under Title VII poses a challenge to prevailing norms of appropriate workplace behavior. If, as Keith seems to claim, the reasonable person standard represents the view of “society,” and it is the standard adopted, we can expect sexual harassment case law to lag behind changes in social perceptions of appropriate workplace behavior, rather than to cause these changes. Keith suggests that fairness requires that the standard used to determine whether hostile environment sexual harassment has occurred must take into account the perspective of those whose voices have not, until now, been taken into account in determining appropriate workplace behavior.

Whether or not the courts should promote social change is a question over which there is much disagreement. Actual courts seem to disagree, since they have not been consistent in their choice of standard in deciding hostile environment sexual harassment cases. “Within the First Circuit, confusion abounds regarding the appropriate perspective to apply in evaluating harassing conduct. One court has applied a ‘two perspective standard.’ . . . Another has adopted a ‘reasonable person’ standard. . . . And yet a third has addressed harassing behavior from the standpoint of the particular plaintiff.”

Where did the idea of a reasonable woman standard come from? Was it created from nothing? Prior to its appearance in *Ellison*, the reasonable woman standard was already in use in certain torts and self-defense cases. In 1984, a Note appeared in which the author argued that a “reasonable woman” standard should be adopted in hostile environment sexual harassment cases. Judge Keith referred to this Note in his dissenting opinion in *Rabidue v. Osceola Refining Co.*

At least one commentator has argued that the urgency of a clear, uniform standard for judging whether hostile environment sexual harassment has taken place increased after the Supreme Court’s decision in *Harris v. Forklift Systems, Inc.* In *Harris*, the Supreme Court ruled that psychological injury was not necessary for a finding of hostile environment sexual harassment. However, this meant that courts could no longer use the criterion of whether
[T]he abrogation of an injury element in hostile environment claims makes the clarification of the standard for determining hostility of critical importance. An injury requirement for hostile environment liability provided some certainty to employers as well as individual offenders. Gauging the culpability of one’s conduct is much easier if actual injury to the victim is necessary to make the conduct legally prohibited. Also, incidents severe enough to cause actual injury to a victim would be much more likely to come to the attention of an employer than conduct that is not likely to cause actual injury. The Court’s recognition that requiring injury to the victim would subvert the goals of Title VII creates a greater degree of uncertainty in the workplace with regard to the type of conduct necessary to cause liability.61

Most commentators seem to agree that Harris did not give a definitive answer to the question of whether the standard should be the reasonable person or the reasonable woman.62 Some see Harris as silent on this issue. Others interpret Harris to imply that “reasonable person” can include features of the actual claimant, such as sex or race.63 Thus, to this day, there is uncertainty about what standard should be used in judging hostile environment sexual harassment cases.

In order to determine what standard should be used, we must inquire just what the reasonable person standard means. We can begin trying to get clear on this by looking at the historical development of the standard. The use of the standard begins in cases involving negligence.

One of the earliest reported uses of the reasonable man standard occurred in a 19th century British case, Vaughan v. Menlove, 132 Eng. Rep. 490 (1837). In that case, the court stated that “[i]nstead . . . of saying that the liability for negligence should be coextensive with the judgment of each individual . . . we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.” . . . The reasonableness test, as it has developed, is intended to reflect changing social mores as well as to present an objective standard that imposes the same behavior on everyone, thereby limiting arbitrary or politically based decision-making by judges.64

Over time, the reasonable person standard has come to mean one of two things: “(i) an ideal, albeit not perfect, person whose behavior served as an objective measure against which to judge our actions and (ii) an average or typical person possessing all of the shortcomings and weaknesses tolerated by the community.”65 Commentators claim that it is the second interpretation that has become the primary meaning of the standard. It is this second interpretation that is used to define the reasonable woman standard: “[T]hose courts that have moved to the ‘reasonable woman’ standard intend it to describe average

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or typical women—women who react differently to situations than do most men but who, at the same time, are neither hypersensitive to nor unoffended by men’s workplace behavior.”66 Thus, the reasonable woman is one who is average, in some sense—not too sensitive, but not insensitive, either—in her reactions to workplace behavior. However, this seems to be a purely descriptive interpretation of the reasonable woman, focusing as it does on the way a reasonable woman does behave. This impression is strengthened by the common use of empirical data to support the view that reasonable women and reasonable men perceive certain conduct differently. However, the origins of the reasonable person standard make it clear that the standard is also prescriptive, or normative. It includes societal views about how a reasonable person should react or behave. It follows that the reasonable woman standard is also normative.

Focusing on the normative aspect of the reasonable person and reasonable woman standards suggests that we do not need a reasonable woman standard—that the reasonable person standard is adequate if we acknowledge that such a standard must change with the changing mores of society. The dispute between the majority and Judge Keith in Rabidue can be interpreted as a clash about what it is to be a reasonable person in the United States in the 1990s. People have interpreted Keith’s response to mean that we should jettison the reasonable person standard and replace it with a reasonable woman or reasonable man standard. One argument for the reasonable woman standard, based on Rabidue, seems to go like this:

1. The court in case x used a reasonable person standard (or an unstated standard) in determining whether sexual harassment occurred.
2. This court did not find that sexual harassment occurred.
3. But sexual harassment did occur.
4. So, the reasonable person standard should not be used when determining whether sexual harassment has occurred.67

However, this argument is faulty. There are many cases in which a reasonable person standard (or an unstated standard) was used and the result was considered just by those who think the outcome in Rabidue was unjust. Thus, it is hasty to conclude that it is the reasonable person standard that is at fault.

However, this is not the only possible way of interpreting Keith—or, if he has since agreed with the predominant interpretation—it is not the only possible way of thinking about what went wrong in Rabidue. An alternative is to understand the majority in Rabidue to have used an obsolete version of the reasonable man standard when they should have used a genuine reasonable person standard. Judge Keith can be seen as pointing out that a reasonable person standard would take into account that not all persons are male, not all persons are unaffected by vulgarity, and so on. I say an obsolete version of the reasonable man standard was used because it seems to me that the circumstances described in Rabidue would have been seen as abusive by many people, not just women. The same can be said of some of the other cases in which the reasonable person standard was used and the plaintiff did not pre-
Rather than throw out the reasonable person standard because it gave the wrong verdict, we should retain it and refine it with knowledge of what is viewed as abusive by different people, and of what people want and have a right to expect in their work environment.

Still another way of viewing Rabidue is as a misapplication of the reasonable person standard. The judges simply used their own, rather restricted perspectives in deciding the case, taking their opinions to represent the reasonable person. The application of a standard can be wrong, even if the standard itself is not inherently flawed.

Sometimes the issue of the reasonable woman standard is presented as if it could be settled by empirical research. If women and men really do perceive sexual and other behaviors differently, we should have different standards; if not, we should not. Arguments in favor of the reasonable woman standard usually do depend in part on empirical data on male and female perceptions of behaviors. But, as we saw in chapter 4, these data are inconclusive: and, as I argued in chapter 1, empirical data are subject to manipulation. Given this, proponents of the competing views seems to be driven by deeper, more global perspectives. Ironically, it turns out that both those who hold a natural/biological perspective and those who hold the sociocultural perspective tend to support use of the reasonable woman standard.

Kingsley Browne argues that male and female sexual strategies are so different that they produce differing perceptions of behavior, and that these differing perceptions must be acknowledged if the law is to be fair.

If a biological perspective can contribute anything to sexual harassment policy, it must be the insight that a “reasonable person” standard is meaningless. At least when it comes to matters of sex and sexuality, there are no “reasonable persons,” only “reasonable men” and “reasonable women.” The different and discrete sexual natures of men and women cannot be blended into a one-size-fits-all “human sexual nature”; sex must be specified in order to make the concept intelligible.

To support his claim, Browne seeks to refute Gutek and O’Connor’s claim that the empirical data on male-female differences in perception do not support use of a reasonable woman standard. He also raises the possibility that which standard is adopted may have no effect on the outcome of cases, and he urges more empirical study to determine whether or not this is the case.

Adherents of a sociocultural perspective, such as MacKinnon, would seem to favor the reasonable woman standard, but McKinnon herself does not. It is clear, however, that many who adopt her perspective do. One of the best arguments for employing a reasonable woman standard is articulated by philosopher Debra DeBruin. DeBruin argues that justice requires that courts adopt the reasonable woman standard when determining whether hostile environment sexual harassment has taken place because the reasonable person standard is actually the reasonable man standard. In other words, simply changing the word “man” to “person” does not change the standard...
from a male standard to a genderless one. Because males dominate in our society, their “identity and experience serve as the characterization or standard of what it is to be a person.” So, applying a reasonable person standard amounts to applying a reasonable man standard. This is significant because in matters of sex, men and women have different perspectives, and they sometimes disagree about whether sexual harassment has occurred or not. DeBruin refers to empirical studies to support this claim. In particular, there is evidence that a woman sometimes feels justifiably threatened by behavior that, at most, shocks a man.72

There are both conceptual and practical issues in DeBruin’s argument. The conceptual issues include her claim that “person” in a male-dominated society means “man,” so that the “reasonable person” is really a “reasonable man.” I find this argument somewhat persuasive; however, I think that it was more true twenty or thirty years ago than it is today. The civil rights movement and the women’s movement challenge this assumption in their claim that opportunities should be open to everyone, not just to certain groups of Americans. In the years since Title VII was enacted, we have seen a deepening of our collective understanding of the extent to which opportunities are not equal. Many beliefs that would have seemed unreasonable to the reasonable man of thirty years ago are now seen as wholly reasonable—which is not to say that there is not a great deal of disagreement.

This brings us to the more practical elements of DeBruin’s argument. She claims that, because “person” means “man,” and because in the context of sexual harassment, there is a relevant difference between women and men, it is unfair to women to adopt a reasonable man as the standard for determining whether hostile environment sexual harassment has occurred. I claim that the truth of the claim that “person” means “man” has changed, and that it is less true than it once was. We have seen evidence that the gap between women and men in perceiving the existence of sexual harassment has narrowed. DeBruin ends her paper with the comment that, “at least at this point in our history, embracing a gender-neutral ideal of justice damns us to the perpetuation of gender oppression.”73 This suggests that DeBruin’s argument is ultimately a practical one. The question at issue is which approach is most likely to bring about the changes in the workplace—and in society at large—that will bring about equality for women and men (if that is what is desired). DeBruin and others seem to believe that adoption of the reasonable woman standard is necessary to bring about a more egalitarian society. I disagree. I do not think it is necessary, nor do I think it is sufficient.

I do not think it is necessary because, as I said earlier, I believe that there are ways of bringing about the kinds of changes that DeBruin desires without adopting such a standard. DeBruin herself seems almost to recognize this when she takes up the notion of reasonableness that the reasonable woman standard requires. This cannot be the average woman since such a woman would probably have imbibed the same sexist culture as the average man and may think that women simply must put up with what DeBruin considers sexual harassment.74 Nor can the reasonable woman be simply any
woman since this would mean that if one woman found behavior harassing, it would be. This would lead to behaviors that should not be considered harassing being categorized as harassing. DeBruin suggests that

an acceptable account of reasonableness must be based on an adequate understanding of what it is like to be a woman in this society. . . . Information about how gender affects our lives is crucial if we are to determine whether it is reasonable to judge that certain treatment is severe and pervasive enough to create an intimidating, hostile or offensive environment, and thus is hostile-environment sexual harassment.75

However, it seems to me that if we were to develop the notion of a reasonable person in this way, we would not need judges to adopt the reasonable woman standard in sexual harassment cases. The particular information about what it is to be a woman in this society—to be, in fact, particularly vulnerable to sexual violence—would be available to judges. The kinds of behavior that are problematic because of these facts could be codified, as DeBruin suggests: “[O]ur sexual harassment regulations should codify guidelines for making . . . judgments. These guidelines should be as specific as possible—including specific types of behavior that it is reasonable to classify as sexual harassment.”76 If this were to be done, it is not clear why adoption of the reasonable woman standard would be necessary.

My view on the reasonable woman standard is consistent with that of legal scholar Kathryn Abrams. Abrams argues that we should use a reconceived notion of a reasonable person: the reasonable person “interpreted to mean not the average person, but the person enlightened concerning the barriers to women’s equality in the workplace.”77 Abrams describes four kinds of information about women that would be necessary for judges and juries to make informed decisions: (1) [i]nformation about “barriers that women have faced, and continue to face, in the workplace”; (2) “the role of sexualized treatment in thwarting women in the workplace”; (3) “effects on the work lives of women” of sexual harassment; and (4) “information about the responses of women workers to harassment.”78 Katherine Franke describes the virtues of this standard.

Abrams’ new standard has the additional advantage of being more likely to provoke the transformation of workplace norms rather than merely critique them from a woman’s perspective—whatever that might be. This standard embodies a progressive normative bias absent from existing sexual harassment doctrine. At best, the reasonable woman standard imposes liability on men who simply “don’t get it,” while at the same time building into the law the notion that men and women “get” sexual conduct differently: reasonable men and reasonable women, in a sense, agree to disagree about the meaning of sexual conduct in the workplace. Abrams’ new standard, on the other hand, substitutes a gender neutral normative standard for what is reasonable conduct in the workplace—harassers have to “get with it.”79
I do not think adoption of the reasonable woman standard is sufficient to bring about equality of opportunity because I think that without the other kinds of activities that are bringing about change, such as the efforts of activists and writers, the reasonable woman standard will become the very thing that many fear it already is: a capitulation to people who claim that women are fragile and just need more protection than men. Adoption of the reasonable person standard does not guarantee outcomes with which one agrees, nor does adoption of a reasonable woman standard. Without education, people will not know how to apply the standard. But if people need to learn to apply the standard by seeing what things are like from another’s point of view, why cannot we simply change the reasonable person standard to include these points of view?

DeBruin responds to the argument that adoption of a reasonable woman standard will simply reinforce harmful gender stereotypes. She calls that argument the “Entrenching Sexism Objection.” She takes as her target a version of the argument from Radke v. Everett.

Although well intended, a gender-conscious standard could reintrench the very sexist attitudes it is attempting to counter. The belief that women are entitled to a separate legal standard merely reinforces, and perhaps originates from, the stereotypic notion that first justified subordinating women in the workplace. Courts utilizing the reasonable woman standard pour into the standard stereotypic assumptions of women which infer women are sensitive, fragile, and in need of a more protective standard. Such paternalism degrades women and is repugnant to the very ideals of equality that the [civil rights] act is intended to protect.80

DeBruin argues that the reasonable woman standard, contrary to this argument, provides equal protection for men and women—it protects each from behaviors that harm them, though these behaviors may not be identical. She makes the important point that this is only seen as paternalism if the traditional male point of view is adopted: real harm is what men think is harmful. What men do not think is harmful is not really harmful. If women think it is, they are being overly sensitive. I do not disagree with DeBruin’s response to this argument. However, my point is that we should only adopt the reasonable woman standard if it is either necessary or sufficient for ensuring equal opportunities for women in the workplace, and that it is neither. It is certainly not sufficient, and DeBruin seems to realize this, since she calls for explicit guidelines on what constitutes harassment, enlightened judges, and educational programs, as well as for adoption of the reasonable woman standard.

However, if everything else that DeBruin recommends were implemented, the adoption of the reasonable woman standard would be otiose. So, my disagreement with DeBruin concerns the necessity of the reasonable woman standard, since we agree that the adoption of the reasonable woman standard is not sufficient to deal adequately with sexual harassment.
Additional reasons have been offered for not adopting the reasonable woman standard. Some have argued that the reasonable woman standard requires that men be judged according to a standard of behavior which they are “unable to understand or appreciate fully.”81 “Undoubtedly, the most troubling question is whether it is proper or fair to impose liability, including potential liability for substantial money damages on men (and on their employers) for well-intentioned behavior that they do not realize is illegal or offensive.”82 This is a genuine worry of men in the academy and in the workplace. As such, it should be taken seriously. If the reasonable woman standard does require that men act in accordance with standards of behavior they are unable to understand fully, clearly it would be unfair to adopt it. However, on most understandings of the reasonable woman standard, men are not required to do this. This objection makes several erroneous assumptions. It seems to assume that unless men can have the same experiences as women, men will be unable to distinguish between harassing and nonharassing behaviors. Men cannot have the same experiences as women; so, men cannot distinguish between harassing and nonharassing behaviors. There are two ways of criticizing this argument. It is not necessary that someone have the same experience as another person to understand that person’s perspective. Listening to people and reading what they write can provide insight into another person’s reality. Empathy and imagination may be required, but most of us have those capacities. We must, of course, be willing to exercise them. We must also be willing to entertain the idea that our feelings and reactions are not the only possible legitimate ones. It may also be true that men can have the same experiences as women, or at least very similar ones, in many areas of life, including those relevant to sexual harassment. Many boys are the victims of sexual abuse by adults, and many others are bullied and ridiculed about their sexuality as they are growing up, and even as adults. Perhaps these are not the harassers, perhaps they are. We do not know the relationship between child sexual abuse and sexual harassment of others. However, not all men harass, and many of these fully understand the meaning of such behavior, whether because they can identify with victims of harassment because of experiences of their own, or because they have sufficient imagination to do so.

However, the worry raised by Davis, Browne, and Wall over genuinely unintentional behaviors that are considered harassment should be addressed.83 Miscommunication certainly does occur, and it is most likely to occur in those ambiguous cases over which women and men tend to disagree. It is difficult to determine a person’s true intention, but that is a general difficulty, not one peculiar to the issue of sexual harassment. Again, it is in the kinds of cases over which there is disagreement that intention is most difficult to determine. Both Browne and Wall seem to think that in cases of miscommunication, men are being asked to bear an unfair burden. Both think that much of the current treatment of sexual harassment, both in the courts and in writings on the subject, ignores women’s role in miscommunication.

Recall Wall’s definition of sexual harassment. He tries to capture the notion of “unwanted sexual advances” by saying that sexual harassment occurs when X does not attempt to obtain Y’s consent to communicate sexual inter-
est to Y but communicates that interest anyway (if certain other conditions are also satisfied).

[S]uppose that somewhere the communication between X and Y breaks down and X honestly believes he or she has obtained Y’s consent to this discussion, when, in fact, he or she has not. In this case, X’s intentions and actions being what they are, X does not sexually harass Y. X has shown respect for Y’s privacy. Y may certainly feel harassed in this case, but there is no offender here. However, after X sees Y’s displeasure at the remarks, it is now X’s duty to refrain from such remarks, unless, of course, Y later consents to such a discussion.84

As Wall rightly points out, the way to avoid such misunderstandings is to practice clear communication. People must make their desires clear to one another. He provides an example: “when someone wishes not to discuss an individual’s sexual interest in them, it would be foolish for them to make flirting glances at this individual. Such gestures may mislead the individual to conclude that they consent to this communication.”85 Without making a point of it, Wall seems here to be distributing the responsibility for misunderstandings between the participants of the sort that may appear to be sexual harassment but are not, on his view.

Browne takes up a similar line: “When sex differences in perspective lead to miscommunication, who, if anyone, is to blame? The usual answer in the sexual harassment literature is that it is the man who is responsible; after all, he has made a sexual advance that was ‘unwelcome.’”86 Browne points out that the source of misunderstanding can come from the woman. The man might think that the woman is welcoming sexual attention by her clothing or makeup, that she is sending “signals,” whether intended or unintended. Because of this, it is unjust to simply place the blame on men.

If men sometimes engage in sexually oriented conduct or speech that a reasonable woman might perceive as threatening even though no threat was intended, the problem could be characterized as either a misperception on the part of the woman or insensitivity on the part of the man concerning the effect of the signals he is sending. By the same token, if women sometimes engage in conduct that a reasonable man might perceive to be inviting even though no invitation was intended, the problem could be characterized as either a misperception on the part of the man or an insensitivity on the part of the woman concerning the signals she is sending. In both cases, however, the usual analysis deems the miscommunication the fault of the man, without explanation of why, if men are held responsible for threats they did not intend, women should not be responsible for invitations they did not intend.87

Though this is stated somewhat contentiously, it addresses an important issue. Men are being asked to change their behavior, but women are not being asked to change theirs. One response would be to point out that the men who
are being asked to change their behavior have done something wrong, while the women have done nothing wrong. But this is to beg the question at issue. The controversy is over whether behaviors in the gray zone—flirtation, sexual teasing, sexual jokes, sexual comments, and the like—should be considered illegal sexual harassment. Though I disagree with Browne’s framing of the issue, I do agree that both women and men need to change their behaviors. This has not been sufficiently emphasized in most writing on sexual harassment.

In the context of the discussion of the reasonable woman standard, I agree with Browne that its adoption seems to place an unfair burden on men. However, I do not agree with the stronger claim, that it requires men to do the impossible—adhere to a standard they cannot understand.

Another argument against adoption of the reasonable woman standard takes the form of a reductio ad absurdum. Some argue that if the reasonable victim approach is adopted, understood as the reasonable woman when the issue is sex, there is no reason not to adopt the appropriate category for other protected classes:

Title VII bars discriminatory behavior based not only on sex, but also based on race, color, religion, or national origin. If the courts are to apply a “reasonable woman” standard in sexual harassment cases, does this suggest that a “reasonable victim” standard will apply in other hostile environment cases? We see no basis for refusing to extend the reasoning in Ellison and similar sexual discrimination cases to causes of action involving other classes protected under Title VII. . . .

Particularizing the “reasonable x” has been done in a case of racial harassment, Harris v. International Paper Co. In Harris, the judge adopted a “reasonable black person” standard, using the analogy to the reasonable woman standard.

To give full force to . . . [the] recognition of the differing perspectives which exist in our society, the standard for assessing the unwelcomeness and pervasiveness of conduct and speech must be founded on a fair concern for the different social experiences of men and women in the case of sexual harassment, and of white Americans, and black Americans in the case of racial harassment. . . . [I]nstances of racial violence . . . which might appear to white observers as mere “pranks” are, to black observers, evidence of threatening, pervasive attitudes closely tied with racial jokes, comments or nonviolent conduct which white observers are more likely to dismiss as non-threatening isolated incidents. . . . Since the concern of Title VII and the MHRA [Maine Human Rights Act] is to redress the effects of conduct and speech on their victims, the fact finder must “walk a mile in the victim’s shoes” to understand these effects and how they should be remedied. In sum, the appropriate standard to be applied in this hostile environment is that of a reasonable black person.
A non–Title VII case involving religious rights adopted a “reasonable non-adherent” standard. In a case involving claims of both sexual and racial harassment, *Stingley v. Arizona*, the court claimed that the proper standard was the “reasonable black woman”: “[t]he proper perspective from which to evaluate the hostility of the environment is the ‘reasonable person of the same gender and race or color’ standard.” The possibility that this particularizing of the standard could extend to all protected classes has led some commentators to reject the reasonable woman standard. Others point to it as a problem that must be faced if the standard is adopted.

If consistency rules in those courts that adopt the “reasonable woman” standard, we see no way for them to avoid adopting similar standards in cases involving race, color, religion, or national origin. To say the least, this presents serious concerns for corporate officials who must comply with Title VII in future years as increasing numbers of women and racial, ethnic, and religious minorities enter the job market. Tailoring the workplace to avoid offending “reasonable Haitians,” “reasonable blacks,” “reasonable Asians,” “reasonable Rastafarians,” “reasonable Muslims,” as well as “reasonable women,” may prove to be an insuperable task.

The tone of this suggests that this is intended as a reductio ad absurdum. However, others welcome the application of particularized standards to protected classes.

I do not think it is absurd to extend the particularity of the reasonable victim standard on the basis of group characteristics other than sex. I do think that the listing of combinations of national origin, race, sex, age, and disability shows that there is something wrong with the approach. For one thing, most judges do not know what a reasonable Muslim female perspective is. However, this is not a reason to retreat to some vague reasonable man standard. Sensitivity to the situations of people of protected classes should be a part of every judge’s education. Since membership in these classes changes, continuing education is needed. But if judges were to become more sensitive to people from groups other than their own, a “reasonable x” standard would not be needed. The experiences of all people should be incorporated into the reasonable person standard, not just one’s own experiences.

The suggested extension of the reasonable victim standard does show a problem with the adoption of a reasonable woman standard that has influenced feminist scholars who previously endorsed the reasonable woman standard to change their minds. What is the common experience of a woman? Which woman is the reasonable woman? How do race, class, religion, and national origin influence the experiences of women? Also, as we saw in chapter 3, same-sex harassment cases can involve harassment of men who are seen as not properly masculine. Use of a reasonable man standard will not help here, because some conceptions of the reasonable men might be more masculine, though many would say that the man is being harassed because of his sex, and that it is negatively affecting his working conditions.
While a reasonable woman standard could help women in some respects, a reasonable man standard could hamper male plaintiffs because the implementation of such a subjective review would invoke all of the traditional notions of manhood. As a result, a man could lose a suit because his response to the sexual harassment was not close enough to the response of a reasonable man, i.e., the traditionally sexually receptive man. A man would lose under the reasonable man theory versus the reasonable person theory because a “hypersensitive” response would be unreasonable under the dictates of his patriarchal gender. In contrast, it would be reasonable (and traditionally accepted) for a woman to be “hypersensitive” to sexual harassment, so she would have a greater chance of prevailing with the reasonable woman standard. Tradition becomes the male plaintiff’s nemesis, however.\footnote{100}

It seems that the shift of some feminist writers from advocates of the reasonable woman standard to advocates of some reconstructed reasonable person standard is prompted at least in part by a wider view of the victims of sexual harassment. Franke, for example, argues that if we look at the causes of sexual harassment of women, we will see that it has to do with the policing of a gender-sex partnering duo—the insistence that biological males be masculine and biological females be feminine. But if this is considered to be discriminatory, then other instances of such regulation, such as harassing men who are not considered to be masculine or heterosexual enough, should also be considered discriminatory. This expansion of the concept of sexual harassment may not be one to which everyone agrees. But it does tend to make sexual harassment more clearly everyone’s problem, and not just women’s.

Katherine Franke cites Kathryn Abrams’s recommendation for an “enlightened reasonable person” standard with approval, noting that it does not go far enough to protect the right to “do gender” as one wishes:

\[T\]o the extent that Abrams’ standard demands only that reasonable people be enlightened with respect to the barriers to women’s equality in the workplace, it demands too little. Title VII should enlighten the underlying causes of women’s inequality, which include the sexual harassment of men who deviate from a hetero-patriarchal script. Thus, I urge that we take Abrams’ standard one step further, and demand that reasonable people be educated in and sensitive to the ways in which sexism can and does limit workplace options for all persons, male or female.\footnote{101}

It seems that even if one accepts the arguments that women and men have been socialized differently—or are inherently different—so that women, but not men, tend to view certain behaviors as threatening or demeaning, it does not follow that the reasonable woman standard should be adopted. Adopting this standard seems to require an additional premise: men are incapable of coming to see which types of behavior are threatening and demeaning to women. But if men are so incapable, then there is no hope, since charging them with sexual harassment and disciplining them will not teach them what is harassing. In discussing the necessity of a reasonable woman stan-
standard, commentators often seem to forget that it was a male judge who first articulated the standard (Keith in *Rabidue*) and that both female and male judges have adopted the reasonable woman standard and the reasonable person standard for hostile environment cases.

If men are truly unable to understand which behaviors compromise women’s equality, the only alternative would seem to be to prohibit all sexual behavior in the workplace—and this is what some recommend. This would, in effect, ban sexual expression of any kind in the workplace. But why should we do this? There is nothing wrong with sexuality. The burden would seem to be on those who want it banned from the workplace to show that there is something wrong with it. I do not think they have done so.

One commentator has argued that sexual conduct should be banned from the workplace because it has no positive business value. This is an example of placing the onus on those who would allow sexual behavior in the workplace to prove that it should be allowed. However, unless it can be proved that it seriously harms people, any kind of behavior that the employer condones should be allowed in the workplace.

The existence of the unwelcomeness requirement suggests that “welcome” sexual conduct has some value in the workplace, so that the law is required to distinguish between the two forms of conduct. But why should the law tolerate any sexual conduct in the workplace? What redeeming value does such conduct have that the law should go to such lengths to protect that conduct? While good working relationships between supervisors and subordinates and between coworkers are conducive to their employer’s interests, the existence of even consensual intimate relationships is not likely to result in good working relationships. Moreover, the hundreds of published sexual harassment cases should inform employers that the existence of sexual banter and sexual posters in the workplace does nothing to enhance the working atmosphere for many, if not most, employees. Surely the law has no interest in bending over backwards to preserve the right of sexist or mean-spirited employees to engage in behavior that almost everyone recognizes is inappropriate for the workplace.102

This seems to dismiss the evidence that many people want sexuality not to be banned from the workplace. As more and more women work, the workplace is a source of romantic partners. It is difficult to see how this kind of interaction could take place if sexual conduct were banned from the workplace, if romantic relationships were prohibited among employees.

Short of banning all sexuality from the workplace, we should place our hope in education. Enormous changes have already taken place with regard to men’s perceptions of the effects of sexual behavior on women in the workplace. The 1987 and 1994 Merit Surveys show a growing consensus among men and women about what is harassing behavior and what is not. Some recent national polls report very little difference in the perceptions of men and women today.103 With regard to those items which women seem more prone to see as harassing than men, serious discussions need to take place to deter-
mine whether they should be treated as harassing, and whether they should be illegal. Most men, being well-intentioned, will not engage in them if women say they are harassing or offensive. But those who do can be ostracized or educated by the group. Men can learn to see which behaviors are threatening to women and which are demeaning. Such claims are not based on “intuition.” They are based on reason. Martha Chamallas emphasizes this point in describing her idea of a reasonable woman: “the hypothetical reasonable woman is the woman who is able to offer a reasoned account of how the sexual conduct challenged in the lawsuit functions to deprive women of equal employment opportunities.”104 Reasons can be used to rationally persuade, rather than to force.

Many seem to misunderstand the reasonable person standard. If a heterosexual male alleges harassment by a homosexual male, and the typical heterosexual male is homophobic, does the reasonable victim standard require us to consider the perspective of a homophobic, heterosexual male as the reasonable victim? Surely not. This suggests that the reasonable person standard is a construct which embodies what we, as a society, have decided is reasonable behavior. It is this that is at issue at this moment in time. Adoption of a reasonable woman standard does not solve this problem. We still must decide, as a society, which kinds of behavior people may seek legal remedy for, and which they must handle on their own. The reasonable person should not rely solely on his or her intuitions or first thoughts in making a decision. The reasonable person should realize that his or her experiences are parochial. He or she looks for arguments, evidence of what other people experience, and tries to make a fair judgment based on both personal experience and the claims of others. To insist on the reasonable woman standard suggests that women will simply consult their intuitions, and men will consult women. Surely this is not reasonable.

Same-Sex Harassment

Most of the sexual harassment cases that have come before the courts have been cases in which men were the harassers and women the harassed. Those who originally conceived of sexual harassment as sex discrimination had such cases in mind. However, Title VII is gender neutral in the sense that its prohibition of sex discrimination applies both to discrimination against women and to discrimination against men. There have been some cases in which women have allegedly harassed men, men harassed men, and women harassed women.105 The number of sexual harassment cases filed with the EEOC by men has been increasing, but it was only 10 percent of all such cases in 1994.106 Men usually lose cases in which they allege harassment by a woman.107 However, some men have received very large amounts of money when the decision went in their favor.108

Since the late 1970s, sexual harassment has been illegal under Title VII of the 1964 Civil Rights Act. This is because sexual harassment is considered to be a form of sex discrimination. However, as I showed in chapter 3, the reasons
for categorizing sexual harassment as sex discrimination have never been clear. Legal scholars and judges continue to struggle to say just why sexual harassment should be considered a form of sex discrimination prohibited under Title VII (or why it should not). As we saw in chapter 3, this issue is highlighted in cases of same-sex sexual harassment—that is, cases in which the alleged harasser is of the same sex as the alleged harassee. In these cases, the assumptions underlying the claim that sexual harassment constitutes illegal sex discrimination are laid bare.109

In chapter 3, I laid out three arguments that have been used by the courts to connect sexual harassment and sex discrimination: the sexual desire argument, the sex stereotype argument, and the differential treatment argument. In this section, I shall discuss the contributions of legal scholars to this debate. The theoretical debate over whether same-sex harassment constitutes sex discrimination is interesting for the light it sheds on the very different perspectives that underlie the more general question of whether sexual harassment constitutes sex discrimination under Title VII.110

Predictably, legal scholars disagree about whether same-sex harassment should be treated in the same way as different-sex harassment, and their arguments for why sexual harassment constitutes sex discrimination—when it does—vary. I will survey some representative theorists who seek to show that at least some sexually harassing behavior is also illegal sex discrimination and compare them by showing the implications of their views for whether Joseph Oncale, the plaintiff in the case in which the Supreme Court ruled that same-sex harassment can constitute sex discrimination under Title VII, was a victim of sex discrimination under Title VII. I shall also discuss whether harassment based on sexual orientation constitutes sex discrimination under each theory.

Many legal scholars subscribe to a version of the differences approach described in chapter 3. Kara Gross holds that the purpose of Title VII is to eliminate gender inequality. She argues that different-sex and same-sex harassment should be treated in the same way because both perpetuate gender inequality:

Title VII’s provision prohibiting sex discrimination was enacted to eliminate gender inequality in the workplace by ensuring that employment decisions are based on individual merit and not on the gender of the employee. Therefore, gender-based decisions motivated either by the employee’s sex (male or female) or by stereotypes associated with the individual’s sex (masculine or feminine) violate Title VII’s mandate of workplace equality. Similarly, harassment of an individual because of the individual’s sex or because of the individual’s failure to conform to preconceived gender roles violates Title VII because such harassment perpetuates gender inequality. The threshold question in determining Title VII violations is whether the harassment is gender-based. Therefore, it should make no difference whether the harasser and the victim are the same gender, provided that the harassment occurs because of the employee’s gender.111
Gross’s argument very clearly makes use of two of the ways of linking sexual harassment and sex discrimination discussed in chapter 3: sexual desire and sex stereotypes. In her view, there should be no difference in the application of Title VII to different-sex and same-sex cases of sexual harassment.

Gross would find for Oncale, because the kind of treatment to which he was subject was “because of sex,” involving, as it did, behavior of an explicitly sexual nature. However, it is not clear why the sexual nature of behavior should be sufficient to render it discriminatory—unless she is assuming that any conduct that acknowledges alleged differences between the sexes is sex discriminatory. And I think she is making this assumption. This would indicate a reliance on the “differential treatment argument.” It should be noted that alleging that any sex difference is a stereotype involves a denial that there are any true general differences between males and females, something with which many Americans would not agree.

According to Gross, harassment based on sexual orientation constitutes sex discrimination, since heterosexuality is clearly part of the stereotype associated with gender, and she says that “harassment of an individual because of the individual’s . . . failure to conform to preconceived gender roles violates Title VII because such harassment perpetuates gender inequality.”

I take Gross to be articulating the position of the Supreme Court. Though they have not been as explicit as Gross is, the direction of their decisions suggests that they would agree that any conduct based on sex may rise to the level of prohibited sex discrimination if it is severe enough to alter the conditions of a person’s employment. “[T]he statute does not reach genuine but innocuous differences in ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the ‘conditions’ of the victim’s employment.” The major alternative to the differences approach is Catharine MacKinnon’s inequality or dominance approach. According to the dominance approach, sex discrimination is not only differential treatment but also unequal treatment. As we have seen, MacKinnon defines sexual harassment as “the unwanted imposition of sexual requirements in the context of a relationship of unequal power.” Thus, sexual harassment is most fundamentally a misuse of power, not of a matter of difference. MacKinnon sees sexual harassment as arising out of the general social inequality of women and men, and as contributing to this inequality. In the context of employment, “[s]exual harassment at work critically undercuts women’s potential for work equality as a means to social equality.” She contrasts the approach with the differences approach: “The [differences] approach envisions the sexes as socially as well as biologically different from one another, but calls impermissible or ‘arbitrary’ those distinctions or classifications that are found preconceived and/or inaccurate. The [inequality] approach understands the sexes to be not simply socially differentiated but socially unequal.” In MacKinnon’s view, sexual harassment can happen only to women. What happens to men may look like sexual harassment, but because of the gender hierarchy that puts all men above all women, sexual harassment does not have the same
meaning—or effect—for men that it has for women.\textsuperscript{119} In her view, sexual harassment places conditions on women’s work lives that men do not share. Thus, sexual harassment of women, but not of men, is sex discrimination.

Furthermore, MacKinnon’s account links the “group harm” that sex discrimination effects with the individual harm that members of the group suffer. Individual acts of sexual harassment serve to reinforce the subordination of women to men. Therefore, all women are harmed by each incident of sexual harassment.

The implications of this analysis for sexual harassment are clear: sexual harassment has a different meaning, and a different effect, for women than it has for men. For men, unwanted sexual advances are not part of a larger social understanding that men are sexually accessible to men, or are sex objects for men or women. Nor is gender hostility, designed to keep women in their place, the same when practiced between men. The meaning of sexual harassment, both quid pro quo and hostile environment, is different for men and for women.

Ideally, the law should recognize this.

Some legal scholars who follow MacKinnon have argued that same-sex sexual harassment does not constitute sex discrimination and so is not prohibited by Title VII. Susan Woodhouse claims:

The motivation behind recognizing sexual harassment as a form of discrimination under Title VII is that, commonly, the harassment based on sex is a result of the struggle between those in power. This struggle has in the past been mostly between men and women or other races that worked for them. Combined with this motivation is the additional effect that a person who sexually harasses another inflicts an injury on the entire gender by harassing an individual.

Same-gender sexual harassment, however, does not result in the same type of injury as would occur between males and females. The harassment is not a result of a power struggle between members of the same gender. Persons of the same gender usually do not suffer from the same imbalance of power that is present between males and females.\textsuperscript{120}

Woodhouse confines her argument to same-sex cases. However, the reasons she offers for why same-sex harassment is not sex discrimination under Title VII would support the claim that no sexual harassment claims by men should be actionable under Title VII. Contrary to Gross, Woodhouse claims that prohibition of same-sex harassment does not further the goals of Title VII.\textsuperscript{121} She recommends that same-sex complaints be brought under existing tort laws. Thus, Oncale would not have a claim under Title VII. What about harassment based on sexual orientation?

Many who follow MacKinnon’s dominance approach want to include some harassed men among people protected by Title VII. These are men who fail to meet the accepted norms for masculinity, and this would include men who are harassed because of their sexual orientation.

Some adherents of the dominance approach have argued that men who are harassed because they are not “masculine” enough are protected from
discrimination by Title VII because they are, in effect, “honorary women.” Martha Challamas and Mary Anne Case argue that men who are harassed because they are considered to be “effeminate” or not sufficiently masculine are harassed because of their similarity to women.\textsuperscript{122}

Katherine Franke argues that both the differences approach and the dominance approach are too narrow. However, because of her inadequate characterizations of the two positions, her own view very much resembles Gross’s. In Franke’s view, sexual harassment is

a tool or instrument of gender regulation. It is a practice, grounded and undertaken in the service of hetero-patriarchal norms. These norms, regulatory, constitutive, and punitive in nature, produce gendered subjects: feminine women as sex objects and masculine men as sex subjects. On this account, sexual harassment is sex discrimination precisely because its use and effect police hetero-patriarchal gender norms in the workplace.\textsuperscript{123}

Franke argues that we have a fundamental right to sexual identity, and that we should be protected from gender harassment aimed at people who do not fit “normal” models of femininity and masculinity. Franke claims that one of the ultimate goals of antidiscrimination law is “to provide all people more options with respect to how they do their gender;”\textsuperscript{124} and that such laws should protect a “fundamental right to determine gender independent of biological sex.”\textsuperscript{125}

On Franke’s view, some, but not all, cases of same-sex sexual harassment constitute sex discrimination. The test is whether the harassment performs the regulatory function described earlier. Thus, male-on-male quid pro quo cases would not constitute sex discriminatory harassment because they perform no policing or regulating of gender norms. However, Franke suggests that men who are the victims of such behavior should go straight for sex discrimination: they are being treated differently than women because of their sex, and so they could get protection under Title VII. Male-on-male hostile environment sexual harassment involving sexual horseplay would not constitute sex discrimination simply because it involved sexual conduct. Sexual conduct in itself does not constitute sex discrimination. In order to constitute prohibited sexual harassment, male-on-male hostile environment sexual harassment would have to involve the punishment of a man for not performing his gender properly. She takes Goluszek to be the paradigm case of such punishment.

What would she say about Oncale? It is difficult to say. Insofar as Oncale was targeted because he was not considered sufficiently masculine, he would have a claim under her interpretation. There is some evidence that this is what was going on. Harassment for sexual orientation would definitely constitute a violation of Title VII in her scheme.

The only court of which I am aware that has put forward a theory similar to Franke’s is that in Doe. Recall that the court claimed:
Assuming arguendo that proof other than the explicit sexual character of the harassment is indeed necessary to establish that same-sex harassment qualifies as sex discrimination, the fact that H. Doe apparently was singled out for this abuse because the way in which he projected the sexual aspect of his personality (and by that we mean his gender) did not conform to his co-workers’ view of appropriate masculine behavior supplies that proof here. The Supreme Court’s decision in Price Waterhouse v. Hopkins . . . makes clear that Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles.126

While I am sympathetic to this view, I do not think that there is at this time widespread consensus that people have a fundamental right to “do” their gender as they see fit. Nor do I think that most people understand antidiscrimination laws the way Franke does. This does not mean that we may not come to understand the purpose of antidiscrimination laws as Franke does.

While there may be some theoretical differences between Gross’s and Franke’s understandings of sexual harassment, both would find for Oncale and would include sexual harassment based on sexual orientation actionable under Title VII. Gross’s concern for people who are harassed because they violate gender stereotypes is mirrored in Franke’s concern with the policing and regulating of masculinity and femininity. This does seem to be the way the courts are moving, though they are not there yet.

This discussion of same-sex sexual harassment has examined only cases involving male-male harassment. Some of the reasons for denying that such cases can constitute sex discrimination apply only to cases in which the harasssee is male. There are not many female-female cases of sexual harassment in case law, and legal scholars rarely discuss such cases. Both Gross and Woodhouse say that their analyses apply equally to male-male harassment and female-female harassment.127

After surveying the arguments used to connect sexual harassment and sex discrimination, I must conclude that the arguments against allowing same-sex sexual harassment claims under Title VII are not justified. The main argument comes from the dominance approach and involves the assumption that only members of “vulnerable groups” or subordinated groups should be protected. Though the courts for the most part adhere to the differences approach, some decisions have shown elements of the dominance approach. The chain of cases discussed in chapter 3, starting with Goluszek, speaks of Title VII’s purpose as protecting “vulnerable groups” and excludes men from those groups.128

Title VII was not originally designed to protect men from discrimination, but this does not mean that it should not protect them. As the Supreme Court said in Oncale, “[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions
of our laws rather than the principal concern of our legislators by which we are governed.”129 They might have pointed out that Congress did not have sexual harassment in mind at all when they enacted Title VII.

The Supreme Court settled the legal issue of whether male-on-male harassment could constitute sexual harassment and is prohibited under Title VII in its decision in Oncale. The Court ultimately concluded, “We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.”130 Their conclusion is based on law. But it accords with my understanding of sexual harassment and sex discrimination, also.

Other Forms of Harassment

Title VII includes prohibition against discrimination on the grounds of race, sex, religion, and national origin. More recent legislation prohibits discrimination on the grounds of age and disability.131 In addition, Title IX prohibits discrimination based on race, sex, religion, and national origin in educational institutions.132 In principle, harassment on the basis of any of these categories is actionable. If harassment is to be found on the basis of any protected category other than sex, it would most likely be similar to hostile environment sexual harassment rather than quid pro quo.

The relationship between sexual harassment and other forms of harassment seems to be mutually influential. The 1980 EEOC Guidelines were justified on the grounds that they brought sexual harassment law more into line with the law in other areas of discriminatory harassment.133 Later, harassment law in these other areas seemed to follow the lead of sexual harassment law. In addition, developments in Title VII harassment law influenced development in Title IX.134 However, there has not been nearly as much attention paid to harassment based on race, national origin, religion, or age as has been paid to sexual harassment.135 One would think there would be, and that issues raised in relation to sexual harassment cases would have their analogues in cases involving other sorts of harassment. But this does not seem to be the case.

In 1993, the Federal Register published for comment the suggestion that other forms of harassment be treated more like gender harassment, which the EEOC distinguished from sexual harassment.

The Equal Employment Opportunity Commission is issuing Guidelines covering harassment that is based upon race, color, religion, gender (excluding harassment that is sexual in nature, which is covered by the Commission’s Guidelines on Discrimination Because of Sex), national origin, age, or disability. The Commission has determined that it would be useful to have consolidated guidelines that set forth the standards for determining whether conduct in the workplace constitutes illegal harassment under the various antidiscrimination statutes.136

The issue of religious harassment caused the greatest outcry.137 ‘‘Religious harassment’ is a dangerous concept. It can be used as a club by disgruntled
employees. The proposed guidelines prohibit free expressions. . . . They turn the private workplace into an extension of the public sphere. They impose impossible burdens on employers.”138 This raises an interesting set of questions. Is sexual harassment analogous to other forms of harassment? If so, should they be treated more like sexual harassment? Or should sexual harassment be treated more like they are? If sexual harassment is not like other forms of harassment, why is it not?

How one answers these questions will depend, in part, on one’s general perspective. Both the natural/biological perspective and the dominance perspective consider sexual harassment to be a special case. It is unlikely that they would extend their analyses to other sorts of harassment, though they would undoubtedly provide some sort of modified analysis. The liberal perspective could allow a general conception of workplace harassment. In what follows, I shall discuss the relationship of sexual harassment to other forms of harassment as they are developing in the law.

Racial Harassment It is clear that the concept of sexual harassment was in part formed by analogy with racial and national origin harassment. In her 1979 book, where she argues that sexual harassment is prohibited by Title VII, MacKinnon often makes reference to the use of Title VII to prohibit racial harassment.

[T]he law with respect to racial discrimination is well developed and instructive. Personal insults or intimidation having a racial basis or referent have repeatedly been found to be discriminatory by the EEOC. An atmosphere that creates psychological strain and emotional distress because of race-based treatment is likewise a violation of Title VII. . . . Insult, pressure, or intimidation having gender as its basis or referent should be equally proscribed.139

In addition, sex discrimination law was modeled on race discrimination law.140 However, from the start, certain perceived differences between sex discrimination and racial discrimination prevented simply applying legal strategies used in racial discrimination decisions to sex discrimination.

There is no doubt that the hostile environment sexual harassment claim was modeled on racial harassment claims. The first court to find hostile environment sexual harassment sex discrimination, Bundy v. Jackson,141 cited Rogers v. EEOC, 142 which has been called “the seminal case regarding racially discriminatory work environment claims.”143 In drawing the parallel between so-called discriminatory environment cases and hostile environment sexual harassment, the court said:

The relevance of these “discriminatory environment” cases to sexual harassment is beyond serious dispute. Racial or ethnic discrimination against a company’s minority clients may reflect no intent to discriminate directly against the company’s minority employees, but in poisoning the atmosphere it violates Title VII. Sexual stereotyping through
discriminatory dress requirements may be benign in intent, and may offend women only in a general, atmospheric manner, yet it violates Title VII. Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual’s innermost privacy, not be illegal?  

Rogers was also cited by the Supreme Court in its decision in Meritor Savings Bank, FSB v. Vinson. And in Henson, the court states: “Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.”  

According to some legal scholars, racial and sexual hostile environment claims have not been treated the same by the courts. Robert Gregory argues that since at least 1986, courts have accepted the view that racial and sexual hostile environment harassment should be governed by the same legal standard, but that, in fact, they are not.

The critical inquiry in cases of hostile environment harassment is whether the harassing behavior is, first, race- or sex-based and, second, “sufficiently severe or pervasive to alter the conditions of the victim’s employment.” In the race context, courts seem particularly receptive to claims that racially harassing behavior has affected the terms or conditions of an individual’s employment, resolving any ambiguities in favor of the claimant and de-emphasizing the need for any specific number of instances of harassment. In the sex context, the judicial reaction seems less solicitous, with courts more often stressing the ambiguities in the conduct at issue and the need for repeated instances of harassing conduct.

The differences in the ways that courts address these cases is interesting. Gregory provides evidence that courts, in particular, have insisted upon specific proof that the conduct stems from an anti-male or -female animus. Courts have also stressed that instances of sexual conduct “that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge,” a principle that appears to have no analog in the race context. Courts have suggested that even the most “gendered” conduct is not discriminatory if the harasser is motivated by a personal dislike, rather than a sexual animus. In contrast to race cases, where animus is typically inferred from the statement or conduct itself, courts in sex cases seem far more willing to probe the context of the statement or conduct and the underlying motivation of the individual engaging in the harassing behavior.
This suggests that judges are considering the causes of apparently harassing behavior in deliberating on such cases. They perceive animus in race cases, but not so readily in sex cases. It seems that they see other possible causes. But what does the cause matter? Apparently, in race cases it is easier for judges to see that the abusive behavior is based on the race of the victim. If personal dislike is the cause of some kind of behavior, then the behavior may not be based on sex, but on the person.

This distinction recalls the natural/biological perspective on sexual harassment. Kingsley Browne claims that much of the gendered harassment of women by men is not based on the sex of the victim. Rather, the harasser is using the kinds of epithets he thinks will be most effective in intimidating or humiliating the woman, and those are often sexual and, when sexual, sex-specific.150 If he were belittling a man, he might use other language, but it might also be sex-specific. According to Browne, the use of sex-specific expressions in the demeaning or annoying of a person does not imply that the person is being picked on because of their sex or gender: “Courts commonly, but incorrectly, conclude that vulgar sexually oriented epithets show that the hostility they embody is necessarily based upon sex. . . . The particular abusive words were no doubt chosen because she was a woman, but it is a different question whether she was selected for abuse in the first place because she was a woman.”151 Once this explanation is articulated, it is clear that it might also be used to explain racial harassment. People often resort to racial slurs and epithets when abusing a person because they know the sensitivities of the targeted individual. But whether or not the person is targeted because of their race is a different question.

This explanation of sexual or racial language or conduct, however convincing it may seem on the surface, omits something important. The speaker would probably not think of using racially or sexually explicit language to try to demean or annoy if he or she did not already consider race or sex to mark inferiority. Suppose that you know that I am a poor cook, and that I am sensitive about it. You might seek to hurt me by using language that prodded this sensitivity. However, you may not have any opinion about whether being a good cook makes one a person who is competent or who deserves respect. Racially and sexually specific expressions seem different. Nearly every woman knows that calling her a “dumb-ass woman” is an attempt to demean.152 Such an expression is not chosen only because the speaker knows that many women are sensitive about being women. The epithet is chosen because the speaker believes women to be inferior and knows that, in many ways, the culture reinforces this belief. That is why racial and sexual epithets exist, ready to hand, as it were. Some who argue as Browne does would claim that the personal nature of the attack, which shows that it is not sex based, is evident because there are other women whom the harasser does not seek to demean. However, most of us, by now, recognize the inadequacy of the “some of my best friends are x” defense.

Many seek to distinguish racial from sexual harassment by remarking that, in cases of racial harassment, it is always clear that the behavior is harassing, whereas in cases of sexual harassment, this is not always obvious.
The “unwelcome” requirement is peculiar to sexual harassment. Harassment as a general matter is considered to be inherently unwelcome. Thus, potentially offensive conduct based on race or national origin is presumably offensive and unwelcome to whomever it is directed. Sexual advances are different, in that sexual advances, while potentially offensive, may reflect a friendly, romantic interest in the recipient and often are welcome, or at least not offensive.\footnote{153}

Sometimes this point is made by saying that in cases of racialized behavior, ill-will toward members of the victim’s race is assumed, whereas in cases of sexualized behavior, such ill-will is not assumed.

It seems to me that this difference between sexual and racial harassment is overemphasized. Whether something counts as a racial epithet, or as evidence of racial prejudice, seems to depend just as much on context as does whether sexualized or gendered behavior is harassing. However, the legal understanding of sexual harassment does seem to diverge from the legal understanding of racial harassment at just this point. This is evident in the inclusion of the expression “unwelcome” in the EEOC definition of sexual harassment.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.\footnote{154} [My emphasis.]

Robert Gregory argues that the standards are more rigorous for hostile environment sexual harassment than for hostile environment racial harassment, even though the legal standards governing them are the same.\footnote{155} As a result, victims of sexual harassment are not given the same level of protection as are victims of racial harassment. His argument is based on two cases which seem to show that.

[i]n the race context, courts seem particularly receptive to claims that racially harassing behavior has affected the terms or conditions of an individual’s employment, resolving any ambiguities in favor of the claimant and de-emphasizing the need for any specific number of instances of harassment. In the sex context, the judicial reaction seems less solicitous, with courts more often stressing the ambiguities in the conduct at issue and the need for repeated instances of harassing conduct.\footnote{156}

Whether or not this is generally true, some judges seem to distinguish between racial and sexual harassment, particularly with regard to motive of the harasser.\footnote{157} Again, we see that sexual harassment is considered differently from other forms of harassment under Title VII.
If this difference between sexual harassment and racial harassment exists in the law, the question is whether it should. One way of sharpening the issue is to focus on the requirement that sexual harassment be “unwelcome” to constitute discrimination. This requirement is present in race cases, but, as Gregory points out, it is almost never at issue. However, this requirement is often at issue in sexual harassment cases.158

Michael Vhay and others take issue with this aspect of the understanding of sexual harassment, pointing out that “Vinson, Henson and the EEOC Guidelines do not explain why a victim of this form of discriminatory harassment, as opposed to racial, religious, or national origin harassment, must prove that the offensive activity was unwelcome.”159 Vhay’s point is a legal one, concerning the requirement placed on the plaintiff to, in effect, rebut the defendant’s defense in his or her prima facie case.160 In most cases of alleged discrimination, the plaintiff presents her or his case initially by showing that they have been the recipient of the alleged behavior: “In the traditional disparate treatment claim of sex discrimination under Title VII, the complainant makes out a prima facie case by proving the basis (gender), the issue (a tangible job detriment), and the causal connection between the basis and the issue (but for the complainant’s gender the complaint would not have suffered the job detriment).”161 The defendant is then given the opportunity to “rebut elements of the prima facie case.”162 This may involve denying that the behavior in question ever took place, or showing that there was some “legitimate, nondiscriminatory reason” for the behavior in question.163 The plaintiff may then seek to establish that the alleged nondiscriminatory reason for the behavior is a pretext for discrimination.

In cases of quid pro quo sexual harassment, the establishment of the prima facie case involves showing that a sexual advance was made and that it was unwelcome. Often, the defendant responds by trying to show that the sexual advance was not unwelcome. Since a showing of sex discrimination requires that the sexual advance be unwelcome, showing that it was in fact welcome would mean that sex discrimination did not take place. Vhay’s point, then, is that by including the “unwelcomeness” requirement in the establishment of the prima facie case, the plaintiff is, in effect, being required to provide a rebuttal of a possible defense.164

The most obvious explanation for including “unwelcomeness” as an element is that the courts and the EEOC see sexual harassment as sexual, and they want to distinguish sexual harassment from consensual sexual behavior in the workplace. They seem to think that the very same behaviors could be illegal sexual harassment in one context, but not in another. Indeed, as Vhay shows, the EEOC says something very like this in its brief in Meritor Savings Bank, FSB v. Vinson.165

[S]exual harassment differs from other class-based harassment because some sexual expressions are normal in the workplace. The EEOC thus concluded that special rules are warranted so as to avoid intrusions into “purely personal, social relationships.” The EEOC argued that courts must insist that plaintiffs demonstrate unwelcomeness in sexual
harassment suits in order to “ensure that sexual harassment charges do not become a tool by which one party to a consensual sexual relationship may punish the other.”

Vhay sees this as revealing an antiquated and stereotypical view of women. It seems to be based on the fear that women will bring sexual harassment suits in revenge after a consensual relationship ends badly. To prevent this misuse of Title VII, the plaintiff must show that the advances, or whatever the behavior in question is, were “unwelcome.” The court says that this may be done by showing that the plaintiff did not incite or solicit the conduct, and that he or she found the conduct undesirable or offensive. Vhay argues that there is no justification for the inclusion of this element in sexual harassment cases, and he advocates treating sexual harassment cases like other discrimination cases, where “unwelcomeness” is assumed. Vhay maintains that “the courts should not distinguish harassment from other forms of discrimination.” In the case of sexual harassment, this would mean shifting the burden of proof of welcomeness from the plaintiff to the defendant.

To drive the point home, Vhay cites Jackson-Coley v. Corps of Engineers, a case in which the court required the victim to show that a sexual advance was unwelcome “in the sense that the employee deliberately and clearly makes her nonreceptiveness known to the alleged offender” in order to prove voluntariness. Vhay remarks, “[O]ne cannot imagine the same court requiring a black employee, for example, to state ‘deliberately and clearly’ his desire not to be insulted on account of his race.”

Of course, one can—but it should never happen. However, one can imagine a court requiring a black employee to prove that a particular sort of behavior or expression is an insult. At issue is whether every sexual advance is an “insult.” If not, how is a person to determine beforehand whether a particular sexual advance will be regarded as an insult?

The question is, should sexual harassment be treated in just the same way as racial harassment—or, more broadly, should sex discrimination be treated identically to race discrimination. If there is a relevant difference between sexual advances and racial insults, then the answer may be no. And I think that, at this point in our social evolution, the answer is that there is a relevant difference between the two. Sexual advances are sometimes romantic overtures, even when they are from people with whom one works, and even when one is not interested in the advance. Racial insults are rarely anything else—certainly, they are never anything like romantic overtures.

Vhay argues that,

[a]s empirical studies have shown, all of the motivations behind sexual advances in the workplace contain discrimination. To purge the workplace of discriminatory barriers to equal opportunity, it should be presumed that a sexual advance, if it imposes such a barrier, is unlawful discrimination. . . . As with other discrimination actions, the defendant will always have the opportunity to assert a defense in order to defeat the presumption of unlawful conduct. Current law, however, begins
with the presumption that sexual advance is permissible until proven unwelcome. A presumption consistent with the general body of discrimination law is that a sexual advance is discrimination, unless the one making the advance can provide a justification.\textsuperscript{172}

I do not know how this claim could be proved empirically. In any case, we must decide, as a society, whether this recommended shift reflects what women want in their workplaces and educational institutions. Otherwise, some standard for determining nondiscriminatory from discriminatory sexual behavior in the workplace will be necessary. If not the “welcomeness” criterion, then some other.

This problem is exacerbated by the differences between quid pro quo sexual harassment and hostile environment sexual harassment. One might argue that sexual advances from supervisors, or from other people who have authority over one in one’s place of work, always threaten coercion. The economic power of the authority lessens the freedom of the person approached to consent. They may feel unable to say no. So, perhaps the assumption should be that advances from such persons are always prima facie wrong. Perhaps Vhay’s suggested shift in presumption should be adopted for quid pro quo harassment by supervisors.

However, things get more complicated when one recalls that co-workers are also capable of sexual harassment, and that most sexual harassment seems to be carried out by co-workers. Without the “unwelcome” requirement, or something like it, romantic overtures in the workplace would seem to be prima facie illegal. And that seems wrong—especially since both men and women are finding romantic partners at work in increasing numbers. Vhay and others seem to ignore the fact that it is still the norm for men to initiate romantic or sexual encounters in heterosexual relationships, and that people see the workplace as a source of sexual partners. Perhaps they think this is wrong. But it is still the practice at this time.

Comparing sexual harassment to racial harassment highlights another feature of sexual harassment. Most of the emphasis in both the literature and court cases has been on sexual behavior. The EEOC definition emphasizes this. However, gender harassment is, in some ways, easier to see as a form of sex discrimination. The distinction is made clear by Lindemann and Kadue: “Sexual harassment reflecting gender-based animosity resembles harassment based on race or national origins. The hostile behavior arises when women enter male-dominated jobs or workplaces. . . . Behavior motivated by gender-based animosity usually takes one of two forms: (1) hostile conduct of a sexual nature (gender baiting), or (2) nonsexual hazing based on gender.”\textsuperscript{173} Gender harassment is “nonsexual hazing based on gender.” Examples of gender harassment include the treatment of Sylvia DeAngelis. DeAngelis was the first woman sergeant in the El Paso Police Department. She filed a sex discrimination suit after being ridiculed in a work-related newsletter. Women in general were dismissed as incompetent as police, and DeAngelis was called a “dingy woman.” The remarks were not sexual in nature, but they did question the competence of women to be police and, in particular, questioned DeAngelis’s
competence, as a woman. In Hall v. Gus Construction Co., several women workers were harassed by their co-workers, who, among other things, urinated in the gas tank of a truck and failed to fix a truck that gave off fumes, and who called them “fucking flag girls.”

In Hall v. Gus Construction Co., the Eighth Circuit recognized that gender discrimination in the work environment is actionable regardless of whether it is sexually motivated. Hall involved a claim by three female employees of a construction company that their supervisors and co-workers subjected them to persistent discriminatory treatment. The pattern of abuse alleged by these employees included certain acts of gender-based harassment: references to one plaintiff as “Herpes” because of a skin condition; male crew members urinating in the gas tank of another plaintiff’s car (characterized as a practical joke); and the company’s failure to fix certain equipment while female employees were operating it.

There was also “sexualized” behavior alleged in Hall, but this case is perceived to be important because, though the defendant wanted the “gender-based” harassment not to be considered, the court said it must be considered. The Eighth Circuit said, “Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances.” There have been other cases in which male co-workers sabotaged women’s tools and refused to share work-related information. These so-called gender harassment cases seem more analogous to most racial harassment cases than to quid pro quo sexual harassment cases or hostile environment cases involving sexualized behavior. Ruth Colker has argued that courts seem to be more willing to find discrimination in harassment cases involving clearly sexualized behavior directed at women than in cases involving only gender-based behavior. It is as if sexual harassment is usurping the category of sex discrimination, and heterosexual sexualized behavior becoming the only genuine form of sexual harassment. This emphasis has spilled over onto racial harassment cases. The only sexual harassment cases considered violations of Title VII involve sexual advances toward women by men. The only racial harassment cases considered violations of Title VII are those involving explicit racial epithets.

[S]exual harassment doctrine has narrowed to include only the claims of a small subset of women who might face gender-based harassment at work. These women’s claims constitute “sexualized” harassment because of the explicit references to sexuality or body parts . . . sexual harassment doctrine has . . . narrowed to include only heterosexualized claims . . . race discrimination doctrine has followed a trend parallel to the one that I observe for gender discrimination. Many courts are requiring minority plaintiffs to produce evidence of explicit racial epithets in order to recover.

This trend, if supported, shows that it is important to consider all forms of harassment and all forms of discrimination together. Treatment of one sort...
bears on treatment of another, sometimes in ways that are not obvious without a comprehensive view. Such comparisons can show us inconsistencies in how the laws are being applied to racial and sexual harassment. This can lead to further consideration of what we think racial and sexual harassment are. This can then be used to decide future cases, to make future laws.

**Religious Harassment** Racial, sexual, and national origin harassment have been discussed together, and, as we have seen, judicial decisions from one area seem to influence decisions in other areas. Few protested the suggestion by the EEOC that racial, national origin, and gender harassment be treated similarly. The remaining categories have been treated quite differently, though for different reasons. Age and disability discrimination became illegal under civil rights laws relatively recently. They were not included in the original Civil Rights Act of 1964. Therefore, people are just beginning to work out the legal and conceptual issues involved in discrimination based on age or disability. Religious discrimination seems to be conceptualized differently from any of the other kinds of discrimination.

The 1976 case *Compston v. Borden, Inc.* was the first to recognize religious harassment under Title VII. There have not been many religious harassment cases since.

Religion is different from the other protected categories. The category of “religion” is, unlike the other protected categories (except some disabilities, and perhaps “sex”), not immutable. In addition: “First, the other bases of discrimination are questions of status; religion is a set of beliefs. Second, the other bases of discrimination are relatively narrow in scope and more easily determined by observation, while religious affiliation is not readily apparent. Third, in the religious context, courts have held that a religious belief can be unique to the individual.” Perhaps the most significant difference between religious harassment and other forms of harassment is that in the case of religious harassment, there is a clear, acknowledged right on the side of the harasser that must be protected. “While an employee’s interest in making sexual or racial comments may be questionable, many employees have a fundamental, societally recognized interest in commenting on religious matters. To those who believe that it is their duty to proselytize to others, an inflexible proscription against this activity may be an unbearable impairment to their religious practice.” Some of those who object to the extent of sexual harassment protection seem to be articulating something analogous to this for alleged sexual harassers. They perceive a right to sexual expression that should not be ignored in considering alleged sexual harassment. However, while religious expression is protected by the First Amendment explicitly, sexual expression is not.

Title VII requires employers to “accommodate an employee’s religious observance, unless to do so would result in an undue burden or hardship on the employer’s business.” Most early claims of religious harassment were by people whose supervisors or co-workers harassed them because of their religious beliefs. More recently, people are claiming that the religious expressions of supervisors or co-workers is creating a hostile environment. Thus,
a conflict has developed between two possible demands issuing from the Title VII language on religious discrimination: religious practice and expression must be accommodated, and religious practice and expression must not create a hostile environment for others. “Legally, discrimination on the basis of religion is forbidden. Further, an employer is required to accommodate an employee’s religious practice or observance. An employer is also required, however, to provide a working environment free from hostile or offensive harassment. Thus, a conflict may arise when one employee’s religious practice is hostile or offensive to a co-worker.”

Because of these conflicting demands, criteria for the occurrence of religious hostile environment harassment should probably differ from those for, for example, sexual harassment. A balance must be struck between accommodating religious practices of employees and maintaining a nonabusive environment for employees. One suggestion is that, instead of the reasonable person or reasonable victim standard, the determination of whether religious harassment has taken place should be determined by whether the work environment is disrupted. This is because, “[u]pon actual evidence of a disruption of the work environment, the employer can argue that undue hardship prevents accommodation of a particular employee’s religious habit.”

In spite of these differences between religion and other protected categories, the development of religious harassment law shows that court decisions have used cases involving other forms of harassment as models. For example, a significant case in religious harassment law, Weiss v. United States, drew a distinction between quid pro quo and hostile environment religious harassment:

the Weiss court noted that religious harassment can arise in either of two forms: “[Q]uid pro quo” harassment, in which a supervisor demands that an employee conform to a specified religious doctrine in order to secure job benefits, or “condition of work” harassment, in which the challenged conduct creates “an intimidating, offensive environment.” This dichotomy was imported verbatim from the law of sexual harassment, and the symmetry between the “condition of work” doctrine of sexual harassment law and the doctrine of “religious intimidation,” which had developed independently in the early religious harassment cases, demonstrates the growing sophistication and interdependency of harassment doctrine under Title VII.

In its rulings on sexual harassment cases, the Supreme Court has affirmed that all forms of harassment should be treated similarly. This was stated explicitly in Meritor and again in Harris. The proposed 1993 EEOC Guidelines simply articulated this. However, people objected vehemently, claiming that the EEOC was trying to overstep its authority by, in effect, making law, and that the effect of following the Guidelines would be a chill on expression of religion in the workplace. However, if, as has been argued, the Guidelines merely articulated the way in which religious harassment law has developed, then the first charge is not true. The second criticism suggests a way in
which religious harassment may genuinely differ from other forms of harassment. Religious harassment seems to differ from racial or national origin harassment in that it appears to conflict with the First Amendment guarantee of freedom of religion.196 Religion is specifically protected by the First Amendment, indicating that there is positive value in religious expression: “Religion is unique among the prohibited classifications found in Title VII and other civil rights statutes. Only religious speech, exercise, and expression have intrinsic, societal recognized and constitutionally enunciated value.”197 There is no directly comparable constitutionally guaranteed liberty in conflict with any of the other forms of harassment. A conflict between freedom of speech and certain kinds of sexual harassment has been discussed in legal literature. However, it can be argued that the conflict in sexual harassment cases is not a true conflict; whereas the conflict between religious harassment and freedom of religious expression is a true conflict.198

This tension between the antidiscrimination mandate of Title VII and the free exercise principle of the First Amendment has been the Achilles heel of hostile work environment harassment doctrine ever since its inception. Whereas previous debate on this question has focused almost exclusively on sexually suggestive speech, a value which at best is outside the core of the First Amendment, the religious harassment debate exposed the fundamental (and arguably irreconcilable) tension between the antidiscrimination principle of Title VII and the free exercise guarantee of the First Amendment. In other words, whereas the tension between sexual harassment doctrine and the First Amendment may be rationalized as a “false conflict” due to the minimal constitutional value of sexually suggestive speech, a similar competition between the religious harassment doctrine of Title VII and the Free Exercise Clause creates a “true conflict” that cannot be elided by doctrinal formalisms. Restrictions on religious expression implicate the very core of the First Amendment, and thus raise much more significant concerns about the scope of Title VII harassment doctrine. These two competing principles are of “equal dignity” in modern constitutional thought, and the religious harassment debate exposes our struggle to reconcile them to each other.199

Another difference between Title VII protections of religion and other protected classes is that religious corporations and educational institutions which are affiliated with religions are exempt.200 These two latter differences are not unrelated.

If the Title VII prohibition of religious harassment is considered to be in conflict with the First Amendment, then victims of religious harassment may not receive the same protection as victims of other sorts of harassment.

Another set of issues concerns the kind of language typical in harassing situations. Particularly in the case of hostile environment harassment, language plays a large role. Certain epithets are inherently offensive; others seem to depend for their offensiveness on context. One commentator distinguished religious harassment from sexual harassment in the following terms:
Religious expression is unique in that many religious statements are inherently offensive. Many religions, for example, preach that an individual must follow their doctrines to obtain salvation and get to heaven. A passive statement by a religious employee that a nonbeliever would go to hell has the effect of hostility toward a nonbeliever or believer of a different religion, regardless of the speaker’s purpose.  

The author argues that simple expressions of religious belief can be disparaging of another’s religious belief. However, it seems that religious expression is not unique in this respect. There are similar expressions of racial and sexual beliefs, for example, that are disparaging of a race of people, or of one sex.

Harassment on the Basis of Disability Discrimination on the basis of disability is prohibited by the Americans with Disabilities Act of 1991 (ADA). The ADA “prohibits discriminatory employment practices against qualified individuals with disabilities, and requires employers to reasonably accommodate such individuals unless accommodation would constitute an undue hardship on the employer.” So far, the focus has been on providing reasonable accommodation for people with disabilities to remove barriers to employment, education, and housing. There has not yet been much attention paid disability harassment, though it was included in the proposed 1993 EEOC Guidelines: “(a) Harassment on the basis of race, color, religion, gender, national origin, age, or disability constitutes discrimination in the terms, conditions, and privileges of employment and, as such, violates title VII of the Civil Rights Act of 1964 . . . the Age Discrimination in Employment Act . . . the Americans with Disabilities Act . . . or the Rehabilitation Act of 1973 . . . .”  Though these proposed Guidelines were eventually rescinded, commentators have argued that harassment on the basis of disability is prohibited by the ADA.

Some have argued that harassment against individuals with disabilities has unique features which distinguish this kind of harassment from all other sorts. One feature is that, “[u]nlike other classes covered by anti-discrimination statutes, which are defined by a single trait, such as sex or race, individuals with disabilities are discriminated against based on the numerous and varied characteristics inherent in the hundreds of disabilities covered by the ADA.”

As of 1993, there had not been any cases claiming harassment on the basis of disability brought under ADA, although a number of disabled people have brought actions under the Rehabilitation Act of 1973. However, these actions were not based on discrimination laws. They were based on common law theories such as constructive discharge and intentional infliction of emotional distress.

The Rehabilitation Act’s employment provisions have been utilized primarily to require that employers receiving government funds provide reasonable accommodation to disabled individuals. Because the focus of the Rehabilitation Act has been on reasonable accommodation . . . claims of harassment brought under the Rehabilitation Act were usually based on common law theories, and brought in conjunc-
tion with, or pendant to, a claim that an employer failed to reasonably accommodate.209

The ADA does contain provisions not present in Title VII. In particular, it requires an employer to reasonably accommodate employees, making it possible for them to do their work. However, a requirement of accommodation also attaches to Title VII protection from religious discrimination.210

In spite of the withdrawal of the proposed EEOC Guidelines, it seems that people can bring harassment charges under the ADEA. What kinds of similarities and differences will be found between this kind of harassment and sexual harassment remains to be seen.

Harassment on the Basis of Age  Discrimination based on age is prohibited by the Age Discrimination in Employment Act of 1988 (ADEA).211 The ADEA applies to people over forty years old. The 1993 Guidelines included age in its list of categories against which hostile environment harassment was prohibited.

The category of age involves features which distinguish it from other sorts of protected categories. “The notable distinction between age and other bases for discrimination is that with advanced age one’s physical and mental capabilities are invariably negatively affected.”212 This has led to the inclusion of a bona fide occupational qualification clause in the ADEA, similar to that applied to the category of sex under Title VII. “For the exception to apply, an age restriction must be ‘reasonably necessary to the normal operation of the particular business.’ Thus, if an employer can point to specific job requirements whereby advanced age would be a definite handicap to the safe administration of the employee’s job, then the employer may dismiss the older employee.”213

At this point, legal scholars are arguing that hostile environment theory should be applied to aging because of the analogies between the purposes of the ADEA and Title VII, and because of actual discrimination against people on the basis of age. These scholars draw analogies between age discrimination and other forms of discrimination:

In fact, the victims of age discrimination seem to have much in common with their Title VII counterparts. Research supports the concept that sexual harassment “sends a message of inferiority and objectification directed against individual women and women as a class.” These messages undoubtedly affect a person’s performance at work. It seems logical that victims of age discrimination would suffer similar effects.214

At the time of writing, no case alleging hostile environment harassment on the basis of age has shown age discrimination, although there have been cases which apply hostile environment discrimination theory to aging.215

It seems that the jury is still out with regard to hostile environment claims based on age. However, the similarities of the ADEA to Title VII suggest that such claims could be upheld. One commentator arguing in favor of such claims says:
The future of age discrimination and the hostile environment theory is unclear. With the withdrawal of the 1993 EEOC guidelines, there is little push for the expansion of the hostile environment to ADEA cases. Although the guidelines were not withdrawn because of the inclusion of age discrimination, there has been no published activity on pursuing similar guidelines without the controversial religious component.\textsuperscript{216}

However, another commentator, reflecting on the impact of the EEOC’s withdrawal of the 1993 EEOC Guidelines, suggests that remarks by EEOC chair Gilbert Casellas imply that the content of the proposed EEOC Guidelines, at least with regard to religious harassment, will be enforced whether or not they are enacted.\textsuperscript{217}
My aim in this book has been to provide the information necessary for careful, critical thinking about the concept of sexual harassment, and to guide the reader through some of the controversial issues that arise in consideration of the concept. The conclusion will be my assessment of the concept of sexual harassment based on this information.

As we have seen, the concept of sexual harassment was formed in the 1970s by feminists in order to create a remedy for a kind of treatment they believed constituted a barrier to equal opportunity for women. From the beginning, sexual harassment was conceptualized as a type of sex discrimination. The courts did not at first consider sexual harassment to be sex discrimination under Title VII. They focused on quid pro quo harassment, which they interpreted as romantic relationships gone wrong. In order to fit quid pro quo harassment into the category of sex discrimination, they had first to decide that conduct that was not an official policy of an employer could constitute discrimination under Title VII. They then had to find a way of reasoning that sexual harassment constituted behavior that was “because of sex” in the sense prohibited by Title VII. We have seen that at least three arguments were used to establish the link between sexual harassment and sex discrimination: the sexual desire argument, the stereotype argument, and the differential treatment argument. Court decisions suggest that either the motive behind the conduct, the nature of the conduct, or differential treatment may be sufficient, but no one element necessary, to establishing that treatment is “because of sex.”

These three arguments have ties to the three perspectives described in chapter 1. The sexual desire argument has ties to the natural/biological perspective. Using the motivation of sexual desire to argue that the behavior in question would not have occurred “but for” the sex of the harassee assumes that sexual desire does indeed motivate some sexual harassment. The notion that sexual harassment is at its base amatory behavior, and thus either inevitable
or justified, is still with us. Justice Kennedy expressed this in his dissent in *Davis v. Monroe County Board of Education* when he claimed that “a teenager’s romantic overtures to a classmate (even when persistent and unwelcome) are an inescapable part of adolescence.”1 Adherents of the natural/biological perspective tend to worry that no clear line can be drawn between ordinary, permissible romantic conduct and sexual harassment. In some cases, this may be so. However, in the cases that reach federal courts, such as *Davis*, the description of the behavior in question as “a teenager’s romantic overtures” is difficult to maintain. The harasser in *Davis* pleaded guilty to sexual battery. Teenage romantic overtures do not typically involve sexual battery—and if they do, then certainly calling such conduct a “romantic overture” does not justify it.

Both the sex stereotype argument and the differential treatment argument are consistent with the liberal perspective, and the sex stereotype argument is consistent with some socioculturalist perspectives. Both these arguments can be based on the principle of equality: equals should be treated equally, and unequals unequally, in proportion to their differences.

MacKinnon does not support what I am calling the sexual desire argument. However, her sociocultural perspective is partially responsible for the tendency of judges to think of sexual harassment as motivated by sexual desire.2 In her view, sexual harassment is “the unwanted imposition of sexual requirements in the context of a relationship of unequal power.”3 But she finds the sexual desire argument inadequate because it appeals to the differences approach: the link between sexual harassment and sex discrimination is made via sexual desire, which establishes that the person is targeted because of her sex. This argument works for men as well as for women. But MacKinnon distinguishes between sexual advances made by men to women, and those made by men or women to men. There is no symmetry. MacKinnon does not endorse either the stereotype or the differential treatment argument, though sex stereotypes are forbidden on her dominance approach.4 Her dominance approach utilizes three arguments for the claim that sexual harassment is sex discrimination.

Women are sexually harassed by men because they are women, that is, because of the social meaning of female sexuality, here, in the employment context. Three kinds of arguments support and illustrate this position: first, the exchange of sex for survival has historically assured women’s economic dependence and inferiority as well as sexual availability to men. Second, sexual harassment expresses the male sex-role pattern of coercive sexual initiation toward women, often in vicious and unwanted ways. Third, women’s sexuality largely defines women as women in this society, so violations of it are abuses of women as women.5

Thus, in spite of MacKinnon’s tremendous influence on the development of sexual harassment law, her particular arguments for the claim that sexual harassment is sex discrimination have not been adopted by many courts, though occasionally elements of a dominance view can be discerned.
In the introduction, I suggested that we might be able to reach some sort of agreement on what ought to be done about sexual harassment without agreeing on just what sexual harassment is. That is, we might be able to acknowledge that people have very different perspectives on gender, morality, and politics, and yet reach a kind of compromise on what to do about the behaviors some wish to designate as sexual harassment.

One of the reasons for approaching the issue in this way is that there is no way of determining which of the three perspectives—the natural/biological, the sociocultural, or the liberal—is “true” without begging the question against the others. There is no neutral position from which to judge them. Empirical data will not settle the issue, since such data are not free of value judgments. The best we can do, it seems to me, is to acknowledge that we live in a liberal state and seek to find an approach that is consistent with liberal political values. Such an approach will probably satisfy few completely but may satisfy most sufficiently.

There is agreement among adherents of the three perspectives on some points. Let us begin by surveying the various perspectives to find out where there is agreement.

Most people now agree that quid pro quo sexual harassment is wrong, though their explanations of that wrong differ. This is something that adherents of all three perspectives—natural/biological, liberal, and sociocultural—can agree on. It strikes most as unfair that someone should have to submit to an employer’s sexual demands in order to retain a position, or to receive a promotion, or to escape retaliation. Many see this kind of behavior as an abuse of power on the part of the supervisor. Representatives of all three perspectives consider quid pro quo harassment to be extortion. However, those holding the natural/biological perspective do not believe it to be sex discrimination under Title VII or Title IX. They are joined in this belief by some liberals. Other liberals, and socioculturalists, consider quid pro quo sexual harassment to be sex discrimination.

There is less agreement about hostile environment sexual harassment. According to the natural/biological perspective, most of what is classified as hostile environment sexual harassment is not wrong at all; or if it is wrong, it is not based on sex or gender. It is a natural result of the conflicts engendered by the differing psychologies of women and men. Browne admits that some hostile environment sexual harassment is based on gender animus and so constitutes sex discrimination. However, he argues that other so-called hostile environment harassment involves hostility, but not hostility toward women (or men). Because this hostility is not based on sex, it is not sex discrimination. Furthermore, unwanted sexual advances should not be considered sex discrimination unless some job-related benefit is conditioned on their acceptance, or some burden threatened should they be refused.

Liberals are divided on what constitutes hostile environment sexual harassment. According to anything. Liberal feminists such as Katie Roiphe and Camille Paglia have ridiculed conceptions of sexual harassment that render any sexual conduct in an educational or employment context immoral and unlawful. They point out that such conceptions feed into traditional perceptions of women as

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in need of protection from male sexuality. Roiphe contends that true abuses of power are indeed wrong and should be regulated. She includes quid pro quo sexual harassment among these. But she objects to “hostile environment” conceptions of sexual harassment. Paglia admits that there are serious instances of sexual harassment, and that these should be regulated. However, like Roiphe, she objects to “hostile environment” sexual harassment claims. Ellen Frankel Paul recognizes both quid pro quo and hostile environment sexual harassment, though she draws the boundaries of the latter more narrowly than some liberals might do. She holds that both forms of sexual harassment should be handled with a new tort of sexual harassment. Mane Hajdin seems to agree with Browne to a large extent. He denies that “sexual harassment” is a meaningful concept but acknowledges that discriminatory conduct that is “motivated by hostility toward the presence of women in the workplace” constitutes sex discrimination, and that quid pro quo sexual harassment constitutes sex discrimination.

Others who adhere to a liberal perspective are closer to socioculturalists. In a recent article, Vicki Schultz sets out a new paradigm for understanding hostile environment sexual harassment. It is worth describing her argument briefly since I believe that her view represents a significant development in the concept of sexual harassment.

Schultz argues that the concept of sexual harassment, as it has developed in the law, is both too broad and too narrow. It is too broad in the sense that it seems to prohibit any expression of sexuality in the workplace. It is too narrow in its focus on sexual conduct, to the exclusion of other gender harassment. According to Schultz, the prevailing paradigm for the concept of sexual harassment is “the sexual desire-dominance paradigm.” She finds its roots in both the biological/natural perspective and the sociocultural perspective. In her view, this paradigm is adequate for quid pro quo sexual harassment, but not for hostile environment sexual harassment.

Schultz argues that the sexual desire–dominance paradigm is too restrictive. The paradigm focuses attention on sexual advances, thereby obscuring the real reason that sexual harassment constitutes sex discrimination. According to Schultz, “[H]ostile work environment harassment is closely linked to job segregation by sex. Harassment serves a gender-guarding, competence-undermining function: By subverting women’s capacity to perform favored lines of work, harassment polices the boundaries of the work and protects its idealized masculine image—as well as the identity of those who do it.”

Schultz argues for a “competence-centered” paradigm. According to her paradigm, hostile environment sexual harassment has the effect of undermining the perceived competence of women, and of some men, to do work that is traditionally masculine. It is discriminatory because it is used to keep women out of certain desirable jobs, or at least to define them as inferior in those jobs. Schultz’s competence-centered paradigm is based on the premise that “a drive to maintain the most highly rewarded forms of work as domains of masculine competence underlies many, if not most, forms of sex-based harassment on the job. Harassment has the form and function of denigrating women’s
competence for the purpose of keeping them away from male-dominated jobs or incorporating them as inferior, less capable workers.”16 There are both material and psychological benefits for men from maintaining job segregation by gender. The material benefits allow men to head households and government. The psychological benefits concern the identities of men as masculine and not feminine. Schultz claims that men want to “define their work (and themselves) in masculine terms,” and that this can be done only if women are unable to do the work or are not really women if they can do the work.17 The image of masculinity that is crucial to the identities of many men is inextricably bound up with work.

Schultz’s competence-centered paradigm focuses on one significant kind of harassment: harassment aimed at keeping women out of certain kinds of jobs, or at generally undermining their perceived competence as workers. This paradigm explains the kind of harassment that is motivated by gender animosity, rather than by sexual desire. The character of the harassment may be sexual, or gendered, or neither. As she argues, her account also provides a reasoned way of understanding same-sex harassment, and of distinguishing between innocuous sexual expression and sexual harassment. Like Franke, Schultz recognizes male-on-male sexual harassment as a form of “gender policing,” although Schultz distinguishes her view from Franke’s by pointing out that the gender policing concerns work competence.18 If a man is perceived as insufficiently masculine to uphold the image of the work as man’s work, then his competence will be questioned, or he may be punished.

I find Schultz’s competence-centered paradigm an improvement over the sexual desire–dominance paradigm for hostile environment sexual harassment. As she argues, courts seem to have gravitated toward the sexual desire–dominance paradigm in an effort to distinguish discriminatory behavior from nondiscriminatory behavior. However, she provides excellent evidence that it does not. Schultz’s competence-centered paradigm refocuses attention on the real issue: equal opportunity. It also provides a test for determining when sexual behavior is discriminatory, and when not. The test is whether the sexual conduct has the effect of undermining the woman’s competence as a worker.

Schultz’s paradigm seems to leave quid pro quo sexual harassment as it is, but to redescribe hostile environment sexual harassment in a way that would be acceptable to some proponents of the natural/biological perspective and to those liberals, such as Paglia and Roiphe, who find hostile environment sexual harassment problematic. Protection from sex is not the issue. Protection of one’s right to equal treatment is the issue. Schultz says explicitly that “women should not be able to sue because they are offended by someone else’s sexual conversation or gestures.”19

Schultz’s reconceptualization of sexual harassment has an effect common to liberal analyses of sexual harassment.20 It tends to create a conceptual division between quid pro quo harassment and hostile environment harassment. The competence-centered paradigm does not do a good job of explaining quid pro quo harassment. It may be true that in some cases, the competence of the
harassed person is compromised, but that does not seem to be a necessary feature of such cases. Thus, we seem to be left with the sexual desire–dominance paradigm for quid pro quo, and the new competence-centered paradigm for hostile environment. This conceptual division between quid pro quo and hostile environment sexual harassment is present in both natural/biological accounts and liberal accounts of sexual harassment. It means that those who wish to argue that both are species of sex discrimination must use different arguments for each kind of harassment. This tends to support the view that there really is no coherent concept of sexual harassment.

It seems that the only way to offer a coherent concept of sexual harassment is to adopt a gendered approach. Some versions of the liberal perspective are gendered approaches, as are all sociocultural views. MacKinnon conceives of quid pro quo and hostile environment sexual harassment as two poles of a continuum: “Note that the distinction is actually two poles of a continuum. A constructive discharge, in which a woman leaves the job because of a constant condition of sexual harassment, is an environmental situation that becomes quid pro quo.”21 She is able to explain both forms of sexual harassment using one explanation because she assumes men dominate women by means of sexuality and by means of work, and that the two reinforce one another. Without some acknowledgment that women’s employment and educational opportunities have been differentially affected by sexual and gendered conduct at work and in school, the coherence of sexual harassment as a category falls apart.

It seems to me that in order to conceive of quid pro quo sexual harassment as sex discrimination, some acknowledgment of the difference that gender makes is necessary. One must acknowledge that the employment and educational opportunities of women in particular have been, and continue to be, detrimentally affected by quid pro quo harassment. One need not adopt the sociocultural perspective to take such a position. Ronald Dworkin articulated an analogous position with regard to race in his response to the Supreme Court’s decision in Bakke v. University of California Regents.22 In that case, the Supreme Court held that Allan Bakke, a white male, had been a victim of racial discrimination because he was denied admission to Davis medical school because of his race. Dworkin claims that the principle underlying legitimate claims of race discrimination is something like, “Every citizen has a constitutional right that he not suffer disadvantage, at least in competition for any public benefit, because the race or religion or sect or region or other natural or artificial group to which he belongs is the object of prejudice or contempt.”23 Dworkin argued that Bakke could not claim that he was kept out of Davis because his race is the object of prejudice or contempt.

An analogous principle with regard to gender would be: Every citizen has a constitutional right that she not suffer disadvantage, at least in competition for any public benefit, because the gender to which she belongs is the object of prejudice or contempt. The category of “sex” was included in Title VII because women had been objects of prejudice or contempt because of their gender, and the form this prejudice and contempt took had direct consequences for their employment opportunities.
Many Americans understand this and agree that women's employment and educational opportunities should not be hampered because of the prejudice or contempt some have for women. The next step in the argument is to conceptualize both quid pro quo and hostile environment sexual harassment in these terms.

Hostile environment sexual harassment that is due to gender animus is pretty universally acknowledged to be due to prejudice or contempt toward women, and so to be wrongful discrimination. Even some of those who object to classifying any other kind of behavior collected under the rubric “sexual harassment” as sex discrimination agree that such behavior is sex discrimination. As we saw, Browne and Hajdin both make an exception for this kind of harassment. Vicki Schultz’s competence-centered paradigm takes this kind of case as central.

Quid pro quo harassment is more problematic. One can argue that quid pro quo sexual harassment is a form of coercion, and that coercion is wrong, as Hughes and May do. One can also argue that it is a form of extortion, as Browne and Paul do. However, these conceptions do not justify treating quid pro quo harassment as a form of sex discrimination. What is needed is some reason for claiming that such conduct discriminates on the basis of sex.

As we have seen, the courts argued that the fact that a quid pro quo harasser is motivated by sexual desire shows that the conduct is because of sex. This only goes part way toward proving that the conduct constitutes sex discrimination. While it is true that a person discriminates between the sexes when he or she is motivated by heterosexual desire, this in itself is not wrongful discrimination. Hajdin makes the point well when he claims that simply pointing out that in almost all sexual harassment cases, the conduct at issue is deliberately directed at members of only one sex, is not sufficient to subsume sexual harassment under the general principle prohibiting discrimination on the basis of sex. That prohibition is against wrongful discrimination . . . while pointing out that the conduct is directed at only one sex merely shows that those who engage in it discriminate in the wide sense of the word. Therefore, if the treatment of sexual harassment as a violation of the principle prohibiting discrimination on the basis of sex is to be justified, it needs to be proven that the differentiation between the sexes that is characteristic of sexual harassment is wrongful.

Hajdin argues that quid pro quo sexual harassment is wrongful discrimination because it conditions employment benefits or burdens on acceptance or rejection of sexual advances. However, it seems to me that this is not enough to show that quid pro quo sexual harassment constitutes sex discrimination in the full sense. That is, I am nearly convinced by Judge Stern’s opinion in Tomkins v. Public Service Electric & Gas: “In this instance the supervisor was male and the employee was female. But no immutable principle of psychology compels this alignment of parties. The gender lines might as easily have been reversed, or even not crossed at all. While sexual desire animated the parties, or at least
one of them, the gender of each is incidental to the claim of abuse." What is needed is some premise showing that gender is not incidental. What is needed is a claim that quid pro quo sexual harassment affects women as a group differently from the way it affects men as a group. Unless it is possible to include quid pro quo harassment and hostile environment harassment under one analysis, we should admit that they are not as similar as all that and seek different accounts and different names for the conduct involved. This seems to be the liberal’s dilemma.

There are several ways in which a unified analysis might be done. One way would be to invoke some version of the stereotype argument, which is what the courts have done. I agree with Hughes and May that men as a group are not affected in the same way by quid pro quo sexual harassment as women as a group. Recall that they claim that women as a group are harmed by the tolerance of quid pro quo harassment by employers because it perpetuates certain debilitating stereotypes about women: “When a company tolerates coercive behavior against one woman, it perpetuates the social convention that a woman’s merits are to be measured in terms of her sexual attractiveness and compliance, not in terms of her skills or job performance. Women as a group are injured by the supervisor’s conduct . . . .” There is no similar group stereotype or convention regarding men as a group. This seems true, but I find Superson’s description of the group harm suffered by women more perspicuous, though I do not agree with her definition of sexual harassment. Superson says that sexual harassment expresses and perpetuates the view that women are inferior because of their sex, and that this harms women. According to Superson, “The group harm has to do primarily with the fact that the behavior reflects and reinforces sexist attitudes that women are inferior to men and that they do and ought to occupy certain sex roles” and not others.

I think it can be argued that quid pro quo sexual harassment expresses and perpetuates the view that women are inferior to men in the workplace and in educational environments. A supervisor who tries to coerce an employee into having sex with him in order to secure a promotion or retain her job does not value her competence as an employee. There is a view abroad that female sexual characteristics and competence in work and education are incompatible. This is expressed in such sayings as, “Don’t you worry your pretty little head.” Thus, when a woman’s sexual attractiveness is emphasized, her competence as an employee is de-emphasized.

This account of why quid pro quo sexual harassment should constitute sex discrimination allows a unified account of quid pro quo sexual harassment and hostile environment sexual harassment using Schultz’s competence-centered paradigm. Both kinds of sexual harassment express and perpetuate the view that women are inferior workers or academics.

As some have argued, conceiving of quid pro quo sexual harassment as sex discrimination does not capture all of the harm of such conduct. Quid pro quo sexual harassment is an abuse of power on the part of the harasser. Such conduct does represent a kind of theft from the employer when the harasser is not the owner of a business or institution. It is also an abuse of
the power of a teacher over a student. None of this is explicitly acknowledged in treating quid pro quo sexual harassment as a form of sex discrimination. However, the fact that the conception of quid pro quo sexual harassment is not fully included in the category of sex discrimination is not a fatal objection to treating quid pro quo sexual harassment as a form of sex discrimination under Title VII and Title IX.

My analysis suggests that men are not victims of sex discrimination when they are the victims of quid pro quo sexual harassment. However, the courts have determined that they may be. I think men should have the protection of Title VII and Title IX for those cases in which they are the victims of quid pro quo sexual harassment and hostile environment sexual harassment. However, the reasons for this are different for different kinds of cases. Some of these reasons are very like those for regarding the harassment of women as sex discrimination. Others are not.

As we saw in chapter 5, some men are harassed by other men. In my view, a man who is a victim of quid pro quo sexual harassment should be able to claim that he is being discriminated against if only men and no women are victims of quid pro quo sexual harassment. That is, he should be able to claim discrimination based on the principle of differential treatment. Recall that this was one of the arguments used by the courts to link sexual harassment and sex discrimination, and that it is one of Hughes and May’s ways of arguing that quid pro quo sexual harassment constitutes sex discrimination.29 However, unless there is some indication that the victim is chosen because he is perceived not to be sufficiently masculine, such harassment does not express or perpetuate the stereotype that such men are inferior workers or academics.

Men who suffer hostile environment sexual harassment that is based on animosity toward men who are not considered sufficiently masculine do, it seems to me, suffer sex discrimination in a sense that is more analogous to that suffered by women. Such men are deemed inferior members of their sex not competent for work and education, and so they are discriminated against on the basis of their gender.

What about the problem of the bisexual harasser? According to the differences approach, differential treatment is required—for a treatment to be discriminatory, only members of one sex can be subject to the treatment in question in a given environment. It is the most important element from the point of view of Justice Ruth Ginsburg: “The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”30 If one follows Ginsburg, it would seem that victims of a bisexual harasser would not be able to claim sex discrimination. According to MacKinnon’s dominance approach, only the women would seem to have a claim.

The problem here seems to be with the scope of the requirement of “differential treatment.” The courts seem to hold that a claim of sex discrimination requires that in each case, women and men be treated differently. The sociocultural approach to the issue does not require that women and men be treated differently in each individual case. The larger social context is one in which women and men are treated differently. It would follow that neither
women nor men would have a claim against a bisexual harasser on the differences approach, and that only women would have such a claim on the sociocultural approach. The question is which should prevail.

To be consistent, I must go with the socioculturalists. In the case of a bisexual harasser, the woman has a claim of sex discrimination for the reasons just stated. The man may also have a claim if there is evidence that he was chosen because he is perceived to be an inferior member of the male sex. Otherwise, he does not have a claim. What this means is that differential treatment is a sufficient but not a necessary condition for a claim of sex discrimination on my view. In taking this line, I am in substantial agreement with Schultz and with Franke. Both discuss the tendency of male-on-male harassment to express and perpetuate the view that certain men are inferior because they are not sufficiently masculine.

I have offered an analysis of sexual harassment that takes into account both quid pro quo sexual harassment and harassment designed to keep women (and some men) out of certain fields or job classifications. I have said very little about other sorts of behavior often classified as sexual harassment.

As Schultz points out, the centrality of the sexual desire–dominance paradigm has led some to think that all sexual conduct or expression in the workplace (or in academe) should be illegal. The EEOC characterization of sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” suggests that there is no safe sexual expression or conduct. This is both unrealistic and undesirable. On Schultz’s model, the whole context of the workplace should be taken into account when considering whether sexual conduct or expression is an indication of sex discrimination.

To determine whether the conduct is based on sex within the meaning of Title VII, they should inquire . . . into whether it embodies gender-based expectations for the workers or work involved. . . . As part of this causation inquiry, the larger structural context of the workplace will be very relevant . . . courts should examine the record for structural indicia of gender inequality at work. For example: Was there a history of discrimination or exclusion of women from the relevant occupation or field, the workplace, or the job title?31

Schultz’s broadening of the context for determining the presence of hostile work environment sexual harassment should enable us to distinguish between discriminatory sexual conduct and nondiscriminatory sexual conduct.32

There is one further type of conduct that has been classified as hostile environment sexual harassment that I have not yet addressed. This is the unwanted sexual advance that is not quid pro quo. I find this a difficult area to classify. There is no doubt that women’s conditions of work are negatively affected by the persistent attentions of men. However, my analysis of sexually harassing conduct suggests that not all such cases qualify as sex discrimination. If the advances are part of a larger campaign to call into question the harassed woman’s competence, then the woman is a victim of sex discrimi-
nation. If the advances are made by a supervisor, or someone the woman reasonably believes to have power over her employment or education, and she has reason to think that there is a threat of retaliation for noncompliance, then the woman is a victim of sex discrimination for the same reasons that a victim of quid pro quo harassment is. If the advances are from a co-worker with no supervisory power over her, but they are so bizarre that they affect the woman’s ability to carry out her work, then I believe that she has a claim of sex discrimination. This is on the grounds of differential treatment.

Thus, most quid pro quo sexual harassment and some, but not all, of what people have considered hostile environment sexual harassment constitute sex discrimination. The determining factor is whether the conduct expresses and perpetuates the view that women are inferior employees or academics.

After thinking through the issues surrounding the nature and treatment of sexual harassment, I conclude that some sexually harassing behavior should continue to be considered a form of sex discrimination and so prohibited under Title VII. The focus on sex rather than on gender has led courts and much of the public to think of sexual harassment as a subset of sex discrimination—a form of discriminatory behavior that involves sexual overtures, or explicit sexual language or gestures. But the history of judicial decisions and the theoretical work of legal scholars convinces me that it is better to think of sexual harassment and sex discrimination as intersecting sets. Not all sexual harassment is sex discrimination, and not all sex discrimination is sexual harassment.

What I have said so far in this discussion deals primarily with the law. But, as I emphasized at the beginning of this work, sexual harassment is not only a legal concept. It is a moral concept, as well. In this wider realm, I find myself in partial agreement with the critics of the concept of sexual harassment. The concept of sexual harassment seems to include within its borders disparate kinds of behavior that are wrong for different reasons. Some of them are abuses of power. Some are invasions of privacy. However, as long as they result in the imposition of disadvantageous terms and conditions in employment or education because of sex, they should continue to be prohibited by Title VII and Title IX. It may be that hostile environment sexual harassment will come to be known simply as “gender harassment,” so that its association with sexual harassment will become a thing of the past. In my view, this would be a good thing. To continue to categorize both quid pro quo and hostile environment sexual harassment as sexual harassment perpetuates two errors in thinking: (1) thinking that harassment that is sex discrimination is sexual, and (2) thinking that all sexual expression and conduct is harassment.