The Supreme Court's decision in Davis that student-student sexual harassment is discriminatory, and that schools have a responsibility to prevent it, seems appropriate, though some of the dissent's arguments on points of law in Davis have merit. Schools are responsible for protecting students from one another, as well as from teachers and staff. Though it may be objected that children are cruel to one another, and that harassment suffered by Davis is not different in kind from nongendered harassment suffered by other students, it should not be forgotten that there is a law against sex discrimination in schools. As long as sexual harassment in the workplace is conceived as sex discrimination, sexual harassment in schools should also be considered such.

Developments outside the United States

While the United States has led the world in recognition of sexual harassment as a phenomenon and in development of the concept of sexual harassment in the law, other countries have been quick to follow. Great Britain, Canada, and Australia have all been involved in the development of the law and theory of sexual harassment. All three tend to follow the United States in interpreting sexual harassment as sex discrimination. However, because of differences in sex discrimination laws and legal administrative structures, there have been differences in the handling of sexual harassment.

In 1992, the International Labour Organization (ILO) published a special issue of their journal, Conditions of Work, on sexual harassment. This work represented the results of a survey of twenty-three industrialized nations with regard to whether or not sexual harassment had been recognized, whether in legislation or in case law, definitions of sexual harassment, the kinds of laws that might be useable in cases of sexual harassment, liability, sanctions, and remedies, and institutional authorities that either were or might be charged with monitoring sexual harassment in employment.

Of the twenty-three industrialized countries surveyed, only seven had statutes which specifically defined or mentioned the term "sexual harassment" (Australia [federal level and most states], Canada [federal level and a number of provinces], France, New Zealand, Spain, Sweden, and the United States [state level only]). In some countries, the term had been explicitly mentioned and defined by judicial decision (Australia [one state], Canada [some provinces], Ireland, Switzerland, United Kingdom, United States [federal level and some states]). In most other countries, sexual harassment had been defined by implication as an activity in violation of a statute that addressed a subject other than sexual harassment, such as unfair dismissal, tort law, or criminal law. Since this 1992 assessment, a number of countries have specifically addressed sexual harassment in legislation, interpretation of existing laws, and trade agreements. A 1996 survey claimed that "sexual harassment in employment now attracts the full attention of the law."}

Since 1976, the various bodies of the European Community (EC) have passed a number of directives and recommendations regarding women and
work. Though most of these do not explicitly mention sexual harassment, they paved the way for the 1991 Recommendation by the Commission of the European Communities which directly addresses sexual harassment. Because these directives concerned sex discrimination, sexual harassment has been conceptualized as a form of sex discrimination. However, there are some interesting differences between the European Community and the United States in the conceptualization of both sex discrimination and sexual harassment.

A 1976 EC Council directive "prohibits any form of sex discrimination as regards access to employment, vocational training, promotion and working conditions." A recommendation adopted by the Council of Ministers in 1984 "aims at eliminating inequalities affecting women in working life and at promoting a better balance between the sexes in employment." A resolution adopted by the European Parliament in 1986 addressed violence against women as a barrier to equality for women. A portion of this resolution was devoted to sexual harassment.

The European Parliament . . .
—having regard to the U.N. Convention on the elimination of all forms of discrimination against women . . .

37. Calls on the Commission to conduct a study
(a) estimating the costs incurred by Member States' social security bodies for illness or absence from work due to sexual blackmail at work (psychosomatic disease, neuroses, etc.).
(b) evaluating the relation between drops in productivity in public or private companies where such cases arise and sexual blackmail at work;

38. Whereas sexual harassment can be seen as non-respect of the principle of equal treatment with regard to access to employment and promotion, and working conditions, calls on the Commission to examine national labour and anti-discrimination legislation with a view to determining its applicability to such cases and, in so far as existing legislation may be deemed adequate, to propose a directive to complete existing legislation;

39. Calls on the Council Ministers meeting on the subject of labour legislation to take all the necessary steps to harmonize laws on sexual blackmail at work in the different Member States of the Community and while awaiting this harmonization, calls on national authorities to strive to achieve a legal definition of sexual harassment so that victims of such attacks will have a clearly defined basis on which to lodge complaints; calls also for an investigation of the extent to which national labour legislation provides for sanctions against sexual harassment; to this end calls for complaints bureaux to be set up;

40. Calls on national governments, equal opportunities committees and trade unions to carry out concerted information campaigns to create a proper awareness of the individual rights of all members of the labour force, to highlight the discriminatory nature of sexual harassment and to inform victims of such harassment concerning
courses of action open to them, and calls for this aspect of conduct to be discussed during sex education and social studies classes.

41. Recommends that trade unions should consider that sexual harassment in the workplace shows similar disregard for human dignity as the infringement of equality of opportunity in employment with a view to drawing up strict codes of practice to defend the victims of such harassment and to impose appropriate sanctions on those who exploit the possibilities offered by a working environment to abuse employees or colleagues, based on the definition proposed by the TUC [Trades Union Congress, United Kingdom]:

42. Deeply deplores the existence of sexual harassment in professional relationships where the dependent status of women is emphasized as [a] patient in need of professional assistance, for example in the medical and paramedical sectors where the need for professional advice and assistance makes many women feel an increased sense of dependence:

(a) calls on the specialized educational authorities to take account of this dimension in training medical and paramedical personnel so that they are aware of what is unacceptable conduct in such a relationship and make respect for the dignity of their patient a matter of paramount importance;

(b) calls on the health authorities of those Member States where it is not customary to consider whether the presence of a third person should be recommended, if the victim requests it and/or agrees to it:

43. With a view to the protection of the individual wishing to lodge a complaint of sexual harassment, calls for:

—adequate assistance of support groups which would be authorized to lodge a complaint in their own name and on behalf of the person concerned;

—the appointment of “complaints consultants” within the medical and paramedical professional associations to whom complaints could be referred with a view to obtaining advice as to the procedure to be followed. 282

The text of this resolution clearly conceives of sexual harassment as a problem for women, affecting women’s equality in the workplace. It also seems to identify sexual harassment with sexual blackmail, or what in the United States is called quid pro quo harassment. The resolution also suggests that sexual harassment, so defined, is an injury to the “dignity” of the victim. This is an expression often used in EC documents. The European Community clearly considers the protection of people’s dignity a responsibility of government and labor organizations, and it considers sexual harassment to be a violation of the dignity of a person.

A 1987 report published by the European Commission “found that sexual harassment was a serious problem, but that existing legal remedies were inadequate.” 283 A resolution adopted by the Council of Ministers in 1990 on the protection of the dignity of women and men at work included a definition of “sexual harassment.”
The Council of European Communities...

1. Affirms that conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work, including conduct of superiors and colleagues, constitutes an intolerable violation of the dignity of workers or trainees and is unacceptable if:
   (a) such conduct is unwanted, unreasonable and offensive to the recipient;
   (b) a person’s rejection of, or submission to, such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person’s access to vocational training, access to employment, continued employment, promotion, salary or any other employment decisions; and/or
   (c) such conduct creates an intimidating, hostile, or humiliating working environment for the recipient.

Such conduct was asserted to be “unacceptable” and, in some cases, to conflict with the 1976 Directive on Equal Treatment.

Finally, in 1991, a recommendation on the protection of the dignity of women and men at work was adopted by the European Commission. The recommendation ordered, in part, that “the Member States take action to promote awareness that conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work, including conduct of superiors and colleagues, is unacceptable” under certain specified conditions in accordance with the definition of sexual harassment just stated.

Appended to this recommendation was a Code of Practice on measures to combat sexual harassment. The purpose of the Code of Practice is “to give practical guidance to employers, trade unions, and employees on the protection of the dignity of women and men at work.” It is designed to “encourage the development and implementation of policies and practices which establish working environments free of sexual harassment and in which women and men respect one another’s human integrity.”

The Code defines sexual harassment and provides examples of unacceptable behaviors. From the perspective of the Code, sexual harassment is primarily a problem of sex discrimination, though the Code mentions that in some Member States, it might also be a criminal offense or a violation of health and safety requirements. Both methods for preventing sexual harassment and procedures for dealing with incidents of sexual harassment are included on the Code of Practice. The recommendation and the Code of Practice were endorsed by the Council of Ministers in a 1991 declaration.

Thus, there is evidence that the European Community has been quite active in raising awareness of sexual harassment among Member States and in developing procedures for its prevention. However, thus far, none of resolutions or recommendations requires Members States to do anything specific about sexual harassment. The European Community is authorized to enact regulations, directives, decisions, recommendations, and opinions. These differ in the degree to which they are binding on Member States.
Regulations are immediately binding on all Member States. They require no subsequent action by Member States to become effective.

A directive requires Member States to which it is addressed to adopt national legislation to effectuate specific objectives. Member States may choose the method adopted to conform with the objectives of a directive. The EC generally uses directives to adopt provisions relating to the single market program or to harmonize Member State legislation in an area of importance to the Community.

Decisions are legally binding on its addressees, which may include specific Member States, institutions, or private parties. The Commission or Council often apply decisions to specific cases whereas regulations and directives apply more broadly to general areas of legislation.

Recommendations and opinions have no binding force. Recommendations set forth, for example, the Commission’s or Council’s desired course of action in a particular area. Opinions generally express Commission or Council viewpoints on a given topic.289

Requiring Member States to act in accordance with demands of the European Community is difficult because of concerns over national autonomy. The European Community approach seems to be to set out broad guidelines, and then to allow each Member State to devise its own way of complying. However, there is no requirement that the Member States comply. This, to some, is a serious weakness of the EC actions on sexual harassment so far.291

While the European Community explicitly defines sexual harassment in the context of sex discrimination, there are suggestions of differences between conceptions of sexual harassment in the United States and in the European Community. Particularly striking is the treatment of sexual harassment in resolutions and recommendations “on the protection of the dignity of women and men at work.” Discussing sexual harassment in this context suggests that concerns about sex discrimination are part of a larger concern with the conditions of work. This seems not to be the case in the United States, where there is little concern for a worker’s dignity. “At-will” employment policies, where employees can be fired without cause and given five minutes to clear their desks while a supervisor observes, are common in the United States.

The concern with the dignity of all workers tends to mitigate the perspective, common in the United States, that the concern with sexual harassment is a concern with sex, and thus that those who want to prohibit sexual harassment want to prohibit sex, or to protect vulnerable women from the sexual assaults of men. The focus on sex arises when one considers why sexual harassment should be singled out when other forms of harassment are not similarly prohibited. It is true that some harassment on the basis of race, national origin, religion, disability, and age is prohibited by Title VII. However, the prohibition stems from the view that these forms of harassment constitute discrimination on the basis of race, national origin, religion, disability, and age, not because harassment in general violates the dignity of a worker.

Perhaps the difference in emphasis between the European Community and the United States regarding sexual harassment should be seen as a de-