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Litigation Narratives: Why Jensen v. Ellerth Didn't Change Sexual Harassment Law, but Still Has a Story Worth Telling

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Book Review

Litigation Narratives:

Why Jensen v. Ellerth Didn't Change Sexual Harassment Law, But Still Has a Story Worth Telling

CLASS ACTION: THE STORY OF LOIS JENSON AND THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW by Clara Bingham and Laura Leedy Gansler. New York: Doubleday, 2002. 390 pp. $27.50 hardcover.

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In *Class Action: The Story of Lois Jenson and the Landmark Case that Changed Sexual Harassment Law*, Clara Bingham and Laura Leedy Gansler tell a disturbing story about the pervasive sexual harassment that plagued the first women to work at Eveleth Taconite Co., an iron mine in northern Minnesota, and the efforts those women made to change the company's environment and policies. These efforts took place both in and out of the courtroom and included a legal battle that lasted nearly fifteen years from the filing of the first charge of discrimination to the settlement of the case. As the book's title suggests, *Class*

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Action seeks to achieve at least two goals in describing this battle. The first is to tell the personal "story of Lois Jenson" and describe the impact the litigation had on her and on the community in which she lived and worked. The second is to tell a story about a "landmark case that changed sexual harassment law."

Jenson v. Eveleth Taconite Co.[1] is generally recognized as the first class action lawsuit litigating a claim of sexual harassment.[2] It is based largely on this fact that Bingham and Gansler claim the case changed sexual harassment law (pp. 240-41, 382). Their claim that *Jenson* changed the law is not ultimately persuasive, however, when measured against the realities of sexual harassment law over the past twelve years. Although contemporary observers predicted a flood of class action sexual harassment suits following certification of the *Jenson* class,[3] the number of sexual harassment class actions certified between 1991 and the present has been relatively small.[4] There are several possible explanations for this. Social changes stemming from an increased awareness of workplace sexual harassment made the kind of large-scale, centralized employer misbehavior that characterized the *Jenson* case less common. The enactment of the Civil Rights Act of 1991, which increased the damages available to individual Title VII claimants, may have made individual lawsuits more appealing to litigants at the same time that it made class action suits potentially more problematic. Finally, the doctrinal limitations inherent in current federal sexual harassment law and in the federal procedural requirements governing class action litigation raise barriers to class certification. *Class Action* does not address these issues, or discuss in any detail the relationship between the *Jenson* litigation and other relevant legal and social changes. As a consequence, the story the authors seek to tell about the triumph of legal change through landmark litigation falls flat.

The book is nonetheless an interesting case study in the potential for nar-

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1. 139 F.R.D. 657 (D. Minn. 1991) [hereinafter *Jenson I*].
2. In fact, it appears that courts certified class actions with claims of sexual harassment in *Frazier v. S.E. Pa. Transp. Auth.*, 123 F.R.D. 195, 197 (E.D. Pa. 1988) (certifying a class alleging race and sex discrimination, including claims of sexual harassment) and *Meiresonne v. Marriott Corp.*, 124 F.R.D. 619, 624 (N.D. Ill. 1988) (certifying a class challenging promotion practices, based in part on "evidence of pervasive sexual harassment"). In *Sims v. Montgomery County Comm'n*, 766 F. Supp. 1052, 1070-77 (M.D. Ala. 1990), the court found defendants liable to a class of female plaintiffs for extensive sexual harassment and discussed the standards for harassment as well as the extent of the abusive conduct at length. However, the court did not discuss the appropriateness of considering the claims in a class action. Certainly, the *Jenson* court believed that "to this Court's knowledge, no class of plaintiffs has ever maintained through trial a claim of sexual harassment." Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 875 (D. Minn. 1993) [hereinafter *Jenson II*]. At this point, *Jenson* is so widely viewed as the first sexual harassment class to have been certified that its place in history as such seems settled.
3. *See, e.g., Eveleth Mining Company Sued by Women Miners* (NPR radio broadcast, Aug. 13, 1992); *Harassment Suit Widened By Judge*, N.Y. TIMES, Dec. 19, 1991, at B17; Diane Alters, *Ruling Clears the Way for 3 Women Miners to File First-Ever Class Action Suit on Sex Harassment*, MINN. STAR-TRIB. Dec. 19, 1991, *available at* 1991 WL 3935541; Amy Dockser Marcus and Milo Geyelin, *'Work Environment' Bias Claim on Trial*, WALL ST. J. May 16, 1991, at B7.
4. *See infra* pp. 279-81 for discussion of classes certified between 1991 and the present.

rative about litigation to provide a richer perspective on the development of the law, not through the analysis of a particular legal issue, but through an exploration of how the actors in a lawsuit shape and are shaped by the litigation. *Class Action* situates a long-running, complicated lawsuit in the real-world context that the several judicial opinions generated by the litigation itself largely fail to convey. This kind of narrative has the potential to add significantly to how legal educators and students think about learning law in both the clinical and traditional classroom settings. Beyond the classroom, legal narrative can enhance popular understanding of the valuable role of litigation as a tool for social change; the personal and economic costs that such litigation may exact; and the relationship between litigation and other forces in effecting social change. While *Class Action* itself suffers certain weaknesses as a legal narrative, it nonetheless raises the possibility of this expanded approach to learning and thinking about law.

I. *JENSON V. EVELETH TACONITE CO.*: THE STORY

In the mid-1970s, Eveleth Mines was one of many mining companies on the Mesabi Iron Range in northern Minnesota.[5] These mines "provided the foundation for the economy of all of northern Minnesota," and offered their employees some of the highest-paying blue-collar jobs in the United States (pp. 7-8). Until 1974, these high-paying jobs were available only to men, but in that year the Equal Employment Opportunity Commission (EEOC) entered a consent decree with a number of the mining companies on the Iron Range, including Eveleth Mines. The consent decree required that twenty percent of new jobs in the mines be set aside for women and racial minorities (p. 8).

In 1975, the first women arrived to work as miners at Eveleth Mines (p. 12). From their earliest days on the job, the women met intense resistance from the formerly all-male work force. Their presence was a challenge to the culture of the mines, as well as to the entire Iron Range and its "distinctly macho worldview" (p. 33). Lois Jenson was one of the first four women hired to work at Eveleth Mines. On her second day on the job, one of her male colleagues said to her, "You fucking women don't belong here. If you knew what was good for you, you'd go home where you belong" (p. 14).

The first part of *Class Action* describes the abusive behavior that Jenson and other women suffered during their years at Eveleth Mines. Much of the conduct that ultimately formed the basis of the lawsuit was not directed at specific women, but consisted of pornography and crass graffiti placed prominently throughout the workplace, constant and graphic conversation about sex, and regular expressions of hostility to the presence of women in the workplace. This omnipresent material was matched with shocking and regular instances of indi-

5. Throughout this review, I will refer to the defendants—Eveleth Taconite Co. and its parent company, Oglebay Norton Taconite Co.—as "Eveleth Mines."

vidual harassment. For example, on one occasion a male employee mimed performing oral sex on one of his female co-workers in front of other men employed in their area while the woman was sleeping during a break (p. 61). Another woman returned to her locker on three different occasions to find that someone had broken into her locker and masturbated onto her clothing (pp. 47-48).

Some of the harassing conduct was not directly sexual, but manifested an extreme hostility to the presence of women on the job. Kathy Anderson, one of the three named plaintiffs in *Jenson*, complained at one point that there was no restroom on her particular worksite and that she was suffering from dehydration since she had stopped drinking water to avoid being forced to urinate outside in front of her male co-workers. The company did not respond to her complaints. One man told her, "If you want to work like a man, you got to learn to piss like a man, and if you can't, go home and bake bread" (p. 55). When a portable toilet was ultimately provided for women working in another particularly remote part of the mine, the toilet was tipped over twice while a female employee was inside of it (p. 314). In 1987, in the earliest days of the *Jenson* litigation, a sign appeared, and remained, on the company bulletin board stating that "Sexual Harassment in this Area Will Not Be Reported. However, it Will be Graded" (p. 132).

The constant sexual harassment at Eveleth Mines was met with little or no response from the union representing the mine's hourly employees or from management. In August 1984, after receiving repeated strange and harassing letters and phone calls from her direct supervisor, Jenson made her first foray into the grievance process at Eveleth Mines (pp. 100-111). The union's unsuccessful attempts to resolve the matter informally brought to light Eveleth management's unwillingness to adopt a sexual harassment policy or to institute any form of training to educate employees about sexual harassment (p. 104). When Jenson's formal union grievance led to accusations of misbehavior on her part, she finally took the first step toward litigation, filing a charge of sex discrimination with the Minnesota Human Rights Commission (MHRC) in October 1984 (p. 110). Conciliation efforts by the MHRC led Eveleth to adopt a rudimentary sexual harassment policy, although the company declined to offer education or training and failed to name an individual or office responsible for administering the policy (pp. 112, 123). The company also refused the MHRC's request that it pay Jenson a small amount in damages for her individual claims of discrimination (p. 112).

Twenty-seven months after Jenson first filed a complaint with the MHRC, her case was assigned to an attorney in the Minnesota Attorney General's office (p. 112). It was this attorney, Helen Rubenstein, who first suggested that the case might be filed as a class action lawsuit. In March 1987, Rubenstein filed a complaint on behalf of the women employees of Eveleth Mines (pp. 116-119). Just a few months later, however, she left the Attorney General's office, and the case thereafter received little attention (pp. 134, 139). The State's inaction led Jenson and Patricia Kosmach, another named plaintiff, to search for a private at-

torney. In February 1988, they met with Paul Sprenger, a Minneapolis-based lawyer who specialized in employment discrimination class action suits (pp. 140-41). Sprenger agreed to take the case, believing that it would settle quickly, with "modest" damages for the individual plaintiffs and the establishment of a "progressive, comprehensive [sexual harassment] policy" at Eveleth Mines (pp. 153).

He was wrong. The case ultimately would settle, but not until ten years later. The second part of *Class Action* tells the story of the ten-year litigation battle leading to this settlement. The book devotes considerable time to the litigation itself, but focuses its primary attention on the atmosphere at Eveleth Mines and in the Iron Range more generally as the litigation progressed. In particular, Bingham and Gansler describe the impact that the litigation had on the lives of the named plaintiffs, and especially on Jenson.

The complaint that Sprenger filed in August 1988 alleged that Eveleth Mines had discriminated against its female employees because the company had "created and condoned" a hostile work environment and had discriminated against women in hiring and promotions (p. 163). The three named plaintiffs (Jenson, Kosmach, and Anderson) sought to represent a class of female employees and applicants for employment at the mines, and the first stage in the legal battle focused on the propriety of certifying this class. In the courtroom, the debate focused on the legal standards for certifying a class under Federal Rule of Civil Procedure 23 and on whether sexual harassment claims were amenable to class treatment. While Gansler and Bingham pay some attention to this legal issue (pp. 155-57, 204-06), their primary focus is on the fights that went on out of court – between Eveleth management and the plaintiffs, between the union and the plaintiffs, and between the women who had brought the lawsuit and other women working at Eveleth (pp. 167-81, 199-203, 224-32). The story of how management and the union worked to create divisions among the female employees, and ultimately convinced a number of women to testify in opposition to class certification, is central to this portion of the book. The divisions among these women ended up affecting the course of the litigation, as those who were convinced to testify for the company early in the litigation were hurt by this testimony later when they ultimately decided to come forward with their own stories of sexual harassment (pp. 324-25). These divisions were also defining experiences in the culture of Eveleth Mines and in the lives of the named plaintiffs, whose previous allegiances within their communities were sorely challenged.

Finally, in 1991, the *Jenson* class was certified,[6] but the legal battle was just beginning. The next stage of the litigation required that the plaintiffs demonstrate that "acts of sexual harassment [were] sufficiently pervasive or severe to alter the conditions of . . . employment and create abusive working conditions" at Eveleth Mines.[7] Success on that issue, which came in 1993, forced the mine to

6. *Jenson I*, 139 F.R.D. at 657.
7. *Jenson II*, 824 F. Supp. at 874 (internal quotations omitted).

adopt a more formal sexual harassment policy[8] (p. 273). But it did not entitle any individual plaintiff to damages. Instead, a determination as to whether any individual plaintiff was actually entitled to money damages was made after a hearing by a Special Master appointed by the district court (pp. 276-78). This portion of the trial, the most personally devastating for the plaintiffs, required that each of the twenty-one women who ultimately sought monetary damages in the case demonstrate that her claimed emotional distress stemmed from the abuse she received at Eveleth Mines, and not from other depressing, humiliating, or otherwise tragic life experiences (pp. 280-83). The Special Master appointed to the case gave the defendants tremendous leeway in discovery, permitting them to inquire into the personal lives of the plaintiffs not only during their employment at Eveleth Mines, but for years prior (pp. 284-86). During the court proceedings, each plaintiff then had to testify about her most devastating past experiences. This testimony was used to call into question any connection between her emotional distress and the experiences she faced at Eveleth Mines (pp. 314-23).

At the end of this process, the Special Master wrote a scathing opinion, questioning the honesty of the plaintiffs, discounting the severity of the harassment they had faced at Eveleth Mines, and awarding the women minimal damages (pp. 346-352). While the Special Master's opinion and the district court's decision to adopt his recommendations came as a blow to the plaintiffs, the appeal and ultimate settlement of the case moved quickly. In December 1997, the Eighth Circuit reversed the trial court decision in a strongly critical opinion and ordered a new trial.[9] A year later, on the eve of the new trial, the parties settled (pp. 372-79).

II. WHY *JENSON V. EVELETH* DIDN'T CHANGE SEXUAL HARASSMENT LAW

Bingham and Gansler declare in their book's title that *Jenson v. Eveleth* "changed sexual harassment law." In particular, they argue that the certification of the case as a class action lawsuit opened the door for other plaintiffs to join in class actions against their employers, asserting claims of sexual harassment and achieving large-scale change because of the threat of significant economic sanctions (pp. 240-41, 382). Their claim mirrors some early predictions about the case's potential impact. Immediately following the court's decision to certify the *Jenson* class, the case received a fair amount of attention, and many predicted that it could become a popular new tool for plaintiffs challenging sexual harassment.[10] But as it has turned out, relatively few sexual harassment class action suits have been brought since *Jenson*'s 1991 certification.

A comprehensive study of sexual harassment cases filed in federal courts

8. *Id.* at 888-89.
9. Jenson v. Eveleth Taconite Co., 130 F.3d 1287 (8th Cir. 1997) [hereinafter *Jenson III*].
10. *See supra* note 3.

between 1986 and 1995 found that "in contrast to well-publicized accounts of class action lawsuits in the media, only three of the approximately five hundred cases involved a class action."[11] Of these three cases, two were opinions generated by the *Jenson* litigation and one predated *Jenson*'s 1991 certification.[12] The study thus found no reported sexual harassment class action suits between *Jenson*'s certification and 1995. There appear to have been only ten reported cases between 1995 and 2002 in which courts considered sexual harassment claims as part of a federal class action suit.[13] The number of cases filed as class actions, but settled or dismissed before any reported judicial opinion was issued, is no doubt higher.[14] However, individual plaintiffs bring the vast majority of sexual harassment suits filed in federal courts. Of the class action sexual harassment claims that have been filed, the number of certified classes appears to be about equal to the number of classes in which the courts denied certification.[15]

In addition to these class action cases, a number of multi-plaintiff sexual harassment claims were brought during the 1990s by the EEOC as "pattern-or-

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11. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 562-63 (2001).
12. *Id.* at 563 n.63.
13. After numerous searches in databases of reported cases, as well as follow-up research based on mention of class suits in secondary sources, I was able to locate only ten cases in which courts considered sexual harassment as part of a Rule 23 class action suit. *See* Marquis v. Tecumseh Prods. Co., 206 F.R.D. 132, 155-62 (E.D. Mich. 2002); Adler v. Wallace Computer Servs., 202 F.R.D. 666 (N.D. Ga. 2001); Beckmann v. CBS, Inc., 192 F.R.D. 608, 617 (D. Minn. 2000); Bremiller v. Cleveland Psychiatric Inst., 195 F.R.D. 1 (N.D. Ohio 2000); Warnell v. Ford Motor Co., 189 F.R.D. 383 (N.D. Ill. 1999); Hoffman v. RI Enters., 50 F.Supp.2d 393 (M.D. Pa. 1999); Cox v. Indian Head Indus., Inc., 187 F.R.D. 531, 534 (W.D.N.C. 1999); Martens v. Smith Barney, Inc., 181 F.R.D. 243 (S.D.N.Y. 1998); Markham v. White, 171 F.R.D. 217 (N.D. Ill. 1997); Neal v. Director, D.C. Dept. of Corr., 1995 WL 517248, *1 (D.D.C. Aug. 9, 1995).
14. *See, e.g.*, Maureen S. Binetti et al., *Multiplaintiff Litigation and Class Actions – Plaintiffs' Perspective, in* LITIGATING THE SEXUAL HARASSMENT CASE 139, 140-41 (ABA 2d ed., 2000) (collecting examples of large settlements in class or multi-party sexual harassment litigation, several of which do not appear to have resulted in or followed from any published judicial opinion).
15. *See Beckmann*, 192 F.R.D. at 617 (certifying class including claims of sexual harassment); *Bremiller*, 195 F.R.D. at 5 (same); Wilfong v. Rent-a-Center, Inc., 2001 WL 1795093, at *1 (S.D. Ill. Dec. 27, 2001) (same); *Warnell*, 189 F.R.D. at 385 (same); *Markham*, 171 F.R.D. at 219 (same), *Martens*, 181 F.R.D. at 258-61 (same). *But see Marquis*, 206 F.R.D. at 155-62 (declining to certify a sexual harassment class because of plaintiffs' failure to meet Rule 23(a)'s requirements of numerosity and typicality); *Adler*, 202 F.R.D. at 670-71 (declining to certify a class because individual damages claims predominated over any common issues); *Hoffman*, 50 F. Supp. 2d at 393 (dismissing class claims for failure to provide sufficient notice in EEOC charge); *Cox*, 187 F.R.D. at 534 (declining to certify class of sexual harassment complainants because of individualized nature of claims and relatively small number of potential class members); Int'l Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. LTV Aerospace and Def. Co., 136 F.R.D. 113, 130 (N.D. Tex. 1991) (declining to certify sexual harassment class, the court concluded that sexual harassment claims are "too individualized" and "not amenable to class treatment"). *See also* Joseph M. Kelly and Adele Sinclair, *Sexual Harassment of Employees By Customers and Other Third Parties: American and British Views*, 31 TEX. TECH. L REV. 807, 828 n.186-87 (2000) (mentioning *Walsh v. Harrah's*, 98 C4388 (N.D. Ill. 1998), in which the court denied certification of a sexual harassment class).

practice" cases.[16] EEOC pattern-or-practice cases are similar to class actions brought under Federal Rule of Civil Procedure 23 in that they challenge an employer's policies or employment practices in their entirety, rather than as applied to only one employee. Because these are multi-plaintiff cases, the legal challenges that stem from Title VII's sexual harassment requirements will be equally relevant to cases brought by the EEOC and to Rule 23 class actions. However, these cases must be treated somewhat differently because the EEOC does not need to meet the requirements of Rule 23.[17]

Even if the EEOC cases are included in the total number of multi-plaintiff sexual harassment cases filed during the 1990s, the number is much smaller than might have been expected, had *Jenson* sparked a revolution in sexual harassment class litigation. A combination of social change—spurred in part by evolving and improving legal responses to employment discrimination—and the doctrinal requirements of sexual harassment and class action law can significantly explain why sexual harassment claims remain largely the province of individual plaintiff litigation.

A. The Changing American Workplace

To a significant extent, the relatively small number of sexual harassment class actions certified in the past twelve years can be attributed to the fact that the American work environment has improved since Lois Jenson and her colleagues confronted the hostility that pervaded Eveleth Mines. While sexual harassment remains a serious and unfortunately common problem for working women, the development of sexual harassment law, increased public awareness about sexual harassment, and the increased costs to employers of ignoring the problem of sexual harassment have changed the U.S. workplace for the better over the past decades.

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16. *See, e.g.*, EEOC v. Dial Corp., 156 F. Supp. 2d 926, 930-69 (N.D. Ill. 2001); Dinkins v. Charoen Pokphand USA, Inc., 133 F. Supp. 2d 1237, 1250 (M.D. Ala. 2001); EEOC v. Mitsubishi, 990 F. Supp. 1059 (C.D. Ill. 1998); EEOC v. Astra USA, Inc., 1998 WL 80324, at *1 (D. Mass., Feb. 5, 1998) (entry of consent decree settling charges of hostile work environment sexual harassment); EEOC v. Moser Foods, Inc., 1997 WL 827398, *1 (D. Ariz., Nov. 7, 1997); *see also* Kathleen Mulligan, *Recent Developments*, VLR9913 ALI-ABA 113 (2000) (discussing EEOC settlement of five sexual harassment pattern and practice cases in 1998 and 1999).

17. Gen. Tel. Co. of the Northwest v. EEOC, 446 U.S. 318, 324 (1980) ("[T]he EEOC need look no further than s. 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals. Its authority to bring such actions is in no way dependent upon Rule 23, and the Rule has no application to a s. 706 suit."). Indeed, the most well-known of these EEOC pattern-or-practice cases explicitly described itself as addressing a matter of first impression, thus distinguishing the EEOC pattern-or-practice case from *Jenson*'s Rule 23 class certification decision. *See* EEOC v. Mitsubishi Motor Mfg. of Am., Inc., 990 F. Supp. 1059, 1069 (C.D. Ill. 1998) ("To the Court's knowledge, this is the first time that this legal question has ever been raised. After careful consideration of the parties' arguments and the relevant case law, this Court finds that a pattern or practice action for sexual harassment is authorized by Title VII and can be brought by the EEOC, both as a legal matter and in this case.").

Jenson began working as one of the first female miners at Eveleth Mines in 1975. At this time, no federal court had recognized sexual harassment as a form of gender discrimination, and few, if any, employers had policies prohibiting sexual harassment. In 1976, the first federal court concluded that Title VII's prohibition on sex discrimination encompassed claims of sexual harassment.[18] During the late 1970s and early 1980s, an increasing number of courts permitted sexual harassment claims. First they acknowledged that a woman who was fired or otherwise disciplined for her refusal to engage in sexual conduct with her boss had a Title VII claim for so-called "quid pro quo" harassment. Then courts recognized that, even when harassment did not result in tangible job consequences, an employer could be held liable for sex discrimination if the employer created or condoned an environment in which harassment was sufficiently pervasive to change the terms or conditions of employment.[19] In 1986, the Supreme Court endorsed the theory that Title VII gave employees a claim for this kind of "hostile work environment" sexual harassment.[20]

Five years later, during the fall of 1991, the televised hearings on the nomination of Clarence Thomas to the Supreme Court brought sexual harassment into the public eye in a dramatic manner when his former employee, Anita Hill, recounted instances of harassment she had suffered at the hands of her former supervisor.[21] "In the wake of the [Hill-Thomas] hearings individuals flooded EEOC offices with sexual harassment complaints."[22] The EEOC reported that the first half of fiscal year 1992 saw a fifty percent increase in sexual harassment claims filed compared to the same reporting period the year before.[23] Moreover, between 1991 and 1997, the number of sexual harassment charges filed with the EEOC more than doubled, rising from 6883 in 1991 to 15,889 in 1997.[24]

Of course, *Jenson* was decided within months of the time that the Hill-Thomas hearings were captivating the nation (pp. 234-35, 240-41). The certification decision in *Jenson* received more media attention than most employment discrimination decisions generally receive, perhaps in part because of that timing. The publicity that *Jenson* received should not be ignored as a factor in in-

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18. Williams v. Saxbe, 413 F.Supp. 654, 657 (D.C.D.C. 1976), *vacated on other grounds*, Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).
19. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-67 (1986).
20. *Id.* at 66-67.
21. *See* Randall Sanborn, *Bias Law Booms: Huge Verdicts, New Laws Rock Employment Litigation Bar*, NAT'L L. J. July 27, 1992 at 14.
22. Susan A. FitzGibbon, *Arbitration, Mediation and Sexual Harassment*, 5 PSYCHOL. PUB. POL'Y & L. 693, 708 (1999).
23. Jane Gross, *Suffering in Silence No More, Women Fight Back on Sexual Harassment*, N.Y. TIMES, July 13, 1992 at C17. *See also* Sanborn, *supra* note 21.
24. Gilbert F. Casellas and Irene L. Hill, *Sexual Harassment: Prevention and Avoiding Liability*, SHRM LEGAL REPORT, Fall 1998, at 18. That number stabilized in 1997, and has in fact dropped off slightly since then, with 15,475 charges filed in 2001. *See* EEOC, SEXUAL HARASSMENT CHARGES EEOC AND FEPAS COMBINED: FY1992-FY2001, *available at* http://www.eeoc.gov/stats/harass.html (last visited Mar. 29, 2003).

creased public awareness of sexual harassment. But the media and public attention to *Jenson* was a small fraction of the attention focused on the nationally televised Hill-Thomas hearings, which were watched by thirty million Americans (p. 234).

Just as public awareness of sexual harassment was increasing, the costs to employers of being found liable for harassment increased significantly. With the passage of the Civil Rights Act of 1991, a successful Title VII plaintiff could potentially receive up to $300,000 in compensatory and punitive damages and was entitled to try her case before a jury.[25] Before 1991, the damages available for hostile work environment sexual harassment claims were relatively limited because hostile work environment claims generally do not involve tangible employment actions, such as firing or demotion. Absent such a tangible employment action, a plaintiff could not recover back pay, and Title VII offered no other significant damages to redress the intangible injuries inflicted by a hostile work environment. Instead, injunctive relief and attorney's fees were the primary damages available.[26] By adding compensatory and punitive damages to those remedies available to hostile work environment plaintiffs, the Civil Rights Act of 1991 increased the value to employers, in terms of avoiding legal liability, of having and enforcing sexual harassment policies.[27]

Two 1998 Supreme Court opinions reinforced this point by setting out more specific standards for when an employer could be held liable for sexual harassment.[28] In *Ellerth* and *Faragher*, the Court explained that an employer may be held vicariously liable for supervisor harassment, even when the harassment did not result in a tangible employment action.[29] An employer can avoid this vicarious liability in hostile work environment cases, however, if it can demonstrate both "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[30] While having a sexual harassment policy will not automatically insulate an employer from liability (and the absence of a policy will not automatically lead to a finding of liability), the Court made clear that the existence of "an antiharassment policy with complaint procedure . . . suitable to the employment circumstances" would be relevant to employer liability.[31] Evidence from litigated cases demonstrates

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25. 42 U.S.C. § 1981a.
26. *See* 42 U.S.C. § 2000e-5(g).
27. *See* Jan Michelsen, Note, *A Class Act: Forces of Increased Awareness, Expanded Remedies, and Procedural Strategy Converge to Combat Hostile Workplace Environments*, 27 IND. L. REV. 607, 612-13 (1994) (noting the potential impact of the newly available remedies for Title VII violations).
28. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998); *see also* Casellas and Hill, *supra* note 24.
29. *Ellerth*, 524 U.S. at 765.
30. *Id.*; *see also Faragher*, 524 U.S. at 807.
31. *Faragher*, 524 U.S. at 807.

that the existence of an employer policy on harassment is often dispositive of the outcome of a case. In reported cases between 1986 and 1995, "when the employer had no formal sexual harassment programs or generalized grievance process which covered sexual harassment, the plaintiff won 71 percent of the time."[32] On the other hand, when an employer did have some system in place for reporting sexual harassment, plaintiffs won their cases only about one-third of the time.[33]

Public attention to sexual harassment throughout the 1990s, together with the legal incentives created by the Civil Rights Act and the Supreme Court's now-established standards for employer liability, sensitized many employers to the need to establish policies prohibiting illegal harassment. A 1998 survey conducted by the Society for Human Resource Management found that ninety-seven percent of responding companies had written policies prohibiting sexual harassment. Of those organizations with a sexual harassment policy, more than ninety percent include both a statement that sexual harassment is unlawful and also a definition of sexual harassment and information about who within the company is responsible for handling complaints.[34] Eighty-six percent of companies had formal processes in place to investigate sexual harassment complaints, and sixty-one percent provided sexual harassment prevention training to their employees.[35]

None of this is to suggest that sexual harassment has been eliminated as a serious issue for women in the workplace. The increase in individual charges filed with the EEOC during the 1990s arguably suggests quite the opposite. Individual instances of harassment remain a serious impediment to workplace gender equality. Certain workplaces will no doubt continue to be more hostile than others for working women. The changes that have taken place during the past decade are predominantly changes in corporate appreciation of the need for prohibitions on sexual harassment. Ideally this kind of corporate response, if effectively implemented, will eventually lead to a decrease in the amount of individual harassment. For now, a more modest claim can be made that the story told in *Class Action* – of company-wide, pervasive hostility to women, and management's stubborn refusal to address the illegal conduct – is a story whose repetition is less likely in the wake of these legal and social changes.

B. Sexual Harassment Law and the Tension in Class Resolution of Harassment Claims

Further explanation for the relatively small number of sexual harassment

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32. Juliano and Schwab, *supra* note 11, at 571. Indeed, the authors of this study suggest that the Court's formalization of these legal rules may have little impact on the outcomes in litigation, since so many courts were essentially following these standards before the Court's decisions. *Id.* at 591-92.

33. *Id.* at 591.

34. SOCIETY FOR HUMAN RESOURCE MANAGEMENT, SEXUAL HARASSMENT SURVEY, at 7 (1999).

35. *Id.* at 7-8.

class actions during the 1990s may come from sexual harassment doctrine itself. In *Meritor Savings Bank v. Vinson,*[36] the Supreme Court explained that a Title VII sexual harassment claim did not require economic injury, but could instead be sustained where the environment of the workplace was so abusive that the conditions of the plaintiff's employment had been changed by the abusive conduct. In order to assert this hostile work environment claim, a plaintiff must demonstrate: 1) that the harassment occurred "because of sex"; 2) that the harassment was so sufficiently severe or pervasive that a reasonable person would find the terms or conditions of employment had been altered; 3) that the harassment was subjectively unwelcome; and 4) that there is some basis for holding the employer responsible for the harassment.[37]

When courts, lawyers, and commentators refer to sexual harassment cases as "very individual and varied,"[38] they often focus on the plaintiff's burden to prove that the challenged workplace conduct was "unwelcome." This subjective element is a requirement independent from the objective reasonableness requirement,[39] and it renders sexual harassment claims more individualized than many types of employment discrimination claims. Most Title VII claims focus exclusively on the behavior of the employer. For example, in a case challenging a failure to promote, it does not matter what the employee's reaction was to not being promoted.[40] All that is relevant is whether the employer was motivated by discriminatory animus in making the promotion decision.[41] In a sexual harassment case, however, without evidence that the employer's impermissible conduct was actually unwelcome to the particular employee, "there is no Title VII violation."[42] Thus, if the employer tolerated workplace conduct that would be found objectively unreasonable, an employee may still be unable to prove a Title VII violation if she is unable to demonstrate that she herself found the conduct objectionable.[43]

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36. 477 U.S. 57 (1986).
37. *Id.* at 66-68. *See also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993); Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 78-79 (1998).
38. *LTV Aerospace and Defense*, 136 F.R.D. at 130.
39. *See Meritor*, 477 U.S. at 66-68 ("The gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome.") (internal quotations omitted); *see also Harris*, 510 U.S. at 21-22.
40. *See Jenson II*, 824 F. Supp at 876 n.72. ("[A] pattern and practice case alleging sex discrimination in hiring or promotion is concerned at all times with the employer's actions. The actions of class members are relevant only to the extent that each must show that she applied for the job or sought the promotion. The reactions of class members, however, that is, whether a female employee was angry, sad, ambivalent, or delirious at not being hired or promoted, is irrelevant to determining whether the employer discriminated against her.")
41. *Id.*
42. *Harris*, 510 U.S. at 22.
43. Among other things, an employee's conduct in the workplace can be relevant to determining unwelcomeness. *See Meritor*, 477 U.S. at 69 ("[A] complainant's sexually provocative speech or dress. . . . is obviously relevant. . . . in light of the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.") (internal quotations omitted).

The *Jenson* court essentially eliminated this requirement of subjective unwelcomeness as an element of a Title VII violation against a class of plaintiffs by bifurcating the trial proceedings. The first part of the trial focused solely on the question of "whether a reasonable woman would find the work environment hostile."[44] This portion of the proceedings resolved the question of whether Eveleth Mines was liable to the class of female employees for "appropriate prospective relief," without any discussion of the subjective unwelcomeness requirement.[45] Thus, Eveleth Mines was found liable to the class of female employees for violating Title VII without the plaintiff class being required to prove one of the elements that is essential to finding a Title VII violation. Once this finding of liability to the class was made, an assessment was then required: 1) whether any individual plaintiff could satisfy the further requirement that she found the challenged conduct unwelcome; and 2) whether any individual plaintiff was entitled to damages flowing from the violation.

The *Jenson* court recognized the tension in this novel approach. In a traditional pattern-or-practice or class action employment discrimination suit, the plaintiff class bears the burden of demonstrating that discrimination was the employer's "standard operating procedure, the regular rather than the unusual practice."[46] If the plaintiffs succeed in making this showing, a presumption is created that every employee within the protected class was a victim of unlawful discrimination.[47] This presumption shifts the burden to the employer at the damages stage to demonstrate that the particular employee was not actually damaged by the concededly unlawful conduct of the employer. In the sexual harassment context, however, bifurcation of the proceedings does not work so neatly. The first stage of the bifurcated trial does address a "pattern-or-practice" question – whether "the employer engaged in a pattern or practice of exposing women to a sexually hostile environment" that was objectively so severe or pervasive that it would change the terms or conditions of employment from the perspective of a reasonable person.[48] But unlike the traditional employment discrimination case, in which a finding of liability at the first stage makes it appropriate to shift the burden to the defendant at the damages phase of the proceedings, in the sexual harassment context, the pattern-or-practice showing "does not entitle every member of the plaintiff class to a presumption that they were sexually harassed—the burden of persuasion does not shift to the employer. . . . Instead, the burden of persuasion remains on the individual class member; each must show by a preponderance of the evidence that she was as affected as the reasonable woman."[49] The sexual harassment trial has therefore not been bifurcated into liability and damages, but instead, into one element of liability, and then a second

44. *Jenson II*, 824 F. Supp. at 875.
45. *Id.*
46. Int'l Bhd. Teamsters v. U.S., 431 U.S. 324, 336 (1977).
47. *See id.* at 362.
48. *Jenson II*, 824 F. Supp. at 875.
49. *Id.* at 875-76.

element of liability.[50] By taking this approach, the *Jenson* court preserved all of the elements of the sexual harassment claim as to each individual plaintiff; however, in so doing, the court allowed a finding of liability to the class of plaintiffs in the absence of an element that would be necessary to a finding of liability to a single plaintiff.

The few other courts that have certified sexual harassment class actions have moved even further away from the requirements set forth in the Supreme Court's sexual harassment jurisprudence, shifting the burden to the defendant to demonstrate, at the second stage of the proceedings, that an individual plaintiff did *not* find the objectively unreasonable conduct unwelcome.[51] This approach effectively eliminates the requirement that a hostile work environment be "unwelcome" to the particular plaintiff or plaintiffs as a necessary element of a Title VII violation.[52]

The appropriateness of sexual harassment class action treatment has yet to reach the Supreme Court, and indeed has received essentially no attention in the courts of appeals.[53] The approaches that have been taken by *Jenson* and subsequent courts may or may not survive further scrutiny, and there may be good reasons for using these cases as a basis for developing a class-specific sexual harassment claim whose elements differ from those of the currently established Title VII sexual harassment claim. Given the departure from the basic elements of a hostile work environment claim, it is not entirely surprising that relatively few courts have followed this path over the past twelve years.

C. Potential Difficulties for Sexual Harassment Plaintiffs in Meeting Rule 23 Class Certification Requirements

Developments in judicial interpretation and application of Federal Rule of Civil Procedure 23 have also contributed to making class action sexual harass-

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50. *See, e.g., Mitsubishi*, 990 F. Supp. at 1071 ("The pattern or practice model established in [*Teamsters*], which works for every other form of prohibited discrimination under Title VII, breaks down for sexual harassment claims . . . because the two seminal cases defining the essence of a claim of sexual harassment . . . require consideration of individual issues and defenses particular to an individual claimant.").

51. *See, e.g.*, Wilfong v. Rent-a-Center, 2001 WL 1795093, at *5 (holding that "once liability has been established," the second stage of the litigation will address "each class members's subjective perception and response to harassment"); *Warnell*, 189 F.R.D. at 388 (shifting the burden to the defendant to prove, as to each plaintiff, that conduct was not unwelcome). The court in *Markham* also treated the suit as bifurcated into a liability and a damages phase. *Markham*, 171 F.R.D. at 224. *Markham*, however, was not a Title VII case and the court was not dealing with the same substantive body of law.

52. *See Jenson II*, 824 F. Supp. at 876 n.73 ("Although requiring parties to prove the negative of a proposition is not always objectionable, such a burden is objectionable where it effectively shifts to a class action defendant the burden of proof on an issue which is carried by the plaintiff in an individual action.").

53. While the *Jenson* litigation did go to the Eighth Circuit, the Court of Appeals did not address the propriety of class certification. The focus of the Court's decision was on evidentiary and burden issues raised during the proceedings on individual claims held before the Special Master after the finding of class liability. *Jenson III*, 130 F.3d at 1291.

ment claims relatively uncommon. In order to maintain a suit as a class action, a putative class bears the burden of demonstrating that its suit meets the requirements of Rule 23(a)[54] and that the class fits one of the categories specified in Rule 23(b).[55] The principal difficulty for sexual harassment class certification is Rule 23(b).

In employment discrimination cases, courts will generally categorize a class under either Rule 23(b)(2) or 23(b)(3). Rule 23(b)(2) authorizes a class action when the defendant has "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief" for the entire class.[56] Rule 23(b)(3) provides a catch-all certification provision for those putative classes which do not quite fit into the other 23(b) categories. Certification under 23(b)(3) is appropriate only after a court has determined first, that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and second, "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[57] When a class is certified under 23(b)(3), class members must be given an opportunity to opt out of the class and pursue their claims individually.[58]

When *Jenson* was certified, courts were routinely certifying employment discrimination classes under Rule 23(b)(2) because employment cases often in-

54. Rule 23(a) requires findings of: 1) numerosity—that the number of plaintiffs be such that joinder would be impracticable; 2) commonality—that the class share common questions of law or fact; 3) typicality—that the named plaintiffs' claims be typical of the class claims; and 4) adequacy of representation—that the named plaintiffs and their attorneys adequately represent the interests of the class members. FED. R. CIV. P. 23(a). The numerosity and commonality requirements can pose problems for potential sexual harassment classes. Those plaintiff classes that have been successful in meeting these requirements have taken advantage of one or both of two strategies: first, to include other claims of gender discrimination along with sexual harassment in their class allegations, which increases the number of potential class members by increasing the range of illegal activity; and second, to allege a company-wide policy failure, which ensures that the class will share at least that common question. *See, e.g., Wilfong*, 2001 WL 1795093, at *1-2, *4 (claiming discrimination in hiring, promotion, demotion, termination, hostile work environment; finding that the common questions that justified class certification included "management's knowledge and toleration of the systematic creation of an environment hostile to women in its stores; the extent to which the company exercised reasonable case to prevent and promptly correct harassing behavior; and the effectiveness of the company's anti-harassment policies and mechanisms for registering and investigating harassment complaints"); *Beckman*, 192 F.R.D. at 610, 613-14 (claiming discrimination in assignments, promotion, training and overtime, as well as the maintenance of a hostile work environment; finding common question of law because CBS's central employment policies applied at every worksite). If, as the evidence suggests, significant numbers of employers have now adopted sexual harassment policies, the strategy of alleging a company-wide policy failure may become less viable. While individual plaintiffs may challenge how a policy is implemented in a particular case, it becomes increasingly difficult to frame a common question around implementation of the policy more generally. Thus, an improvement in working conditions—employer adoption of antiharassment policies—may be contributing to the small number of sexual harassment class actions.

55. FED. R. CIV. P. 23(b).

56. FED. R. CIV. P. 23(b)(2).

57. FED. R. CIV. P. 23(b)(3).

58. FED R. CIV. P. 23(c)(2).

volve circumstances in which the employer has "acted or refused to act on grounds generally applicable to the class."[59] The 1990s have seen increasing judicial uncertainty about the propriety of certifying employment classes under 23(b)(2) when class members seek the compensatory and punitive damages now available to them under the Civil Rights Act of 1991. In 1994, the Supreme Court noted that there is "at least a substantial possibility" that "in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3)," because putative class members' constitutional due process rights must be protected by allowing them the opportunity to opt out of the class and pursue their individual damages claims.[60] Again, in *Ortiz v. Fibreboard Corp.*, the Court indicated its discomfort with damages claims gathered in a class action from which members do not have a right to opt-out and pursue individual suits.[61] This discomfort has been echoed in lower court decisions, as courts have concluded that classes are not appropriately certified under 23(b)(2) unless any monetary relief sought is "incidental" to the requested injunctive relief.[62] With the availability of up to $300,000 in punitive and compensatory damages for each plaintiff injured by an intentional Title VII violation,[63] it has become extremely difficult to describe the available monetary damages as "incidental" to any request for injunctive relief. When the damages request seems to be one of the primary elements of relief sought, courts will generally require the class to meet the requirements of Rule 23(b)(3).[64]

Once courts start shifting their focus from 23(b)(2) to 23(b)(3), it becomes much harder to certify a class because of 23(b)(3)'s additional requirements that common issues predominate over individual ones and that a class action be the superior method for resolving claims. In the sexual harassment class actions that have been certified, the common questions have been whether the work environment was objectively hostile and whether the employer's policy for addressing harassment was inadequate. Courts have found these questions sufficient to satisfy the commonality requirement of Rule 23(a), but whether they can satisfy

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59. FED. R. CIV. P. 23(b)(2).

60. Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994) (dismissing writ of certiorari as improvidently granted).

61. 527 U.S. 815, 845-47 (1999).

62. *See* Molski v. Gleich, 307 F.3d 1155, 1165-68 (9th Cir. 2002); Jefferson v. Ingersoll Intern. Inc., 195 F.3d 894, 897-98 (7th Cir. 1999); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415-16 (5th Cir. 1998); *see also* FED. R. CIV. P. 23 advisory committee's note ("The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."). *But see* Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001) (declining to follow this reasoning); Thomas v. Albright, 139 F.3d 227 (D.C. Cir. 1998) (affirming certification of a 23(b)(2) class where claim included large compensatory damages component).

63. *See* 42 U.S.C. § 1981(a).

64. Some courts use a hybrid approach, certifying the class under 23(b)(2) for purposes of determining whether the employer is liable to the class as a whole and can appropriately be enjoined from further discrimination, and then shifting to a 23(b)(3) class for purposes of establishing individual damages. *See, e.g.*, Beckman v. C.B.S., Inc., 192 F.R.D. 608, 615 (D. Minn. 2000) (certifying hybrid class).

the requirement that common questions "predominate" over individual ones is much less clear. Measured against these common questions, the court must consider the individual questions of whether each woman found the work environment subjectively unwelcome; whether the standards for employer liability for the conduct have been met as to each plaintiff; and what damages each particular plaintiff may be entitled to receive. While courts in theory could go either way in balancing the common questions against these individual issues, the need to do the balancing at all diminishes the likelihood of certification.

The availability of substantial damages for individual claimants may also influence lawyers' and judges' assessment of the "superiority" of a class action over other forms of litigation for resolution of sexual harassment claims. This is true even in circumstances where harassment in a particular workplace appears sufficiently wide-spread to justify consideration of a class action. Class litigation has long served a valuable role in enabling plaintiffs who might have no incentive to pursue individual actions, or who might be unable to provide attorneys with the incentive to handle their individual claims, to bring their claims together and thus to increase the potential value of the suit.[65] This rationale for the class action makes sense in circumstances where the relief available to any individual plaintiff may be negligible. In the Title VII context after passage of the 1991 Civil Rights Act, however, individual plaintiffs who have claims of intentional discrimination now have incentive to pursue their claims individually because of the newly available compensatory and punitive damages.[66] With this change in incentives, the superiority of class litigation is substantially diminished

Thus, the legal changes that may have encouraged employers to institute sexual harassment policies during the 1990s—increased value of individual sexual harassment suits and clarification of the standards for employer liability—might also have diminished the likelihood of successful class certification. To a large extent, one can only speculate as to whether the legal difficulties discussed here offer an explanation for the relatively small number of Rule 23 sexual harassment class actions reported in the twelve years since the *Jenson* class was certified. It seems possible that these potential legal roadblocks have given lawyers pause in considering whether to represent a class of sexual harassment plaintiffs except in the most egregious circumstances. More optimistically, it may be that the number of workplaces plagued by a hostile work environment on the pervasive, company-tolerated level faced by Lois Jenson and her colleagues has declined with increased awareness of laws and employer policies prohibiting sexual harassment. Whatever the explanation, *Jenson* did not start the class action revolution that Gansler and Bingham claim it did.

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65. *See, e.g.*, Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1998).
66. *See* 42 U.S.C. § 1981a.

III. CLASS ACTION AS LEGAL NARRATIVE

What *Class Action* demonstrates, however, is that a case does not have to change the legal landscape to merit the telling of its story. There are several good reasons to write and read stories of cases that have been litigated. A number of books have been written about landmark cases that did in fact change the law in enormously important ways, and the legal ramifications of a particular case offer one possible reason for learning about the human realities behind the litigation.[67] But legal narratives serve a potentially invaluable role, regardless of whether the cases they illuminate are landmark cases, by teaching us much beyond the dry bones of the legal doctrine about why a lawsuit went the way it did.[68] "Cases and stories allow us to see backward (historically, how this situation came to be), side-ways (how others in the situation perceive it) and forward (the consequences and effects of what happened). Thus, cases and stories give us more information and more choices to consider than does the primary text of legal education—the 'completed' appellate case."[69] By offering human text to supplement the judicial opinions generated by *Jenson v. Eveleth*, *Class Action* situates itself among a number of similar legal narratives.[70] Together with these books, it demonstrates the importance of legal narrative for legal education—both formally, in law schools, and informally, as part of the public debate about issues shaping and shaped by developing legal doctrine.

There are at least two other important purposes legal narrative can serve beyond telling the story of an important case. The story behind a litigated case can reveal what happened to the parties involved in the case as the litigation went on, providing insight into the effects that litigation has on the plaintiffs, the defendants, and their communities. This aspect of litigation is one that is often entirely ignored by lawyers and courts, and only very rarely mentioned in judicial opinions. Yet, without a deeper understanding of the effect that litigation actually has on the extra-legal world, it is hard to make a fully informed judgment about the benefits, or harms, of a particular piece of litigation. A second important goal that legal narrative can serve is to tell a story about lawyering, providing insight into the decision-making processes underlying the arguments that were ultimately made to the court. A successful legal narrative, by exploring the

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67. *See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* & BLACK AMERICA'S STRUGGLE FOR EQUALITY (Knopf Publ'g Group 1977); ANTHONY LEWIS, GIDEON'S TRUMPET (Vintage Books 1964) (recounting the story of *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

68. The term "legal narrative" could refer to a number of different types of writing. Here, it is used to refer to stories told about litigated cases. For a fairly comprehensive catalog of types of legal narrative, along with examples, see Carrie Menkel-Meadow, *Forward Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 FORDHAM L. REV. 787 n. 3 & 788-91 nn. 4-5 (2000).

69. *Id.* at 793.

70. *See* JONATHAN HARR, A CIVIL ACTION (Vintage Books 1995) (making similar efforts); PETER SCHUCK, AGENT ORANGE ON TRIAL (Harvard Univ. Press 1987); GERALD M. STERN, THE BUFFALO CREEK DISASTER (Knopf Publ'g Group 1977).

strategic choices and personal motivations of both the plaintiffs' and the defendants' attorneys, can unveil much of what is invisible in legal decisions as they are conveyed to the public, and thus give a clearer picture of how law develops.

Class Action seems at times to be trying to achieve all three of these possible goals of legal narrative: to tell the story of a "landmark" case; to describe the impact of both the underlying events and the litigation itself on the parties involved; and to give insight into the lawyers' motivations and decisions. As discussed in Part II, the argument for *Jenson v. Eveleth* as a landmark case is a somewhat tenuous one. However, the events that led to the *Jenson* lawsuit, and the decade-long, complex, discovery-intensive litigation itself provide just the kind of material that can make legal narrative an essential learning tool. *Class Action* is very successful as a story about the plaintiffs and about the Iron Range community and the impact this litigation had on these people. It is significantly less successful as a story about the litigation itself.

From the perspective of the plaintiffs, and of the entire mining community in Minnesota's Iron Range, the story of *Jenson v. Eveleth* started at least as early as 1974, when the EEOC directed mines on the Iron Range to hire women miners for the first time. The events that led Lois Jenson and her colleagues to resort to litigation as a means of addressing workplace inequality and hostility are one part of the story. The events that unfolded within the community after the litigation had commenced are an equally important part of the story. Moreover, the story of Jenson herself, and of her response to the events that took place at the mine, and even more significantly to the course of the litigation, is instructive for anyone seeking to understand the actual effects of legal battles on the people involved. As Gansler and Bingham detail, largely with the assistance of Jenson's own diaries, notes and letters to her attorneys, the litigation took a toll on Jenson's physical and mental health that was arguably on a par with the impact of the harassment she faced at Eveleth Mines (pp. 237, 307-09, 345, 372, 384-85).

Class Action's descriptions of the mines, the male and female miners, and the towns and families from which the mines primarily hired provide a vivid backdrop against which the success of the litigation must ultimately be measured. Stories like this one raise important questions about the human costs of litigation – questions that, for the most part, are not raised when lawyers, law professors, and law students discuss the "merits" of a particular legal outcome. Perhaps because the study of law focuses our attention so entirely on precedent and doctrine, on the chain of one legal decision to another, we forget to consider the value of a litigated case to the parties who had to go through the litigation. Through a narrative like *Class Action*, we are forced to consider whether litigating *Jenson v. Eveleth* was "worth it"—either financially or emotionally. While the answer to that question will not change the precedential value of the Eighth Circuit's decision in the case, or otherwise affect the legal doctrine that shaped the decision, we are missing an important part of complete legal analysis if we ignore the question. Viewed less as a story about the litigation itself, and more

as a story about the context in which the litigation took place, *Class Action* is a successful and often compelling story.[71]

Unfortunately, *Class Action* falls short as a story about the actual litigation of a case. Its principal weakness lies in the enormously one-sided nature of the book. In all of their discussions about litigation strategy and reactions to the judicial decisions that were issued in the cases, the authors include only the viewpoint of the plaintiffs' attorneys. Gansler and Bingham explain in their Notes on Sources that they attempted to contact the defendants and their counsel as they were researching the book but that their requests were denied (p. 386). Obviously, this silence on the defendants' part posed an impediment to the creation of a balanced legal narrative. Despite this difficulty, the authors go on to say that they sought to "tell a fair, balanced story" (p. 387). The story they tell, however, offers little or no plausible explanation for the defendant's conduct in either settlement discussions or the litigation process. At the few places where the authors try to explain the defendants' motivations, the explanations are grudging at best (pp. 198, 283-86).

Could the authors have done anything to solve this problem, given the defendants' attorneys' apparent unwillingness to be interviewed? One solution might have been to discuss the case and the choices the defendants and their attorneys made with other lawyers who have defended companies charged with sexual harassment on a large scale. While this approach would still have left the motivations of the specific actors in the *Jenson* litigation unclear, it would likely have given slightly more balance to those portions of the book that tell the story of the litigation.

Perhaps a more important question is whether the authors *should* have done something to correct for the imbalance in their narrative. If the story were intended to provide an interlinear to the reported judicial opinions in *Jenson v. Eveleth* that would shed light on the federal justice system and the litigation process, then the answer to that question is yes. Of course, perfect balance in a legal narrative of this sort is impossible to achieve, given the likelihood of greater access to one side, and the inevitability—and value—of the authors' perspective on the proceedings. But two of the most potentially useful aspects of legal narrative are lost when the imbalance in the story's telling is as striking as it is in *Class Action*.

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71. *Class Action* provides more insight into the effects of litigation on the plaintiffs than other similar books have done. To take probably the best-known example, in *A Civil Action*, Jonathan Harr focused his attention primarily on the lawyers trying the case. *See* Kevin E. Mohr, *Legal Ethics and A Civil Action*, 23 SEATTLE U. REV. 283, 284 (1999) ("Lawyers identify with this book, perhaps because, after an opening section describing the families and their injuries, the narrative presents the pursuit of the case almost exclusively from the lawyers' perspective."). While the story he told was also one about the personal toll that litigation can take, it was fundamentally a story about the toll that litigation can take on attorneys trying the case. This is also an important perspective from which to consider litigation – and a perspective that is probably particularly interesting to law students – but it serves a different purpose from that served by focusing attention on the way that parties are affected by the litigation.

First, by speaking entirely from the perspective of the plaintiffs, the authors lose their opportunity to shed light on the choices made by the judges who decided *Jenson*. Most litigation ends with a judicial opinion as the only written assessment of the case. Because judicial opinions serve, at least in some part, a justificatory role, they tend to present the arguments of one side – the winning side – as significantly more persuasive than those of the losing side. Often, however, and certainly in complex cases in which courts are dealing with novel questions, the arguments are much more in equipoise than the ultimate decision will reveal. This was certainly the case in the class certification decision reached by the district court in *Jenson*. Without endorsing the position that the class should not have been certified, *Class Action* could have done significantly more to explain why the judge's decision came as a surprise to many, given the strength of the arguments against certification. In fact, offering some of the arguments against class certification would have strengthened the authors' claim that the decision was a particularly important one; while it may not have changed sexual harassment law, it did represent a break from existing precedent and deserves examination in that light. However, because Gansler and Bingham present next to nothing about the arguments made by the defendants in the case, the book leaves readers with a sense that the court could only have come out one way—for the plaintiffs.

Furthermore, independent of legal arguments are the myriad strategic choices made by each side during the course of litigation. A long-running, complex case like *Jenson* presents a nearly endless array of strategic possibilities: what claims to pursue, what plaintiffs to include as named representatives, whose testimony to rely on, whether and when to settle, how to run discovery, and whether and how to present motions to the court. Many of these issues came up repeatedly during the course of the *Jenson* litigation. As an example, Sprenger and his colleagues made numerous offers to settle the case between 1991 and 1998. Each time that the plaintiffs' attorneys made efforts to settle, Eveleth's lawyers responded either with silence or with what appear to have been unreasonably low counter-offers (pp. 197, 280, 344, 369). *Class Action* does a nice job of explaining the rationale behind each of the plaintiffs' settlement offers. But the book offers basically nothing—other than suggestions of bad judgment or improper motivations—to explain why the defendants chose to respond the way that they did. Hearing only one side of this kind of strategic battle is frustrating. While it is possible that Eveleth's attorneys (or the client) were either incredibly stupid or simply bad people, it seems more likely that they had reasons for assessing the case in the way that they did and for making the choices about settlement that they made. *Class Action* sheds no light on these possible motivations, and thus tells a disappointingly imbalanced story.

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In its two aims—to tell Lois Jenson's story and to tell the story of a land-

mark legal battle—*Class Action* seeks to intertwine a narrative about the course and importance of a piece of litigation with one about the effects of that litigation on the actors most intimately involved in it. It is a valuable goal, met with mixed success. While the book does not make a strong case for *Jenson v. Eveleth*'s landmark status, it does demonstrate that there is much to be learned even from the story of a case that does not fundamentally alter legal doctrine. The story of the litigation itself suffers because of the authors' complete reliance on the perceptions of the plaintiffs and their attorneys. They miss an opportunity to offer a broader perspective on the case by adding to these perceptions the necessarily different perspectives of the defendants and their attorneys, and the judges in their opinions and examining each of them in light of the others and with the benefit of hindsight. But the book does offer an important perspective on the litigation of *Jenson v. Eveleth* by exposing, through the stories of Lois Jenson and others who work and live in the Iron Range, the tremendous costs and personal victories and sacrifices that remain untold in judicial opinions and thus largely unexamined by those outside of the case itself. This perspective deserves a broader role in legal education and public discussion.